No. 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

BRIEF FOR APPELLEE

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

G. ZACHARY TERWILLIGER
United States Attorney

MICHAEL S. RAAB
JENNIFER L. UTRECHT
Attorneys, Appellate Staff
Civil Division, Room 7710
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9039

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INTRODUCTION

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

In recognition of the fact that immigration judges have a responsibility to maintain an appearance of impartiality and that their public speech can affect the agency's overall mission, EOIR has worked carefully to develop and adjust policies governing outside speaking and writing engagements, consistent with federal law and Department of Justice policies. In so doing, it has collaborated closely with the union that formerly represented its non-supervisory immigration judges, the plaintiff National Association of Immigration Judges (NAIJ). In 2011, EOIR and NAIJ jointly issued an Ethics Guide that set forth many workplace ethics and personnel laws that apply to immigration judges. That Ethics Guide also required immigration judges to seek EOIR review of potential speaking or writing engagements to determine if the engagement would comport with the ethics requirements. In 2017, EOIR created a standardized process to review those requests, which prompted NAIJ to initiate collective bargaining over the implementation and impact of that process. Again, EOIR and NAIJ worked together to resolve any differences on this score.

In January 2020, EOIR made slight clarifications to the policy, creating an electronic portal to automate the request submission-and-approval process. Six months later, NAIJ brought suit, contending that the policy it helped shape violates the Constitution and should be preliminarily enjoined. The district court correctly denied NAIJ's claim for an injunction on the ground that the court lacks jurisdiction over NAIJ's claims. As an initial matter, NAIJ does not have standing to bring this claim. NAIJ premised its standing in district court on the theory that it was the certified representative of a bargaining unit that included non-supervisory immigrations judges who were injured by the speaking-engagement policy. After the district court issued its opinion in this case, however, the Federal Labor Relations Authority (FLRA) determined that immigration judges are management officials who may not be part of any collective bargaining unit. NAIJ thus lacks associational standing to bring these constitutional claims on behalf of the immigration judges.

Even if NAIJ somehow retained standing after the FLRA's determination, the district court correctly held that the district court lacks subject matter-jurisdiction to hear NAIJ's claim, which must be channeled through the exclusive procedures for administrative and judicial review set forth in the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. § 7101 *et seq.*. And even if NAIJ could overcome these threshold jurisdictional obstacles, NAIJ has not established a likelihood of success on the merits of its constitutional challenge, that it will be

irreparably harmed in the absence of an injunction, or that the public interest would be served by an injunction.

STATEMENT OF JURISDICTION

NAIJ invoked the jurisdiction of the district court under 28 U.S.C. § 1331. The district court entered an order denying NAIJ's motion for a preliminary injunction on August 6, 2020. JA291. NAIJ filed a timely notice of appeal on August 7, 2020. Fed. R. App. P. 4; JA293-94. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether plaintiff has associational standing to bring this suit on behalf of immigration judges who are not parties to this case.

2. Whether plaintiff may bypass the exclusive regime for administrative and judicial review established in 5 U.S.C. § 7123, which requires that labor-relations disputes be brought before the Federal Labor Relations Authority, with direct review in the courts of appeals.

3. Whether plaintiff has established that it is entitled to a preliminary injunction.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, created a comprehensive and exclusive "scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983). Among other things, the FSLMRS grants federal employees the right to form and join a union and "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102(2).

The statute also requires that agencies and unions must "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. § 7114(a)(4). This duty to bargain in good faith thus extends to all "personnel policies, practices, and matters . . . affecting working conditions." *Id.* §§ 7102(2), 7103(14). However, the statute "excludes from negotiations a host of subjects that employers would be obliged to bargain about in the private sector." *National Treasury Emps. Union v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (en banc) (*NTEU*). For example, "conditions of employment" do not include "matters . . . specifically provided for by Federal statute," 5 U.S.C. § 7103(a)(14), such as wages and retirement benefits.

More broadly, agencies are not required to bargain over any matter that would be "inconsistent with any Federal law or any Government-wide rule or regulation." 5

U.S.C. § 7117(a)(1). As the D.C. Circuit has described it, this provision "essentially permits the government to pull a subject out of the bargaining process by issuing a government-wide rule that creates a regime inconsistent with bargaining." *U.S. Dep't of the Treasury v. FLRA*, 996 F.2d 1246, 1250 (D.C. Cir. 1993). In addition, agencies are not required to bargain over any matter covered by "any rule or regulations issued by any agency or issued by any primary national subdivision of such agency," unless the agency or the FLRA determines that there is not a compelling need for adherence to the regulation. 5 U.S.C. § 7117(a)(3); *FLRA v. Aberdeen Proving Ground, Dep't of the Army*, 485 U.S. 409, 412-13 (1988).

Agencies also do not bargain over the substance of specified management rights, which include, among many other things, the agency's ability to "hire" and "layoff" employees, and to "make determinations with respect to contracting out." 5 U.S.C. § 7106(a). Agencies must, however, still engage in impact-and-implementation bargaining over procedures for exercising management rights, and "appropriate arrangements" for affected employees. *Id.* § 7106(b)(2), (3).

B. Federal Labor Relations Authority

The FLRA adjudicates disputes regarding compliance with the FSLMRS. *See* 5 U.S.C. §§ 7104-7105. In that regard, the FLRA adjudicates disputes regarding, *inter alia*, whether a group of employees constitute an "appropriate unit for labor organization representation," or if they are statutorily precluded from such collective bargaining. 5 U.S.C. § 7112.

The FLRA also adjudicates disputes about whether there is a duty to bargain over particular subjects. 5 U.S.C. §§ 7105(a)(2)(E), 7117(c). These disputes arise, for example, when an agency has refused to bargain on topics the agency believes would conflict with an agency-wide regulation, and the FLRA must determine whether there is a "compelling need" for that regulation that justifies the agency's refusal to bargain. *Id.* § 7117(a)(2); *Aberdeen Proving Ground*, 485 U.S. at 412-13.

The FLRA's adjudicatory authority further extends to "unfair labor practice[]" charges, 5 U.S.C. §§ 7105(a)(2)(G), 7118, which include disputes regarding whether an agency has refused to collectively bargain over negotiable matters, engaged in bad-faith negotiations, or "otherwise fail[ed] or refuse[d] to comply with any provision of" the statute, *id.* § 7116(a)(8). In addition, the FLRA has the authority to review exceptions to arbitration awards that arise from grievances filed by an employee or a union concerning matters related to employment and complaints regarding violations of a law, rule, or collective-bargaining agreement. *Id.* § 7121(a)(2).

Subject to certain limited exceptions, the FSLMRS provides that "any person aggrieved by any final order of the [FLRA]" may seek direct judicial review of the FLRA's decision in the courts of appeals. 5 U.S.C. § 7123(a); *see also id.* § 7123(a)(1) (excepting certain arbitration awards); *id.* § 7123(a)(2) (excepting determinations involving "appropriate unit[s]" for labor organization representation).

C. The Executive Office for Immigration Review and Federal Ethics Regulations

EOIR is a component of the Department of Justice (DOJ) that has been delegated adjudicatory authority over immigration proceedings. EOIR employs approximately 500 immigration judges who preside over removal proceedings across the county to determine whether foreign-born individuals charged with violating immigration law should be ordered removed from the United States. *See* JA158-60, JA162 (McHenry Decl. ¶¶ 10-19, 31). Like every employee of the federal executive branch, immigration judges are subject to broad ethical restrictions that are designed to avoid the appearance of bias and preserve an image of impartiality. *See* 5 U.S.C. §§ 7321-7326; 5 C.F.R. pt. 2635; 5 C.F.R. § 2635.101(b)(14).

Immigration judges are also subject to supplemental regulations that apply to all DOJ employees. 5 C.F.R. pt. 3801. Among other things, these regulations generally prohibit outside employment that involves the practice of law or the subject matter that is in the employee's area of responsibility absent an ethical waiver from the agency. 5 C.F.R. § 3801.106. In addition, immigration judges are subject to supplemental ethics guidelines that specifically pertain to their unique responsibilities, *see* JA252-69, and emphasize the importance of avoiding the appearance of bias or partiality in their adjudicatory role. JA253-54.

II. Factual and Procedural Background

A. NAIJ's Collaboration with EOIR Regarding EOIR's Review of Speaking Engagement Requests

Plaintiff NAIJ is an organization that formerly served as the bargaining representative for approximately 470 non-supervisory immigration judges. JA163 (McHenry Decl. ¶ 32).[1] NAIJ has had a collective bargaining agreement with EOIR in place since 2006, and that agreement includes a grievance process for resolving workplace disputes. JA163 (McHenry Decl. ¶ 35). Over the years, NAIJ has collaborated with EOIR over a number of personnel policies, including EOIR's policy of reviewing requests by immigration judges to make public speeches or publish written work.

In 2011, EOIR and NAIJ jointly issued the Ethics & Professionalism Guide for Immigration Judges ("Ethics Guide"), JA253-69, which memorialized certain ethical conduct standards and provided that immigration judges "must seek prior supervisory and ethics approval for written work and speeches." JA261. However, the Ethics Guide did not identify a specific review process for immigration judges to obtain ethics approval.

[1] During the pendency of this appeal, the FLRA determined that all immigration judges are management officials who are not appropriate members of NAIJ's bargaining unit under 5 U.S.C. § 7112. *See* 71 F.L.R.A. 1046 (Nov. 2, 2020). That order is final and not subject to direct judicial review. *See* 5 U.S.C. § 7123(a)(2). NAIJ is thus no longer the certified bargaining representative for any immigration judges.

Before 2017, immigration judge speaking-engagement requests were approved or denied by the immigration judge's supervising Assistant Chief Immigration Judge. If that supervisor granted the request, it was forwarded to EOIR Ethics Office for ethical guidance. Under this scheme, EOIR drew a distinction between "official capacity" engagements and "personal capacity" engagements, and EOIR authorized immigration judges to speak and appear in their personal capacities while using their official titles, so long as they provided a disclaimer stating the appearance and speech was occurring in a personal capacity and not as an EOIR employee. JA167 (McHenry Decl. ¶ 49); *see also* JA278.

In 2017, EOIR issued a memorandum entitled "Speaking Engagement Policy for EOIR employees." JA36, 278. That memorandum outlined a standardized formal review process for immigration judge speaking engagements. Under this process, after an immigration judge submits a request to attend a speaking engagement, an Assistant Chief Immigration Judge must determine whether the speaking engagement pertains to speech in a personal or an official capacity. JA278. The memorandum explained that if the immigration judge was speaking in his or her personal capacity, the immigration judge could not use his or her official title, unless that title was included only as one of "several biographical details" provided during the event. JA36. And if the immigration judge was speaking in his or her official capacity, the supervisor would need to forward the request to EOIR's Speaking Engagement Team (SET).

In 2018, NAIJ formally initiated collective bargaining with EOIR regarding the 2017 memorandum. JA169-70 (McHenry Decl. ¶ 58). Later that year, the parties executed a memorandum of understanding which settled their labor dispute. JA41-42. That memorandum set aspirational timelines for speech requests and required EOIR to provide reasons when denying requests. JA278. It also required EOIR to provide a summary of requests received by SET every six months. JA278-79.

On January 17, 2020, EOIR issued a memorandum entitled "Submission and Processing of Requests for Speaking Engagements" that launched a new "automated speaking engagement request portal" for the submission of speaking requests. JA45. The 2020 memorandum further "restate[d] EOIR's established policy on speaking engagements" for the purpose of clarifying certain prior EOIR guidance that had caused confusion, but did not substantively alter the 2017 memorandum or the 2018 memorandum of understanding. JA45-50, JA279. As particularly relevant here, the 2020 memorandum made explicit that the determination of whether an engagement involved personal capacity or official capacity speech depended upon the nature of the engagement, not on the "label given by either the inviter or the invitee." JA46, JA279. It further made explicit that "[a]n employee who has been invited to participate in a speaking engagement related to immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies, or who has been invited because of the employee's official duties or position, has been

invited in an official capacity regardless of how the invitation is labeled." JA46, JA279.

B. District Court Proceedings

Six months after the issuance of the 2020 memorandum, NAIJ filed suit, alleging that EOIR's 2020 memorandum imposes an unconstitutional prior restraint on immigration judges' speech, and is further void for vagueness under the First and Fifth Amendments. That same day, nearly three years after EOIR first created a standardized review process for immigration judges' speaking-engagement requests, NAIJ also moved for a preliminary injunction against the process's continued enforcement.

The district court denied the preliminary injunction on the ground that NAIJ was not likely to succeed on the merits of its claim. In particular, the court held that it lacked subject-matter jurisdiction over NAIJ's complaint because NAIJ's claim needed to be channeled through the exclusive regime for administrative and judicial review set forth in the FSLMRS. As the court explained, the gravamen of NAIJ's complaint—that the agency's policy is unlawful and should not be enforced—is "directly related" to federal labor relations, and indeed, the challenged policy "has been the subject of collective bargaining, and may be raised in the context of a concrete bargaining dispute pursuant to the [s]tatute's procedures." JA286. In so holding, the court rejected NAIJ's argument that its First Amendment challenge fell wholly outside the scope of the FSLMRS. To the contrary, the district court held,

courts have "time and time again" held that constitutional claims are subject to the prescribed channeling structure, and that NAIJ cannot evade that procedure by creatively framing their challenge as a constitutional dispute, rather than a labor dispute that should be channeled through the FLRA. JA288.

SUMMARY OF ARGUMENT

As the district court correctly determined, NAIJ cannot demonstrate a "substantial likelihood" of success on the merits, because NAIJ has not established that the district court has subject-matter jurisdiction over its claims. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). This is true for two independent reasons.

First, NAIJ claimed associational standing in district court based on its status as the certified collective bargaining representative for EOIR's non-supervisory immigration judges. After the district court issued its determination in this case, however, the FLRA determined that immigration judges are management officials that cannot be included in bargaining units under 5 U.S.C. § 7112(b). This intervening event makes clear that NAIJ lacks standing to bring this challenge, and the district court's decision should be affirmed on this alternate threshold ground.

Second, even if NAIJ could overcome this threshold jurisdictional issue, the district court correctly determined that NAIJ had only one proper route to challenge the personnel policy at issue: through the scheme set forth by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* That law

comprehensively governs federal labor-management relations and provides the exclusive means of seeking administrative and judicial review of claims brought by unions on this subject matter. *See, e.g.*, *American Fed'n of Gov't Emps., AFL-CIO (AFGE) v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019); *AFGE v. Secretary of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013); *Service Emps. Int'l Union Local 200 United v. Trump*, 419 F. Supp. 3d 612 (W.D.N.Y. 2019), *aff'd* 975 F.3d 150 (2d Cir. 2020) (per curiam).

Under that scheme, a union is empowered to collectively bargain with agencies over changes in employment conditions, and if the union is not satisfied with the results of that bargaining, it has several potential mechanisms available to seek administrative review before the FLRA. Among other things, the union may file a grievance under any applicable collective bargaining agreement grievance and arbitration procedures, 5 U.S.C. § 7121; the union may file a negotiability dispute, *id.* §§ 7105(a)(2)(E), 7117(c)(1); and the union may file an unfair labor practice charge, *id.* §§ 7105(a)(2)(G), 7116(a), 7118. From there, the union may (if necessary) seek review of the FLRA's decision in federal courts of appeals. *Id.* § 7123. Critically, however, the statutory scheme provides no mechanism for the union to seek district court review unless the claim falls entirely outside the scope of the sorts of claims that Congress intended to be channeled through the FSLMRS under the analysis set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

As the district court correctly found, NAIJ's challenge to EOIR's speaking-engagement policy is precisely the sort that Congress intended to be channeled exclusively through the FSLMRS because it is clearly a matter of federal labor-management relations that has been the subject of collective bargaining. NAIJ and EOIR jointly issued the Ethics Guide that set forth the requirement that immigration judges seek EOIR review and approval for speaking and writing engagements in 2011. And when EOIR sought to create a standardized process to review these requests in 2017, NAIJ initiated collective bargaining and collaborated with EOIR to create a memorandum of understanding about this standardized process.

In arguing that it need not have channeled its challenge to this collaboratively created policy through the exclusive procedures of the FSLMRS, NAIJ seeks to carve a broad exception from the ordinary channeling procedures for all First Amendment claims. But no court has ever granted such an exception. To the contrary, courts have repeatedly held that a union's constitutional challenges, including First Amendment claims, should be channeled through the FLRA on the same terms as other types of challenges to federal labor-management policies and practices. *See, e.g.*, *Bennett v. U.S. SEC*, 844 F.3d 174, 181 (4th Cir. 2016); *AFGE*, 929 F.3d at 753-54 (holding that a First Amendment challenge to executive order about the scope of collective bargaining must be channeled exclusively through FLRA); *AFGE v. Loy*, 367 F.3d 932, 934-36 (D.C. Cir. 2004) (holding that a constitutional challenge to an agency directive prohibiting collective bargaining by airport security screeners must be

channeled through the FLRA). So too here, NAIJ's constitutional challenge to the speaking-engagement policy is of the sort that can be addressed by the FLRA, and must be channeled through that scheme.

Even if NAIJ could overcome these jurisdictional hurdles, NAIJ has not shown that it is entitled to the extraordinary relief of a preliminary injunction because NAIJ has not shown that it is likely to succeed on the merits of its constitutional claims. The First Amendment permits the government broad ability to regulate the speech of its employees, and here, the challenged policy does not prohibit any immigration judge speech. Rather, it sets forth a process by which EOIR reviews whether an immigration judge's outside speaking would violate ethics rules, federal law, DOJ policies, or otherwise compromise the immigration judge's appearance of impartiality. NAIJ does not challenge these underlying ethics rules, it challenges only EOIR's review process. But EOIR has a clear and compelling interest in conducting this review, as it enables the agency to protect the judicial integrity of immigration judges; promote compliance with ethics, personnel, and confidentiality rules; ensure that the agency speaks to the public on issues within its core mission with a consistent message; and ensure the orderly operation of its courts.

Moreover, NAIJ has not shown irreparable harm simply on the basis of its alleged First Amendment violation. Indeed, EOIR required review of speaking engagements for years before NAIJ filed this suit, which undermines any claim of irreparable harm that NAIJ might otherwise have. Nor has NAIJ established that the

equities weigh in favor of an injunction. Whatever the public's interest might be in hearing immigration judges publically voice their personal opinions about immigration law, cases that may come before them, or EOIR policies, that interest cannot be advanced at the expense of protecting judicial integrity or the effective operation of EOIR and the immigration courts.

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." *Mountain Valley Pipeline, LLC v. Western Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir 2019). 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.* A district court's decision may be affirmed on any grounds apparent from the record. *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005).

ARGUMENT

I. NAIJ Lacks Standing to Pursue this Appeal Because It No Longer Represents Any Immigration Judges

In district court, NAIJ asserted that it had associational standing to bring its constitutional challenge on behalf of "all non-managerial immigration judges" for which it is the certified bargaining representative. JA13. To demonstrate associational standing, an organization must show that "(a) its members would

otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

In its complaint and motion in support of its request for a preliminary injunction in district court, NAIJ stated that it represented "approximately 460 immigration judges located in sixty-seven immigration courts and two adjudication centers." JA13. NAIJ asserted that these immigration judges had standing to sue in their own right because they were injured by the speaking-engagement policy's requirement that the judges seek prior supervisory approval for written work and speeches under the standardized process set forth in the 2020 memorandum. In response, the government argued that this alleged injury was not likely to be "redressed by a favorable decision" in court, *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted), because even if the court enjoined the 2020 memorandum, that claimed injury would still exist. That is because, regardless of the 2020 memorandum, all immigration judges are required to "seek prior supervisory and ethics approval for written work and speeches" under the requirements of the Ethics Guide that was jointly issued by NAIJ and EOIR in 2011. JA166, JA171 (McHenry Decl. ¶ 47, 63). Thus, like the plaintiffs in *Lujan*, the government asserted that the immigration judges lack standing because "redress of

the only injury in fact [they] complain[] of requires action," and the relief that would be provided by this suit is "not likely to produce that action." 504 U.S. at 571.

The government maintains that NAIJ has not established that the individual immigration judges have standing in their individual capacities. However, intervening developments have made clear that, regardless of whether the immigrations judges themselves have standing, NAIJ does not have associational standing to bring this suit on their behalf. On November 2, 2020, while this appeal was pending, the FLRA issued a final determination which held that immigration judges are "management officials under § 7103(a)(11)" who are "not appropriate" members of a bargaining unit under 5 U.S.C. § 7112(b)(1), 71 F.L.R.A. 1046, 1047 (Nov. 2, 2020). And the FLRA's decision specifically directs the FLRA's Regional Director to exclude all immigration judges from NAIJ's bargaining unit. *Id.*

The FLSMRS precludes direct judicial review of FLRA determinations regarding bargaining unit determinations. 5 U.S.C. § 7123(a)(2); *Association of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 341-42 (D.C. Cir. 2002). The FLRA's determination is therefore final, and the direct effect of that decision is that is that NAIJ is no longer the certified bargaining representative of any immigration judges. NAIJ thus lacks associational standing to bring constitutional claims on behalf of these judges, as they are no longer members of the bargaining unit NAIJ represents.

For this reason, this Court should affirm the denial of the preliminary injunction, and remand to the district court for dismissal of this case.[2]

II. Plaintiff Must Adjudicate Its Claims Before the FLRA as Congress Required, Not in District Court

Even if NAIJ could establish standing in the aftermath of the FLRA's decision, it is clear that the district court appropriately held that it lacked subject-matter jurisdiction to adjudicate NAIJ's claim.

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) and *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), the Supreme Court set forth a framework for determining when a statutory scheme of administrative and judicial review forecloses parallel district court jurisdiction. Under that two-part test, courts determine that Congress intended that a litigant proceed exclusively through a statutory scheme of administrative and judicial review when (i) such intent is "fairly discernible in the statutory scheme" and (ii) the litigant's claims are "of the type Congress intended to be reviewed within this statutory structure." *Bennett v. U.S. SEC*, 844 F.3d 174, 181 (4th Cir. 2016) (quoting *Thunder Basin*, 510 U.S. at 212-13). Here, the district court

[2] On November 17, 2020, NAIJ filed an untimely motion for reconsideration of the FLRA's bargaining unit determination. *See* 5 C.F.R. § 2429.17 (requiring any motion for reconsideration to be filed within ten days). That motion was accompanied by a request that the FLRA stay the implementation of the FLRA's decision while the motion for reconsideration is pending. However, that pending motion should have no bearing on this appeal. If the FLRA's determination stands, NAIJ lacks standing to represent the immigration judges. And if the FLRA grants the motion for reconsideration, this case should be dismissed for lack of jurisdiction, for the reasons discussed in Part II below.

correctly held that the FSLMRS creates an exclusive process for administrative and judicial review, and that NAIJ's claims are of the type that must be channeled through this process.

A. The FSLMRS Creates an Exclusive Review Scheme

Congress's intent to foreclose district court review for all matters that fall within the FSLMRS's ambit is "fairly discernable" from the fact that the FSLMRS is an "enormously complicated and subtle scheme [that] govern[s] employee relations in the federal sector," and provides the "exclusive procedures by which federal employees and their bargaining representatives may assert federal labor-management relations claims." *AFGE v. Trump*, 929 F.3d 748, 755 (D.C. Cir. 2019) (quotation marks omitted).

Under that scheme, unions have several alternative mechanisms through which they can challenge federal labor-relations policies and management actions like the speaking-engagement policy at issue here. First, FSLMRS requires that every collective bargaining agreement include a grievance resolution and arbitration procedure, and unless a specific statutory or contract exception applies, that is the "exclusive administrative procedure[] for resolving grievances which fall within its coverage." 5 U.S.C. §§ 7121, 7122. A party aggrieved by a labor-relations policy or management action may thus invoke the grievance procedures specified in any collective bargaining agreement, and an arbitrator's award may be reviewed by the FLRA to ensure that it is not "contrary to any law, rule, or regulation" or otherwise

deficient on any ground "similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. §§ 7121, 7122. Second, the FSLMRS permits a union to collectively bargain over challenged policies or actions. If management asserts that the matter is non-negotiable, the union can pursue a negotiability appeal with the FLRA. *Id.* §§ 7105(a)(2)(E), 7117(c)(1). Third, to the extent that management enforces a policy that violates a collective bargaining agreement predating the policy, "any person" can lodge an unfair labor practice charge with the FLRA. *Id.* §§ 7105(a)(2)(G), 7116(a), 7118. Subject to certain limited exceptions, the FLRA's decisions are subject to direct review in either the United States Court of Appeals for the District of Columbia, or in the court of appeals in the circuit in which the person resides or transacts business. 5 U.S.C. § 7123(a).

B. Plaintiff's Claims Must Be Channeled Through the FSLMRS

NAIJ does not dispute that the FSLMRS creates an exclusive regime providing for administrative review by the FLRA, nor does it dispute the fact that this exclusive regime forecloses district court review for matters that fall within its orbit. Instead, NAIJ contends that the First Amendment challenges it seeks to bring are not the type of claim that Congress intended to channel through the FSLMRS. The district court correctly rejected this argument.

Claims will be found to fall outside the scope of a special statutory scheme only in limited circumstances where there is a "strong countervailing rationale" for excluding a litigant's claims from the exclusive regime. *Jarkesy v. SEC*, 803 F.3d 9, 17

(D.C. Cir. 2015) (quotation marks omitted). Three guideposts help to determine whether particular claims may be brought in district court: (1) whether channeling review through the statutory scheme would "foreclose[] all meaningful judicial review," (2) whether a litigant's suit is "wholly collateral" to the statute's scheme, and (3) whether the claims are outside the "agency['s] expertise." *Bennett*, 844 F.3d at 181 (quotation marks omitted). These considerations do not form "three distinct inputs into a strict mathematical formula." *Jarkesy*, 803 F.3d at 17. Rather, they serve as "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Id.* Here, those factors do not supply any rationale—much less a strong one—for permitting plaintiff's claims to proceed in district court.

1. Plaintiff could have obtained meaningful review

The availability of "meaningful judicial review is the most important factor in the *Thunder Basin* analysis." *Bennett*, 844 F.3d at 183 n.7. Under this factor, the question is whether the exclusive review regime ensures that a plaintiffs claim can "be meaningfully addressed in the Court of Appeals" after the requisite agency proceedings. *Thunder Basin*, 510 U.S. at 215; *Elgin*, 567 U.S. at 18 n.8)

a. Here, as the district court correctly recognized, the FSLMRS provides unions with multiple alternative means to challenge a labor-relations policy like the speaking-engagement policy at issue in this case. Among other things, NAIJ could have attempted to bargain over the policy, and if EOIR determined that the certain

aspects of the policy were non-negotiable, NAIJ could have filed a negotiability appeal. 5 U.S.C. § 7117(c). NAIJ in fact took steps toward this course in both 2011—when it collaborated with EOIR to issue the Ethics Guide—and in 2018, when it collaborated with EOIR to establish a memorandum of understanding setting forth certain terms affecting the implementation of EOIR's standardized procedures for reviewing speaking engagements.

In addition, contrary to NAIJ's contention that it had no ability to bargain over the substance of the policy, the collective bargaining agreement in effect at the time the 2020 memorandum issued permitted NAIJ to "reopen up to three (3) existing articles [in the collective bargaining agreement] for renegotiation." American Immigration Lawyers Ass'n, *Labor Agreement between NAIJ and USDOJ, EOIR* 24 (Apr. 3, 2018), https://www.aila.org/File/Related/18040300a.pdf. NAIJ could have invoked that process, for example, to expand the provisions governing "Employee Rights" under Article 2 to protect the interests that NAIJ seeks to advance here. *Id.* at 1-2. If NAIJ pursued that avenue and the agency did not bargain in good faith, NAIJ could have pursued a grievance through the procedures established in the collective bargaining agreement, demanded arbitration, and sought review by the FLRA and the courts of appeals.

Regardless which route NAIJ pursued, the FLRA could have heard NAIJ's primary contention: that the speaking-engagement policy is contrary to law and violates the First and Fifth Amendments. NAIJ could have further asked the FLRA

to issue a "general statement of policy or guidance" where, among other things, doing so "would prevent the proliferation of cases involving the same or similar question." 5 C.F.R. § 2427.5; *see* 5 U.S.C. § 7105(a)(1). And if the FLRA's decision was not satisfactory, NAIJ could have sought judicial review of that decision under 5 U.S.C. § 7123.

In short, as the district court correctly recognized, the FSLMRS provides NAIJ with multiple administrative mechanisms with which it could have challenged the speaking-engagement policy at issue in this case, and NAIJ could have sought meaningful judicial review of its constitutional challenge at the conclusion of this process. *See, e.g.*, *AFGE*, 929 F.3d at 757 (holding that the FSLMRS permits unions to "obtain review of and relief from" actions they allege to be unconstitutional "by litigating their claims through the statutory scheme"). NAIJ cannot circumvent the regime by instead bringing suit in a district court.

b. NAIJ raises three separate arguments as to why it cannot obtain meaningful judicial review of its constitutional claims through the FSLMRS review scheme. None is availing.

First, NAIJ argues (Br. 21) that, although judicial review of its constitutional claims would be available under the FSLMRS, that review is not "meaningful" in this circumstance because immigration judges will be continuously harmed throughout the course of any FLRA proceedings. By contrast, NAIJ states, it can obtain immediate preliminary injunctive relief in district court, relief that is not available in the FSLMRS.

NAIJ apparently believes that *any* First Amendment challenge to an agency personnel policy falls outside the scope of the FSLMRS scheme—all such challenges would presumably involve ongoing alleged speech injuries. But NAIJ identifies no case supporting that proposition. To the contrary, as the district court acknowledged, the courts of appeals have repeatedly held that there is meaningful judicial review of a claim so long as the issue can be addressed by courts at the end of the administrative process, even if that process would deprive a plaintiff of their preferred remedy of a preliminary injunction.

In *Thunder Basin* itself, a mining company's employees designated two non-employees to serve as their representatives. 510 U.S. at 204. The company believed that this violated federal law, and it filed a pre-enforcement challenge in the district court. *Id.* at 204-05. The Supreme Court held that the suit in district court was precluded by the statutory scheme, which provided for review before the Mine Safety and Health Review Commission followed by appeal to the courts of appeals. Critically, the Court held that this review was "meaningful" even though there was no way for the company to assert its pre-enforcement challenge, whether before the Commission or district court. *Id.* at 212-16.

Likewise, in *Bennett*, an investment firm that had been charged with violating the antifraud provisions of the federal securities laws sought to raise a constitutional challenge that the appointment of the administrative law judge presiding over the enforcement proceeding violated the Appointments Clause of the United States

Constitution. 844 F.3d at 177-78. This Court held that the Exchange Act required the investment firm to channel its claims through an administrative forum and then to the courts of appeals, and that the firm could not circumvent that process by seeking immediate review in district court. *Id.* at 182. In so holding, this Court rejected the investment firm's argument that judicial review of the constitutional claim at the conclusion of agency proceedings was not "meaningful" because the constitutional claim was a "structural, prophylactic challenge to the constitutionality of the forum" presiding over her ongoing enforcement proceedings, and the "only appropriate relief is an injunction to halt" that ongoing injury. *Id.* at 184. This Court explained that the plaintiff had no "inherent right . . . to her preferred remedy—an injunction in district court." *Id.* at 185 n.12. To the contrary, *Thunder Basin* plainly held that "Congress can require persons subject to administrative adjudication to pursue their claims exclusively there first before reaching an Article III court." *Id.* (citing *Thunder Basin*, 510 U.S. at 216).

Other courts of appeals have similarly rejected the argument that meaningful review of First Amendment claims is not available through the FSLMRS. In *AFGE v. Trump*, for example, several federal labor unions challenged a series of executive orders related to federal labor-management relations on the ground that these executive orders were *ultra vires* and violated the Take Care Clause and the First Amendment right to freedom of association. 929 F.3d at 753-54. The D.C. Circuit held that the district court lacked subject-matter jurisdiction over *all* of the unions'

claims, including their constitutional challenges. *Id.* This was true notwithstanding the fact that the unions sought "'pre-implementation' review of the executive orders or immediate relief barring all agencies from implementing the executive orders," and that such relief would not be available through a dispute heard by the FLRA. *Id.* at 755. As the D.C. Circuit explained, consistent with this Court's decision in *Bennett*, "*Thunder Basin* instructs" that "so long as [a union] can eventually obtain review and relief" of their legal challenge by raising them in the procedures available under the FSLMRS, then the challenge may not be brought in the district court in the first instance. *Id.*

Thus, "[a]lthough the unions are not able to pursue their preferred systemwide challenge through the scheme," so long as "they can ultimately obtain review of and relief from the executive orders by litigating their claims in the context of concrete bargaining disputes," their claims must be channeled through the FSLMRS. *AFGE v. Trump*, 929 F.3d at 759; *see also AFGE v. Secretary of the Air Force*, 716 F.3d at 635-38 (holding that meaningful review exists so long as there are "administrative options" available to raise the challenge, followed by judicial review in the courts of appeals, because "it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies thereunder, that counsels judicial abstention").

Here, as in *Bennett*, *AFGE v. Trump* and other related cases, there are several administrative options through which NAIJ could challenge the speaking-engagement policy before the FLRA, and ultimately, obtain review of its First Amendment claim

before a court of appeals. It is thus of no consequence that the FLRA may not be able to provide the specific relief NAIJ seeks; NAIJ cannot circumvent the FSLMRS's exclusive process by attempting to seek relief in district court.

Second, NAIJ argues (Br. 22) that it should not be required to pursue the exclusive administrative procedures proscribed by the FSLMRS because the FLRA does not itself have the power to actually resolve NAIJ's constitutional claims.

Again, NAIJ identifies no support for this blanket proposition. To the contrary, as the D.C. Circuit held in *AFGE v. Trump*, the question whether the FLRA has the authority to decide broader constitutional claims is not dispositive of the question whether meaningful review is available, "[f]or even if the FLRA could not address the claims, circuit courts could do so on appeal from the FLRA." 929 F.3d at 758. Indeed, the court acknowledged, "[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge . . . that the agency concluded it lacked authority to decide." *Id.* (quoting *Elgin v. Deparment of Treasury*, 567 U.S. 1, 18 n.8 (2012)); *see also Jarkesy*, 803 F.3d at 19 ("It is of no dispositive significance" whether an agency "has the authority to rule" on constitutional claims so long as the claims "can eventually reach an Article III court fully competent to adjudicate them."); *AFGE v. Loy*, 367 F.3d 932, 936-37 (D.C. Cir. 2004).

Third, NAIJ argues (Br. 16-22) that under *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 492 (2010), "meaningful" relief is not available

if a plaintiff has to "manufacture" a dispute in order to bring a constitutional claim through the required agency procedures. Here, NAIJ asserts, it does not want to bring a negotiability dispute, grievance, or unfair labor practice, and it would have to "manufacture" such a dispute in order to bring its First Amendment claim before the FLRA pursuant to the FSLMRS procedures. This argument is unavailing for several independent reasons.

As an initial matter, *Free Enterprise* is readily distinguishable on its facts. At issue in *Free Enterprise* was the constitutionality of the Public Company Accounting Oversight Board, a board composed of five members appointed by the Securities and Exchange Commission tasked with regulation of the accounting industry. *Free Enterprise*, 561 U.S. at 484-85. Among other things, the Board has the authority to "regulate every detail of an accounting firm's practice," "perform[] routine inspections of all accounting firms," "initiate[] formal investigations and disciplinary proceedings," and impose considerable sanctions. *Id.* at 485. The petitioner in *Free Enterprise*, an accounting firm subject to the Board's inspections and auditing procedures, sought a declaratory judgment that the Board is unconstitutional on the ground that the Board members were not subject to sufficient Presidential control and that they had not been properly appointed in violation of the Appointments Clause. The Supreme Court held that this challenge did not need to be channeled through the exclusive review procedures of the Sarbanes-Oxley Act, because that Act permitted aggrieved parties to challenge any "final order of the [SEC]," or any "rule of the [SEC]," but

"not every Board action is encapsulated in a final [SEC] order or rule." *Free Enterprise*, 561 U.S. at 489-90 (quotation omitted). Thus, as this Court explained in *Bennett*, the Supreme Court "allowed petitioners' claims against the Board to proceed outside the statutory scheme" because the challenge was not actually related to any SEC order or rule: "the Board had not undertaken a regulatory action that would yield a reviewable [] order or rule, [so] the petitioners would have had to 'challenge a Board rule at random' or 'bet the farm' by voluntarily incurring a sanction in order to trigger [the statutory] mechanism for administrative and judicial review." *Bennett*, 844 F.3d at 180, 182 (quoting *Free Enterprise*, 561 U.S. at 490).

Here, in contrast, NAIJ is not challenging the existence of an administrative body, nor did it need to pick a dispute at random in order to invoke the procedures of the FSLMRS. To the contrary, NAIJ has specific and identifiable concerns about a specific personnel policy. NAIJ would not need to "manufacture" a dispute with that policy in order to invoke the administrative procedures of the FSLMRS; NAIJ believes that the policy is unlawful and should not exist, and the FSLMRS provided NAIJ with clear administrative mechanisms to attempt to change the policy—mechanisms that NAIJ invoked when it collaborated with EOIR to publish the Ethics Guide in 2011 and when it bargained with the agency over the standardized review process in 2018. If NAIJ's concerns had not been resolved at that juncture, it could have invoked the grievance procedures set forth in the collective bargaining

agreement, or potentially, initiated a negotiability proceeding, and from there proceeded to FLRA and the court of appeals.

The majority of NAIJ's arguments about why meaningful relief is not available under the FSLMRS appear to be based on the NAIJ's assumption that it would likely lose any grievance or unfair labor practice charge that it brought against the agency. NAIJ hypothesized that if it had invoked the FSLMRS procedures and tried to bargain over the substantive requirement that speaking requests must be reviewed by EOIR, the agency might have refused to bargain, and that if NAIJ then brought a challenge before the FLRA, the FLRA would likely have concluded that the agency had no obligation to bargain over the substance of the policy. But this only underscores the general point that there is a specific dispute over a labor-relations policy here, and this is exactly the type of claim that Congress intended to be challenged through the FSLMRS.

Had NAIJ actually pursued the procedures available under the FSLMRS, this Court would not be presented with hypotheticals about what might have happened during that process. If any of NAIJ's assumptions about the hypothetical process proved to be incorrect, and EOIR did in fact agree to bargain over the substance of the speaking-engagement policy or the FLRA found fault with any of EOIR's actions, the First Amendment issue might become moot before it reached this Court—a fact which supports channeling in this case. And if the issue were not moot, meaningful

review of all of NAIJ's claims, including the First Amendment challenge at issue here, would be available in this Court.

2. Plaintiff's suit is not "wholly collateral" to the FSLMRS

For many of the same reasons, NAIJ's claims are not "wholly collateral" to the statutory scheme. NAIJ has specific concerns about EOIR's speaking-engagement policy, and the FSLMRS provides procedures for NAIJ to negotiate over, and ultimately, seek judicial review of, its concerns about the policy.

In arguing to the contrary, NAIJ repeats its argument that the relief it seeks is different from that available under the FSLMRS because it is not attempting to raise a statutory claim or else to reverse or enjoin an agency action covered by the administrative-review scheme. But this is precisely the problem: by filing suit in district court, rather than attempting to continue bargaining over the policy and use the administrative mechanisms available under the FSLMRS, NAIJ avoided context-specific adjudication.

That deliberate consequence of evading Congress's comprehensive statutory scheme cannot supply its own justification. As this Court held in *Bennett*, a plaintiff cannot "bypass the judicial-review scheme established by Congress simply by alleging a constitutional challenge and framing it as 'structural,' 'prophylactic,' or 'preventative.'" 844 F.3d at 188; *see also AFGE v. Trump*, 929 F.3d at 757-59 (Though a union is "not able to pursue [its] preferred systemwide challenge through the

schemes," after "litigating . . . through the statutory scheme in the context of concrete bargaining disputes," an Article III court could address constitutional claims "even if the FLRA could not"). "To hold otherwise would be to excuse non-compliance with the requirement that one must exhaust administrative remedies on the basis that the party failed to comply." *Loy*, 367 F.3d at 936.

NAIJ seeks to support its argument (Br. 27) that First Amendment pre-enforcement claims are "wholly collateral" to the FSLMRS by reference to the fact that the Supreme Court reached the First Amendment question in *United States v. NTEU*, 513 U.S. 454 (1995) without requiring that the claim be channeled through the FSLMRS. But that argument reads far too much into the Supreme Court's silence on the question. The Court in *NTEU* granted certiorari on a specific First Amendment question, and the Court's decision did not discuss the FSLMRS's claims processing requirement. The Court's silence on the channeling question is thus, at best, the sort of "drive-by jurisdictional ruling[]" that can have "no precedential effect." *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (quotation omitted).

Likewise, NAIJ's reliance on *Weaver v. U.S. Info. Agency*, 87 F.3d 1429 (D.C. Cir. 1996) is misplaced. That case relied on *NTEU* for the proposition that courts had "jurisdiction" over "simple pre-enforcement attack[s] on a regulation restricting employee speech." *Id.* at 1434. As discussed, *NTEU* did not explicitly hold as much, and in the years since *Weaver* was decided, the Supreme Court has admonished that

courts of appeals should not afford any precedential value to the Supreme Court's assumed jurisdictional holdings unless the jurisdictional question was "central to the case, and thus did not require close analysis." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). In any event, as the district court recognized, *Weaver*'s jurisdictional holding has been superseded by subsequent cases in the D.C. Circuit that have held that pre-enforcement First Amendment claims must be channeled through the FSLMRS. JA289; *see, e.g.*, *AFGE v. Trump*, 929 F.3d at 753-54.

Thus, as the district court held, the fact that NAIJ seeks a categorical invalidation of the speaking-engagement policy does not empower NAIJ to "circumvent the scheme established by" Congress. JA287. "[T]ime and time again, courts have held that merely adding a constitutional claim to an otherwise jurisdictionally precluded lawsuit does not remove" either the statutory claim or the constitutional claim "from Congress' prescribed channeling structure." JA288. It stands to reason that NAIJ cannot avoid the channeling structure simply by crafting its complaint to remove reference to all other context-specific claims it could otherwise bring.

3. Plaintiff's claims would benefit from the expertise of the FLRA

Finally, NAIJ erroneously contends that the constitutional claim it seeks to raise here falls outside the FLRA's "specialized expertise in federal labor relations." Br. 32 (citing *AFGE Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir.

1986). In making that argument, NAIJ overlooks the fact that the constitutional challenges that it seeks to bring involve "many threshold questions . . . to which the [FLRA] can apply its expertise" even if the FLRA does not "pass upon the constitutionality" of the speaking-engagement policy. *Elgin*, 567 U.S. at 16, 22.

As illustrated by the discussion of the merits of NAIJ's constitutional claims in Part III *infra*, the FLRA's expertise and judgment would greatly benefit the resolution of plaintiffs' claims had the plaintiff actually presented the claim through the context-specific adjudication required by the FSLMRS. Take, for example, NAIJ's claim (Br. 44-46) that the speaking-engagement policy "lacks the safeguards generally required of prior restraints" because, among things, the policy "fails to include definite time limits for decision." Even accepting the NAIJ's argument that EOIR has no hypothetical duty to bargain over the substance of the speaking engagement policy, it is clear that EOIR could and did bargain over the implementation and impact of the policy, and that it worked with NAIJ to create a timeline for review, as set forth in the 2018 Memorandum of Understanding. If NAIJ was not satisfied with the outcome of this bargaining, it could have brought a challenge through one of the many procedures available under the FSLMRS. Had it done so, the FLRA could have brought its expertise to bear on questions regarding the negotiation of those provisions, and its ultimate determination on these related matters could have resulted in a determination that potentially mooted the need to resolve NAIJ's complaint that the current policy is unconstitutional. *See Jarskey*, 803 F.3d at 27 ("One of the principal reasons to await

the termination of agency proceedings . . . is to obviate all occasion for judicial review.") (alteration and quotations omitted)

Even if the administrative proceedings did not moot the constitutional claims, the FLRA could bring its expertise to bear on issues relevant to constitutional questions. For example, NAIJ insists (Br. 17-18) that in the hypothetical world in which it sought to bargain over these issues, EOIR would have refused to bargain over the substance of the policy. NAIJ suggests that the reason for this is because the policy is a "management right" over which there is no duty to bargain. Of course, as discussed above, that is only one possible outcome of the hypothetical. Among other things, EOIR might have concluded that there is a separate and distinct reason why bargaining would have been inappropriate: because removing the policy entirely would be inconsistent with agency-wide ethics rules for which there is a compelling need under 5 U.S.C. § 7117(a); *see also* 5 C.F.R. § 2424.50 (defining compelling need).

In either case, NAIJ could have brought a negotiability dispute, and the FLRA could have brought its expertise to bear, for example, on the question whether there was actually a "compelling need" for agency's ethics rules. The resolution of that question would in turn require the development of a factual record that has a direct bearing on the First Amendment claims at issue here, because the question whether an agency has a "compelling need" for ethics rules would shed light on the question

whether the government's interests in regulating employee speech is sufficiently important to justify the restriction imposed here.[3]

III. The Speaking-Engagement Policy Does Not Violate the Constitution

Even assuming NAIJ could overcome the jurisdictional hurdles precluding its suit, NAIJ has failed to show that it is likely to succeed on the merits of its claim that the speaking-engagement policy violates the First Amendment or that the policy is unconstitutionally vague.

A. NAIJ Lacks a First Amendment Claim to the Extent the Speaking-Engagement Policy Applies to Speech Made Pursuant to Immigration Judges' Official Duties

As an initial matter, 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." *NTEU*, 513 U.S. at 465. 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." *Andrew v. Clark*, 561 F.3d 261, 268 (4th Cir. 2009) (quoting

[3] In addition, even if NAIJ's members had brought this suit in their individual capacity, the suit would be barred by the Civil Service Reform Act of 1978, which requires employees to exhaust jurisdictionally required administrative remedies before bringing suit challenging any prohibited personnel action by federal agencies. *See* 5 U.S.C. §§ 2301(b)(2), 2302(a)(1); *see also Fleming v. Spencer*, 718 F. App'x 185, 188 (4th Cir. 2018) ("The CSRA plainly precludes extrastatutory judicial review of constitutional claims that are asserted before an employee has exhausted his remedies available under the statute.").

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)). "If the answer is no, the employee has no First Amendment cause of action," even if the employee wishes to speak on a matter of public concern. *Garcetti*, 547 U.S. at 418, 421. That is because, when government personnel speak "pursuant to their official duties," their speech "owes its existence to a public employee's professional responsibilities," and any restriction "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22; *see also Crouse v. Town of Moncks Corner*, 848 F.3d 576, 584 (4th Cir. 2017).

Here, an "accepted and understood" part of immigration judges' duties is speaking at engagements about immigration law and courts. JA162 (McHenry Decl. ¶ 28). Immigration judges often receive invitations to speak at events related to immigration matters that implicate EOIR, and certain public speaking events are explicitly part of immigration judges' duties, such as conducting naturalization ceremonies, presiding over model hearings, and conducting *pro bono* trainings. JA164, JA174 (McHenry Decl. ¶¶ 39, 75). To the extent the speaking-engagement policy captures this "official capacity" speech, the policy falls outside of the First Amendment's purview.

Despite NAIJ's insistence to the contrary (Br. 35-37), the speaking-engagement policy also sensibly considers immigration judges to be speaking in their official capacities (and thus pursuant to official duties) when they are invited or assigned to speak at engagements or write for publication about immigration law or policy, their

"official EOIR duties or position," or EOIR's programs and policies. JA46. As this Court has explained, the question of whether speech is made in an employee's official capacity does not turn on 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." *Crouse*, 848 F.3d at 584. Rather, courts must "engage in a practical inquiry into the employee's daily professional activities" to determine if the speech is reasonably perceived as official speech. *Id.* at 584 (quotations omitted); *Garcetti*, 547 U.S. at 425.

In *Crouse*, for example, this Court 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 the officers were on an unpaid lunch hour, wearing plain clothes, in an unmarked car, and not following their supervisor's orders. 848 F.3d at 584-85. The reason for this was 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.* at 585; *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 his official duties because the teacher "identified himself by his job title" in the letter).

Thus, as relevant here, the question whether the immigration judges are speaking in their official capacity does not turn on whether the judges *wish* to speak in their personal capacity or whether the speech takes place in their personal time, but

whether, as a practical matter, their speech "owes its existence to a public employee's professional responsibilities." *Garcetti,* 547 U.S. at 421. And when immigration judges are invited or assigned to speak at engagements about immigration law or their official duties, it is likely that the immigration judge was invited to the event "because of [his or her] official duties or position." JA279; *see also* JA174-76 (McHenry Decl. ¶¶ 74-79). In fact, organizations often invite immigration judges to speak because their positions and titles add an imprimatur of official recognition or authority to engagements. JA174-75 (McHenry Decl. ¶ 77). Simply labeling the judges' speech at these events as personal-capacity speech does not make it so. *See* JA167-68 (McHenry Decl. ¶ 49, 52) (discussing the public confusion arising out of EOIR's previous policy of permitting immigration judges to use their official titles when speaking in a purportedly personal capacity about immigration matters). Thus, to the extent the policy requires immigration judges to receive agency approval to speak about immigration law or EOIR policies, such speech is properly understood as official capacity speech that is not subject to the First Amendment.

B. The Speaking-Engagement Policy Places Minimal Burdens on Immigration Judges' Speech as Private Citizens

To evaluate a potential First Amendment claim regarding government restrictions on an employee's personal capacity speech, courts employ a balancing test that looks to (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. Board of Educ., 391 US. 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). Here, the de minimis burdens that the speaking-engagement policy places on the private speech interests of immigration judges and potential audience are far "outweighed by that expression's necessary impact on the actual operation of the government." *NTEU*, 513 U.S. at 455 (quotation omitted).

1. The speaking-engagement policy is a review process that places minimal, if any, burdens on speech

As an initial matter, contrary to NAIJ's repeated claims, the speaking-engagement policy at issue here does not in any way resemble the "wholesale deterrent to a broad category of expression by a massive number of potential speakers" that the Supreme Court held warranted exacting scrutiny in *NTEU*. *See* 513 U.S. at 454.

To the contrary, the speaking-engagement policy itself does not actually prohibit speech of any kind. Instead, the policy sets forth a formal review process through which EOIR may review proposed speaking engagements to determine if an employee's participation in those engagements would comply with other longstanding laws and agency policies. JA168, JA171-72, JA177-78 (McHenry Decl. ¶¶ 51, 62, 66, 87); JA224-25 (Reid Decl. ¶¶ 7, 10); JA45. Those laws and policies, which are summarized in the Ethics Guide published in 2011, may impose their own restrictions

on employee speech, but those requirements are separate and distinct from the EOIR review process, and they are not challenged here.

To this extent, the speaking-engagement policy is similar to the agency prepublication review process that the D.C. Circuit upheld in *Weaver v. United States Information Agency*, 87 F.3d 1429 (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 D.C. Circuit 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. The clearance process merely ensured that "the agency's judgment c[ould] be expressed to the employee," putting him or her "fully on notice" of a potential violation. *Id.* at 1437 (emphasis omitted); *see also Snepp v. United States*, 444 U.S. 507 (1980); *Zook v. Brown*, 865 F.2d 887 (7th Cir. 1989).

Moreover, to the extent that the policy imposes any burdens on private speech, those burdens are minimal. Pursuant to the timeline that NAIJ negotiated in the 2018 memorandum of understanding, the review process is a relatively short one: upon receiving a speaking request, the Speaking Engagement Team must strive to respond within five business days. JA41. Further, the majority of these requests are approved.

At the time this case was filed, approximately 80% of the 356 speaking requests received by EOIR had been approved. JA166 (McHenry Decl. ¶ 47); JA234 (Reid Decl. ¶ 47). In particular, immigration judge 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. JA173, JA175-76 (McHenry Decl. ¶¶ 69, 82, 85); JA234 (Reid Decl. ¶ 47) (noting that from November 2017 to July 17, 2020, EOIR denied just 16 personal capacity requests, and granted 59 requests).

2. The speaking-engagement policy furthers EOIR's interests in ensuring the agency's efficient operation

The minimal burdens that the policy places on First Amendment interests are clearly outweighed by the "government's interest in governmental effectiveness, efficiency, order, and the avoidance of disruption." *McVey*, 157 F.3d at 277. As this Court has explained, 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.* (quotation omitted). That interest is particularly strong where, as here, its personnel have 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. For this reason, courts of appeals have "generally denied" "high-ranking agency

personnel First Amendment protection." *Id.* at 279. "[T]he higher 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, immigration judges are high-level, public-facing officials. As the FLRA recently acknowledged, immigration judges "influence the policy of the Agency in the decisions they render," 71 F.L.R.A. at 1047, and it is clear that immigration judges have a clear public-facing role as representatives of EOIR in immigration court. JA162 (McHenry Decl. ¶ 27); *Kidd Commc'ns v. FCC*, 427 F.3d 1, 5 (D.C. Cir. 2005) (federal agencies can "make legal-policy through rulemaking or by adjudication"). Accordingly, an immigration judge's expression, even as a private citizen on matters of public concern, can have a "necessary impact on the actual operation' of the Government," leading to a series of harms that "are real, not merely conjectural." *NTEU*, 513 U.S. at 468, 475.

a. First, 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. This is particularly true with respect to immigration judges, 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) (quotation omitted)); *see also* 8 C.F.R. § 1003.10(b).

As the Supreme Court has explained, '[p]ublic perception of judicial integrity is . . . a state interest of the highest order." *Williams-Yulee v. Florida Bar*, 575 U.S. 433,

446 (2015) (quotation omitted). It is without question that an immigration judge's acceptance of a particular speaking engagement, or an ill-considered statement at an event, could damage an immigration judge's impartiality or appearance of impartiality. EOIR thus has a significant interest in reviewing whether an immigration judge's speaking engagements might impact an immigration judge's role as an impartial arbiter.

The policy's review process also ensures that EOIR may provide advice to immigration judges before any potential violations of the Hatch Act or any other ethical regulations occur. JA179, JA193-94 (McHenry Decl. ¶¶ 92, 139). For example, invitations to speak often raise issues of whether an engagement might risk an immigration judge using his or her public office for private gain in violation of 5 C.F.R. § 2635.702(b). Many immigration judges have developed friendships with individuals who run the organizations that invite them to speak, including attorneys who appear before them. JA180 (McHenry Decl. ¶ 95). And because many speaking invitations are for events that would ordinarily require payment to the organization hosting the event, an immigration judge speaking at that event using his official title could potentially raise issues regarding whether the immigration judge used his official position to provide preferential treatment or affect the financial interests of a friend. *Id.*; *see also* JA193-94 (McHenry Decl. ¶ 139). The policy eliminates the risk of violations, and ensures that the agency may provide consistent advice to immigration judges on potential ethical concerns.

b. In addition to ensuring that speaking engagements do not interfere with the public perception of immigration judges' impartiality, the process also serves EOIR's and DOJ's interest in ensuring that its "messaging is consistent across official engagements." JA35, JA47. For events where immigration judges are speaking pursuant to their official duties, the agency's interest in ensuring consistent messaging that actually conveys the viewpoint of the agency is particularly strong. *See McVey*, 157 F.3d at 278-79 (holding that 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"). The policy's review process allows EOIR to ensure, before any official speaking event, that the speaker is prepared to answer questions on behalf of the agency, and if not, to choose another speaker who is able to present a consistent, nationwide message to the public. JA104.

EOIR's interest in avoiding "disrupting" and "confidence-destroying speech" is no less strong where an immigration judge may wish to speak on issues of immigration in his purported personal capacity. Regardless whether an immigration judge wishes to speak on immigration law or EOIR policy as a member of the general public, immigration judges are *not* members of the general public, and they could do real harm to the agency if they speak about these issues using their official title, as demonstrated by the activities of some former immigration judges. Several former immigration judges, for example, run websites dedicated to criticizing EOIR policies.

Others frequently speak to the media. And dozens of others have filed amicus briefs asking federal courts to reject EOIR precedents and DOJ's legal positions on immigration law. *See, e.g.*, Br. for Former EOIR Judges as Amici Curiae, *Nasrallah v. Barr*, No. 18-1432 (U.S. Dec. 16, 2019). If similar views were expressed by current immigration judges that are tasked with impartially applying the very policies they are publically criticizing, it would do significant damage to the reputation of DOJ, EOIR, and the immigration courts, as well as to immigration judges generally.

The policy's review process thus promotes DOJ's and EOIR's consistent messaging and preserves immigration judges' appearance of impartiality by reviewing all requests to speak in a personal capacity to ensure that the event in question is a genuinely personal capacity event in order to prevent these real potential harms. JA46; *see also, e.g.*, *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993) (explaining that high-level government employees do not "have much protection under the First Amendment when [they] speak[] or act[] in a hostile way toward [their] employer[s]").

c. The policy's review process also serves EOIR's significant interests in managing the effect of speaking engagements on the operation of the agency. JA233-34 (Reid Decl. ¶¶ 43-44); *McVey*, 157 F.3d at 278.

As a practical matter, speaking engagements typically involve time away from the bench, which may require immigration judges to use leave and have the agency reallocate work to other personnel. JA233 (Reid Decl. ¶ 42). While requests for genuinely personal capacity speaking engagements are normally approved, if an

employee's absence at a particular time is not operationally feasible due to deadlines, the agency's workload, or other leave requests by other personnel, a request may be denied. JA176-77 (McHenry Decl. ¶ 82). The policy thus allows the agency to ensure that time away from adjudicating cases will not harm the agency's ability to fulfill its mission, which is particularly critical given the unprecedented workload faced by immigrations courts, with more than one million cases pending—double the caseload that existed even as recently as 2017. JA233-34 (Reid Decl. ¶¶ 43, 44, 45).

3. The policy's sweep is reasonably necessary to protect EOIR's effectiveness

Contrary to NAIJ's argument in this appeal, there is no basis to assume that the policy sweeps broader than reasonably necessary to protect the agency's interests. As discussed above, any potential speaking engagement by an immigration judge risks the appearance of impartiality and disruption of EOIR's mission whether by inadvertently violating ethics or personnel rules, federal law, DOJ policy, missing time from work, or conveying inconsistent messaging. And these interests are implicated when an immigration judge speaks on immigration-related issues regardless whether the immigration judge self-labels that speech as "personal." In any case, there is a legitimate risk that audience members will associate the judge's allegedly personal speech with his official title and position, and thus, that the appearance of impartiality is at stake.

Furthermore, no prospective review process could reasonably satisfy NAIJ's demand (Br. 43) that the policy apply only to speech that could reasonably be expected to disrupt EOIR's operations. The purpose of the review process at issue is for EOIR to make determinations about potential disruption and help immigration judges adhere to ethics rules by examining each particular speaking event. As in *Weaver*, the review process "enables the government to take preemptive rather than merely reactive steps in response" to speech that could harm the government's legitimate interests. 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"). And the policy also provides a safeguard to immigration judges who rely upon EOIR's ethical advice, a safeguard that could not be available absent preemptive review. *See* JA252-53 ("Disciplinary action will not be taken against any Immigration Judge who has engaged in conduct in good faith reliance upon the advice of an agency ethics official provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances.").

There is likewise no merit to NAIJ's argument (Br. 44-45) that the policy lacks the "safeguards generally required of prior restraints." NAIJ cites several clearly inapposite cases about government licensing requirements for speech by private parties for the proposition that the review policy at issue must have "narrow, objective, and definite standards" and "time limits." Br. 45-46. But while courts have

required such standards as applied to private parties, they have not done so in "the context of the *Pickering/NTEU* balance" that applies in the government-employment context. *Harman v. City of New York*, 140 F.3d 111, 120 (2d Cir. 1998); *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."). Indeed, courts have "uniformly assessed prior restraints in the setting of government employment by standards less demanding than those used for traditional prior restraints," and upheld agency pre-publication review processes without applying the more demanding standard NAIJ urges. *Weaver*, 87 F.3d at 1441-43. But even if this 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 memorandum of understanding sets forth safeguards against "indefinite delay." *Chesapeake B&M, Inc. v. Harford County*, 58 F.3d 1005, 1011 (4th Cir. 1995).

C. The Policy is Not Unconstitutionally Vague

Finally, there is no merit to NAIJ's claim that the policy is unconstitutionally vague. A regulation is unconstitutionally vague only 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 v. City of Rockford*, 408 U.S. 104, 108 (!972). "[P]erfect clarity and precise guidance have never been required." *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 749

(4th Cir. 2010) (quotation omitted). 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)).

Here, the policy directs employees to the specific substantive guidelines for reviewing of speaking requests. JA47-48. It expressly incorporates the Hatch Act, the Justice Manual, and the Ethics Guide. Which laws and policies are applicable, then, is a matter of "common sense" to NAIJ members, as they are laid out in the policy and summarized in the Ethics Guide. *See U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 579 (1973). And the policy also provides a mechanism for seeking EOIR ethics guidance, JA50, which further counsels against a finding that the policy is void for vagueness, *Letter Carriers*, 413 U.S. at 580.

NAIJ asserts that the policy is broad and indefinite because it permits EOIR to make decisions "based on EOIR's preferred message," Br. 47, but this amounts simply to a disagreement with EOIR's classification of speech on immigration issues as speech in the immigration judge's "official" capacity and the attendant restrictions this entails. As discussed above, EOIR reasonably determined that speech about immigration laws and EOIR policy is always official capacity speech because of the risk that such speech can harm a public's perception of the impartiality of the immigration judge and the consistency of EOIR's policy messaging. It is only when

speech is "official" that the policy tasks EOIR with determining whether the immigration judge's request to speak will align with EOIR's messaging and advance EOIR's mission. The fact that NAIJ disagrees with EOIR's classification of this speech as being "official" speech does not mean that the process through which EOIR reviews official capacity speech is unconstitutionally vague.

IV. The Remaining Factors Weigh Against an Injunction

Finally, NAIJ has failed to show either that it will be irreparably harmed in the absence of an injunction or that the balance of equities weighs in favor of an injunction. To the contrary, although NAIJ asserts that immigration judges are irreparably harmed by the standardized process for reviewing speaking engagements, that process has been in existence since at least 2017, and any claimed urgency is thus belied by NAIJ's own substantial delay in seeking relief. *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("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.") (alteration in original).

NAIJ also has not shown "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Here, NAIJ again claims that the policy operates as a prior restraint, but it ignores the fact that the policy does not actually prohibit any speech. And while the public might have an interest in hearing from immigration judges, it does not have an

entitlement to hearing immigration judges speak in a manner that implicates the immigration judges' appearance of impartiality, or otherwise violates ethics laws, the Hatch Act, or other DOJ policies. JA46. On the other side of the balance, the government's interest in preserving EOIR's ability to preserve judicial integrity during a time of intense scrutiny of immigration policy is substantial, and eliminating the clear review process EOIR set forth would render it "operationally difficult, if not impossible, to provide appropriate and consistent advice" to immigration judges on a prospective basis, JA193-94 (McHenry Decl. ¶ 139, 140), which could ultimately result in an even greater chilling of speech.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

G. ZACHARY TERWILLIGER
United States Attorney

MICHAEL S. RAAB
/s/ Jennifer L. Utrecht
JENNIFER L. UTRECHT
Attorneys, Appellate Staff
Civil Division, Room 7710
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9039
Jennifer.l.utrecht@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,966 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Jennifer L. Utrecht
Jennifer L. Utrecht

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

/s/ Jennifer L. Utrecht
Jennifer L. Utrecht

ADDENDUM

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§ 7114. Representation Rights and Duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

5 U.S.C. § 7117.

§ 7117. Duty to Bargain in Good Faith; Compelling Need; Duty to Consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by--

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall--

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive

change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall--

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization--

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

5 U.S.C. § 7121

§ 7121. Grievance Procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that--

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the

employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected--

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

5 U.S.C. § 7123

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by

substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.