20-1868

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

Plaintiff–Appellant

v.

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

Defendant–Appellee

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

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Introduction

The National Association of Immigration Judges ("NAIJ") challenges a prior restraint that silences federal immigration judges on topics at the core of their expertise and of national importance. Policies issued by the Executive Office for Immigration Review ("EOIR") in 2017 and 2020 (referred to collectively as the "Policy") categorically prohibit immigration judges from speaking publicly in their personal capacities about immigration or EOIR, and require that immigration judges submit to an onerous preapproval process before speaking publicly in their personal capacities on any other topic. The Policy violates the First and Fifth Amendments, and NAIJ seeks a preliminary injunction against its enforcement.

The government denies that the Policy prohibits any speech at all, but its arguments rely either on a misrepresentation of the Policy (the plain text of which prohibits personal-capacity speech that NAIJ's members wish to engage in) or a fundamental misunderstanding of the Supreme Court's First Amendment precedent (which makes clear that federal employees may speak about job-related topics in their personal capacities). Indeed, the Policy is far more restrictive than the regulation invalidated in the Supreme Court's seminal decision in *United States v. NTEU*, 513 U.S. 454 (1995), and the undersigned are not aware of any remotely comparable employee-speech policies having been upheld by any court.

Perhaps recognizing the constitutional defects in the Policy, the government strains to prevent this Court from exercising jurisdiction over NAIJ's claims, but its arguments are meritless and, on top of that, internally inconsistent.

First, the government argues that NAIJ no longer has associational standing to represent its members because it has been decertified, but this is doubly wrong. The government is wrong, first, to suggest that NAIJ's standing turns on its bargaining status. NAIJ has standing to represent its members as a voluntary association of immigration judges irrespective of whether it is a certified bargaining representative. The government seems to believe that NAIJ's status as the former relies on its status as the latter, but this is simply false. The government is also wrong to suggest that NAIJ has been decertified. On November 2, 2020, the Federal Labor Relations Authority ("FLRA") directed the Regional Director to exclude immigration judges from the bargaining unit represented by NAIJ, *Nat'l Ass'n of Immigr. Judges*, 71 F.L.R.A. 1046, 1047 (Nov. 2, 2020), but the Regional Director has not yet done so. Unless and until the Director does so, NAIJ will remain the certified bargaining representative of non-supervisory immigration judges.[1]

Second, the government maintains that the Federal Service Labor-Management Relations Statute ("FSLMRS" or "Statute"), 5 U.S.C. § 7101 *et seq.*,

[1] On November 17, 2020, NAIJ timely filed a motion for reconsideration and stay of the FLRA's decision. The motion remains pending.

impliedly withdraws district court jurisdiction over NAIJ's claims, but this argument is similarly misconceived. As an initial matter, this argument flatly contradicts the government's primary argument on appeal: if, as the government asserts, NAIJ is no longer a bargaining representative, then the FSLMRS could not possibly withdraw district court jurisdiction over NAIJ's claims. NAIJ would no longer be covered by the Statute and accordingly could not raise any claims through the Statute's review scheme.

In any event, the FSLMRS does not impliedly withdraw district court jurisdiction over NAIJ's claims even now, while NAIJ remains a bargaining representative. Under *Thunder Basin v. Coal Co. v. Reich*, 510 U.S. 200 (1994), this Court may infer congressional intent to withdraw federal court jurisdiction only if NAIJ's claims are of the type Congress intended to be reviewed through the Statute. It is clear, however, that Congress did not intend the type of claims raised by NAIJ to fall within the scope of the Statute. All three *Thunder Basin* factors point in this direction. First, NAIJ would not be able to obtain meaningful judicial review of its constitutional claims. The government disputes this but fails to identify a concrete path for NAIJ to actually obtain judicial review, aside from the sham bargaining dispute NAIJ has already explained would not lead to meaningful review. Second, NAIJ's claims are wholly collateral because they are substantively and procedurally

unrelated to the Statute's review scheme. Third, NAIJ's claims fall entirely outside the FLRA's expertise in labor-management relations.

For these reasons and those that follow, NAIJ has demonstrated that a preliminary injunction is appropriate. Accordingly, NAIJ respectfully urges the Court to vacate the district court's denial of a preliminary injunction and remand with specific instructions for the district court to enter an injunction. If, however, the Court concludes that jurisdiction turns on NAIJ's bargaining status, NAIJ respectfully requests that the Court defer issuing a decision until NAIJ's status is administratively resolved.[2] Doing so would conserve judicial resources and narrow the issues to be resolved in the event that NAIJ is decertified. Further, it would not cause any prejudice to EOIR, which could continue to enforce the Policy in the interim.

Argument

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

A. NAIJ has associational standing.

As a voluntary association dedicated to promoting the independence of immigration judges, Tabbador Decl. ¶ 4 (JA60), NAIJ has standing to vindicate the

[2] NAIJ's bargaining status will be administratively resolved when (1) the FLRA grants NAIJ's motion for reconsideration and issues a new decision, or (2) the FLRA refuses NAIJ's motion *and* the Regional Director revokes NAIJ's certification. *See* 5 C.F.R. § 2422.32(b)(2).

rights of its members, who have been injured by the Policy. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–60 (1958) (holding that the NAACP had standing to assert the First Amendment rights of its members). The government raises two objections to NAIJ's standing. Both lack merit.

1. The FLRA's recent decision does not deprive NAIJ of standing.

The government argues that the FLRA's decision deprives NAIJ of associational standing because NAIJ purportedly claimed standing solely as a certified bargaining representative and the decision strips NAIJ of that status. Opp. 18. The government is wrong on all counts.

First, NAIJ claimed standing both as a "voluntary association of immigration judges *and* the recognized representative of all non-managerial immigration judges for the purposes of collective bargaining." Compl. ¶ 8 (JA12) (emphasis added).

Second, NAIJ's continued existence as a voluntary association does not depend on its status as a certified bargaining representative. NAIJ was founded in 1971 as a voluntary association of immigration judges and remained one when it became a certified bargaining representative in 1979. Tabaddor Decl. ¶ 4 (JA60). And NAIJ remains one now, no matter the effect of the FLRA's decision. *Id.* For the purposes of associational standing, that is sufficient. *UAW v. Brock*, 477 U.S. 274, 281 (1986) ("It has long been settled that . . . an association may have standing solely as the representative of its members.").

Third, to the extent NAIJ's bargaining status has any relevance, NAIJ remains a certified bargaining representative unless and until the Regional Director revokes its certification. *See* 5 C.F.R. § 2422.32(b)(2) ("[T]he Regional Director revokes a recognition or certification . . . when . . . the unit is no longer appropriate."). Indeed, by its own terms, the FLRA's decision recognizes that it is the task of "the [Regional Director] to exclude [immigration judges] from the bargaining unit." *Nat'l Ass'n of Immigr. Judges*, 71 F.L.R.A. at 1049. The Regional Director has not taken that step.[3]

2. An injunction would redress the injuries to NAIJ's members.

The government points to a narrow preapproval requirement memorialized in the 2011 Ethics Guide, Tabaddor Suppl. Decl. Ex. N (JA252–69), as evidence that an injunction would not redress NAIJ's members' injuries. Opp. 17–18. This argument is unpersuasive. As a threshold matter, the injuries to NAIJ's members are attributable solely to the Policy, because the Ethics Guide makes clear that it does not supersede other EOIR management policies. Ethics Guide at 1 (JA253). Moreover, the Policy injures immigration judges in ways independent of the

[3] The record establishes NAIJ's standing to sue as a voluntary association of immigration judges. If the Court has any doubt as to NAIJ's standing, however, it should remand so that NAIJ may supplement the record with further evidence. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 270–71 (2015) (remanding to allow a membership organization to present additional evidence of associational standing).

preapproval requirement in the Ethics Guide. The Policy categorically prohibits immigration judges from speaking or writing in their personal capacities about immigration or EOIR, and it institutes an onerous preapproval process. Tabaddor Suppl. Decl. ¶¶ 4–5 (JA249). The Ethics Guide contains no such categorical prohibition, and as explained in NAIJ's opening brief, Pl. Br. 4–5, the preapproval process in place under the Ethics Guide was not nearly as burdensome as the process instituted by the Policy.

This is more than adequate to demonstrate that NAIJ's members' injuries are redressable. As this Court has explained, "[t]he removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018); *see also Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

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

1. If NAIJ is no longer a bargaining representative, it cannot avail itself of the Statute's review scheme.

The second step of the *Thunder Basin* framework asks whether the plaintiff's claims "are of the type Congress intended to be reviewed within [the statutory review scheme]." 510 U.S. at 212. If, as the government argues, the FLRA's decision stripped NAIJ of its status as a bargaining representative, the answer to that question is unequivocally "no." The FSLMRS provides the exclusive procedures by which

employees and their bargaining representatives may assert certain labor-relations claims. *AFGE v. Trump*, 929 F.3d 748, 755 (D.C. Cir. 2019). If NAIJ is no longer a bargaining representative, it would no longer be covered by those procedures and could not avail itself of them. NAIJ could not file a negotiability appeal or an unfair labor practice charge. *See* 5 U.S.C. § 7117(c)(1) (providing that negotiability appeals can be filed only by "the exclusive representative"); *id.* §§ 7118(a)(1), 7103(a)(1) (providing that unfair labor practices may be charged only by an "individual, labor organization, or agency"); *id.* § 7103(a)(4), (a)(2) (defining "labor organization" to exclude organizations representing "management official[s]"). Nor could NAIJ file a grievance under the grievance and arbitration procedures provided in its collective bargaining agreement ("CBA"). *Id.* § 7103(a)(9) (defining "grievance[s]" as complaints brought by an "employee," "labor organization," or "agency").

To get around this fatal inconsistency in its logic, the government attempts to apply the second step of *Thunder Basin* retrospectively—for example, by asking whether NAIJ "*could have* obtained meaningful review," Opp. 22 (emphasis added)—but this turns the test on its head. The *Thunder Basin* test is meant to ensure that courts channel claims only when a litigant can in fact realize the benefits of administrative review and ultimately obtain meaningful judicial review. Thus, the *Thunder Basin* factors are framed prospectively. The court must ask whether the plaintiff "can obtain meaningful judicial review," *Bennett v. SEC*, 844 F.3d 174, 186

(4th Cir. 2016), whether its claims "are 'wholly collateral,'" *id.* at 181 (quoting *Thunder Basin*, 510 U.S. at 212), and whether "agency expertise could be brought to bear," *id.* (quoting *Thunder Basin*, 510 U.S. at 215). If the government is correct, and NAIJ is no longer a bargaining representative, the answer to these questions is quite obviously "no."

2. Even if NAIJ remains a bargaining representative, its claims are not of the type Congress intended to be reviewed within that scheme.

The three *Thunder Basin* factors weigh decisively against jurisdictional preclusion even if NAIJ remains a bargaining representative.

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

As NAIJ explained in its opening brief, it cannot obtain meaningful judicial review of its claims through the FSLMRS. Pl. Br. 16–25. The government suggests otherwise, but it ignores the scope of EOIR's duty to bargain. EOIR has a duty to bargain only over the Policy's *implementation*, but if NAIJ demanded to bargain over implementation, EOIR would almost certainly agree to bargain, as it did in 2018, and NAIJ could not obtain judicial review whether EOIR ultimately agreed to or rejected NAIJ's implementation proposals. Meanwhile, demanding to bargain over the Policy's *substance* would not lead to judicial review that is meaningful. The Statute prohibits EOIR from bargaining over the subject, and so such a demand

would be knowingly frivolous. Moreover, filing a frivolous administrative claim would involve substantial—and possibly indefinite—delay, causing irreparable harm to the First Amendment rights that NAIJ's claims seek to vindicate.

The government's arguments to the contrary have no merit.

The government argues that NAIJ had "multiple alternative means" to challenge the Policy, Opp. 22, but it describes only one, and this option fails to square with the Statute. The government states that "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." Opp. 22–23. This ignores the distinction between substance and implementation bargaining. As NAIJ explained in its opening brief, the FSLMRS prohibits agencies from bargaining over the substance of a change in employment conditions if the change involves the exercise of a "management right." Pl. Br. 17 (citing 5 U.S.C. § 7106(a)(2)(A)). The Policy involves such a right, *id.*, a fact the government does not dispute. Accordingly, EOIR cannot negotiate over the Policy's substance, and any demand by NAIJ to bargain over that subject would be knowingly frivolous. Moreover, attempting to bargain over the Policy's implementation would not result in a negotiability appeal (and therefore could not lead to judicial review) because EOIR does not dispute the negotiability of that matter; indeed, EOIR agreed to

bargain when NAIJ issued a demand to bargain over the 2017 Policy's implementation. Op. 10–11 (JA 286–87).[4]

While NAIJ could hypothetically attempt to bargain over a matter it knows is non-negotiable—the Policy's substance—it could not obtain *meaningful* judicial review of its constitutional claims. This is for two reasons. *See* Pl. Br. 19–25. First, as the Supreme Court explained in *Free Enterprise*, manufacturing a sham administrative dispute to obtain judicial review of unrelated constitutional claims is not a "meaningful" avenue of relief. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). Second, because NAIJ challenges a prior restraint on time-sensitive political speech that the FLRA is powerless to enjoin, any eventual judicial review would come too late, imposing "irremediable harm beyond the burdens associated with the dispute resolutions process." *Bennett*, 844 F.3d at 186 n.13 (quoting *Tilton v. SEC*, 824 F.3d 276, 286 (2d Cir. 2016)).

The government argues that *Free Enterprise* is inapplicable because the facts of this case are not identical, Opp. 29, but it misses the forest for the trees. In *Free Enterprise*, the Supreme Court considered whether a district court had jurisdiction over the petitioners' Article II challenge to the Public Company Accounting

[4] The government suggests that NAIJ could have bargained over the Policy's substance by attempting to reopen the CBA for renegotiation. Opp. 23. Even assuming that NAIJ could reopen the CBA—a document not before the Court—it could not gain the right to bargain over the Policy's substance. The Statute forecloses that result.

Oversight Board. The Court found jurisdiction because the Board had not yet undertaken any regulatory action that could yield a reviewable SEC rule or order, meaning that to obtain SEC (and ultimately judicial) review the petitioners would have to "challenge a Board rule at random." *Free Enter.*, 561 U.S. at 490. The government attempts to confine *Free Enterprise* to its facts, but its holding is grounded in the common-sense rationale that judicial review of a plaintiff's constitutional claims is not meaningful if the plaintiff is forced to erect "a Trojan-horse" administrative dispute to obtain it. *Jarkesy v. SEC*, 803 F.3d 9, 20 (D.C. Cir. 2015). That rationale is equally applicable here, where NAIJ would have to file a sham bargaining dispute to obtain judicial review of a First Amendment prior restraint challenge.[5]

The government also fails to address NAIJ's argument that review through the FSLMRS would not be meaningful because it would cause irreparable harm to the free-speech rights of immigration judges and the public. Instead, the government makes a series of strawman arguments, asserting that neither pre-enforcement challenges nor First Amendment challenges are categorically exempted from

[5] The government suggests this argument is based on the faulty assumption that NAIJ "would likely lose any grievance or unfair labor practice charge it brought against the agency." Opp. 31. But EOIR's refusal to bargain over the Policy's substance is not merely "likely"—it is a certainty. As NAIJ and its *amici* have explained at length, EOIR does not have discretion to bargain over the Policy's substance; the Statute clearly prohibits it from doing so. *See* Pl. Br. 17; Br. of Labor Law Scholars and Experts 20.

administrative channeling. Opp. 25–28. NAIJ does not make these categorical claims. Instead, it argues that the FSLMRS does not provide meaningful judicial review of a First Amendment challenge to a policy imposing a prior restraint on time-sensitive political speech. While the government attempts to ignore the character of NAIJ's claims, both this Court and the Supreme Court have recognized that "the nature of the claim being asserted and the consequences of deferment of judicial review" are important factors in determining whether district court jurisdiction is precluded. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976); *see also Bennett*, 844 F.3d at 186 n.13; *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1434 (D.C. Cir. 1996). Indeed, where this Court has held that jurisdiction is precluded over a First Amendment challenge, it has specifically emphasized that it was not facing a prior restraint. *Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 241 n.1 (4th Cir. 2004); *id.* at 244 (Wilkinson, J., concurring) ("We do not have before us a pre-enforcement challenge to a statute that seeks to silence criticism of the operation of a government program.").[6]

[6] The government suggests that whether the FLRA can adjudicate NAIJ's constitutional claims is irrelevant to the Court's *Thunder Basin* analysis, Opp. 28, but NAIJ does not rely on the FLRA's inability to resolve constitutional claims as an independent reason why judicial review would not be meaningful. Rather, it points to that factor to explain why immigration judges would continue to suffer irreparable harm throughout the duration of any administrative proceedings. *See* Pl. Br. 23–24 (explaining that administrative delay could be indefinite).

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

NAIJ's claims are wholly collateral to the FSLMRS scheme because they are substantively unrelated to any hypothetical claims that could be brought under the scheme, and because they are not a vehicle to reverse or enjoin agency action covered by the scheme. *See* Pl. Br. 25–26.

The government argues that NAIJ is attempting to "evad[e]" the FSLMRS by raising a constitutional challenge instead of "context-specific claims" under the Statute, Opp. 32–34, but it fails to identify what these claims would be. To the extent the government proposes that NAIJ bring a bargaining dispute, such a dispute would hardly be context-specific—doing so would require NAIJ to manufacture the context necessary to file one. *See* Pl. Br. 19–20. Moreover, the substance of a bargaining dispute would be unrelated to the merits of NAIJ's constitutional claims, and so would not add any context relevant to those claims.

The government cites *Bennett* and *AFGE*, but neither supports its accusation. In *Bennett*, the plaintiff asked a district court to short-circuit an ongoing SEC enforcement proceeding. 844 F.3d at 177–78. Unsurprisingly, this Court held that the plaintiff's constitutional challenge was not wholly collateral to the statutory scheme because it was the "vehicle" by which she sought to enjoin the enforcement proceeding. *Id.* at 187. *AFGE* involved a challenge to executive orders that allegedly directed agencies to violate the FSLMRS. 929 F.3d at 760. Although the plaintiffs

also raised constitutional claims, the D.C. Circuit concluded that these claims were substantively and procedurally intertwined with the plaintiffs' statutory ones. *Id.* NAIJ's constitutional claims, however, are neither a vehicle for enjoining agency action covered by the FSLMRS, nor related to the merits of any administrative proceeding that could be before the FLRA.

The government's attempts to undermine NAIJ's reliance on *NTEU* and *Weaver* also miss their mark. As NAIJ explained in its opening brief, its suit is essentially identical to the ones the Supreme Court and D.C. Circuit allowed to proceed in those cases. Pl. Br. 27–28.

In *NTEU*, the Supreme Court invalidated employee-speech restrictions in a challenge originally brought in district court by a union that was subject to the FSLMRS. The government argues that NAIJ cannot rely on *NTEU* because the case did not expressly address jurisdiction, Opp. 33–34, but the Court's "willingness to exercise jurisdiction without comment" merely underscores the Court's conviction that it had jurisdiction. *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1131 (D.C. Cir. 2015). The cases relied on by the government are inapposite. The Court in those cases was describing the kind of "unrefined disposition[]" that fails to appropriately distinguish between dismissal for lack of subject matter jurisdiction and failure to state a claim. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). The government's reliance on

the cases also ignores the Supreme Court's warning not to "'disregard the implications of an exercise of judicial authority assumed to be proper' in [the Court's] previous cases." *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962)); *accord Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000).

In *Weaver*, the D.C. Circuit cited *NTEU*, holding that a district court could exercise jurisdiction over "a simple pre-enforcement attack on a regulation restricting employee speech," where it "st[ood] independently" of any hypothetical claim that could be brought under a related statutory scheme. *Weaver*, 87 F.3d at 1434. The government argues that "*Weaver*'s jurisdictional holding has been superseded by subsequent cases," Opp. 34, but the only case cited by the government does not reject, and is not inconsistent with, that holding. In *AFGE*, the plaintiffs raised a First Amendment claim that was closely related to the merits of their statutory claims. *See* Am. Compl. ¶¶ 77–79, *AFGE v. Trump*, No. 18-cv-01261, 2018 WL 7197439 (D.D.C. June 14, 2018). By contrast, NAIJ does not raise any statutory claims, and its First Amendment claim is entirely unrelated to the merits of any proceeding it could bring before the FLRA. *See also Turner v. U.S. Agency for Glob. Media*, No. 20-CV-2885 (BAH), 2020 WL 6822780, at *21 n.20 (D.D.C. Nov. 20, 2020) (finding that "the D.C. Circuit has not rejected *Weaver* in *Elgin*'s wake").

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

NAIJ's claims do not remotely implicate the FLRA's administrative expertise. *See* Pl. Br. 32–33. They have nothing to do with "interpreting" the FSLMRS or "applying the general provisions of the [Statute] to the complexities of federal labor relations." *AFGE*, 929 F.3d at 760 (cleaned up). To the contrary, they are purely constitutional claims concerning the right of NAIJ's members to speak publicly and the right of the public to hear what they have to say.

The government argues that NAIJ's claims involve "many threshold questions" to which the FLRA can apply its expertise. Opp. 35 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012)). But the government fails to identify any such questions. Instead, it argues that the FLRA could have brought its expertise to bear *if* NAIJ had brought completely unrelated claims under the Statute. *Id.* This only proves NAIJ's point.

The government's proposals also fail on their own terms. For example, the government argues that NAIJ could have sought FLRA review if it had been dissatisfied with the outcome of the parties' negotiations over the 2017 Policy's implementation, and that such review could have resulted in a determination that "potentially mooted the need to resolve NAIJ's complaint that the current policy is unconstitutional." Opp. 35. That is wrong. NAIJ could not have had recourse to the FLRA merely because it was dissatisfied with the government's implementation

proposals. The FLRA does not have jurisdiction over a negotiation impasse—that is the domain of the Federal Service Impasses Panel, and the Panel's decisions are not subject to judicial review. *See* Pl. Br. 18.

The government also argues that if NAIJ had sought to bargain over the Policy's substance, EOIR could have refused to do so for any number of reasons and that, depending on the reason, FLRA review could have shed light on NAIJ's constitutional claims. Opp. 36–37. Again, the government misses the point. EOIR is statutorily foreclosed from bargaining over the Policy's substance. A demand to bargain over the subject would thus be knowingly frivolous, and it is irrelevant that the government could have multiple justifications for rejecting it.

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

The Policy imposes a sweeping prior restraint: it bars immigration judges from speaking as private citizens on "immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies," 2020 Policy at 2 (JA97), and it establishes an onerous preapproval process for speech on all other topics, *id*. To pass constitutional muster, the Policy must survive "exacting scrutiny." *Janus v. AFSCME*, 138 S. Ct. 2448, 2472 (2018). The government must show that its interests in restraining immigration judges' speech outweigh "the interests of both potential audiences and a vast group of present and

future employees" in that expression. *NTEU*, 513 U.S. at 468. The Policy fails that test. *See also* Pl. Br. 34–46.

1. The Policy is subject to *NTEU* scrutiny because it restrains personal-capacity speech on matters of public concern.

The government does not contest that the Policy limits immigration judges' speech on matters of public concern. Instead, it argues that *NTEU* does not apply because the Policy primarily applies to "official-capacity" speech, Opp. 37–40, and because the Policy is unlike the restriction considered in *NTEU*, Opp. 41. The government is wrong on both counts.

First, the government argues that speech about immigration or EOIR is *necessarily* official-capacity speech because it relates to immigration judges' job duties. Opp. 38–39. But the Supreme Court has already rejected this argument, explaining that speech may be in an employee's personal capacity even when it "relates to public employment or concerns information learned in the course of public employment." *Lane v. Franks*, 573 U.S. 228, 239 (2014). Indeed, *Lane* holds that employee speech is unprotected only if it is "ordinarily within the scope of an employee's duties." *Id*. at 240.

The speech at issue in this case is not within the scope of immigration judges' ordinary duties. Immigration judges wish to educate the public about immigration law and policy by speaking at lectures, conferences, and trainings, and with members of the press. Tabaddor Decl. ¶¶ 34–36 (JA67–68). These activities are not part of

their routine duties, which involve the adjudication of immigration proceedings. *See* Tabaddor Suppl. Decl. ¶¶ 7–8 (JA250); *id.* Ex. O (JA271–75) (official position description for immigration judges); *see also Nat'l Ass'n of Immigr. Judges*, WA-RP-19-0067, at 5–7 (Reg. Dir. Wash. Region FLRA July 31, 2020), https://perma.cc/79Uv-W2FX, *aff'd in part and rev'd in part* 71 F.L.R.A. 1046 (leaving factual determinations undisturbed).[7]

Second, the government argues that the Policy is categorically unlike the one at issue in *NTEU* because it "does not actually prohibit speech of any kind," Opp. 41, but this is false. By deeming all speech about immigration and EOIR official capacity, the Policy effectively prohibits personal-capacity speech on these topics. This makes the Policy even more restrictive than the ban on accepting honoraria at issue in *NTEU*, which imposed only an indirect burden on speech. *See* 513 U.S. at 459–60. In any event, courts also analyze preapproval policies under *NTEU*. *See, e.g.*, *Crue v. Aiken*, 370 F.3d 668, 679 (7th Cir. 2004).

[7] The government argues that three kinds of events in particular are part of immigration judges' job duties: naturalization ceremonies, model hearings, and pro bono trainings. Opp. 38. This case does not concern naturalization ceremonies, which are official government events. Nor does it concern model hearings and pro bono trainings hosted and sponsored by EOIR. To the extent the government argues that *all* model hearings and trainings are part of judges' job duties, this finds no support in the caselaw or the record.

2. The Policy cannot survive *NTEU* scrutiny.

a. The interests of immigration judges and the public in the restrained speech are substantial.

As NAIJ's opening brief explained, the Policy restrains speech of extraordinary public interest. Pl. Br. 38–40. When immigration judges speak about immigration or EOIR, they offer "unique insights into the workings of government generally and their areas of specialization in particular." *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995). The interests implicated by a policy silencing this speech are therefore "manifestly significant." *Liverman v. City of Petersburg*, 844 F.3d 400, 208 (4th Cir. 2016). And while "the true cost of [the] burden" associated with speech unrelated to immigration or EOIR cannot easily be measured, immigration judges and their potential audiences have a substantial interest in this expression as well. *See NTEU*, 513 U.S. at 470.

Against these interests, the government asserts that the Policy minimally burdens speech, but its arguments are without merit. First, the government asserts that the Policy merely facilitates review of speaking-engagement requests for compliance with "longstanding laws and agency policies," Opp. 41–42, but this is demonstrably false. As explained above, the Policy independently prohibits immigration judges from speaking publicly in their personal capacities about immigration and EOIR. *See also* Tabaddor Decl. Exs. H–L (JA102–49). Moreover, the Policy expressly permits EOIR to reject requests on grounds unrelated to the

laws or policies that the government cites. *See* 2020 Policy at 3 (JA98) (instructing EOIR officials to consider "consistency in EOIR's communications"). Second, the government asserts that most requests are currently approved, Opp. 42–43, but this ignores the unknowable number of requests that immigration judges might submit but for the Policy. *See* Tabaddor Decl. ¶ 32 (JA66). Additionally, *NTEU* requires the Court to consider the Policy's effect not only on current employees, but also future ones. 513 U.S. at 468.

b. The harms asserted by the government do not outweigh the interests of immigration judges and the public.

The government argues that the Policy serves its legitimate interests in several ways, but these arguments are pretextual: EOIR's true motivation is to silence immigration judges who might speak negatively about the agency. One of the government's declarants, a former Deputy Director of EOIR and current EOIR supervisor, admits that she reviews immigration judges' personal-capacity speaking-engagement requests for the possibility of "negative publicity or scrutiny to EOIR or the Federal Government." Owen Decl. ¶ 17 (JA243). This description, presumably submitted as representative of how EOIR supervisors conduct review, is fatal to the Policy. *See Liverman*, 844 F.3d at 411 ("[I]t is axiomatic that the government may not ban speech on the ground that it expresses an objecting

viewpoint."). Surprisingly, the government does not address this direct evidence of viewpoint discrimination in even a single sentence in its brief.

Even if this were not fatal to the Policy, the government cannot show that EOIR has suffered "real" harms that the Policy alleviates "in a direct and material way." *NTEU*, 513 U.S. at 475.

First, the government argues that it has wide latitude to control immigration judges' speech because they are "high-level, public facing officials," Opp. 44, but immigration judges are categorically unlike the policymakers in the cases upon which the government relies. Immigration judges adjudicate proceedings neutrally and impartially, not as partisan political appointees. Tabaddor Decl. ¶ 3 (JA60); McHenry Decl. ¶ 25 (JA161). Although the FLRA recently found that immigration judges "influence" EOIR policies by adjudicating immigration cases, *see* 71 F.L.R.A. at 1048, this is not enough to show that they are high-level policymakers. In the cases the government relies on, for instance, the relevant officials controlled the employer's "day-to-day operations and confidential information," *McVey v. Va. Highlands Airport Comm'n*, 44 F. App'x 630, 636 (4th Cir. 2002) (resolving the *Pickering* claim at issue in *McVey v. Stacy*), or formulated departmental goals and policies, *Hall v. Ford*, 856 F.2d 255, 264 (D.C. Cir. 1988). Immigration judges simply do not fit this description; accordingly, the government has no heightened interest in controlling their speech.

Second, the government asserts an interest in preventing disruptive and "confidence-destroying" personal-capacity speech, Opp. 46–47, but the government conflates interests that might justify post-hoc discipline under *Pickering* with the interests necessary to sustain an ex ante restraint under *NTEU*. To justify a prior restraint, an agency must do more than point to the mere possibility of disruptive or confidence-destroying speech. The government must show that these harms are "real," not "speculative," *Liverman*, 844 F.3d at 408–09, but it has not done so. Instead it points to a brief submitted by *former* immigration judges in *Nasrallah v. Barr* as evidence that *active* immigration judges would engage in disruptive speech, Opp. 47, but this example proves NAIJ's point. Justice Department policy already prohibits immigration judges from commenting on ongoing cases, McHenry Decl. ¶¶ 109–10 (JA184), and the government has not shown why any additional restraint is necessary.[8]

Third, the government argues that the Policy promotes ethics compliance and consistent staffing, Opp. 44–45, 47–48, but EOIR's preexisting policies address these interests, and the government fails to explain why they are insufficient. *See, e.g.*, Cox Decl. ¶ 3 (JA199) (describing preexisting ethics rules and training programs); 2020 Policy at 2 n.3 (JA97) (referencing annual leave policy). This

[8] The government also argues that it has an interest in ensuring consistent messaging "before any official speaking events," Opp. 46, but this lawsuit is not about EOIR's official engagements.

failure is fatal to the government's argument. *See Swartzwelder v. McNeilly*, 297 F.3d 228, 239 (3d Cir. 2002). Nor can these interests, even if valid, sustain the sweep of the Policy. For example, neither interest justifies a complete prohibition on personal-capacity speech about immigration and EOIR. *See also* Pl. Br. 41–42.

If this were not enough, NAIJ's members are entitled to an additional thumb on the scale because the Policy lacks procedural safeguards. *See* Pl. Br. 44–46. The government argues that procedural safeguards are not required of employee-speech restrictions, but courts have routinely faulted employee-speech policies that lack these safeguards. *See, e.g.*, *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017); *Harman v. City of New York*, 140 F.3d 111, 120–21 (2d Cir. 1998); *Crue*, 370 F.3d at 679.[9]

Because of the overwhelming interests favoring expression, the absence of any legitimate or concrete countervailing harms, and the Policy's lack of procedural safeguards, the Policy violates the First Amendment.

[9] The government also argues that the 2018 MOU includes safeguards against delay, Opp. 50, but the MOU only put in place aspirational time limits, not binding ones. Tabaddor Decl. Ex. D (JA84). Moreover, it is far from clear that EOIR will continue to honor the MOU given its position that NAIJ has been decertified.

D. NAIJ is likely to succeed on the merits of its Fifth Amendment claim.

As explained in NAIJ's opening brief, Pl. Br. 46–48, the Policy is unconstitutionally vague because it enables "arbitrary or discriminatory" enforcement. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

The government admits that EOIR considers the agency's preferred messaging in evaluating speaking-engagement requests, but asserts that it does so only with respect to requests it deems "official capacity." Opp. 51–52. This is inconsistent with the plain text of the Policy and statements by one of the government's own declarants. 2020 Policy at 3 (JA98); Owen Decl. ¶ 17 (JA243); *id.* Ex. A (JA246). In any event, and for reasons already explained, *supra* Part I.C.1, much of the speech EOIR defines as official capacity is in fact personal capacity.

The government also argues that the Policy's mechanism for obtaining "ethics guidance" helps cure any vagueness, Opp. 51, but that mechanism is intended to provide guidance about handling proposed speaking engagements, not the review process itself.

II. The remaining preliminary injunction factors weigh in favor of relief.

NAIJ has demonstrated irreparable injury both by establishing a likelihood of success on the merits of its First Amendment claim and independently through the factual record. Pl. Br. 48–49. The government asserts that NAIJ "delay[ed]" in seeking relief, Opp. 52, but NAIJ brought suit months after the 2020 Policy was

issued.[10] Even if NAIJ had delayed, NAIJ's "likelihood of success on the merits and the seriousness of any infringement upon First Amendment rights" would suffice to overcome that delay. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004).[11]

Similarly, the balance of equities and the public interest favor an injunction. This Court has held that these factors are established where there is a likely First Amendment violation. *See Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013). The government does not contest this principle; instead, it mischaracterizes the Policy and attempts to minimize the interests implicated by it. *See* Opp. 52–53. But even the government concedes that the public has an interest in hearing from immigration judges. Opp. 52. While the government also argues that it has an interest in preserving judicial integrity, it fails to demonstrate that the harms it asserts are real or that the Policy's restrictions are necessary to address them. *See* Pl. Br. 44. A preliminary injunction would therefore serve the public's interest while

[10] The government asserts that NAIJ challenges a process "in existence since at least 2017." Opp. 52. But as NAIJ's opening brief explained, the 2020 Policy altered the 2017 Policy in significant ways, including by imposing an outright prohibition on personal-capacity speech related to immigration or EOIR. *See* Pl. Br. 7–8.

[11] The government's only cited authority does not involve an infringement upon First Amendment rights and is therefore inapposite. *See Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (declining to enjoin a highway construction project).

leaving EOIR free to draft a policy "better tailored to" any legitimate interests it might have in regulating judges' speech. *Swartzwelder*, 297 F.3d at 242.

Conclusion

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

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Respectfully submitted,

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