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

RESPONSE TO COMBINED MOTION TO VACATE AND PETITION FOR REHEARING

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INTRODUCTION AND SUMMARY OF ARGUMENT

At all relevant periods in this interlocutory appeal, the National Association of Immigration Judges (NAIJ) was a union organized under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*, as the exclusive bargaining agent of all non-supervisory immigration judges employed by the Executive Office of Immigration Review (EOIR). In 2020, NAIJ commenced this action against EOIR on behalf of the immigration judges it represented, challenging changes made to EOIR's policy requiring immigration judges to obtain supervisory and ethics approval prior to their participation in public speaking or writing engagements. In its complaint, NAIJ sought declaratory and injunctive relief from the January 2020 version of EOIR's speaking-engagement policy, as well as from an earlier version of that policy issued in September 2017, to the extent that any portion of that earlier version remained operative.

In August 2020, the district court denied NAIJ's motion for a preliminary injunction, holding that NAIJ's challenge must proceed through the exclusive administrative dispute-resolution mechanism for resolving labor disputes set forth in the Federal Service Labor-Management Relations Statute. In an unpublished, per curiam opinion issued on April 4, 2022, this Court affirmed the district court's decision, and remanded with instructions for the district court to dismiss this case without prejudice. *See NAIJ v. Neal*, 2022 WL 997223 (4th Cir. Apr. 4, 2022). The Court noted that, at the time its decision issued (and indeed, throughout all prior

proceedings), NAIJ was a union organized under the Federal Service Labor-Management Relations Statute, and as such, was empowered to engage in collective bargaining over labor disputes such as the dispute in this case. *Id.* at *1.

In so holding, the Court recognized that NAIJ's continued status as a certified union was subject to imminent change, because in a parallel proceeding, the Federal Labor Relations Authority (FLRA) had determined that immigration judges are management officials who are not entitled to engage in collective bargaining, and directed the FLRA Regional Director to "exclude" immigration judges from NAIJ's bargaining unit. *NAIJ*, 2022 WL 997223, at *1 (quoting 71 F.L.R.A. 1046, 1049 (Nov. 2, 2020)). The Court noted, however, that "more than two months after the FLRA denied [NAIJ's] motion for reconsideration," the FLRA Regional Director had "still not complied with the FLRA's order." *Id.* at *2. The Court thus concluded that "[u]ntil the Regional Director complies with the FLRA's order or the FLRA itself decertifies the Union," NAIJ's challenge must proceed through the administrative process provided by the Federal Service Labor-Management Relations Statute. *Id.*

Invoking *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), NAIJ moves to vacate the district court's decision denying its motion for a preliminary injunction, as well as this Court's opinion affirming that decision. NAIJ suggests that vacatur is appropriate because it is no longer the exclusive bargaining representative for immigration judges, and thus, the Federal Service Labor-Management Relations Statute no longer serves as a jurisdictional hurdle to its ability to challenge EOIR's

speaking-engagement policy in district court. In the alternative, NAIJ asks that this court grant rehearing on account of this post-judgment contingency, vacate the district court's decision, and instruct the district court to reconsider NAIJ's motion for a preliminary injunction.

As an initial matter, NAIJ has failed to establish that it is entitled to vacatur of this Court's opinion based upon a post-judgment contingency that was expressly anticipated in that opinion. Vacatur under *Munsingwear* is an equitable remedy applicable when a case has become moot pending appeal. In such cases, vacatur serves to protect a losing party from being bound by a final and unreviewable lower court decision. But here, NAIJ does not contend that the case has become moot or that happenstance divested this Court of its jurisdiction to review the denial of NAIJ's requested preliminary injunction. And while this Court is empowered to exercise its equitable discretion to amend or even vacate its judgment prior to the issuance of the mandate, NAIJ has not shown that it is appropriate to exercise that power in this case. This Court's decision held only that NAIJ "must proceed through the administrative process provided by the Federal Service Labor-Management Relations Statute" at least "[u]ntil the Regional Director complies with the FLRA's order" to decertify NAIJ as a union. *NAIJ*, 2022 WL 997223 at *2. That contingency has already come to pass, and NAIJ—which has already received all of the appellate review to which it is entitled as of right—has not shown that it will suffer any adverse preclusive effects

from the decisions it seeks to vacate or that third parties will be prejudiced by this Court's unpublished and non-precedential decision.

Further, NAIJ's request that this Court grant rehearing and instruct the district court to reconsider the now-outdated motion for a preliminary injunction is particularly inappropriate because, as the government noted in its supplemental briefing in this case, the January 2020 version of the speaking-engagement policy that NAIJ challenged in its complaint and moved to enjoin no longer exists. To the extent that NAIJ has concerns about the new version of the policy, the appropriate course of action at this juncture would be to file an amended complaint that identifies with specificity the grounds on which NAIJ wishes to challenge that policy and that justifies NAIJ's continued standing to bring suit on behalf of immigration judges notwithstanding its changed legal status. This Court's decision, which remands with instructions to dismiss this case without prejudice, does not prohibit NAIJ from pursuing this course of action. This Court should therefore deny NAIJ's combined motion to vacate and petition for rehearing.

STATEMENT

A. This case concerns a dispute between NAIJ and EOIR regarding EOIR's policies regulating speaking engagements by immigration judges. In 2011, EOIR and NAIJ jointly issued the Ethics & Professionalism Guide for Immigration Judges, JA253-69, which memorialized certain ethical conduct standards, including by providing 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 about a matter in a private capacity. *See id.*

In September 2017, EOIR created a standardized process for obtaining that necessary supervisory and ethics approval. JA34-38. NAIJ requested collective bargaining regarding the September 2017 version of the speaking-engagement policy, and as a result of that bargaining, NAIJ and EOIR entered into a memorandum of understanding. JA41-42. Then, in January 2020, EOIR issued a memorandum that restated and clarified the process established in 2017 and launched a new automated portal for the submission of speaking requests. JA45-50. Six months later, NAIJ commenced this action, seeking to enjoin the January 2020 version of the speaking-engagement policy, as well as the September 2017 version to the extent that earlier version remained operative. On the same day that it filed its complaint, NAIJ filed a motion for a preliminary injunction, requesting that the district court enjoin EOIR's enforcement of the challenged versions of the speaking-engagement policy.

The district court denied NAIJ's request for a preliminary injunction. In particular, the district court explained that when Congress enacted the Federal Service Labor-Management Relations Statute, it created an exclusive administrative dispute-resolution mechanism for resolving labor disputes between federal labor unions, their members, and government employers. JA282-83. The court further observed that

NAIJ was empowered to engage in collective bargaining regarding the January 2020 version of the speaking-engagement policy, just as it had previously done with respect to the September 2017 version of the policy. JA286-87. The court held that NAIJ's challenge to the January 2020 version of the policy was the type of claim which Congress intended to fall within this exclusive statutory scheme, and thus, that Congress has precluded district court jurisdiction over NAIJ's claims.

B. While this interlocutory appeal was pending, there were two significant developments in parallel proceedings. First, in November 2020, the Federal Labor Relations Authority determined that immigration judges are management officials who are not entitled to engage in collective bargaining under the Federal Service Labor-Management Relations Statute, and it ordered the FLRA Regional Director to exclude all immigration judges from the bargaining unit represented by NAIJ. 71 F.L.R.A. 1046, 1049 (Nov. 2, 2020). NAIJ filed a motion for reconsideration and a motion to stay the effect of that decision, which remained pending for over a year, and which was denied a few days before oral argument in this case. 72 F.L.R.A. 622 (Jan. 21, 2022).[1]

[1] On February 23, 2022, NAIJ filed a petition for review of the FLRA's decision in the United States Court of Appeals for the District of Columbia Circuit. *See NAIJ v. FLRA*, No. 22-1028 (D.C. Cir.) (petition filed Feb. 23, 2022). The FLRA moved to dismiss the case for lack of jurisdiction, and that motion has been referred to a merits panel for full consideration. *See* Per Curiam Order, *NAIJ v. FLRA*, No. 22-1028 (D.C. Cir. Apr. 26, 2022).

Second, 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 to Attorney General Merrick Garland, asking that new agency leadership review and revise the January 2020 version of the speaking-engagement policy. As a result of its review, in October 2021, EOIR revoked the version of the speaking-engagement policy challenged in this appeal, and issued a new policy that differs from its predecessors in several significant respects. Notably, the new policy eliminates the longstanding requirement that employees receive supervisory approval to speak in a personal capacity about topics unrelated to the employee's official duties, and substantially streamlines the process for obtaining approval of other types of speaking requests.

After the issuance of this new policy and before oral argument in this case, the parties submitted supplemental briefing to this Court discussing the effect of these developments on this interlocutory appeal. As particularly relevant here, the government took the position that this interlocutory appeal had become moot, because the relief sought by NAIJ—to enjoin EOIR's enforcement of the January 2020 version of the speaking-engagement policy—was no longer available. The government further argued that, even if some portion of this interlocutory appeal was not moot, prudential and equitable considerations counseled against permitting NAIJ to transform this interlocutory appeal into a forum to seek an injunction of the new policy in the first instance. At oral argument, however, the government agreed that

NAIJ continued to be the certified bargaining representative for immigration judges, and thus, that any future challenge to the October 2021 version of the speaking-engagement policy must proceed through the exclusive procedures of the Federal Service Labor-Management Relations Statute unless and until NAIJ was decertified. *See, e.g.*, Oral Arg. 36:08–38:34, https://www.ca4.uscourts.gov/OAarchive/mp3/20-1868-20220125.mp3.

C. On April 4, 2022, this Court issued an unpublished, non-precedential per curiam opinion affirming the decision of the district court and remanding with instructions for the district court to dismiss this case without prejudice. In that decision, this Court acknowledged that NAIJ's continued status as the certified bargaining representative of the immigration judges was subject to change in the near future. Indeed, the Court noted that when the FLRA denied NAIJ's motion for reconsideration in January 2022, it "chastised the Regional Director's 'astonishing intransigence' for not complying for more than a year with [the FLRA's] 'unequivocal[ ]' 2020 order to exclude immigration judges from the bargaining unit." *NAIJ*, 2022 WL 997223, at *1 (quoting 72 F.L.R.A. at 627 (second alteration in original)). Nevertheless, "more than two months after the FLRA denied [NAIJ's] motion for reconsideration," the Regional Director had not complied with the FLRA's order, and thus, "at least in a very formal sense, the Union still represents the non-supervisory immigration judges." *Id.* at *2. And "[u]ntil the Regional Director complies with the FLRA's order or the FLRA itself decertifies the Union, . . . the

Union must proceed through the administrative process provided by the Federal Service Labor-Management Relations Statute." *Id.*

On April 12, 2022, after this Court's opinion and judgment issued and over two years after the original FLRA decision holding that immigration judges are management officials, the FLRA denied NAIJ's second motion for reconsideration of and directed that the FLRA Regional Director "exclude" immigration judges from NAIJ's bargaining unit "as soon as possible but no later than seven calendar days from the date of this order." 72 F.L.R.A. 733, 737 (Apr. 12, 2022). Three days later, the FLRA Regional Director complied, and issued an order entering a revocation of NAIJ's Certification of Representative. Revocation of Certification, Case No. WA-RP-19-0067 (Reg. Dir. Wash. Region. FLRA Apr. 15, 2022). NAIJ sought emergency relief from this order in the United States Court of Appeals for the District of Columbia Circuit, which was denied. *See* Per Curiam Order, *NAIJ v. FLRA*, No. 22-1028 (D.C. Cir. Apr. 26, 2022). NAIJ now asks this Court to vacate both its decision and the district court's decision denying a preliminary injunction pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), or, in the alternative, to grant a petition for rehearing and remand to the district court to reconsider NAIJ's motion for a preliminary injunction in light of the changed circumstances.

ARGUMENT

I. This Court should deny NAIJ's request that it vacate its opinion, because NAIJ has entirely failed to establish that it is entitled to that equitable remedy based

upon a post-judgment contingency that was expressly anticipated in the opinion that it asks this Court to vacate.

A. As an initial matter, vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950), is an equitable remedy that may be granted "when a case is rendered moot on appeal," and the parties "lack a legally cognizable interest in the outcome." *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 325-26 (4th Cir. 2021). In such circumstances, this Court is divested of its jurisdiction to take further action on the merits of a case, and its customary practice is to vacate the lower court's decision with instructions to dismiss the case as moot, *id.*, in order to protect the losing party from a final and now unreviewable lower court decision, *see Munsingwear*, 340 U.S. at 39-40. Because this practice is "'rooted in equity,'" however, the decision whether to vacate "'turns on the conditions and circumstances of the particular case.'" *Hirschfeld*, 14 F.4th at 327 n.5 (quoting *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (internal quotations omitted)).

Notably, although NAIJ asks that this Court vacate its opinion under *Munsingwear*, NAIJ does not contend that this case is moot or that this Court has been divested of jurisdiction to review the district court's denial of a preliminary injunction. To the contrary, NAIJ strenuously argued in its supplemental briefing that there remains a live controversy in this interlocutory appeal notwithstanding the fact that

the policy it sought to enjoin in district court was revoked by the agency.[2] Likewise, NAIJ's request that this Court remand to the district court for further consideration of its now-outdated motion for a preliminary injunction reflects NAIJ's continued belief that this case is not, in fact, moot.

Instead, NAIJ argues that the jurisdictional defect identified by the district court as a basis for denying NAIJ's motion for a preliminary injunction was cured *after* this Court issued a judgment affirming that denial. But even if NAIJ had been decertified prior to the issuance of this Court's judgment, that decertification would not have divested the Court of jurisdiction. In such circumstance, this Court would have the option to remand the case to the district court for further consideration. Indeed, the government urged that such a remand was necessary before NAIJ could seek to enjoin the October 2021 version of the speaking-engagement policy, which has yet to be challenged in district court. But this Court could alternatively have elected to affirm the district court's denial of a preliminary injunction on any number of alternative and fully-briefed grounds, including by addressing the government's argument that NAIJ's decertification deprives it of associational standing. It stands to reason that NAIJ's decertification after this Court's judgment issued likewise does not establish mootness warranting vacatur under *Munsingwear*. That the mandate in this

[2] Because this Court held that the district court lacked jurisdiction over NAIJ's complaint, this Court found it unnecessary to address the question whether this interlocutory appeal had become moot in light of the changed policy.

case has not yet issued is relevant only to the extent that, until the mandate issues, this Court has the power to grant rehearing or even to *sua sponte* amend its opinion or judgment. As discussed below, however, NAIJ has not shown that such equitable relief is appropriate or necessary in this case.

B. In any event, NAIJ's motion entirely fails to establish that this Court should exercise its equitable discretion to grant vacatur. As NAIJ notes, the only question addressed in this Court's opinion is whether the Federal Service Labor-Management Relations Statute precludes district court jurisdiction over NAIJ's challenge to the January 2020 version of the speaking-engagement policy for at least so long as NAIJ remained a certified union. At the time this Court's judgment issued on April 4, 2022, NAIJ continued to be the certified bargaining representative for immigration judges. NAIJ thus errs in suggesting (Mot. 14) that this Court's opinion has been "rendered advisory" by circumstances arising after the issuance of judgment; there was a live controversy regarding that question at the time of this Court's judgment, and the Court's opinion on that fully-litigated question was not an advisory one.

Further, while NAIJ asserts, without support, that the jurisdictional question addressed by this Court is "of great importance" to third parties (Mot. 13), NAIJ has already received all of the appellate review of that question to which it is entitled as of right, and NAIJ's motion identifies no errors in this Court's unpublished and non-precedential opinion that might warrant further discretionary review of that question

had NAIJ not been decertified. *Cf.* Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-28 n.34 (11th ed. 2019) ("[O]bservation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases," instead of ordering vacatur, "unless the petition presents an issue (other than mootness) worthy of review"); *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review").

Likewise, there has been no showing that vacatur is necessary to protect NAIJ from the preclusive effects of an otherwise unreviewable decision. *Cf. Hirschfeld*, 14 F.4th at 328 (vacating a prior panel opinion after a case had become moot pending further review because this Court was "reluctant to leave a preclusive judgment standing against a federal agency responsible for enforcing federal law while cutting off the appellate process, particularly where the panel is split in its views"). To the contrary, this Court's decision holds only that, for so long as NAIJ remains a union, its challenge to the January 2020 version of the speaking-engagement policy "must proceed through the administrative process provided by" the Federal Service Labor-Management Relations Statute. *NAIJ*, 2022 WL 997223, at *2. But NAIJ has now been decertified, and the January 2020 version of the speaking-engagement policy has been revoked. Future litigation between the parties regarding the specific jurisdictional issue addressed by this Court is thus unlikely to ever recur.

II. Finally, to the extent that NAIJ requests that this Court amend (rather than vacate) its decision, NAIJ has failed to establish any error in this Court's judgment warranting such relief. This Court's decision correctly anticipated that NAIJ would eventually be decertified as a union, and the fact that this post-judgment contingency indeed came to pass does not itself establish error. And contrary to NAIJ's argument that this Court's instruction to the district court to dismiss this case "overlooked" the possibility that NAIJ would be decertified after the Court's judgment issued (Mot. 6, 15), the opinion specifies that the dismissal should be *without* prejudice. The decision thus contemplates that NAIJ may wish to file an amended complaint after it had been decertified and its status as a certified bargaining representative no longer served as an obstacle to proceeding directly in district court.

By contrast, there is no occasion for this Court to grant NAIJ's request (Mot. 6, 9) to instruct the district court to "reconsider" NAIJ's now-outdated motion to enjoin the January 2020 version of EOIR's speaking-engagement policy. As discussed extensively in the government's supplemental brief in this case, that policy no longer exists, and the relief that NAIJ sought in that motion is no longer available. To the extent NAIJ wishes to challenge the new version of the policy on behalf of immigration judges, the appropriate procedure at this juncture would be, at a

minimum, to file an amended complaint that alleges with specificity the grounds on which NAIJ challenges the new policy.[3]

CONCLUSION

For the foregoing reasons, this Court should deny NAIJ's combined motion to vacate and petition for rehearing.

Respectfully submitted,

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[3] Throughout this appeal, NAIJ has claimed that, in addition to being a certified labor organization, it is a voluntary association that would have associational standing to represent immigration judges even in the event that it was decertified. But the record does not establish whether any immigration judges have continued to be members of NAIJ after its decertification. The filing of an amended complaint would also permit NAIJ to address this additional jurisdictional defect.

CERTIFICATE OF COMPLIANCE

I certify that this response complies with the type-volume limit of Federal Rule of Appellate Procedure 40(b) because it contains 3,588 words. This response 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 type face.

/s/ Jennifer L. Utrecht
Jennifer L. Utrecht

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2022, I electronically filed the foregoing response with the Clerk of the Court by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

/s/ Jennifer L. Utrecht
Jennifer L. Utrecht