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## Immigration Judges Ask 4th Circ. To Block Muzzling Policy

By Dorothy Atkins

Law360 (December 17, 2020, 7:00 PM EST) -- An immigration judges' union urged the Fourth Circuit Wednesday to block the Justice Department's prior restraint policy prohibiting them from speaking publicly about immigration, arguing their constitutional claims must be resolved by federal courts and not administratively, and that the claims aren't impacted by the union's collective bargaining status.

In a 34-page brief, the National Association of Immigration Judges slammed the U.S. Department of Justice's argument that the union doesn't have standing to pursue free speech claims on behalf of immigration judges in light of the Federal Labor Relations Authority's recent decision to decertify the union's collective bargaining status. The union said the argument on standing "flatly contradicts" the government's primary jurisdictional argument on appeal.

"If, as the government asserts, NAIJ is no longer a bargaining representative, then the [statute at issue] could not possibly withdraw district court jurisdiction over NAIJ's claims," the reply brief says. "NAIJ would no longer be covered by the statute and accordingly could not raise any claims through the statute's review scheme."

The union's reply brief is the latest chapter in a lawsuit that the NAIJ lobbed against Executive Office for Immigration Review Director James McHenry III in July, challenging a prior restraint policy issued by the EOIR — which is a DOJ sub-agency that employs roughly 500 immigration judges — in 2017 and this year.

The policy categorically bars immigration judges from speaking publicly about immigration or the EOIR, and requires that the judges obtain government approval before speaking publicly.

The union alleges in its suit that the policy violates the judges' First and Fifth Amendment rights, and it's seeking a preliminary injunction against enforcement. But in August, U.S. District Judge Liam O'Grady denied that bid, finding the union likely won't win its claims because Congress intended under the Federal Service Labor-Management Relations Statute that such disputes would be resolved outside of federal court in the FLRA's administrative hearings.

The NAIJ appealed the ruling to the Fourth Circuit, arguing in its opening brief in September that the trial judge erred, that the statute does not provide meaningful judicial review of the NAIJ's claims, and that the constitutional claims are beyond the FLRA's expertise.

Shortly after, the National Treasury Employees Union and a group of legal scholars **threw**

**their weight behind the NAIJ**, arguing in amicus briefs that federal courts, and not administrative hearings, are the proper venue to resolve such constitutional disputes.

But the government fired back, arguing that the trial judge got it right in finding that federal courts don't have jurisdictional authority to hear the dispute. The DOJ added that the union also doesn't have standing to sue, because after the injunction order came down, the FLRA determined that immigration judges are management officials who may not be part of any collective bargaining unit and directed the regional director to decertify the bargaining unit.

However, on Wednesday, the NAIJ slammed the government's arguments, calling them meritless and "internally inconsistent." The NAIJ said the union hasn't been decertified yet by the regional director, and even if it had, its standing doesn't hinge 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 brief says.

The NAIJ also argued that the government's position misreads the plain text of the EOIR's policy and fundamentally misunderstands the U.S. Supreme Court's First Amendment precedent in its 1995 decision in [United States v. NTEU](#), which clearly allows federal employees to speak about job-related topics in their personal capacities.

The union added that under the three-prong test established in the high court's [Thunder Basin v. Coal Co. v. Reich](#) ruling, the statute does not "impliedly" withdraw federal court jurisdiction over the NAIJ's constitutional claims.

The NAIJ asked the appellate court to vacate the trial judge's ruling and order Judge O'Grady to enter an injunction blocking the policy. If the Fourth Circuit panel finds the jurisdictional issue turns on the NAIJ's bargaining status, the union said the appellate court should defer ruling on the injunction bid until the NAIJ's status is administratively resolved.

"Doing so would conserve judicial resources and narrow the issues to be resolved in the event that NAIJ is decertified," the brief says. "Further, it would not cause any prejudice to EOIR, which could continue to enforce the policy in the interim."

The NAIJ's counsel, Ramya Krishnan of the Knight First Amendment Institute at Columbia University, said Thursday that the government doesn't want the federal court to resolve the NAIJ's claims because they are "undeniably strong."

"EOIR's policies impose an intolerable burden on the speech of immigration judges, and without any legitimate justification," Krishnan said. "Indeed, they are clearly designed to suppress criticism about the agency."

Representatives for the government didn't immediately respond Thursday to a request for comment.

The NAIJ is represented by Ramya Krishnan, Stephanie Krent, Xiangnong Wang and Alex Abdo of the Knight First Amendment Institute at Columbia University and Victor M. Glasberg.

The government is represented by Michael S. Raab and Jennifer L. Utrecht of the DOJ's Civil Division.

The case is the National Association of Immigration Judges v. James McHenry III, case number 20-1868, in the Fourth Circuit Court of Appeals.

--Additional reporting by Michael Angell. Editing by Philip Shea.

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