20-1868

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

Plaintiff–Appellant

v.

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

Defendant–Appellee

On appeal from the United States District Court for the Eastern District of Virginia — No. 1:20-cv-00731-LO-JFA (O'Grady, J.)

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Table of Contents

Table of Authorities iii

Introduction 1

Statement of Jurisdiction 2

Statement of Issues on Appeal 3

Statement of the Case 3

Summary of Argument 10

Standard of Review 13

Argument 13

I. NAIJ has established a likelihood of success on the merits. 13

A. NAIJ's claims are not precluded by the Federal Service Labor-Management Relations Statute. 13

1. The Statute does not provide meaningful judicial review of NAIJ's claims. 16

2. NAIJ's claims are wholly collateral to the Statute. 25

3. NAIJ's claims are beyond the expertise of the Federal Labor Relations Authority. 32

B. NAIJ is likely to prevail on the merits of its First Amendment claim. 34

1. Because the Policy is a prior restraint on the protected speech of public employees, it is subject to exacting scrutiny under *NTEU*. 35

2. The Policy does not satisfy *NTEU*'s exacting scrutiny. 37

a. The interests of immigration judges in speaking, and of the public in hearing what they have to say, are substantial.....38

b. The hypothetical interests asserted by the government cannot justify the Policy.....40

3. The Policy lacks the safeguards generally required of prior restraints.....44

C. NAIJ is likely to prevail on the merits of its Fifth Amendment claim.....46

II. NAIJ has satisfied the remaining preliminary injunction factors. 48

A. NAIJ's members will suffer irreparable harm absent a preliminary injunction. 48

B. The balance of equities and the public interest strongly favor issuing preliminary injunctive relief.....49

Conclusion.....50

Table of Authorities

Cases and Administrative Decisions

Able v. United States, 88 F.3d 1280 (2d Cir. 1996) 22

AFGE Council of Locals No. 214 v. FLRA, 798 F.2d 1525 (D.C. Cir. 1986) 32

AFGE v. Trump, 929 F.3d 748 (D.C. Cir. 2019).....15, 30, 33

AFGE, Local 2094 v. FLRA, 833 F.2d 1037 (D.C. Cir. 1987).....20

AFGE, Local 3936 v. FLRA, 239 F.3d 66 (1st Cir. 2001).....22

Am. Entertainers, LLC v. City of Rocky Mount, 888 F.3d 707 (4th Cir. 2018) 45

Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015).....21, 26

Bennett v. SEC, 844 F.3d 174 (4th Cir. 2016).....passim

Berkley v. Mountain Valley Pipeline LLC, 896 F.3d 624 (4th Cir. 2018) 24, 31, 32

Califano v. Sanders, 430 U.S. 99 (1977).....13

Centro Tepeyac v. Montgomery Cty., 722 F.3d 184 (4th Cir. 2013).....49

Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427 (6th Cir. 2004).....49

Chesapeake B & M, Inc. v. Harford Cty., 58 F.3d 1005 (4th Cir. 1995) 46

Clark v. FLRA, 782 F.2d 701 (D.C. Cir. 2015) 23

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996) 39

Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) 36, 46

Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019) 22

Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) 47

Dep't of Def., Army-Air Force Exch. Serv. v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981) 20

Dep't of Navy, Marine Corps Logistics Base v. FLRA, 962 F.2d 48 (D.C. Cir. 1992) 17

Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999) 37

Elgin v. Dep't of Treasury, 567 U.S. 1 (2012) .....passim

Elrod v. Burns, 427 U.S. 347 (1976) 25, 48

FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012) 46

Fed. Bureau of Prisons FCI Bastrop, 55 F.L.R.A. 848 (1999) 17

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) .....passim

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002) 49

Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020) 14

Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998) 38, 45, 46

Heckler v. Ringer, 466 U.S. 602 (1984) 26

Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016) 21, 26

In re Murphy-Brown, LLC, 907 F.3d 788 (4th Cir. 2018) 48

Janus v. Am. Fed'n of State, City., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) 28, 34

Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015) .....passim

Lane v. Franks, 573 U.S. 228 (2014) 34, 36, 37

Lanier v. Bats Exch., Inc., 838 F.3d 139 (2d Cir. 2016) 26, 29

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014) 50

Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016) 35, 37, 38

Mathews v. Eldridge, 424 U.S. 319 (1976) 25

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 14, 25

McVey v. Stacy, 157 F.3d 271 (4th Cir. 1998) 42

Moonin v. Tice, 868 F.3d 853 (9th Cir. 2017).....35, 40, 43, 45

Mt. Valley Pipeline, LLC v. W. Pocahontas Props. LP, 918 F.3d 353 (4th Cir. 2019).....13

NAAE v. Trump, No. 19-3057, 2020 WL 2571105 (D. Md. May 21, 2020) 30, 32, 33

Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel, 606 F.3d 780 (D.C. Cir. 2010) 18

Nat'l Ass'n of Immigr. Judges, 56 F.L.R.A. 616 (2000).....4

Nat'l Ass'n of Immigr. Judges, WA-RP-19-0067 (Reg. Dir. Wash. Region FLRA July 31, 2020), https://perma.cc/79UV-W2FX 4, 43

Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin., 376 F.3d 239 (4th Cir. 2004) 32

Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) 21

NLRB Union Local 21, 36 F.L.R.A. 853 (1990) 17

Nuclear Regul. Comm'n v. FLRA, 895 F.2d 152 (4th Cir. 1990).....17

Overseas Educ. Ass'n v. FLRA, 827 F.2d 814 (D.C. Cir. 1987) 17

Pickering v. Bd. of Educ., 391 U.S. 563 (1968) 34

Ramirez v. U.S. Customs & Border Prot., 709 F. Supp. 2d 74 (D.D.C. 2010) 22

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 44

Sanjour v. EPA, 56 F.3d 85 (D.C. Cir. 1995).....34, 37, 39, 47

SEIU Local 200 United v. Trump, 419 F. Supp. 3d 612 (W.D.N.Y. 2019) 29

SEIU Local 200 United v. Trump, 420 F. Supp. 3d 65 (W.D.N.Y. 2019) 29

SEIU Local 200 United v. Trump, No. 19-4143, 2020 WL 5542674 (2d Cir. Sept. 16, 2020).....29

Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1 (1st Cir. 2012) 49

Steadman v. Governor, U.S. Soldiers' and Airmen's Home, 918 F.2d 963 (D.C. Cir. 1990) 26, 27

Swartzwelder v. McNeilly, 297 F.3d 228 (3d Cir. 2002).....passim

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 13, 14, 31

Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016).....21, 24, 26, 32

Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982) 23, 24

Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) 35

U.S. Dep't of Justice & Nat'l Ass'n of Immigration Judges, 56 F.L.R.A. 616 (2000).....43

U.S. Dep't of the Treasury, Bureau of the Pub. Debt Wash., D.C. v. FLRA, 670 F.3d 1315 (D.C. Cir. 2012).....17

United States v. NTEU, 513 U.S. 454 (1995).....passim

Weaver v. U.S. Info. Agency, 87 F.3d 1429 (D.C. Cir. 1996) 27, 28, 34

Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965).....14, 20

Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006) 34

WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009).....48

Statutes

28 U.S.C. § 1331 .....2, 14

5 C.F.R § 2423.6 23

5 C.F.R. § 2423.10 23

5 C.F.R. § 2423.8 23

5 U.S.C. § 1101 28

5 U.S.C. § 1701 1

5 U.S.C. § 2105 33

5 U.S.C. § 2302 33

5 U.S.C. § 7104 23

5 U.S.C. § 7105 15

5 U.S.C. § 7106 .....6, 17

5 U.S.C. § 7116 .....15, 18

5 U.S.C. § 7117 15

5 U.S.C. § 7118 .....15, 23

5 U.S.C. § 7122 19

5 U.S.C. § 7123 .....15, 19, 29

8 C.F.R. § 1003.10 3

8 U.S.C. § 1101 3

Other Authorities

Chris Opfer, *Trump's Government Labor Pick Comes Accused of Union Violations*, Bloomberg News (Mar. 27, 2019), https://perma.cc/7P8X-JQEZ 23

Code of Conduct for U.S. Judges Canon 4 (Judicial Conference of the U.S. 2019) 44

Federal Labor Relations Authority, *Absence of a General Counsel*, https://perma.cc/UL53-WGSW 23

Introduction

This case involves a challenge to a sweeping prior restraint the government has imposed on the speech of the nation's approximately 470 immigration judges. Under a policy substantially revised in January 2020, the Executive Office for Immigration Review ("EOIR") categorically prohibits immigration judges from speaking publicly in their personal capacities about immigration law or policy or about EOIR programs and policies. On all other topics, it requires judges to submit to an onerous preapproval process. At a time of fierce public debate about the nation's immigration policies, the policy imposes a gag order on public servants in a unique position to educate the public about the immigration system and the effect of recent changes to immigration law and policy. The gag order violates the First and Fifth Amendments, and the National Association of Immigration Judges ("NAIJ") seeks a preliminary injunction against EOIR's enforcement of it.

The district court denied NAIJ's motion for a preliminary injunction based on its mistaken conclusion that the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 1701 *et seq.* (the "FSLMRS" or "Statute"), impliedly divested it of jurisdiction over NAIJ's constitutional claims. This holding was wrong. As the Supreme Court has taught, courts may infer congressional intent to divest district court jurisdiction over a plaintiff's claims only where such intent is "fairly discernible" from the text, purpose, and structure of an alternative scheme of review.

No such intent is discernible here. The FSLMRS establishes an alternative scheme of administrative and judicial review for certain statutorily defined claims arising from federal labor disputes. NAIJ's claims, however, have nothing to do with the rights and duties established by and reviewable under the Statute. Nor would NAIJ be able to obtain meaningful judicial review under the Statute of its constitutional claims. To seek judicial review, NAIJ would have to manufacture a sham labor dispute; even then, its claim that EOIR has instituted a prior restraint on speech of urgent public concern would languish in administrative proceedings before a review board powerless to rule upon it. Forcing NAIJ down that futile course would irreparably harm the First Amendment rights of immigration judges and the public, without serving any possible interest discernible from the text, purpose, or structure of the Statute. Congress surely did not intend such a result.

For the reasons below, NAIJ respectfully urges the Court to vacate the district court's denial of a preliminary injunction and to remand with specific instructions for the district court to enter an injunction.

Statement of Jurisdiction

This Court has jurisdiction to hear this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). The district court had jurisdiction over the underlying action under 28 U.S.C. § 1331 and the U.S. Constitution. The court entered an order

denying NAIJ's motion for a preliminary injunction on August 6, 2020. Op. at 15 (JA291). NAIJ filed a timely notice of appeal on August 7, 2020. JA293–94.

Statement of Issues on Appeal

1. Did the district court err in holding that the FSLMRS—which establishes a scheme for the review of certain federal labor relations claims—impliedly withdraws district court jurisdiction over First and Fifth Amendment claims that would not receive meaningful judicial review if channeled through the scheme, that are wholly collateral to the scheme, and as to which the relevant agency has no expertise?

2. Did the district court err in denying NAIJ's motion for a preliminary injunction where the record clearly establishes that NAIJ is likely to succeed on the merits of its constitutional claims, that NAIJ's members will suffer irreparable harm absent a preliminary injunction, that the balance of equities tips in NAIJ's favor, and that the injunction is in the public interest?

Statement of the Case

Immigration judges are administrative judges who exercise the authority of the United States Attorney General to adjudicate immigration proceedings. 8 U.S.C. § 1101(b)(4); 8 C.F.R. §1003.10. In this role, they preside over immigration hearings and serve as neutral and impartial arbiters. Tabaddor Decl. ¶ 3 (JA60); McHenry Decl. ¶ 25 (JA161). Immigration judges undertake this work as employees of EOIR, an agency within the Department of Justice ("DOJ"). Tabaddor Decl. ¶ 3 (JA60).

NAIJ is a non-partisan, non-profit voluntary association of immigration judges. *Id*. ¶ 4 (JA60). It is the recognized collective bargaining representative for all non-managerial immigration judges. *Id*. Non-managerial immigration judges do

not have any authority to set policy for EOIR or direct the agency's operation. *See Nat'l Ass'n of Immigr. Judges*, WA-RP-19-0067, at 19–22 (Reg. Dir. Wash. Region FLRA July 31, 2020), https://perma.cc/79UV-W2FX; *Nat'l Ass'n of Immigr. Judges*, 56 F.L.R.A. 616, 622 (2000).

Immigration Judges' Public Speaking Prior to 2017

In addition to serving as judicial officers, many immigration judges are active members of civic and legal communities. Prior to 2017, many immigration judges routinely spoke in their personal capacities at schools, universities, and bar associations. Tabaddor Decl. ¶¶ 8–9 (JA61); Lynch Decl. ¶¶ 7–8 (JA54). Their efforts educated the public about the immigration courts and made the immigration system more transparent. Tabaddor Decl. ¶ 10 (JA62).

Although immigration judges were required to obtain EOIR's approval before publishing their writing or speaking at public events in their personal capacities, EOIR gave its approval as a matter of course. Tabaddor Decl. ¶ 8 (JA61); Tabaddor Suppl. Decl. ¶ 5 (JA249). Under EOIR's process, immigration judges would submit requests to their supervising Assistant Chief Immigration Judge ("ACIJ"). Tabaddor Decl. ¶ 8 (JA61). If the supervisor approved the request, the matter would be forwarded to EOIR's Ethics Office, which would offer ethics guidance. *Id.* Judges were generally permitted to use their official titles to identify themselves in connection with their speaking, so long as they also included a disclaimer stating

that they were appearing in their personal capacities and not as employees of EOIR. *Id.* This process was memorialized in the 2011 Ethics and Professionalism Guide for Immigration Judges, Tabaddor Suppl. Decl. Ex. N (JA252–69) (the "2011 Ethics Guide"), and it remained in place until EOIR issued a new policy in late 2017. *See* McHenry Decl. ¶¶ 46–51 (JA166–68).

The 2017 Policy

On September 1, 2017, the Director of EOIR issued a memorandum titled "Speaking Engagement Policy for EOIR Employees," which established a new and onerous preapproval process for public speaking requests. Tabaddor Decl. Ex. B (JA75–81) (the "2017 Policy"). The 2017 Policy required all immigration judges who wished to speak at an "event" to submit a request to their supervising ACIJ. *Id.* at 1 (JA76). Subsequent communications from the agency confirmed that the policy also applied to contacts with the press. Tabaddor Decl. Ex. A (JA68–74); *see also* Tabaddor Decl. ¶ 14 (JA63).

Under the 2017 Policy, supervising ACIJs were charged with deciding whether a speaking engagement would be undertaken in a judge's "personal" or "official" capacity (as defined by the policy), and whether to approve the request. 2017 Policy at 1 (JA76). Immigration judges who wished to speak on "immigration-related topics" or whose requests were reclassified as "official capacity" were then required to seek a second level of approval from the centralized speaking

engagement team (the "SET"). *Id.* at 1–2 (JA76–77). The only judges exempted from this process were NAIJ representatives, who under federal labor law are guaranteed the ability to engage in union speech related to employee working conditions. Tabaddor Decl. ¶ 6 (JA60).

The 2017 Policy did not specify any criteria for EOIR officials to consider in determining whether to approve personal-capacity speaking requests. Nor did the policy require them to make decisions within any particular time frame.

The 2018 Memorandum of Understanding

NAIJ did not receive advance notice of the 2017 Policy and was not involved in the policy's development. In March 2018, NAIJ issued a formal demand to bargain over the policy's implementation, Swanwick Decl. ¶¶ 8–12 (JA205–06); McHenry Decl. ¶ 58 (JA169–70), resulting in negotiations which ultimately yielded a two-page Memorandum of Understanding.[1] Tabaddor Decl. Ex. D (JA83–86) (the "2018 MOU"). The 2018 MOU sets out certain procedures relating to the application of the 2017 Policy to immigration judges. *Id.*; *see also* Reid Decl. ¶ 20 (JA228). For example, the 2018 MOU sets out aspirational time limits for certain steps in the preapproval process and institutes a limited reconsideration process for judges

[1] NAIJ did not demand to bargain over the policy's substance because bargaining over that subject would have been foreclosed by the FSLMRS. *See* 5 U.S.C. § 7106(a); *see also infra* Part I.A.1.

whose requests were denied. 2018 MOU ¶¶ 2, 5 (JA84–85). The 2018 MOU remains in effect.

The 2020 Policy

On January 17, 2020, the Director of EOIR issued a memorandum titled "Submission and Processing of Requests for Speaking Engagements." Tabaddor Decl. Ex. G (JA95–101) (the "2020 Policy"). Although the 2020 Policy purports to "reissu[e]" without "substantively alter[ing]" the 2017 Policy, *see id.* at 1 (JA96), it modifies the 2017 Policy in several important ways.

First, the 2020 Policy extends to all "written pieces intended for publication," not only to public speaking and press contacts. *Id*. at 2 n.2 (JA97); Tabaddor Decl. ¶ 23 (JA65). Second, the 2020 Policy categorically prohibits immigration judges from speaking publicly in their personal capacities about immigration or EOIR. It does so by deeming "official" any speech relating to "immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies." 2020 Policy at 2 (JA97); Tabaddor Decl. ¶¶ 22, 25 (JA64–65). Third, the 2020 Policy imposes additional layers of review and, in so doing, creates further opportunities for delay. Under the new policy, immigration judges are required to submit all speaking requests—regardless of speaking capacity or content—to four levels of review: by their supervisor, by the SET, by the Ethics Program, and by their supervisor a second time for final decision. 2020 Policy at 3 (JA98). In cases

involving speeches, written pieces, or other prepared material, the supervisor can condition approval on making certain changes. Tabaddor Decl. ¶ 36 (JA68).

The 2020 Policy also shares many of the defects of the 2017 Policy. It applies to *all* speaking engagements in an immigration judge's personal capacity. It does not include narrow or objective criteria for deciding whether to approve personal-capacity speaking requests. In addition, it does not impose any firm deadline for decisions, although it leaves intact the 2018 MOU's aspirational time limits.

Before the district court, the government argued that the 2017 Policy and 2020 Policy constitute a single, controlling policy. Op. 4 (JA280). Accordingly, NAIJ uses the term "Policy" to refer to the 2017 Policy as modified by the 2020 Policy.

The Impact of the Policy on Immigration Judges and the Public

Many immigration judges wish to contribute to the national debate over recent changes to immigration policy or to participate in the urgent discussion surrounding the impact of the COVID-19 pandemic on immigration courts and detained immigrants. Tabaddor Decl. ¶ 35 (JA67–68). But the Policy prohibits them from doing so.

Under the Policy, immigration judges who have submitted requests to speak or write in their personal capacities have frequently been denied permission to do so. *Id*. ¶ 25 (JA65). For instance, many judges have been denied permission to speak about immigration law and policy issues to law school clinics, at continuing legal

education seminars, and to grade-school children. *Id*. Exs. H–L (JA102–49). Some judges have failed to receive a timely decision or any decision at all, despite repeated follow-up. *Id*. ¶ 26 (JA65–66). Still others have been deterred from even submitting requests to speak publicly because the Policy makes it clear that requests are likely to be denied or held up in review. *Id*. ¶¶ 32–33 (JA66–67).

As a result, civic and legal organizations that used to host immigration judges at their events no longer do so. *E.g.*, Lynch Decl. ¶¶ 9–12 (JA54–56). Many event organizers have concluded that the Policy makes it pointless to invite sitting immigration judges to participate in events, and some have stopped extending invitations altogether. *Id*. ¶¶ 11, 13 (JA55–56). The effect is to deny the public access to insights about how recent changes to immigration law and policy are working in practice.

Procedural History

On July 1, 2020, NAIJ filed this suit, alleging that the Policy imposes an unconstitutional prior restraint in violation of the First Amendment and is void for vagueness under the Fifth Amendment. JA2. NAIJ also moved for a preliminary injunction against EOIR's enforcement of the Policy. JA3. The district court denied NAIJ's motion on August 6, 2020. Op. 15 (JA291). Based solely on its determination that the FSLMRS divested district court jurisdiction over NAIJ's claims, the court

held that NAIJ had failed to demonstrate a likelihood of success on the merits. *Id.* (JA291).

NAIJ timely filed its notice of appeal on August 7, 2020. JA293–94.

Summary of Argument

The district erred in concluding that the FSLMRS scheme impliedly divested it of jurisdiction over NAIJ's claims. The Supreme Court has made clear that courts may infer congressional intent to withdraw district court jurisdiction only where it is evident from a statute's text, purpose, and structure that Congress intended the statute to be an exclusive avenue of administrative and judicial review, *and* where it is evident that Congress intended the kinds of claims in question to be routed through that scheme. Here, while there is no dispute that the FSLMRS is the exclusive avenue for review of labor-relations claims falling within its ambit, Congress did not intend the kinds of claims that NAIJ has raised here to fall within the Statute's ambit. NAIJ brings a simple facial challenge to a far-reaching prior restraint on the speech of federal employees. Routing this challenge through the Statute would serve none of the purposes underlying the channeling of claims through administrative proceedings; instead, it would serve only to delay—perhaps indefinitely—judicial review of a policy silencing time-sensitive and constitutionally protected speech.

Indeed, under the three factors that the Supreme Court and this Court have considered in assessing congressional intent to channel claims through

administrative proceedings, it is clear that the district court has jurisdiction over NAIJ's claims. First, NAIJ cannot obtain meaningful judicial review of its constitutional claims within the statutory scheme. The only conceivable route to judicial review would involve manufacturing a knowingly frivolous bargaining dispute. Attempting this course would serve none of the goals of statutory channeling, and it would needlessly prolong irreparable harm to the First Amendment rights of immigration judges and the public. Second, NAIJ's constitutional claims are wholly collateral to the statutory scheme because they are substantively unrelated to any hypothetical claim that could be brought under the scheme, and because they are not a vehicle to reverse or enjoin agency action covered by the scheme. Third, the claims are entirely outside the competence and expertise of the Federal Labor Relations Authority, the agency charged with hearing disputes under the scheme. For these reasons, the district court had jurisdiction over NAIJ's claims.

Moreover, accepting the district court's holding to the contrary would imply that the Supreme Court's seminal decision on the free-speech rights of public employees was wrongly decided. Just one year after issuing the opinion that established the framework for considering administrative channeling, the Supreme Court decided *United States v. NTEU*, 513 U.S. 454 (1995), in which the Court exercised jurisdiction over a First Amendment claim virtually identical to NAIJ's—

brought by a union challenging a prior restraint on federal employee speech—without even mentioning the possibility of channeling. Instead, the Court resolved the union's claims on the merits, holding that a ban on the acceptance of honoraria by federal employees was an unconstitutional prior restraint.

Having erroneously concluded that it lacked jurisdiction, the district court did not consider the merits of NAIJ's claims. This Court should. NAIJ sought preliminary injunctive relief because the Policy is silencing immigration judges who wish to speak now on matters of urgent public concern, including the impact of the ongoing pandemic on the safety of immigration proceedings, and the impact of new immigration policies on the immigration system. NAIJ is likely to succeed on its First Amendment claim because the Policy is a prior restraint on the protected speech of its members that is subject to—but does not satisfy—the test set forth in *NTEU*. NAIJ is also likely to succeed on its Fifth Amendment claim because the Policy fails to sufficiently cabin agency discretion to ensure that it is applied in a consistent, non-discriminatory manner. NAIJ's members will continue to suffer irreparable harm absent a preliminary injunction. And the balance of equities and public interest strongly favor issuing preliminary injunctive relief.

For these reasons and those below, the Court should vacate the district court's denial of NAIJ's motion for a preliminary injunction and remand with specific instructions that the court enter a preliminary injunction.

Standard of Review

A party seeking a preliminary injunction must establish that: "(1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm without the preliminary injunction; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest." *Mt. Valley Pipeline, LLC v. W. Pocahontas Props. LP*, 918 F.3d 353, 366 (4th Cir. 2019) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). This Court reviews the denial of a preliminary injunction for abuse of discretion, reviewing factual findings for clear error and legal conclusions *de novo*. *Id.*

Argument

I. NAIJ has established a likelihood of success on the merits.

A. NAIJ's claims are not precluded by the Federal Service Labor-Management Relations Statute.

The central conclusion of the district court was that the FSLMRS impliedly divests it of jurisdiction over NAIJ's claims. Op. 14 (JA290). This conclusion was based on a misapplication of the framework set forth in *Thunder Basin Coal Co. v. Reich* (*Thunder Basin*), 510 U.S. 200 (1994).

It is a bedrock principle that "access to the courts is essential" to resolve the constitutionality of agency action. *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see also Thunder Basin*, 510 U.S. at 215 n.20. As a general matter, then, district courts have jurisdiction over civil actions arising under the Constitution and laws of the

United States, 28 U.S.C. § 1331, unless Congress has withdrawn that jurisdiction expressly. *Cf. Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (noting the "well-settled" and "strong presumption" favoring judicial review of administrative action (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 498 (1991))). In narrow contexts, however, the Supreme Court has inferred congressional intent to withdraw district court jurisdiction over legal claims where Congress has enacted an alternative scheme for the resolution of those claims.

In *Thunder Basin*, the Court set out a two-step framework for determining whether Congress has manifested an intent to withdraw jurisdiction. 510 U.S. at 207. First, courts ask "whether Congress's intent to preclude district court jurisdiction is 'fairly discernible in the statutory scheme.'" *Bennett v. SEC*, 844 F.3d 174, 181 (4th Cir. 2016) (quoting *Thunder Basin*, 510 U.S. at 207). Second, and if so, courts ask "whether [the plaintiff's] 'claims are of the type Congress intended to be reviewed within [the scheme].'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212). In undertaking this analysis, courts seek to vindicate Congress's purposes in creating alternative schemes of administrative and judicial review: "to permit agency expertise to be brought to bear on particular problems," *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965), and to avoid "unnecessary duplication and conflicting litigation," *id.* at 422.

The FSLMRS establishes a scheme of administrative and judicial review for certain statutorily defined claims arising from federal labor disputes. *AFGE v. Trump*, 929 F.3d 748, 752 (D.C. Cir. 2019). Administrative review is provided by the Federal Labor Relations Authority ("FLRA"), a three-member agency that adjudicates labor disputes, including negotiability disputes and unfair labor practice disputes. 5 U.S.C. § 7105(a). In negotiability disputes, the FLRA "determines whether agencies and unions must bargain over certain subjects." *AFGE*, 929 F.3d at 752 (citing 5 U.S.C. §§ 7105(a)(2)(E), 7117(c)(1)). In unfair labor practice disputes, the FLRA "resolves whether an agency must bargain over a subject, violated the duty to bargain in good faith, or otherwise failed to comply with the Statute." *Id.* (citing 5 U.S.C. §§ 7105(a)(2)(G), 7116(a), 7118). The FLRA's decisions in negotiability and unfair labor practice disputes are subject to judicial review by the courts of appeals. *Id.* (citing 5 U.S.C. § 7123(a), (c)).

In this case, the district court erred at the second step of the *Thunder Basin* inquiry by holding that NAIJ's First and Fifth Amendment claims are of the type Congress intended to be reviewed through this scheme. Op. 13 (JA289). As this Court has recognized, three factors bear on that inquiry: "(1) whether the statutory scheme 'foreclose[s] all meaningful judicial review,'" "(2) the extent to which the plaintiff's claims are 'wholly collateral' to the statute's review provisions," and "(3) whether 'agency expertise could be brought to bear on the . . . questions presented.'"

Bennett, 844 F.3d at 181 (quoting *Thunder Basin*, 510 U.S. at 212–13). As explained below, all three factors weigh heavily against the district court's conclusion that Congress intended to withdraw district court jurisdiction over NAIJs' claims.

1. The Statute does not provide meaningful judicial review of NAIJ's claims.

NAIJ cannot obtain meaningful judicial review of its claims under the FSLMRS. The district court suggested otherwise, asserting that "NAIJ could initiate collective bargaining regarding the policy just as it did in 2018," and that "EOIR's subsequent refusal to consult or negotiate in good faith or an impasse would constitute an unfair labor practice resolvable by the FLRA," and ultimately reviewable in court. Op. 11–12 (JA287–88 (internal citations omitted)). But demanding to bargain over the Policy as NAIJ did in 2018 would not lead to judicial review. As explained below, EOIR has a duty to bargain only over the Policy's *implementation*, but if NAIJ demanded to bargain over implementation, EOIR would almost certainly agree, just as it did in 2018, and no matter how that bargaining proceeded, NAIJ would not be able to obtain judicial review. Meanwhile, demanding to bargain over the Policy's *substance* would not lead to judicial review that is meaningful. EOIR would be prohibited from bargaining over the Policy's substance, and so such a demand would be knowingly frivolous; moreover, the delay inherent in the administrative handling of that claim would cause irreparable harm to the First Amendment rights of immigration judges and the public.

The district court's assumption that NAIJ would be able to obtain judicial review under the Statute ignored the fact that EOIR is prohibited from bargaining over the Policy's *substance*. While the Statute generally requires an agency to bargain in good faith with a union over changes in conditions of employment, it exempts certain "management rights" from the duty to bargain, including the right to direct and to discipline employees. 5 U.S.C. § 7106(a)(2)(A); *see also U.S. Dep't of the Treasury, Bureau of the Pub. Debt Wash., D.C. v. FLRA* (*DOT*), 670 F.3d 1315, 1317 (D.C. Cir. 2012). As a result, an agency has no duty to bargain over the substance of a change to employment conditions if the change involves the exercise of a management right. *DOT*, 670 F.3d at 1317; *see also Fed. Bureau of Prisons FCI Bastrop*, 55 F.L.R.A. 848, 852 (1999) (*FCI Bastrop*). In fact, the agency is prohibited from doing so. *See Nuclear Regul. Comm'n v. FLRA*, 895 F.2d 152, 154 (4th Cir. 1990); *see also Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 819 (D.C. Cir. 1987); *NLRB Union Local 21*, 36 F.L.R.A. 853, 857–58 (1990). Because the Policy involves the exercise of EOIR's right to direct and to discipline employees, EOIR cannot bargain over its substance. It can and must bargain, however, over the Policy's implementation—that is, the "procedures" for implementing the Policy and the "appropriate arrangements" for employees adversely affected by it. 5 U.S.C. § 7106(b)(2)–(3); *see also Dep't of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992); *FCI Bastrop*, 55 F.L.R.A. at 852.

For this reason, NAIJ could demand to bargain only over the Policy's *implementation*, but doing so—as the district court proposed, Op. 11–12 (JA287–88)—would not lead to judicial review. As noted above, were NAIJ to issue a demand to bargain over the Policy's implementation, EOIR would almost certainly agree to bargain, just as it did in 2018 when NAIJ issued a similar demand to bargain over the implementation of the 2017 Policy. *Id*. at 10–11 (JA286–87). But this bargaining could not result in judicial review of NAIJ's claims. If EOIR *rejected* NAIJ's implementation proposals, NAIJ could not obtain judicial review of any resulting impasse because a negotiation impasse is not an "unfair labor practice" under the Statute. *See* 5 U.S.C. § 7116; *contra* Op. 12 (JA288) (stating that an impasse itself constitutes an unfair labor practice). While NAIJ could present the impasse to the Federal Service Impasse Panel—an entity within the FLRA that assists in resolving impasses between agencies and unions—any decision by the Panel would not be reviewable in court. *See Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 783–84 (D.C. Cir. 2010). If, on the other hand, EOIR *accepted* NAIJ's implementation proposals, NAIJ would have no basis upon which to charge an "unfair labor practice," thereby denying NAIJ judicial review of its constitutional objections to the *substance* of the Policy.[2]

[2] For similar reasons, NAIJ would be unable to file a grievance over the Policy's implementation in a way that would result in judicial review. NAIJ can seek judicial review of a grievance only if: (1) it exhausts the grievance and arbitration procedures

Even if NAIJ took the extraordinarily unusual step of demanding to bargain over a matter it knows to be non-negotiable—namely, the Policy's substance—it could not obtain judicial review of its constitutional claims that would be meaningful. This is so for two critical reasons.

First, pursuing this administrative option would require NAIJ to "manufacture a dispute," and as the Supreme Court explained in *Free Enterprise*, requiring a plaintiff to do so is not a "meaningful" avenue of relief. *Jarkesy v. SEC*, 803 F.3d 9, 20 (D.C. Cir. 2015) (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010)). As explained above, EOIR has no duty to bargain over the Policy's substance. As a result, if NAIJ demanded to bargain over the Policy's substance—for example, by proposing that EOIR modify the Policy to comply with the First Amendment—EOIR would have no choice but to refuse to bargain.[3] NAIJ

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set forth in the parties' collective bargaining agreement; (2) a party then files exceptions to the arbitrator's award with the FLRA, 5 U.S.C. § 7122; and (3) the FLRA issues an order that "involves an unfair labor practice," *id.* § 7123(a)(1). In other words, in order to obtain judicial review of a grievance, NAIJ must grieve an unfair labor practice, but for reasons already explained, NAIJ cannot provoke such a practice by demanding to bargain over the Policy's implementation. NAIJ would also be unable to obtain judicial review by filing a negotiability dispute over the Policy's implementation for the simple reason that EOIR does not dispute the negotiability of that matter. Even if, counterfactually, EOIR maintained that the Policy's implementation is non-negotiable, judicial review would not be available because the FLRA would order EOIR to negotiate (as it must under the Statute), and no judicial review could be had from that order.

[3] NAIJ could not avoid this result through creative pleading. As the D.C. Circuit has recognized, "[a] proposal, although cast in procedural language, which impinges

could then file a frivolous unfair labor practice dispute or negotiability dispute with the FLRA, and seek judicial review of the FLRA's certain denial of that dispute. In other words, NAIJ could potentially obtain judicial review of its constitutional claims by manufacturing a dispute about the negotiability of a matter it knows to be non-negotiable.

This is the very essence of "erect[ing] a Trojan-horse challenge," *Jarkesy*, 803 F.3d at 20, however, and as the *Free Enterprise* Court recognized, requiring litigants to resort to such artifice is surely not what Congress intended in enacting an alternative scheme of review, 561 U.S. at 490–91. The reason is clear: incentivizing plaintiffs to manufacture disputes does not serve Congress's goals in creating an administrative-review scheme. It does not result in agencies determining matters within their expertise, *see Free Enter.*, 561 U.S. at 489 (quoting *Whitney Nat'l Bank*, 379 U.S. at 420–21), or the avoidance of unnecessary duplicative litigation, *cf. Whitney Nat'l Bank*, 379 U.S. at 422. In fact, it does the opposite, by forcing agencies

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on substantive management decisions is . . . non-negotiable if its implementation would directly interfere with the agency's [management rights]." *AFGE, Local 2094 v. FLRA*, 833 F.2d 1037, 1041 (D.C. Cir. 1987) (internal quotation marks and citation omitted). Thus, for example, the Statute would bar EOIR from considering a proposal that the agency change the criteria it uses to consider whether to approve personal-capacity speaking requests. *See Dep't of Def., Army-Air Force Exch. Serv. v. FLRA*, 659 F.2d 1140, 1152 (D.C. Cir. 1981) (holding that "proposals cast in procedural language impinge on substantive management decisions by specifying the criteria pursuant to which decisions must be made").

to confront matters outside of their areas of expertise and often jurisdiction. The district court suggested that *Free Enterprise* was inapposite because NAIJ challenges the existence of an agency policy rather than the existence of an agency, Op. 9 (JA285), but the considerations that animated that decision apply. In both, the proposed channeling would require the plaintiff to institute sham administrative proceedings that would serve no purpose other than to lodge a constitutional challenge. This is not a case, therefore, where the plaintiff is "already embroiled in an enforcement proceeding" and could "pursue her claims through the administrative scheme." *Bennett*, 844 F.3d at 186; *see also Jarkesy*, 803 F.3d at 23 (noting that the plaintiff had raised the same issues as an affirmative defense during the course of enforcement proceedings); *Hill v. SEC*, 825 F.3d 1236, 1239 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 279 (2d Cir. 2016) (same); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015) (same).

Second, any eventual judicial review in this case would not be meaningful because it would come far too late, imposing "irremediable harm beyond the burdens associated with the dispute resolutions process." *Bennett*, 844 F.3d at 186 n.13 (quoting *Tilton*, 824 F.3d at 286). The Policy constitutes an unconstitutional prior restraint on the speech of NAIJ's members, *see infra* Part I.B, and a prior restraint on speech is "the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Accordingly, courts have recognized that the imposition of a prior restraint, even for short periods of time, causes irreparable harm. *See, e.g.*, *Cuviello v. City of Vallejo*, 944 F.3d 816, 831–32 (9th Cir. 2019) (noting that, unlike a criminal penalty, "a prior restraint stifles speech before it can take place, freezing it altogether").

Requiring a plaintiff to endure this harm before testing the constitutionality of a prior restraint is not a meaningful avenue of relief. Yet that is precisely what channeling NAIJ's claims would entail. The FLRA has no power to determine NAIJ's constitutional claims or to grant the relief NAIJ seeks. *See AFGE, Local 3936 v. FLRA*, 239 F.3d 66, 71–72 (1st Cir. 2001) ("[T]he Authority's jurisdiction extends only to statutory, not constitutional, claims.") (citing *NTEU v. King*, 961 F.2d 240, 243 (D.C. Cir.1992)). Pursuing proceedings before the FLRA would therefore needlessly delay NAIJ's ability to obtain review of its claims, causing unnecessary and irreparable harm to the First Amendment right of NAIJ's members to speak, and to the First Amendment right of the public to hear what they have to say. *Cf. Able v. United States*, 88 F.3d 1280, 1288 (2d Cir. 1996) (holding that plaintiffs challenging the Don't Ask, Don't Tell law were not required to exhaust administrative remedies in separation proceedings because they "alleg[ed] violations of their First Amendment right to free speech" and "even minimal impairments of this right create irreparable injury"); *Ramirez v. U.S. Customs & Border Prot.*, 709 F. Supp. 2d 74, 83–84 (D.D.C. 2010) (holding that a CBP employee challenging the

CBP's decision to deny him authorization to serve on a city council was not required to exhaust administrative remedies under the CSRA for the same reason).[4]

The risk of delay is especially acute in this case because the FLRA does not have a General Counsel and indeed has not had one for almost three years. In the ordinary course, a union accusing an agency of an unfair labor practice must submit a charge to the Regional Director, 5 C.F.R § 2423.6(a), who, acting on behalf of the General Counsel, investigates the charge, 5 C.F.R. § 2423.8(a), and decides whether to issue a complaint, 5 C.F.R. § 2423.10(a). Crucially, however, the Regional Director cannot issue a complaint unless the FLRA has a General Counsel, and an unfair labor practice dispute cannot proceed until a complaint has been issued. *See* 5 U.S.C. §§ 7104(f)(2)(B), 7118(a)(1); *see also Clark v. FLRA*, 782 F.2d 701, 704 (D.C. Cir. 2015); *Turgeon v. FLRA*, 677 F.2d 937, 940 (D.C. Cir. 1982).[5] The FLRA has not had a General Counsel or Acting General Counsel since November 2017, resulting in a backlog of more than 6,500 unfair labor practice charges and counting.[6] As the Court recognized in *Berkley*: "[I]n some rare situations, agency inaction may

[4] As explained below, NAIJ has also established irreparable harm independent of its claimed First Amendment violation. *See infra* Part II.A.

[5] *See also* Federal Labor Relations Authority, *Absence of a General Counsel*, https://perma.cc/UL53-WGSW (last visited Sept 25, 2020) (stating that "ULP complaints may only be issued when the FLRA has a General Counsel").

[6] Chris Opfer, *Trump's Government Labor Pick Comes Accused of Union Violations*, Bloomberg News (Mar. 27, 2019), https://perma.cc/7P8X-JQEZ.

turn the promise of meaningful judicial review into meaningless review." *Berkley v. Mountain Valley Pipeline LLC*, 896 F.3d 624, 631 (4th Cir. 2018). This is such a situation.[7]

Citing *Tilton*, the district court held that irreparable injury to First Amendment rights did not excuse NAIJ from bringing administrative proceedings, Op. 10 (JA286), but that case is inapposite. In *Tilton*, the plaintiff sought to enjoin the Securities Exchange Commission from carrying out an allegedly unconstitutional administrative proceeding to determine whether she had violated the Securities Exchange Act. 824 F.3d at 278–79. The Second Circuit held that the burden of defending herself in that proceeding did not constitute irreparable harm because post-proceeding judicial review of any sanctions imposed by the Commission was meaningfully accessible. *Id.* at 286–87. The harm NAIJ points to, however, is not the burden of "going through an agency proceeding," *cf.* Op. 10 (JA286) (quoting *Tilton*, 824 F.3d at 286), but the inability of NAIJ's members to engage in core political speech and the inability of the public to hear from them. These injuries flow

[7] Even if a new General Counsel were confirmed (and there is no indication that is imminent), it is extraordinarily unlikely that the General Counsel would issue a complaint over EOIR's refusal to bargain over the Policy's substance. As explained above, the Policy's substance is clearly non-negotiable, and a frivolous claim to the contrary would not be "sufficiently meritorious to warrant [Authority] consideration." *Turgeon*, 677 F.2d at 940. If the General Counsel refused to issue a complaint, NAIJ would have no recourse to the courts because that refusal is not judicially reviewable. *Id.*

from the Policy's very existence, not ongoing enforcement proceedings, and they cannot be undone by the reversal of an agency order, as in *Tilton*—or any other post-deprivation relief a court of appeals could provide. *See Elrod v. Burns*, 427 U.S. 347, 374 n.29 (1976) (noting that "[t]he timeliness of political speech is particularly important."). This is the very definition of irreparable harm. *Cf. McNary*, 498 U.S. at 496–97 (allowing plaintiffs to raise a due-process challenge in district court because they could ensure post-proceeding judicial review "only if they voluntarily surrender[ed] themselves for deportation"); *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) (allowing plaintiff to raise a due-process challenge in district court because "an erroneous termination" of disability benefits "would damage him in a way not recompensable through retroactive payments.").[8]

2. NAIJ's claims are wholly collateral to the Statute.

The district court also erred in its consideration of the second *Thunder Basin* factor. NAIJ's claims are wholly collateral to the Statute because they are substantively and procedurally unrelated to any statutory claim the union could bring before the FLRA and seek review of in court.

[8] For similar reasons, NAIJ could not obtain meaningful judicial review by attempting to "grieve" an unfair labor practice based on EOIR's refusal to bargain or negotiate in good faith over the Policy's substance. Pursuing this administrative option would involve manufacturing a dispute and pursuing administrative proceedings that would needlessly impose ongoing and irreparable harm.

As the Court noted in *Bennett*, courts have adopted two approaches to determining whether a claim is wholly collateral to a statute. 844 F.3d at 186. In some cases, courts have considered whether the claim is "inextricably intertwined" with the merits of a proceeding before the agency or a proceeding that could be brought before the agency. *See Bebo*, 799 F.3d at 773 n.2 (quoting *Heckler v. Ringer*, 466 U.S. 602, 614 (1984)). Courts have required such claims to be raised through the administrative process to avoid bifurcated or piecemeal litigation. *See id.*; *see also Hill*, 825 F.3d at 1251 (citing *Mathews*, 424 U.S. at 330); *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 147 (2d Cir. 2016); *Steadman v. Governor, U.S. Soldiers' and Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990). In other cases, courts have considered whether the claim is a "vehicle" to reverse or enjoin agency action covered by the statute's remedial scheme. *Bennett*, 844 F.3d at 186–87 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012)); *see also Bebo*, 799 F.3d at 773; *Hill*, 825 F.3d at 1251; *Tilton*, 824 F.3d at 287–88; *Jarkesy*, 803 F.3d at 22–23; *Elgin*, 567 U.S. at 22. Courts have channeled such claims through administrative proceedings to prevent litigants from "short-circuit[ing]" the administrative process. *Bennett*, 844 F.3d at 188.

Under either approach, NAIJ's constitutional claims are wholly collateral to the Statute.

First, NAIJ's claims are not inextricably intertwined with the merits of a statutory claim that could be brought before the FLRA. NAIJ does not allege that EOIR has refused to bargain over the Policy or failed to negotiate over the Policy in good faith. NAIJ challenges the existence of the Policy itself, alleging that it prohibits and deters protected speech and deprives the public of speech it is entitled to hear. As noted above, *see supra* Part I.A.1, this type of claim falls entirely outside the FLRA's jurisdiction. It also stands independently of any statutory claim NAIJ could bring before the FLRA. *See Steadman*, 918 F.2d at 967 (holding that a constitutional claim is not "intertwined" with a statutory one when it "raises issues totally unrelated to [the statute]," and is not "premised on the same facts").[9]

The Supreme Court's landmark decision in *NTEU* and the D.C. Circuit's decision in *Weaver v. U.S. Info. Agency*, 87 F.3d 1429 (D.C. Cir. 1996) are directly on point. In *NTEU*, the Supreme Court invalidated employee-speech restrictions in a challenge brought originally in federal district court by a union that was subject to the same statutory scheme at issue here. The Court issued its opinion the year after it decided *Thunder Basin*, but at no point did it suggest that *Thunder Basin* required

[9] The district court treated as relevant the fact that the parties engaged in collective bargaining over the 2017 Policy resulting in a memorandum of understanding, but those negotiations and the 2018 MOU that resulted from them merely prove NAIJ's point. Both the negotiations and the MOU were limited to narrow issues "related to the implementation of [the 2017] Policy" and did not reach the Policy's substance. *See* 2018 MOU (JA83–85).

the challenge to be brought first before the FLRA. In *Weaver*, a federal agency employee challenged the constitutionality of a speech policy requiring the submission of certain materials for prepublication review, as well as an admonishment she received for failing to comply with that requirement. 87 F.3d at 1432. The D.C. Circuit dismissed the employee's challenge to her admonishment, explaining that it was remediable through the Civil Service Reform Act, 5 U.S.C. § 1101 *et seq.* ("CSRA") as a "prohibited personnel practice." *Id.* at 1433–34. But, citing *NTEU*, the court recognized jurisdiction over the constitutional claim as "a simple pre-enforcement attack on a regulation restricting employee speech" that "st[ood] independently of the admonishment." *Id.* NAIJ's suit is essentially identical to the suits permitted to proceed in *NTEU* and *Weaver*.

The district court found that *NTEU* and *Weaver* "are inapplicable today" because they predate more recent case law addressing the application of *Thunder Basin*, Op, 13–14 (JA289–90), but both cases postdate *Thunder Basin*, and neither case has been overturned or abrogated. Indeed, the Supreme Court cited *NTEU* approvingly as recently as two years ago. *See Janus v. Am. Fed'n of State, City., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018). In any event, recent case law applying *Thunder Basin* is entirely consistent with *NTEU* and *Weaver*. The Supreme Court's decision in *Free Enterprise* is instructive. In that case, the Court held that the district court had jurisdiction to consider the plaintiffs' constitutional challenge

to the existence of the Public Company Accounting Oversight Board. *Id. Free Enter.*, 561 U.S. at 491. Rejecting the government's argument that the plaintiffs were required to first seek review by the Securities Exchange Commission, the Court explained that judicial review was not precluded because the statute "provides only for judicial review of *Commission* action" and the plaintiffs' challenge was "collateral" to "any Commission orders or rules from which review might be sought." *Id.* at 490 (emphasis in original). That analysis is equally applicable to this case. Here, the Statute provides only for judicial review of certain FLRA orders, 5 U.S.C. § 7123(a), but NAIJ's constitutional challenge is substantively unrelated to any dispute resolvable by the FLRA. *Cf. Lanier*, 838 F.3d at 148 (finding plaintiff's breach-of-contract claims wholly collateral to a statute providing for judicial review of a final order of the Commission because the claims "are not justiciable" by such an order); *SEIU Local 200 United v. Trump*, 420 F. Supp. 3d 65, 74 (W.D.N.Y. 2019) (finding that a procedural notice-and-comment challenge to an agency's regulations is wholly collateral to the Statute and therefore not excluded from district court review); *SEIU Local 200 United v. Trump*, 419 F. Supp. 3d 612, 618 n.4 (W.D.N.Y. 2019) (declining to revisit the issue), *aff'd per curiam*, No. 19-4143, 2020 WL 5542674 (2d Cir. Sept. 16, 2020) (same).

The district court concluded that *Free Enterprise* was distinguishable because the plaintiffs in that case would have been required to challenge a rule at random to

obtain judicial review, Op. 9 (JA285), but requiring a plaintiff to manufacture a frivolous administrative claim has much the same flavor. In *Free Enterprise*, the Court found that "select[ing] and challeng[ing] a Board rule at random [would have been] an odd procedure to choose [to challenge the Board's existence], especially since only new rules, and not existing ones, are subject to challenge." 561 U.S. at 490. The same is true here: requiring NAIJ to contrive a sham bargaining dispute would be an entirely peculiar method of challenging the Policy's existence.

The district court's reliance on *AFGE* and *NAAE v. Trump*, No. 19-3057, 2020 WL 2571105 (D. Md. May 21, 2020), Op. 11 (JA287), is also misplaced. Both *AFGE* and *NAAE* involved a challenge to Executive Orders that, the plaintiffs claimed, directed federal agencies to violate the Statute. *NAAE*, 2020 WL 2571105, at *8. The plaintiffs raised statutory claims *and* related constitutional claims, and the courts held that the two sets of claims were inextricably intertwined. In both cases, the courts found that the plaintiffs' challenge was "of the type that is regularly adjudicated through the [Statute]: disputes over whether the Statute has been violated." *AFGE*, 929 F.3d at 760; *see also NAAE*, 2020 WL 2571105, at *8 ("Plaintiff frames the Complaint as a broad facial challenge to the Executive Orders, however, the dispute giving rising to this action is that Defendant . . . will implement the Executive Orders, and therefore allegedly violate the Statute."). NAIJ, however,

does not raise any claim that EOIR has violated the Statute, and its constitutional claims do not derive from and are not intertwined with any such dispute.

Second, NAIJ's constitutional claims are not an attempt to reverse or enjoin an agency action covered by the Statute's administrative-review scheme. This fact distinguishes the vast majority of cases finding that a plaintiff's claims are not wholly collateral. For example, in *Elgin*, the Supreme Court "asked whether the plaintiff–employees' challenge aimed to obtain the same relief they could seek in the agency proceeding." *Jarkesy*, 803 F.3d at 23 (discussing *Elgin*, 567 U.S. at 22). The Court found that it did and thus that the plaintiffs' challenge was a "vehicle by which they seek to reverse" adverse employment actions covered by an administrative scheme. *Elgin*, 567 U.S. at 22; *see also Bennett*, 844 F.3d at 187 (plaintiff's claim was "the vehicle by which she seeks to vacate the [Administrative Law Judge]'s initial findings" under the Securities Exchange Act (internal quotation marks omitted)); *Berkley*, 896 F.3d at 632 (plaintiffs' claims "are the means by which they seek to vacate the granting" of a certificate under the Natural Gas Act); *Thunder Basin*, 510 U.S. at 216 (plaintiffs' claim was an attempt to "enjoin[] the Secretary [of Labor] from commencing enforcement proceedings" under the Mine Act).

This case is not like *Elgin*, but is instead like *Free Enterprise*. NAIJ's claims—like those brought by the *Free Enterprise* plaintiffs—arise "outside" the

Statute's administrative-review scheme. *Cf. Jarkesy*, 803 F.3d at 22–23 (holding that plaintiffs' claims did not meet this description because "they arise from actions the [agency] took in the course of" such a scheme). The claims are not a vehicle to "reverse" agency actions covered by the scheme, *cf. Elgin*, 567 U.S. at 22; *Berkley*, 896 F.3d at 632; to "stop[]" an agency from taking actions that allegedly violate the Statute, *cf. NAAE*, 2020 WL 2571105, at *8 n.6; to "prevail" in an enforcement proceeding, *cf. Jarkesy*, 803 F.3d at 23; *Bennett*, 844 F.3d at 187; *Tilton*, 824 F.3d at 288; or to enjoin an "imminent" one, *cf. Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 244 n.3 (4th Cir. 2004). The district court was therefore wrong to suggest NAIJ had engaged in the purely formalistic ploy of "adding a constitutional claim and at the same time eliminating statutory counts" to confer jurisdiction. Op. 12 (JA288) (citing *Elgin*, 567 U.S. at 22).

3. NAIJ's claims are beyond the expertise of the Federal Labor Relations Authority.

The third *Thunder Basin* factor also weighs heavily against jurisdictional preclusion. NAIJ's claims are beyond the FLRA's "specialized expertise in federal labor relations," *AFGE Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986), because they are purely constitutional claims involving the right of immigration judges to speak and the right of the public to hear what they have to say. *Cf. Free Enter.*, 561 U.S. at 491 (holding that plaintiffs' Appointments Clause claims were beyond the agency's expertise). Indeed, NAIJ's claims could have been

raised by a willing listener, and if they had, no one would argue that they fell within the FLRA's expertise. The mere fact the claims are brought by a union on behalf of members whose speech the Policy suppresses does not change the calculus. This is not a case in which the FLRA could "obviate the need to address" NAIJ's claims by resolving the case on other grounds, or "alleviate constitutional concerns" through its interpretation of the Statute. *Elgin*, 567 U.S. at 22–23. *AFGE* and *NAAE* are therefore distinguishable. In those cases, the plaintiffs "essentially allege[d] that the agency [would] violate the Statute by implementing the Executive Orders, and the FLRA's expertise was clearly relevant to whether that [was] the case." *NAAE*, 2020 WL 2571105, at *9; *see also AFGE*, 929 F.3d at 760. As the D.C. Circuit observed in *AFGE*, the FLRA could also "moot the need to resolve the [plaintiffs'] constitutional claims" by concluding that the Statute barred the agencies from implementing the orders, or "offer[] an interpretation of the [Statute] in the course of the proceeding" that might relieve the constitutional concerns. 929 F.3d at 761 (internal quotation marks omitted). Here, the FLRA's expertise cannot be "brought to bear" in any of these ways.[10]

[10] In the briefing below, the government suggested that the district court's jurisdiction may also be precluded by the CSRA, but it did not pursue this argument at the hearing, and the district court did not address it in its ruling. In any event, the suggestion is misconceived. Contrary to the government's assertion, NAIJ cannot challenge the Policy as a "prohibited personnel practice" under 5 U.S.C. § 2302 (b)(12) because NAIJ is not a covered "employee," 5 U.S.C. § 2105(a), and the Policy is not a covered "personnel action," *id.* § 2302(a)(2)(A). *Cf. Elgin*, 567 U.S.

B. NAIJ is likely to prevail on the merits of its First Amendment claim.

As the Supreme Court held over fifty years ago, "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 573 U.S. 228, 231 (2014) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Rather, they retain their rights, as citizens, to comment on matters of public concern. *Id.* at 235–36. Under the test set forth in *NTEU*, any government policy that constitutes a prior restraint on this speech must survive "exacting scrutiny," *Janus*, 138 S. Ct. at 2472. "The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571). It must also "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a

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at 21. A "personnel action" includes certain actions taken "with respect to an employee," *id.* § 2302(a)(2)(A), but the Policy cannot be so described; it is a generally applicable policy. Nor could NAIJ's challenge to the Policy be described as "the vehicle . . . to reverse" an individual personnel decision. *Cf. Elgin*, 567 U.S. at 22; *see also Weaver*, 87 F.3d 1429 (holding that CSRA did not preclude district court jurisdiction over a pre-enforcement challenge to an employee-speech regulation); *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (assuming that district court had jurisdiction in case involving similar challenge); *Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006) (same).

direct and material way." *Id*. at 475 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994)).

The government cannot satisfy the test imposed by *NTEU* in this case.

1. Because the Policy is a prior restraint on the protected speech of public employees, it is subject to exacting scrutiny under *NTEU*.

NTEU applies whenever "a generally applicable statute or regulation (as opposed to a post-hoc disciplinary action) operates as a prior restraint" on personal-capacity speech by public employees on matters of public concern. *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016). The Policy is precisely this sort of prior restraint and, accordingly, is subject to *NTEU*'s exacting scrutiny.

First, the Policy operates as a prior restraint on the personal-capacity speech of immigration judges in two ways. It categorically prohibits immigration judges from speaking about immigration or EOIR in their personal capacities, by deeming "official" any speech "relat[ing] to immigration law and policy issues, the employee's official EOIR duties or position, or any agency programs and policies." 2020 Policy at 2 (JA97). It also requires judges to seek EOIR's approval before speaking in their personal capacities on any other topic. Both restrictions are prior restraints because they "chill[] potential speech before it happens." *NTEU*, 513 U.S. at 468; *see also Liverman*, 844 F.3d at 407–08 (applying *NTEU* to a direct speech prohibition); *Moonin v. Tice*, 868 F.3d 853, 874 (9th Cir. 2017) (same); *Crue v.*

Aiken, 370 F.3d 668, 679 (7th Cir. 2004) (applying *NTEU* to a preapproval requirement); *Swartzwelder v. McNeilly*, 297 F.3d 228, 233, 235–38 (3d Cir. 2002) (same).

In the proceedings below, the government argued that speech about immigration and EOIR is, by definition, official capacity, Gov't Br. 13, ECF No. 27, but that is contrary to established Supreme Court precedent. As the Supreme Court explained in *Lane*, the "critical question" in determining whether speech occurs in an employee's official capacity is "whether the speech . . . is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240. Here, immigration judges wish to contribute to ongoing public discussion about immigration law and policy by, for example, educating the public about the immigration court system, describing how recent policy changes affect their ability to do their jobs, and opining on proposed reforms. *See infra* Part I.B.2.a. None of this speech ordinarily falls within the scope of an immigration judge's duties. *See* Suppl. Tabaddor Decl. ¶¶ 7–9 (JA250); *id.* Ex. O (JA270–275) (EOIR's formal position description for immigration judges). In fact, in denying judges approval to speak at engagements related to immigration, EOIR has made clear that speaking at such engagements is not an official responsibility of rank-and-file judges and, accordingly, should be undertaken by EOIR "management officials." *See* Tabaddor Decl. Exs. H–K (JA102–133).

Second, the speech restricted by the Policy is of manifest public concern. Speech concerning the immigration legal system is "of obvious concern to citizens on both sides of [this] often hotly debated issue[]," *Edwards v. City of Goldsboro*, 178 F.3d 231, 247 (4th Cir. 1999). The insights of immigration judges "hold[] special value" because of the unique vantage point they hold in that system. *Lane*, 573 U.S. at 240; *see also Liverman*, 844 F.3d at 408 (4th Cir. 2016); *Sanjour*, 56 F.3d at 91. Speech on public issues unrelated to the judges' employment is no less important. *See NTEU*, 513 U.S. at 466.

2. The Policy does not satisfy *NTEU*'s exacting scrutiny.

The Policy fails to satisfy *NTEU*'s exacting scrutiny because the government cannot show that the interests of immigration judges and their potential audiences in the restrained speech are outweighed by the expression's necessary impact on the actual operation of government. Immigration judges have a strong interest in speaking about matters of public concern, and the public has an equally strong interest in hearing what they have to say. On the other hand, the government's asserted harms are hypothetical—in fact, one of the government's own declarants suggests that they are mere pretext for viewpoint discrimination. The Policy is not "reasonably necessary" to addressing any actual harms, *NTEU*, 513 U.S. at 474, and it lacks the safeguards courts ordinarily require of prior restraints on speech by public employees.

a. The interests of immigration judges in speaking, and of the public in hearing what they have to say, are substantial.

By preventing immigration judges from publicly discussing any issue related to immigration and EOIR, and by severely restricting their ability to publicly discuss any other issue, the Policy implicates interests that "go to the core of the freedoms the First Amendment was designed to protect." *Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir. 1998).

Immigration policy is a near-daily fixture in our national discourse, and immigration judges are uniquely positioned to inform that discourse in "any number of ways." *Liverman*, 844 F.3d at 408. Many judges wish to play a role in educating the public about the immigration legal system and their position within it. They would like to speak at local and national conferences, guest lecture at universities and law schools, and contribute to legal trainings about these topics. Tabaddor Decl. ¶ 34 (JA67). Many immigration judges also wish to be able to address how new or proposed immigration policies affect (or would affect) their ability to do their jobs. *Id.* ¶ 35 (JA67–68). For example, many judges have contacted NAIJ to express concerns about EOIR's decision to keep immigration courts open during the current COVID-19 pandemic. *Id.* (JA67–68). Some of these judges wish to share these concerns speak publicly, but have declined to do so because of the Policy. *Id.* (JA67–68).

The public's interest in hearing this speech is obvious. "[A]s numerous courts and commentators have observed, government employees are in a position to offer the public unique insights into the workings of government generally and their areas of specialization in particular." *Sanjour*, 56 F.3d at 94; *see also Cromer v. Brown*, 88 F.3d 1315, 1327 (4th Cir. 1996). By denying immigration judges the opportunity to share their insights into the immigration legal system, the Policy deprives the public of their "novel and valuable perspective," as recent experience with the Policy demonstrates. *Sanjour*, 56 F.3d at 94. Law school clinics, professional associations, and other organizations that used to host immigration judges at their events are generally no longer able to do so. Tabaddor Decl. ¶¶ 9, 25, 34 (JA61–62, 65, 67). Some organizations have stopped inviting sitting immigration judges to their events altogether. *See* Lynch Decl. ¶¶ 9–12 (JA54–56).

The interests of the public—and of judges themselves—in speech unrelated to immigration or EOIR is also strong. But the Policy's preapproval requirement deters this speech. *See* Tabaddor Decl. ¶ 37 (JA68). As the Supreme Court explained in *NTEU*, while the value of speech lost to such a prior restraint is hard to quantify, it is no less vital:

> The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne.

NTEU, 513 U.S. at 470 (internal citation omitted).

b. The hypothetical interests asserted by the government cannot justify the Policy.

Before the district court, the government argued that the Policy served its interests in ensuring compliance with ethics and professionalism laws, preventing absences that interfere with EOIR's work, protecting public confidence in EOIR, and promoting judicial integrity. None of these asserted interests can sustain the Policy.

As an initial matter, these interests appear to be a pretext for EOIR's true purpose of suppressing public criticism of the agency. In the proceedings below, the government argued that immigration judges could "do real harm to the agency" by "critiquing EOIR." *See* Gov't Br. 21, ECF No. 27. One of the government's affiants, a former Acting Deputy Director of EOIR and current ACIJ admitted that, in evaluating requests to participate in personal-capacity speaking engagements, she considers whether a judge's participation could result in "any negative publicity or scrutiny to EOIR or the Federal Government." Owen Decl. ¶ 17 (JA243). This is an entirely illegitimate justification for a prior restraint. As the Court explained in *Liverman*, "it is axiomatic that the government may not ban speech on the ground that it expresses an objecting viewpoint." 844 F.3d at 411; *see also Moonin*, 868 F.3d at 866 ("[E]fficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value.").

This conceded purpose of viewpoint discrimination is fatal to the government's defense of the Policy, but even setting it aside, EOIR has failed to satisfy its burden of demonstrating that speech by immigration judges in their personal capacities has caused real harm to any legitimate interest. Nor has it carried its burden of demonstrating that the Policy is appropriately tailored to any such interest.

First, the government asserted an interest in ensuring compliance with ethics and professionalism laws, but it failed to show why the laws themselves are not adequate. *See* Cox Decl. ¶ 3 (JA199) (EOIR's Ethics Counsel noting that he conducts training for newly hired EOIR employees, including immigration judges, regarding their ethics responsibilities). The government put forward no evidence suggesting that, absent the Policy, immigration judges would flout the ethics and professionalism laws that bind them. *See Swartzwelder*, 297 F.3d at 239 (holding that police department's interest in protecting confidential information did not sustain preapproval policy where department failed to produce evidence that its preexisting code of conduct "was insufficient to deal with the problem"). Nor did the government explain how the Policy's restrictions are tailored to this interest. *See* 2020 Policy at 2–3 (JA97–98) (describing four layers of review, only one of which is carried out by EOIR's Ethics Program, and permitting EOIR to deny requests for reasons unrelated to ethical violations).

Second, the government argued that the Policy is necessary to ensure consistent staffing, but EOIR already has a policy requiring that employees clear the use of annual leave with their supervisors. *See* 2020 Policy at 2 n.3 (JA97). The government produced no evidence that its preexisting policy was inadequate to protect its interest. The Policy is also poorly tailored to address the problem of managing staffing. It applies to all speaking events, regardless of whether they will take place during the workday, as well as to the publication of written material, regardless of when it is drafted. It also permits EOIR to review the content of an immigration judge's proposed speech, even though the speech's content is irrelevant to staffing needs. McHenry Decl. ¶ 42 (JA165); *cf. Swartzwelder*, 297 F.3d at 238.

Third, the government argued that the Policy was necessary to avoid public confusion and preserve confidence in EOIR, but here, too, it failed to produce any evidence that this was so. The government pointed to a narrow set of cases allowing public employers to punish certain "agency heads or high-ranking agency personnel" for speech reasonably likely to disrupt the government's ability to effectively and efficiently manage its operations. *See McVey v. Stacy*, 157 F.3d 271, 279 (4th Cir. 1998). Those cases are inapt. Immigration judges are not the type of employees contemplated by cases like *McVey*, because they neither set policy nor manage agency operations. Rather, they adjudicate cases based on well-established precedent, and their decisions are subject to review by the Board of Immigration

Appeals. *See, e.g.*, *U.S. Dep't of Justice & Nat'l Ass'n of Immigration Judges*, WA-RP-19-0067 (2020) (holding that immigration judges are not management officials for these reasons); *U.S. Dep't of Justice & Nat'l Ass'n of Immigration Judges*, 56 F.L.R.A. 616 (2000) (same). Indeed, immigration judges' obligations of independence and impartiality make them categorically unlike the high-ranking officials whose expected loyalty to their superiors has been the basis for restrictions on their public dissent.

In any event, the Policy must be invalidated because it lacks a "close and rational" relationship to EOIR's asserted interest in avoiding public confusion and preserving public confidence. *Moonin*, 868 F.3d at 867. For example, the Policy "makes no distinction between speech about [EOIR policies and programs] that reasonably could be expected to disrupt [the agency's] operations and speech that plainly would not, or that would do so only inasmuch as it engendered legitimate public debate about the [agency]." *Id.* The Policy applies indiscriminately to all speech by EOIR employees, including speech having nothing to do with EOIR operations. It also authorizes EOIR to review speaking requests for consistency with agency policies and communications, 2020 Policy at 3 (JA98), not merely the potential of speech to undermine public confidence in the agency. *Cf. Swartzwelder*, 297 F.3d at 239.

Fourth, and finally, the government argued that the Policy is justified by EOIR's interest in promoting judicial impartiality, but the Policy is not tailored to this interest either. As the Supreme Court recognized in *Republican Party of Minnesota v. White*, impartiality in the judicial context has a narrow meaning: "the lack of bias for or against either party to the proceeding." 536 U.S. 765, 775–76 (2002). Neither protecting impartiality nor the appearance thereof requires judges to avoid sharing their legal and political views. *Id*. at 788 (holding unconstitutional canon of judicial conduct preventing judges from announcing their views "on disputed legal and political issues"); *see also* Code of Conduct for U.S. Judges Canon 4 (Judicial Conference of the U.S. 2019) (encouraging federal judges to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice"). The Policy is not targeted to that interest. The Policy requires that employees seek preapproval for all speaking engagements, not merely those that create a risk or appearance of bias for or against a party, and it imposes a categorical ban on employees speaking publicly in their personal capacities about immigration and EOIR. Neither restriction is justified by the government's interests in maintaining judicial impartiality.

3. The Policy lacks the safeguards generally required of prior restraints.

Recognizing the risk that prior restraints lead to illegitimate censorship, courts applying *NTEU* have placed "an additional thumb on the employees' side of [the]

scales" when the prior restraint in question lacks safeguards designed to minimize the risk of abuse. *Harman*, 140 F.3d at 120 (alteration in original) (quoting *Sanjour*, 56 F.3d at 97). The Policy here lacks two critical safeguards.

First, the Policy fails to include "narrow, objective, and definite standards" that would guide decisionmakers. *See Harman*, 140 F.3d at 120–21 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)) (applying *Shuttlesworth*'s requirement of "narrow, objective, and definite standards" to a public employee speech policy under *NTEU*). To begin, the Policy's definition of official-capacity speech is far from narrow: the Policy classifies all requests to speak on topics related to immigration and EOIR as official capacity, thereby prohibiting broad categories of speech protected by the First Amendment. The Policy also requires immigration judges to submit all requests to speak publicly for review for compliance "with applicable law and agency policies" and "consistency in EOIR's communications." 2020 Policy at 2–3 (JA97–98). Far from ensuring objectivity, these standards "raise[] the specter of arbitrary or viewpoint-discriminatory enforcement." *Moonin*, 868 F.3d at 867. Courts have consistently rejected similarly subjective and ill-defined standards. *See, e.g.*, *Am. Entertainers, LLC v. City of Rocky Mount*, 888 F.3d 707, 712 (4th Cir. 2018) (holding unconstitutional a licensing regime that conditioned approval on compliance with "all applicable laws"); *Harman*, 140 F.3d at 116, 120–21 (holding unconstitutional an employee-

speech policy permitting the agency to "determine the appropriate manner in which to handle media contacts . . . consistent with the efficient and effective operation of the Agency" because it "inherently disfavor[ed]" speech critical of the agency).

Second, the Policy fails to include definite time limits for decision. As this Court has explained, definite time limits are an "essential" safeguard for preapproval regimes. *Chesapeake B & M, Inc. v. Harford Cty.*, 58 F.3d 1005, 1011 (4th Cir. 1995); *see also Crue*, 370 F.3d at 679 (striking down a policy requiring preclearance before university affiliates could contact athletic recruits in part because the policy did not create "a schedule for the review of proposed communications"); *Harman*, 140 F.3d at 121 (noting that without a time limit, requests could be "rendered moot by delay" under a city agency's press policy). The Policy lacks this safeguard, and as explained above, the 2018 MOU sets only *aspirational* time limits for some parts of the preapproval process. The record establishes that these time limits are often not met in practice. Tabaddor Decl. ¶ 26 (JA65–66); *id.* Ex. L (JA134–49).

C. NAIJ is likely to prevail on the merits of its Fifth Amendment claim.

The void for vagueness doctrine requires that a policy or regulation provide sufficient clarity and guidance to ensure that it is not applied "in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) . "[R]igorous adherence to [this] requirement[] is necessary to ensure that ambiguity

does not chill protected speech." *Id.* at 253–54. The Policy, however, fails to provide clear guidance.

First, the Policy explicitly allows supervisors and the SET to make decisions based on EOIR's preferred message. *See* 2020 Policy at 3 (JA98); *see also* Tabaddor Decl. Ex. I at 5 (JA111) (asking judges to confirm whether their proposed speech "align[s] with EOIR messaging"); Swanwick Decl. Ex. B at 3 (JA214) (stating that the SET considers whether requests to speak about immigration will "advance EOIR's mission"); Owen Decl. ¶ 17 (JA243) (supervisor stating that she considers whether the judge's participation could result in "negative publicity or scrutiny"). The Policy thus enables and encourages viewpoint discrimination in the speaking-engagement process.

Second, the Policy fails to meaningfully limit supervisory review. The Policy provides only that supervisors will "determine whether the request should move forward in the review process." *Id.* This "unrestricted delegation of power" invites arbitrary and discriminatory enforcement. *See Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (striking down a university speech policy as unconstitutionally vague because it "le[ft] the definition of its terms to [decisionmakers], and thereby invite[d] arbitrary, discriminatory and overzealous enforcement"); *see also Sanjour*, 56 F.3d at 97 ("[T]he regulatory scheme vests essentially unbridled discretion in the agency to make the determination on the basis

of the viewpoint expressed by the employee . . . [which] reinforces our belief that they are impermissible.").

II. NAIJ has satisfied the remaining preliminary injunction factors.

A. NAIJ's members will suffer irreparable harm absent a preliminary injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *accord In re Murphy-Brown, LLC*, 907 F.3d 788, 796 (4th Cir. 2018). Accordingly, this Court has held that a plaintiff demonstrates irreparable injury by establishing a likelihood of success on a First Amendment claim. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). NAIJ has done so, as explained above. *See supra* Part I.

The record also independently demonstrates irreparable harm to NAIJ's members. Under the Policy, immigration judges may not publicly voice their personal views on immigration law or policy or EOIR. They may voice their personal views on other topics only if they submit to an onerous preapproval process. Judges who have submitted requests to speak in their personal capacities have frequently been denied approval to do so. Tabaddor Decl. ¶¶ 25, 27–31 (JA65–66). Many have been subject to arbitrary and protracted decisionmaking. Tabaddor Decl.

¶¶ 24–31 (JA65–66). Still others have been discouraged from even submitting requests to speak publicly. Tabaddor Decl. ¶¶ 32, 34 (JA66–67).[11]

B. The balance of equities and the public interest strongly favor issuing preliminary injunctive relief.

This Court has held that the final two factors—the balance of equities and public interest—are deemed established where, as here, there is a likely First Amendment violation. *See, e.g.*, *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013). This reflects the Court's recognition that the government has no legitimate interest in "enforcing restrictions likely to be found unconstitutional," and that "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002).

Even absent this presumption, the balance of equities and the public interest would favor the relief NAIJ seeks. The public's interest in hearing from immigration judges is substantial. *See supra* Part I.B.2.a. There is an ongoing national debate

[11] In the district court, the government argued that the union's supposed "delay" in filing suit undercuts the urgency of injunctive relief. Gov't Br. 28, ECF No. 27. But NAIJ sued within months of the issuance of the 2020 Policy. And even if it had delayed, NAIJ's "likelihood of success on the merits and the seriousness of any infringement upon First Amendment rights" outweighs any countervailing concerns. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004); *see also Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 8, 16 (1st Cir. 2012) (finding that a delay of seven and a half months did not overcome the plaintiff's showing of irreparable harm to its First Amendment rights).

about recent and proposed changes to the immigration legal system and their effect on that system's ability to operate independently and fairly. Now, amid the COVID-19 pandemic, the public has an urgent interest in learning about the impact of EOIR's decision to keep the immigration courts open on those who appear before them. Immigration judges are uniquely situated to share insights on these matters. On the other hand, the government has not articulated any legitimate justification for the sweeping restraint it has imposed on the personal-capacity speech of immigration judges. There is nothing in the record to suggest that this speech has disrupted—or could reasonably be anticipated to disrupt—EOIR's operations. *Cf.* Tabaddor Decl. ¶¶ 10, 15 (JA62–63). Moreover, a preliminary injunction would leave EOIR free to draft a policy "better tailored to" any legitimate interests it might have in regulating judges' speech. *Swartzwelder*, 297 F.3d at 242.

Conclusion

For the foregoing reasons, this Court should vacate the decision below and remand with instructions for the district court to enter a preliminary injunction.[12]

[12] *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) ("Appellate courts have the power to vacate and remand a denial of a preliminary injunction with specific instructions for the district court to enter an injunction.").

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