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.

DAVID L. NEAL, 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

SUPPLEMENTAL BRIEF FOR APPELLEE

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal concerns a now-defunct process through which the Executive Office of Immigration Review (EOIR) reviewed employee requests to participate in public speaking or writing engagements. Since at least 2011, EOIR has required that agency employees seek "prior supervisory and ethics approval for written work and speeches" made in both their personal and official capacity. JA261. In 2017 and 2020, EOIR created and modified a standardized process for seeking such approval, embodied in a memorandum entitled "Submission and Processing of Speaking Requests for Speaking Engagements" (2020 Policy). JA96-101. Six months after the issuance of the 2020 Policy, NAIJ filed suit, alleging that the 2020 Policy imposed an unconstitutional prior restraint on immigration judges' speech, and is further void for vagueness under the First and Fifth Amendments. That same day, NAIJ moved for a preliminary injunction seeking to enjoin EOIR's enforcement of the 2020 Policy. The motion was denied, and NAIJ appealed.

The 2020 Policy that NAIJ unsuccessfully sought to enjoin in the district court no longer exists. On October 12, 2021, EOIR Director David L. Neal issued a new speaking-engagement policy that explicitly cancels the 2020 Policy, and which differs substantially from the now-cancelled policy that NAIJ sought to enjoin. Among other things, the 2021 Policy no longer requires employees to seek supervisory approval for speaking engagements on topics unrelated to their official duties. And although the new policy requires supervisory approval for speaking engagements on topics related

to an employees' official duties—a requirement that predates the changes made in 2017 and 2020—the new policy has substantially streamlined the process for obtaining that approval. Because the 2020 Policy no longer exists, the relief that NAIJ sought in the district court (and that it seeks in this interlocutory appeal) is no longer available, and this appeal is now moot.

Further, even if this Court disagrees and finds that some portion of NAIJ's interlocutory appeal is not moot, prudential and equitable considerations warrant an affirmance of the district court's denial of a preliminary injunction. As discussed in the briefing to date, the primary issue on appeal is whether the district court appropriately held that NAIJ was not likely to succeed on the merits of its claim because the court lacked subject-matter jurisdiction. Specifically, the district court held that because the 2020 Policy "ha[d] been the subject of collective bargaining," and because NAIJ's constitutional challenge could be "raised in the context of a concrete bargaining dispute," NAIJ's claim needed to be channeled through the exclusive regime for administrative and judicial review set forth in the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. § 7101 *et seq.* JA286. The district court further determined that NAIJ had failed to establish irreparable harm because it had failed to establish a likelihood of success on the merits.

The parties have never briefed the question of whether the same jurisdictional obstacles would prevent NAIJ from seeking a preliminary injunction of the 2021 Policy. And indeed, over the course of this appeal, there have been significant

developments concerning NAIJ's status as the certified bargaining representative for immigration judges that may bear on that question. Further, because the declarations submitted in district court by both parties concern the now-defunct 2020 Policy, the parties have never had the opportunity to develop a record regarding any alleged burdens of the new policy or the important government interests that motivated EOIR's decision to retain any aspects of the 2020 Policy that NAIJ finds objectionable. These considerations have direct bearing on the merits of NAIJ's constitutional challenge and the availability of equitable relief. Because it would be inappropriate for this Court to assess the propriety of injunctive relief concerning the new policy on the basis of the current record, the Court should dismiss the appeal as moot, or in the alternative, affirm the denial of the preliminary injunction without prejudice as to NAIJ's ability to raise a new challenge to the new speaking-engagement policy in an appropriate forum.

STATEMENT

A. The Record on Appeal

1. As discussed in the government's response brief, in 2011, EOIR and NAIJ jointly issued the Ethics & Professionalism Guide for Immigration Judges, JA253-69, which memorialized certain ethical conduct standards for agency employees. As particularly relevant here, the Ethics Guide provided that agency employees "must seek prior supervisory and ethics approval for written work and speeches." JA261. This requirement for supervisory approval extended to all speaking events, regardless

whether the topic of discussion was related to an employee's official duties or whether the immigration judge wished to speak in a private capacity. *Id.*

In 2017 EOIR created a standardized process to review speaking-engagement requests. JA34-38. And in 2020, NAIJ 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, and restated and clarified the process established in 2017. JA45-50. As relevant here, the 2020 Policy establishes different protocols depending upon whether a speaking engagement pertains to speech in a personal or an official capacity. But in general, both types of engagements required that after initial supervisory approval, employee requests must be forwarded to EOIR's Speaking Engagement Team for additional review and ethics guidance. JA46-47, JA230-32.

2. Six months after the issuance of the 2020 Policy, NAIJ filed the complaint in this case. The complaint acknowledged that, prior to 2017, supervisory "approval was required" for immigration judges to speak about topics related to immigration law or the employee's official duties, and that "EOIR's Ethics office . . . would then offer ethics guidance" about such engagements. JA17. The complaint did not allege that this agreed-upon requirement for supervisory approval or ethics guidance was unlawful, but instead, that the 2020 Policy's standardized process for obtaining this supervisory approval and guidance was unlawful because it imposed additional burdens and led to more frequent denials. JA22-24, JA29-30. In its prayer for relief,

NAIJ requested that the district court declare that the 2020 Policy (and, to the extent it remained operative, the 2017 Policy) was unconstitutional, and enjoin EOIR "from continuing to enforce the 2020 Policy." JA30-31.

On the same day that it filed its complaint, NAIJ filed a motion for a preliminary injunction, requesting that the district court "enter a preliminary injunction against EOIR's enforcement of the 2020 Policy." Mot. 1. Again, NAIJ acknowledged that, prior to 2017, EOIR required immigration judges to obtain supervisory approval and ethics guidance for all speaking engagement requests, including those about matters related to immigration law. Mot. 3. NAIJ nevertheless contended that the changes made in 2017 and 2020 "drastically limited" immigration judge's ability to speak, on the theory that by characterizing speech related to immigration law as official-capacity speech, EOIR "impose[d] an outright prohibition on immigration judges speaking publicly in their personal capacities about immigration or EOIR." Mot. 6, 9-10. In addition to its complaint about how EOIR labeled such speech, NAIJ also complained, *inter alia*, that the collective burdens imposed by the 2020 Policy's approval process chilled employee speech and were not appropriately tailored to the government's interests. Mot. 12-21.

3. The district court denied the motion for a preliminary injunction. In particular, the court held that NAIJ was not likely to succeed on the merits because NAIJ's challenge to the 2020 Policy 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 EOIR's employment 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. NAIJ then appealed.

B. Significant Developments During the Course of this Appeal

Two significant developments have occurred while this appeal was pending that bear on the issues presented before this Court. First, on November 2, 2021, while this appeal was pending, the FLRA determined that immigration judges are management officials who may not be part of any collective bargaining unit under 5 U.S.C. § 7112(b)(1). Over the course of the past year, the parties have disputed the effect of that decision on NAIJ's status as the certified bargaining representative for immigration judges, but the parties have recently reached an agreement that resolves this issue on an interim basis. Second, in October 2021, EOIR issued a new policy for the submission and approval of speaking-engagement requests. The memorandum that sets forth this new policy states that the 2020 policy that NAIJ has challenged through this interlocutory appeal has been cancelled and superseded by the new policy, and no longer has any operative effect.

1. On August 9, 2019, EOIR filed a representation petition with the FLRA requesting that the FLRA clarify the bargaining unit represented by NAIJ to exclude all immigration judges on the grounds that they are management officials and

therefore not appropriate members under 5 U.S.C. § 7112(b)(1). As noted in the government's prior brief, on November 2, 2020, while this appeal was pending, the FLRA granted EOIR's petition, held that immigration judges are management officials, and directed the FLRA Regional Director for the Washington region "to exclude [immigration judges] from the bargaining unit." 71 F.L.R.A. 1046, 1047 (Nov. 2, 2020). NAIJ filed a motion for reconsideration, which remains pending. EOIR initially opposed reconsideration, but it has since withdrawn both its opposition to reconsideration and its representation petition.

Over the course of the past year, the parties have disputed the effect of the FLRA's decision while the motion for reconsideration remains pending. As reflected in the government's prior brief in this case (Br. 16-19), until recently, EOIR had taken the position that, because the FLRA has not granted a stay of its decision pending the resolution of the motion for reconsideration, NAIJ was no longer the certified bargaining representative of immigration judges. EOIR asserted this same defense in response to several unfair labor practice charges brought by NAIJ before the FLRA. However, on December 3, 2021, the FLRA Regional Office informed EOIR that, in its view, NAIJ remained the certified bargaining representative of immigration judges unless and until the FLRA Regional Director issued a new certification, and that the Regional Director did not intend to issue an amended certification or revocation until the FLRA ruled on the pending motion for reconsideration. On December 7, 2021, the parties reached a settlement agreement whereby EOIR agreed to continue to

recognize NAIJ as a certified bargaining representative unless or until such time as the FLRA or the FLRA Regional Director revokes NAIJ's certification.

2. On March 25, 2021, after this appeal had been fully briefed and scheduled for oral argument, counsel for NAIJ sent a letter addressed to EOIR's then-Acting Director, Jean King, as well as Attorney General Merrick Garland, asking that new agency leadership review and revise the 2020 Policy challenged in this appeal. On April 26, 2021, this Court granted EOIR's request to stay this case to permit new agency leadership an opportunity to consider revisiting that policy.

On October 12, 2021, EOIR Director David L. Neal issued a new speaking-engagement policy, which cancels its predecessor (2021 Policy). As stated in its introduction, the new speaking-engagement policy differs from the challenged 2020 Policy in several substantial respects. Notably, the new policy eliminates the requirement that employees receive supervisory approval to speak in a personal capacity on topics unrelated to the employee's official duties. The 2021 Policy maintains, however, that speaking engagements directly related to an employee's official duties "provide the public with the impression that the speech has the imprimatur of the agency, and therefore, require close coordination with the employee's supervisor." 2021 Policy at 2. EOIR nevertheless made substantial changes that streamline the process for obtaining approval for such speaking engagements. In particular, the 2021 Policy does not require supervisors to forward initially approved requests to teach courses related to immigration law or an

employee's official duties to EOIR's Speaking Engagement Team, and it creates a "blanket approval" process for employees who engage with the public in an official capacity on a recurring or repetitive basis. 2021 Policy at 5.

ARGUMENT

THIS INTERLOCUTORY APPEAL IS MOOT BECAUSE THE RELIEF SOUGHT BY NAIJ IS NO LONGER AVAILABLE

I. This is an interlocutory appeal from the denial of a preliminary injunction. In district court, NAIJ sought to enjoin a policy issued by EOIR on January 17, 2020. *See* Mot. 1 ("[NAIJ] now urges this Court to enter a preliminary injunction against EOIR's enforcement of the 2020 Policy"), *id.* at 26 ("[T]he Court should issue a preliminary injunction against EOIR's enforcement of the 2020 Policy, and, to the extent it is still operative, the 2017 Policy as well."). The 2020 Policy that NAIJ sought to enjoin no longer exists, and thus the relief plaintiffs seek in this interlocutory appeal—a preliminary injunction preventing EOIR from enforcing the 2020 policy—is no longer available. The appeal should be dismissed as moot. *See, e.g.*, *Fleet Feet, Inc. v. NIKE, Inc.*, 986 F.3d 458, 463 (4th Cir. 2021) ("If an event occurs during the pendency of an appeal that makes it impossible for a court to grant effective relief to a prevailing party, then the appeal must be dismissed as moot.").

A. The 2020 Policy that NAIJ sought to preliminarily enjoin no longer exists. In March 2021, after this appeal had been fully briefed and scheduled for argument, counsel for NAIJ sent a letter to new EOIR and DOJ leadership requesting that they

consider revisions to the 2020 Policy. This Court thereafter granted EOIR's request to stay the appeal so that the new agency leadership could familiarize themselves with the issues and determine if any changes to the 2020 Policy were warranted. Over the course of that stay, EOIR carefully developed a new speaking-engagement policy, which it issued in October 2021. The memorandum that sets forth EOIR's new policy clearly states that the 2020 Policy NAIJ previously sought to enjoin has been cancelled and no longer has any operative effect.

The 2021 Policy differs substantially from the policy NAIJ previously sought to enjoin. Indeed, the 2021 Policy entirely eliminates the requirement (which long predates the 2020 Policy) that employees seek supervisory approval to speak in their personal capacity about matters unrelated to their official duties. In addition, although EOIR continues to require employees to seek supervisory approval for speaking events related to the employee's official duties, the 2021 Policy has substantially streamlined that approval process. Among other things, the new policy makes clear that while supervisors should forward initially approved requests to speak about matters related to an employee's official duties to the EOIR Speaking Engagement Team, "Ethics does not approve or deny requests to speak," it merely offers "guidance to avoid speakers' ethical dilemmas." 2021 Policy at 3-4. Further, under the new policy, supervisors may approve employee requests to teach "an immigration law course, or any course on a subject matter or topic that is related to their official duties" without forwarding such requests to EOIR's Speaking

Engagement Team. *Id.* at 5. Finally, the 2021 Policy creates a "blanket approval" process for employees who engage with the public on matters related to their official duties on a "recurring or repetitive basis." *Id.*

B. NAIJ has represented that it believes the appeal is not moot because the new policy retains, at a broad level of generality, some aspects of the 2020 Policy that NAIJ previously found objectionable. But NAIJ has not sought to enjoin EOIR from imposing *any* requirement that immigration judges seek supervisory approval for speaking engagements related to their official duties, nor has it claimed that such requirements are unconstitutional on their face. To the contrary, in 2011, NAIJ and EOIR jointly issued an Ethics Guide that required supervisory approval for all speaking and writing engagements, regardless whether the topic discussed related to the employee's official duties. JA261, JA269. And both NAIJ's complaint and its motion for a preliminary injunction acknowledged that EOIR required supervisory preapproval for all speaking and writing engagements before the 2020 Policy. NAIJ has not argued that this requirement was unlawful as a general matter.

Instead, NAIJ has argued that the collective requirements of the approval process embodied in the 2020 Policy are not justified by the interests the government asserted in defense of the policy. *See* Opening Br. 38-48. As discussed *supra*, however, the new policy differs substantially from that challenged process. Indeed, the 2021 Policy eliminates the longstanding requirement that employees obtain supervisory approval for engagements unrelated to the employee's official duties in a

personal capacity. And the fact that the 2021 Policy continues to require *some* form of a preapproval process (one different from that set forth in the 2020 Policy) for speech related to an employee's official duties does not rescue this interlocutory appeal from mootness. In district court, plaintiffs sought a specific remedy—to preliminarily enjoin EOIR from enforcing the 2020 policy. That remedy is no longer available. Thus, this interlocutory appeal is moot. *See Fleet Feet Inc.*, 986 F.3d at 463.

The unavailability of NAIJ's requested relief thus distinguishes this appeal from *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc). There, a group of grassroots community advocates in Baltimore appealed the denial of a preliminary injunction against the pilot run of a surveillance program operated by the Baltimore Police Department. While the appeal was pending, the program completed its pilot run and Baltimore City leadership decided not to renew its operation. This Court concluded that, although the program had ceased operations, the plaintiffs' appeal "present[ed] a live controversy" because the plaintiffs' motion for a preliminary injunction sought not only to enjoin the police department from operating the program, but also from "accessing any stored images created . . . during the pendency of this lawsuit." *Id.* at 336 (alteration in original). This Court held that the plaintiffs continued to have a "concrete interest" in preventing the police department from accessing surveillance materials created over the course of the appeal. *Id.* at 337-38. Here, however, NAIJ sought only to enjoin

any enforcement of the 2020 Policy (and, to the extent it was still operative, the 2017 policy). Those policies no longer exist, and thus, this interlocutory appeal is moot.

II. Even if this Court determines that NAIJ still has a concrete interest in some portion of this interlocutory appeal, prudential and equitable considerations counsel against permitting NAIJ to transform this appeal from a denial of a preliminary injunction into a forum to seek an injunction of the new policy in the first instance. To the extent NAIJ has concerns about EOIR's new speaking-engagement policy, the appropriate course would be for NAIJ to raise those concerns in the district court in the first instance, so that it can evaluate the challenge on the basis of an appropriately developed record.

As an initial matter, a preliminary injunction "is an extraordinary remedy never awarded as of right." *Henderson for National Labor Relations Board v. Bluefield Hospital Co.*, 902 F.3d 432, 440 (4th Cir. 2018). Further, the "decision to issue or deny a preliminary injunction is committed to the sound discretion of the trial court," and should not be "disturbed on appeal unless the record shows an abuse of that discretion, regardless of whether the appellate court would, in the first instance, have decided the matter differently." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013).

Here, as discussed, it is without question that the new policy was developed under distinct circumstances and has significant differences from the 2020 Policy. Notably, the district court's stated basis for rejecting NAIJ's challenge to the 2020

Policy was that, because that policy had been the subject of collective bargaining, and because NAIJ could have raised its challenge to the policy in the context of a bargaining dispute, NAIJ's challenge had to be channeled through the special procedures for administrative review under the FSLMRS. JA284-JA290. That status quo has changed; the 2021 Policy was developed before NAIJ and EOIR reached an agreement regarding whether EOIR should continue to treat NAIJ as the certified bargaining representative for immigration judges during the pendency of the FLRA proceedings about this question. The parties have not previously addressed the question of whether the same jurisdictional hurdles apply to any challenge NAIJ may wish to bring to the new policy, which was developed under different circumstances, and those questions are best addressed by the district court in the first instance.

Furthermore, the existing record on appeal only confirms the utility of requiring any challenge to EOIR's new policy to be brought in the district court in the first instance. In the proceeding below, both EOIR and NAIJ submitted declarations supporting their respective positions. For its part, EOIR's declarations largely discuss the development of the 2020 Policy and the important government interests that it served. JA154-246. NAIJ, by contrast, submitted declarations that, among other things, discussed the alleged difficulties immigration judges experienced in obtaining approval for various speaking engagements under the prior policies. JA51-153, JA247-275. Those declarations do not speak to the development of the 2021 Policy or the decision by new EOIR leadership to retain certain elements of the old policy in

order to serve important government interests. Nor is there any developed record about questions of alleged burdens on agency employees or the equities of the new policy. And the lack of a record or briefing tailored to the new policy is especially problematic where, as here, NAIJ has raised a First Amendment challenge, which requires courts to balance the burdens on employee speech against the government interests served.

CONCLUSION

For the foregoing reasons, the Court should dismiss this interlocutory appeal as moot, or in the alternative, affirm the district court's denial of the request to preliminarily enjoin the 2020 Policy.

Respectfully submitted,

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December 2021

CERTIFICATE OF COMPLIANCE

This supplemental brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and with this Court's order of December 15, 2021, because it is no longer than 15 pages. 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
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2021, 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
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