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January 24, 2022

Patricia S. Connor, Clerk
U.S. Court of Appeals for the
Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Re: *National Association of Immigration Judges v. Neal*, No. 20-1868

Dear Ms. Connor,

Pursuant to Rule 28(j), Plaintiff–Appellant the National Association of Immigration Judges ("NAIJ") respectfully submits a copy of the January 21, 2022 decision of the Federal Labor Relations Authority ("FLRA") denying NAIJ's motion for reconsideration of a 2020 decision finding that immigration judges should be excluded from the bargaining unit represented by NAIJ.

In 2020, the FLRA determined that immigration judges are "management officials" within the meaning of 5 U.S.C. § 7103(a)(11). NAIJ timely filed a motion for reconsideration. *See* Appellant Reply 2 n.1, ECF No. 23. The government initially opposed the motion, but later sought withdrawal of its opposition and the underlying decertification petition. *See* 72 FLRA No. 121, at 3 n.15 (Jan. 21, 2022). In a 2–1 decision, the FLRA nevertheless denied NAIJ's motion for reconsideration. *Id.* at 8.

The FLRA's decision supports NAIJ's argument that the Federal Service Labor-Management Relations Statute (the "Statute") does not divest the district court of jurisdiction over its constitutional claims.

First, NAIJ remains the certified bargaining representative of nonmanagerial immigration judges unless and until the Regional Director revokes its certification. As NAIJ has explained in its briefing, it cannot obtain meaningful judicial review through the Statute of its constitutional challenge to EOIR's speaking-engagement policy, if it

remains a certified bargaining representative. *See* Appellant Reply 9–13.

Second, if the Regional Director *were* to revoke NAIJ's certification, federal jurisdiction over NAIJ's claims would be even clearer. Without its certification, NAIJ would no longer be covered by the Statute, and accordingly its constitutional claims could not possibly be channeled through the Statute's scheme for administrative review. *See* Appellant Reply 7–9.

Finally, any uncertainty about whether or when the Regional Director will revoke NAIJ's certification only supports NAIJ's argument that it cannot obtain meaningful judicial review under the Statute. Even if NAIJ filed an administrative claim today, it could become decertified before the completion of any administrative proceedings, making the already illusory prospect of judicial review through the Statute more illusory still.

For these reasons, the FLRA's decision lends further support to the federal courts' jurisdiction over NAIJ's claims.

Respectfully submitted,

/s/ Ramya Krishnan

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