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 — No. 1:20-cv-00731-LO-JFA (O'Grady, J.)

SUPPLEMENTAL BRIEF FOR APPELLANT

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

Through this appeal, the National Association of Immigration Judges ("NAIJ") challenged a speaking-engagement policy issued by the Executive Office for Immigration Review ("EOIR") in 2017, and substantially revised in 2020, that imposed an unconstitutional prior restraint on the speech of immigration judges. Although the appeal is fully briefed and was initially scheduled for oral argument on May 4, 2021, the case was stayed for nearly six months while EOIR considered revising the policy. On October 12, 2021, EOIR issued a new speaking-engagement policy (the "2021 Policy") that retains the central flaws of the previous one. NAIJ respectfully submits this supplemental brief to address the implications of that policy for this appeal.

In summary, the 2021 Policy does not affect this appeal. It does not render the case moot, because the new policy imposes a prior restraint on the speech of immigration judges in almost exactly the same way that the old one did. The Court should also decline the government's request to remand the case. Remand would be futile because the 2021 Policy has no bearing on the jurisdictional question the district court considered to be dispositive. And remand is also unnecessary because the 2021 Policy does not materially alter NAIJ's arguments on appeal. Accordingly, this Court should hear oral argument on January 25, 2022, as previously scheduled.

Background

NAIJ filed this lawsuit on July 1, 2020 to challenge a speaking-engagement policy issued by EOIR in 2017, and substantially revised in 2020, that categorically prohibited immigration judges from speaking publicly in their personal capacities about immigration or EOIR, and that required immigration judges to submit to an onerous preapproval process before speaking publicly in their personal capacities on any other topic. The district court denied NAIJs' motion for a preliminary injunction based on its conclusion that it lacked jurisdiction, but on appeal, EOIR sought a stay to allow its new leadership to determine whether to revise the policy NAIJ had challenged. The Court granted that stay on April 26, 2021, *see* ECF No. 39, and on September 10, 2021, the Court extended the stay by thirty days, *see* ECF No. 46.

On October 12, 2021, EOIR Director David L. Neal issued the 2021 Policy, which cancelled the agency's prior policy. As explained further below, the 2021 Policy retains the key constitutional flaws of the previous one: it imposes a categorical prohibition on personal-capacity speech about immigration or EOIR, and it maintains an onerous preapproval process for personal-capacity speech on a broad range of other topics.

On December 16, 2021, the appeal was calendared for oral argument on January 25, 2022. *See* ECF No. 50.

Argument

I. The 2021 Policy does not render the case moot because the new policy retains the same constitutional flaws as the old one.

The 2021 Policy does not render the appeal moot because the policy is "sufficiently similar" to the prior one "that it is permissible to say that the challenged conduct continues." *Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville* (*AGC*), 508 U.S. 656, 662 n.3 (1993). This Court's decision in *Green v. City of Raleigh* is instructive. In that case, the plaintiff challenged a city's picketing ordinances, alleging that they constituted an unconstitutional prior restraint on his speech. 523 F.3d 293 (4th Cir. 2008). After the plaintiff filed his action, the city amended the ordinances. The plaintiff did not amend his complaint, instead maintaining that the amended ordinances offended his First Amendment rights "in the same manner" as the original ones. *Id.* On appeal, the Fourth Circuit agreed that the amendments to the picketing ordinances did not moot the plaintiff's challenge because the key provisions of the new ordinances were "'sufficiently similar' to the equivalent provisions in the original ordinances." *Id.* at 300 (quoting *AGC*, 508 U.S. at 662 n.3)).

So too here. As explained at greater length below, the 2021 Policy retains the central defects of its predecessor: it categorically prohibits immigration judges from speaking publicly in their personal capacities about immigration or EOIR, and it requires judges to submit to an onerous preapproval process before speaking

publicly in their personal capacities on a broad range of other topics. *See infra* II.B. It follows that the policy "disadvantages [NAIJ] in the same fundamental way" as the old one, and thus that the appeal is not moot. *AGC*, 508 U.S. at 662; *see also Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 362 (D.C. Cir. 2018) (concluding that repeal of challenged moratorium did not moot appeal where moratorium was replaced "with a policy that is fundamentally similar"); *Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 284 (7th Cir. 2014) (similar); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 936 n.8 (9th Cir. 2002) (similar).

II. The Court should reject the government's request for remand.

The government has indicated to counsel that it will argue that the Court should remand this case to the district court, but a remand would be futile—nothing in the 2021 Policy would change the district court's decision, which turned entirely on the question of jurisdictional preclusion. A remand is also unnecessary because the 2021 Policy does not materially alter NAIJ's arguments on the merits.[1]

[1] In its brief on appeal, the government argued that the FLRA's November 2020 decision finding that immigration judges are management officials decertified NAIJ, thereby depriving NAIJ of associational standing to raise claims on behalf of immigration judges. Opp. 18. But in a settlement agreement entered into this month, EOIR agreed to recognize NAIJ "as the exclusive representative of non-supervisory immigration judges unless or until such time as the FLRA denies [NAIJ]'s pending Motion for Reconsideration," and the FLRA or the FLRA Regional Director "issues a new certification or revokes [NAIJ]'s recognition or certification of representative." Settlement Agreement Between U.S. DOJ, EOIR and NAIJ (Dec. 7,

A. Remand would be futile because the 2021 Policy has no bearing on the jurisdictional question the district court considered to be dispositive.

The central holding of the district court was that the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* (the "Statute") impliedly divested it of jurisdiction over NAIJ's constitutional claims. That holding did not turn on the text of the policy NAIJ challenged, and so nothing in the 2021 Policy would affect the district court's analysis. Accordingly, remand would be futile because the district court would simply reenter its earlier ruling.

The district court determined that it lacked jurisdiction over NAIJ's constitutional claims based on its conclusion, under the *Thunder Basin* framework, that NAIJ's claims "are of the type Congress intended to be reviewed within" the Statute's review scheme. Pl. Br. 14 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994)). The district court concluded that NAIJ's claims were of this type based on its belief that NAIJ could raise them "in the context of a concrete bargaining dispute pursuant to the Statute's procedures," Op. 10 (JA286), by initiating collective bargaining over the implementation of EOIR's speaking-

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2021), https://perma.cc/5WXJ-9GCT. Neither of those circumstances has occurred. In any event, as NAIJ has already explained, NAIJ's standing does not turn 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. *See* Pl. Reply 4–6.

engagement policy, "just as it did in 2018," Op. 11 (JA287). NAIJ has challenged that conclusion on appeal, explaining in its briefing that demanding to bargain over the policy's implementation would not lead to judicial review. EOIR would agree to bargain, just as it did in 2018, and NAIJ would not obtain judicial review no matter how their negotiations proceeded. Meanwhile, demanding to bargain over the policy's substance would not lead to judicial review that is meaningful. EOIR would be statutorily foreclosed from bargaining over that subject, and so such a demand would be knowingly frivolous. Moreover, pursuing an administrative claim based on EOIR's inevitable refusal to bargain would involve substantial delay, causing irreparable harm to the First Amendment rights of immigration judges and the public. Pl. Br. 16–25; Pl. Reply 10–11.

In other words, the district court's jurisdictional holding and NAIJ's challenge to it turn on the statutory scheme, not the prior policy, and so remand would be futile. This Court should decline to grant a remand for this reason. *See, e.g.*, *Blue Cross & Blue Shield of S.C. v. Goer Mfg. Co.*, Nos. 93-1764, 93-1837, 1994 WL 384589, at *2 (4th Cir. July 25, 1994) (refusing to remand to the district court for further proceedings where remand "would not change the result").

B. Remand is unnecessary because the 2021 Policy does not materially alter NAIJ's arguments on the merits.

In addition to being futile, remand is unnecessary because the 2021 Policy does not alter NAIJ's arguments on the merits. The 2021 Policy is an unlawful prior

restraint in violation of the First Amendment, and it is void for vagueness under the Fifth Amendment, for largely the same reasons that the prior policy was. *See, e.g.*, *Smith*, 742 F.3d at 287–288, 290 (declining to remand case for further proceedings where the amended policy was "substantially similar" to the old one, instead addressing the merits and remanding with instructions to enter a preliminary injunction).

1. NAIJ is likely to succeed on the merits of its First Amendment claim for the same reasons as before.

a. Like its predecessor, the 2021 Policy imposes a prior restraint on protected public-employee speech and accordingly should be subject to *NTEU*'s exacting scrutiny.

As explained in NAIJ's opening brief, the prior policy was subject to exacting scrutiny because it operated as a prior restraint on the protected speech of immigration judges in two ways: by prohibiting judges from speaking publicly in their personal capacities about immigration or EOIR, and by demanding that judges refrain from speaking publicly in their personal capacities on other topics unless they had received EOIR's prior approval. *See* Pl. Br. 35–37. The same is true of the 2021 Policy.

First, the 2021 Policy categorically prohibits immigration judges from speaking about immigration or EOIR in their personal capacities. It does so by deeming "official capacity" all speech that discusses "agency policies, programs, or

a subject matter that directly relates to [employees'] official duties." *See* 2021 Policy at 2. And an attachment to the 2021 Policy makes plain that EOIR considers immigration "a subject matter that directly relates" to an immigration judge's duties. *See id*. at 7. For example, the attachment designates as "official capacity" participation at "immigration conferences or similar events where the subject is immigration," while designating commencement speeches as "personal capacity" only if the topic is "unrelated to immigration or official duties." *Id.* Likewise, it classifies speech made to "community, religious, youth, or small social groups" as "personal capacity" only if it is "not directly related to immigration law or advocacy." *Id*.

As NAIJ explained in its opening brief, the idea that speech about immigration or EOIR is necessarily "official capacity" is flatly inconsistent with established Supreme Court precedent. Pl. Br. 36. As the Supreme Court stated in *Lane v. Franks*, whether an employee's speech is made in an official capacity turns on whether the speech is "ordinarily within the scope of [the] employee's duties," not "whether it merely concerns those duties." 573 U.S. 228, 240 (2014). Many immigration judges wish to participate in continuing legal education events addressing immigration law and policy issues, to speak before professional associations about the immigration bar, and to educate members of the public about changes to the immigration court system. None of this speech falls within the scope of an immigration judge's

professional duties, but the 2021 Policy prohibits personal-capacity speech on these topics anyway, just like the prior policy.

Second, the 2021 Policy continues to subject broad categories of personal-capacity speech unrelated to immigration or EOIR to a burdensome prior review scheme. Although the policy purports to eliminate the preapproval requirement for personal-capacity speech "unrelated to [an immigration judge's] official duties," 2021 Policy at 1, 2, it creates two exceptions that threaten to swallow this new rule. If a judge's proposed speaking engagement occurs during working hours, the judge must submit a leave request; the supervisor is then entitled to "inquire how [the judge] intends to use the time," and must "approve[]" not only the leave request, but also the "engagement" itself. *Id.* at 2. In addition, "whether or not [a judge] opted to seek supervisory approval" for a proposed speaking engagement in the first instance, "if the circumstances surrounding the [engagement] change," the judge must "convey such changes to the supervisor to consider the advisability of the [judge]'s continued participation." *Id*. at 3. In both instances, the 2021 Policy envisions review not only by the judge's supervisor but also a roster of other EOIR officials. *Id*. at 2–3 (contemplating a role for EOIR's centralized speaking engagement team and Ethics Program). Accordingly, in the likely event that an immigration judge receives an invitation to speak during a workday, or discovers that the details of a planned

speaking engagement have changed even slightly, the judge is in the same position as they were under the prior policy: forced into an onerous preapproval process.

Third, there is no question that the restrained speech is of significant public concern. Pl. Br. 37. Under the 2021 Policy, immigration judges may not speak as private citizens about immigration or EOIR, despite the fact that such speech is "of obvious concern to citizens on both sides of . . . often hotly debated issues." *Edwards v. City of Goldsboro*, 178 F.3d 231, 247 (4th Cir. 1999); *see also Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016). Speech on other public issues is no less vital. *See United States v. NTEU*, 513 U.S. 454, 466 (1995).

Thus, like its predecessor, the 2021 Policy is a prior restraint on protected public-employee speech, and must survive the test set forth in *NTEU*—a test that "closely resembles exacting scrutiny." *Janus v. AFSCME*, 138 S. Ct. 2448, 2472 (2018).

b. Like its predecessor, the 2021 Policy fails *NTEU*'s exacting scrutiny.

As NAIJ explained in its opening brief, the prior policy fails *NTEU*'s exacting scrutiny because the government cannot show that the interests of immigration judges, and their potential audiences, in the restrained speech are outweighed by the expression's necessary impact on the actual operation of government. *See* Pl. Br. 37–46. The 2021 Policy suffers from the same flaw.

First, the 2021 Policy imposes the same immense burden—on the speech of immigration judges and on their audiences—that the prior policy did. Most critically, the 2021 Policy continues to categorically prohibit immigration judges from discussing immigration law and policy issues, and the policies and programs of EOIR. As the Supreme Court recognized in *Lane*, this speech "holds special value precisely because [public employees] gain knowledge of matters of public concern through their employment." 573 U.S. at 240. The 2021 Policy deprives the public of this speech of "special value," *id.* , and prevents immigration judges from contributing to the public discourse on issues important to them. Pl. Br. 38–39. The 2021 Policy also continues to restrain speech on topics unrelated to immigration and EOIR, and while there is "no way to measure the true cost of that burden," the Supreme Court has made clear that the interests favoring such speech should not be underestimated. *NTEU*, 513 U.S. at 470.

Second, the government still has not offered any adequate justification for its sweeping prior restraint on speech by immigration judges. The 2021 Policy points to no new government interests that might conceivably outweigh the interests favoring immigration judges' speech. Nor are the restrictions any more tailored to the interests previously asserted by the government.[2]

[2] EOIR has therefore done nothing to address the concern, based on the concession of one of its declarants, that the true purpose of its speaking-engagement policy is to suppress public criticism of EOIR. *See* Pl. Br. 40; Owen Decl. ¶ 17 (JA243)

The 2021 Policy refers to the role of the speaking engagement team (the "SET") in "ensuring compliance with both the law and agency policy, while promoting consistency in all of EOIR's communications." 2021 Policy at 1. But as NAIJ has already explained, EOIR has no legitimate interest in censoring an immigration judge's private speech merely because it would be inconsistent with the agency's official positions. Pl. Br. 40–41; Pl. Reply 22–23. Such an interest would render any criticism of the agency or its policies off-limits, violating the First Amendment's prohibition on viewpoint discrimination. *See id.*; *see also Liverman*, 844 F.3d at 411. The government's interest in promoting compliance with ethics and professionalism laws is no more convincing. EOIR still cannot show why its preexisting ethics rules and regulations are insufficient to address this interest. *See* Pl. Br. 41; Pl. Reply 24–25; *see also Swartzwelder v. McNeilly*, 297 F.3d 228, 239 (3d Cir. 2002).

To the extent that the 2021 Policy expresses concern that "speaking engagements directly related to the employee's official duties provide the public with the impression that the speech has the imprimatur of the agency," 2021 Policy at 2, that concern has not been substantiated. The government has not produced any

(admitting that requests to participate in personal-capacity speaking engagements were reviewed for whether participation could result in "any negative publicity or scrutiny to EOIR or the Federal Government").

evidence to suggest that the public is likely to confuse the private speech of rank-and-file immigration judges for the agency's official views. This alone is fatal. *Liverman*, 844 F.3d at 408–09 ("[S]peculative ills . . . are not sufficient to justify such sweeping restrictions on [employees'] freedom to debate matters of public concern"); *see also* Pl. Br. 42–43; Pl. Reply 23–24. In any event, the 2021 Policy's categorical ban on personal-capacity speech about immigration is not appropriately tailored to any legitimate interest in preventing public confusion. For example, the government has failed to explain why requiring immigration judges to provide a disclaimer when speaking would be insufficient, despite the fact that judges routinely spoke in their personal capacities about immigration in the years prior to 2017 using disclaimers, without any apparent disruption to EOIR's operations. *See* Pl. Br. 4–5; *see also* 2021 Policy at 3 & n.1 (promoting the use of disclaimers for personal-capacity speech unrelated to immigration).[3]

Finally, immigration judges are entitled to "an additional thumb on the employees' side of [the] scales" because the 2021 Policy lacks adequate procedural safeguards. *See* Pl. Br. 44 (quoting *Harman v. City of N.Y.*, 140 F.3d 111, 120 (2d Cir. 1998)). As NAIJ explained in earlier briefing, the prior policy failed to include

[3] For the reasons described in NAIJ's earlier briefing, none of the agency's other asserted interests can outweigh the interests of immigration judges and the public in the speech restrained by the 2021 Policy. *See* Pl. Br. 40–44, Pl. Reply 22–25.

narrow, objective, and definite criteria to guide decisionmakers or definite time limits for review. *See id.* at 44–45; Pl. Reply 25. These failures plague the 2021 Policy as well. The 2021 Policy vests supervisors with unbridled discretion to grant or deny speaking-engagement requests. 2021 Policy at 2 (stating only that "[s]upervisors are encouraged to grant appropriate requests"). It fails to appropriately cabin SET review, which is at least partially concerned with "promoting consistency in all of EOIR's communications," 2021 Policy at 1, and accordingly "raises the specter of arbitrary or viewpoint-discriminatory enforcement." Pl. Br. 45 (quoting *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017)); *see also Harman*, 140 F.3d at 120–21. The 2021 Policy also fails to set firm deadlines for review of speaking-engagement requests. Pl. Br. 45.

2. NAIJ is likely to prevail on the merits of its Fifth Amendment claim for the same reasons as before.

As NAIJ explained in earlier briefing, the prior policy was unconstitutionally vague because it encouraged arbitrary or discriminatory decision-making in relation to personal-capacity speaking-engagement requests. Pl. Br. 46–48; Pl. Reply 26. The same is true for the 2021 Policy. As discussed above, the 2021 Policy gives complete discretion to supervisors to approve or deny speaking-engagement requests on whatever grounds they consider relevant. The sum total of the 2021 Policy's guidance for supervisors is: "grant appropriate requests." 2021 Policy at 2. The policy also empowers the SET to review requests for consistency not only with "the

law and agency policy," but also "all of EOIR's communications." 2021 Policy at 1. The policy does nothing, therefore, to address the concern that EOIR's true motivation is to silence immigration judges who might hold personal views the agency dislikes. *See* Pl. Br. 47; *see also* Owen Decl. ¶ 17 (JA243); Swanwick Decl. Ex. B at 3 (JA214); Tabaddor Decl. Ex. I at 5 (JA111).

Conclusion

For the reasons set out above, the Court should not remand the case, and should instead hear oral argument on January 25, 2022. The 2021 Policy does not materially alter NAIJ's arguments on appeal, and a preliminary injunction continues to be appropriate.

December 23, 2021

Respectfully submitted,

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