

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS
PROJECT (“NWIRP”), a nonprofit Washington
public benefit corporation; and YUK MAN
MAGGIE CHENG, an individual,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III, in his official
capacity as Attorney General of the United
States; UNITED STATES DEPARTMENT OF
JUSTICE; EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW; JUAN OSUNA, in
his official capacity as Director of the Executive
Office for Immigration Review; and JENNIFER
BARNES, in her official capacity as
Disciplinary Counsel for the Executive Office
for Immigration Review,

Defendants.

No. 2:17-cv-00716

MOTION FOR PRELIMINARY
INJUNCTION

Note on Motion Calendar:
June 30, 2017

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I. INTRODUCTION

On May 17, 2017, this Court granted Northwest Immigrant Rights Project (“NWIRP”)’s Motion for Temporary Restraining Order, enjoining the Executive Office for Immigration Review (“EOIR”) from enforcing a “cease and desist” order that impaired NWIRP’s ability to provide legal assistance to thousands of immigrants per year (Dkt. 33). The Court’s nationwide TRO also prevented EOIR from targeting others for similar unconstitutional enforcement efforts.

This broad injunctive relief was, and remains, vitally necessary. EOIR cannot articulate *any* constitutionally permissible justification for its newfound insistence that NWIRP either commit in advance to full representation of *every* immigrant in removal proceedings—an impossibility—or refrain from providing them *any* legal assistance. EOIR’s cease-and-desist order will deprive thousands of unrepresented immigrants—including asylum seekers, unaccompanied children, and those in detention—of the chance to consult with a NWIRP attorney and receive critical assistance navigating the complex immigration system. If left unchecked, EOIR’s unconstitutional conduct will cause immediate and irreparable harm to NWIRP, its staff and volunteer attorneys, its clients, and countless other legal aid providers, volunteer lawyers, and unrepresented immigrants across the country. For the reasons identified previously (*see* Dkts. 2, 21) and those discussed below, the Court should convert the temporary restraining order into a preliminary injunction, allowing NWIRP and others to continue providing vital legal assistance to unrepresented immigrants while this lawsuit is pending.

II. FACTUAL BACKGROUND

A. The Vital Importance of Legal Assistance to Immigrants in Removal Proceedings

Removal proceedings have often been described as the second most complex legal system, following only the tax code. *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987); *see also Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (emphasizing the complexity of the immigration system and noting lawyers may be the only ones capable of navigating it). Removal proceedings are also fiercely adversarial, with a U.S. government-employed attorney advocating against the noncitizen in every proceeding. Despite the

1 complexity and adversarial nature of removal proceedings, and despite all that is at stake
 2 (including, *inter alia*, forced return to persecution and torture as well as permanent separation
 3 from family, home and employment), there is no right to appointed counsel for indigent persons
 4 in removal proceedings. *See* 8 U.S.C. 1229a(b)(4)(A). This is true for unaccompanied children,
 5 illiterate persons, and those in custody.

6 “Detainees who are represented by counsel prevail in their cases almost ten times more
 7 often than those who proceed *pro se*.” Allen Decl. Ex. U ¶ 18; Ex. II ¶ 4. Yet, between 2007
 8 and 2012, only 65 percent of non-detained individuals at immigration court in downtown Seattle
 9 were represented by an attorney; while only *eight* percent of detained individuals in Tacoma
 10 were represented. *Id.* Ex. II ¶ 4. Nationwide, for those detained while in removal proceedings,
 11 approximately 86% are forced to proceed without any legal representation.¹ Seattle ranks among
 12 the top 20 metropolitan areas with the largest populations of undocumented/unauthorized
 13 immigrants. *Id.* Against this backdrop, organizations like NWIRP provide crucial services to
 14 otherwise unrepresented immigrants navigating the byzantine immigration legal system.

15 **B. NWIRP Plays a Critical Role in Providing Legal Assistance to Immigrants**

16 Founded in 1984, NWIRP seeks to promote justice by defending and advancing the
 17 rights of immigrants through direct legal services, systematic advocacy, and community
 18 education. Barón Decl. ¶ 2. NWIRP is the primary nonprofit legal services provider for
 19 immigrants in removal proceedings in Washington State and for persons detained at the
 20 Northwest Detention Center in Tacoma. *Id.* NWIRP relies on grants and contributions to fund
 21 its operations and services. *Id.* NWIRP provides “Know Your Rights” (“KYR”) presentations,
 22 community workshops, and individual consultations to unrepresented individuals. *Id.* ¶ 3.
 23 NWIRP screens several thousand potential clients per year, and its staff attorneys provide direct
 24 representation in hundreds of immigration cases before EOIR. *Id.* NWIRP also organizes pro
 25 bono representation for more than 200 additional cases each year in removal proceedings. *Id.*

26 _____
 27 ¹ *See* Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court*,
 (Sept. 2016), at 5, available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/
 access_to_counsel_in_immigration_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf).

1 Full representation in removal proceedings entails the preparation and filing of required
2 procedural and substantive motions, applications and briefing for all defenses and forms of relief
3 for which the applicant is eligible and/or extensive documentation of key facts in the case,
4 including reports on country conditions, witness testimony, and evaluations by psychologists or
5 other medical professionals. *Id.* Removal proceedings also often involve multiple hearings over
6 the course of several years. *Id.* Due to time, cost, and other resource constraints, NWIRP cannot
7 provide full representation to every person who seeks out NWIRP’s assistance. *Id.* Therefore, to
8 meet the exigent need for legal assistance, NWIRP provides a range of limited services to
9 otherwise unrepresented immigrants. *Id.* These services include helping file motions to
10 terminate proceedings, change venue, and reopen old removal orders before EOIR. Dkt. 4 ¶ 5.
11 NWIRP also assists clients in preparing various forms seeking relief from removal, including
12 applications for asylum, family visas, cancellation of removal, special immigrant juvenile status,
13 and U & T visas for survivors of trafficking and violent crimes. *Id.*; Barón Decl. ¶ 4.

14 NWIRP’s limited legal services are critical to immigrants who cannot afford private
15 legal representation, especially unaccompanied children, detained persons, and those who are
16 illiterate or speak a rare language and therefore have difficulty accessing resources and preparing
17 their own filings. Dkt. 4 ¶ 9; Dkt. 3 ¶ 8. These services help pro se individuals navigate
18 complex immigration court procedures, file motions and applications with all information
19 necessary to preserve eligibility for relief, and understand their rights and options. *Id.* To ensure
20 accountability when providing these services, NWIRP provides written and oral notice to
21 individuals that it is not agreeing to represent them, and it explains to them the scope of the
22 services it will and will not provide. Dkt. 4 ¶ 10; Dkt. 3 ¶ 7.

23 **C. EOIR Threatens NWIRP with Disciplinary Sanctions for Providing Limited Legal**
24 **Assistance to Unrepresented Immigrants**

25 On December 18, 2008, EOIR published a rule of professional conduct governing
26 “practitioners who appear before [EOIR].” *See* Professional Conduct for Practitioners, 73 Fed.
27 Reg. 76,914 (Dec. 18, 2008) (the “Rule”), codified at 8 C.F.R. §§ 1001, 1003 & 1292. Among
other things, EOIR’s Rule establishes that an attorney “shall be subject to disciplinary sanctions”

1 if the attorney “[f]ails to submit a signed a completed Notice of Entry of Appearance ... when
 2 the [attorney] ... [h]as engaged in practice or preparation.” 8 C.F.R. § 1003.102(t)(1). The Rule
 3 further defines the terms “practice” and “preparation” as follows:

4 The term *practice* means the act or acts of any person appearing in any case,
 5 either in person or through the preparation or filing of any brief or other
 6 document, paper, application, or petition on behalf of another person or client
 before or with DHS, or any immigration judge, or the Board

7 The term *preparation*, constituting practice, means the study of the facts of a
 8 case and the applicable laws, coupled with the giving of advice and auxiliary
 activities, including the incidental preparation of papers

8 C.F.R. § 1001.1(i), (k).

9 When this Rule was adopted, NWIRP met with the local EOIR immigration court
 10 administrator to discuss the Rule’s impact on NWIRP’s services to pro se individuals. Barón
 11 Decl. ¶ 5. NWIRP agreed that it would notify the courts of its assistance with any pro se motion
 12 or brief by including a subscript or other clear indication that NWIRP had prepared or assisted in
 13 preparing the motion or application. *Id.* In the nine years since the Rule was adopted, the
 14 immigration courts have not raised any concerns to NWIRP about this practice. *Id.*

15 On April 13, 2017, NWIRP received a letter from Defendant Jennifer Barnes, EOIR’s
 16 Disciplinary Counsel, stating EOIR was aware that NWIRP had assisted at least two pro se
 17 applicants in filing motions without first filing notices of appearance. Dkt. 8-1. Defendant
 18 Barnes instructed NWIRP to “cease and desist from representing aliens unless and until the
 19 appropriate Notice of Entry of Appearance form is filed with each client that NWIRP
 20 represents,” threatening discipline if NWIRP failed to do so. *Id.* EOIR did not, however, allege
 21 NWIRP’s limited assistance to the two pro se individuals was in any way deficient. *Id.*

22 EOIR does not allow practitioners to enter limited notices of appearance to handle
 23 discrete motions or issues in a removal case.² Dkt. 4 ¶ 6; Dkt. 3 ¶ 7. Any attorney who appears
 24 consents to fully represent the immigrant in the proceeding until its conclusion. The attorney
 25 cannot withdraw from representation without leave of the immigration court, and leave is granted
 26

27 ² The one exception allows for a limited appearance for the purpose of representing a respondent in a custody proceeding. *See* Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59,500 (Oct. 1, 2015).

1 only in exceptional circumstances. *See* Imm. Ct. Prac. Man. R. 2.3(d) (“Once an attorney has
 2 made an appearance, that attorney has an obligation to continue representation until such time as
 3 a motion to withdraw or substitute counsel has been granted by the Immigration Court.”);³ *see*
 4 *also* Dkt. 4 ¶ 9. NWIRP lacks the resources to provide full representation of each immigrant to
 5 whom it currently provides limited services. So, in effect, EOIR’s new interpretation of this
 6 Rule will force NWIRP to discontinue providing limited legal services to thousands of
 7 individuals in removal proceedings. Dkt. 4 ¶ 6; Dkt. 3 ¶ 14.

8 EOIR’s interpretation of the Rule compels NWIRP attorneys to accept a scope of
 9 representation beyond what they and their clients have agreed to. EOIR’s letter also casts doubt
 10 on whether NWIRP can initially consult with pro se persons or screen cases for referral to
 11 volunteer attorneys. This uncertainty means NWIRP must now choose to either abandon most of
 12 the services it provides to immigrants in removal proceedings or to continue to provide those
 13 services under the imminent threat of disciplinary sanctions. EOIR’s letter has a considerable
 14 chilling effect on NWIRP’s activities and the activities of other legal aid providers and volunteer
 15 lawyers, impairing their ability to provide legal advice to and advocacy for immigrants.

16 III. ARGUMENT

17 To obtain a preliminary injunction, NWIRP must satisfy the same criteria it satisfied for
 18 the TRO: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm if relief is
 19 denied; (3) the balance of equities tips in the movant’s favor; and (4) the public interest favors
 20 granting relief. *See Winter v. Nat’l Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit
 21 uses a balancing or “sliding scale” approach: where the balance of equities weighs strongly in
 22 favor of the moving party, it may prevail if its claims raise serious legal questions and otherwise
 23 meet the remaining factors. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–
 24 35 (9th Cir. 2011).

25 A. Plaintiffs Are Likely to Succeed on the Merits

26 NWIRP is likely to succeed on the merits of its claims because EOIR’s Rule, and its
 27

³ https://www.justice.gov/sites/default/files/pages/attachments/2016/12/02/practice_manual.pdf#page=26.

1 application to NWIRP, violates the First and Tenth Amendments. As it did when it entered the
2 TRO, the Court should again find that NWIRP is likely to succeed on the merits of its claims.

3 **1. EOIR’s Compulsory-Representation Rule Violates the First Amendment**
4 **Because It Unduly Burdens Plaintiffs’ Speech and Petitioning Rights**

5 The Rule violates NWIRP’s First Amendment right to advocate on behalf of
6 immigrants, including the right to speak and associate through the provision of nonprofit legal
7 services, and the right to petition the government for redress. NWIRP brings its challenge on
8 both an as-applied basis, to the extent EOIR seeks to enforce the rule against NWIRP through its
9 cease-and-desist letter, *and* on a facial basis, as the Rule is unconstitutional on its face. The Rule
10 cannot survive the applicable strict scrutiny standard, much less the lower, intermediate scrutiny
11 standard, because the Rule is not narrowly tailored to achieve EOIR’s purported interest.

12 **a. As a Non-Profit Legal Advocate, NWIRP Has a First Amendment**
13 **Right to Advise Others of Their Legal Rights**

14 NWIRP’s right to assist clients and prospective clients in removal proceedings is
15 protected by the First Amendment. “Attorneys have rights to speak freely subject only to the
16 government regulating with ‘narrow specificity.’” *Conant v. Walters*, 309 F.3d 629, 637 (9th
17 Cir. 2002) (citing *NAACP v. Button*, 371 U.S. 415, 433, 438–39 (1963)). “The Supreme Court
18 has repeatedly emphasized that counsel have a [First Amendment] right to inform individuals of
19 their rights ... when they do so as an exercise of political speech without expectation of
20 remuneration.” *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984), *aff’d*, 472 U.S. 846 (1985).

21 The First Amendment accords heightened free speech guarantees to Plaintiffs and
22 similarly situated persons who “advocate [for] lawful means of vindicating legal rights.”
23 *NAACP v. Button*, 371 U.S. 415, 429, 437 (1963). In *Button*, the Supreme Court upheld the
24 NAACP’s right to provide nonprofit legal services—as Plaintiffs do here—as “a form of political
25 expression” by “serving to vindicate the rights of members” of a particular community. *Id.* at
26 429, 431 (invalidating solicitation law prohibiting attorneys from advising others their legal
27 rights had been infringed and referring them to an attorney). Recognizing this form of legal
advice and advocacy was protected expression, the Court remarked that the First Amendment

1 “protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.” *Id.* at
2 429, 437. Thus, although EOIR asserts the Rule regulates lawyer conduct, EOIR “may not,
3 under the guise of prohibiting professional misconduct, ignore constitutional rights.” *Id.* at 439.

4 Since *Button*, the Supreme Court has continued to accord broad First Amendment
5 protections to lawyers who advise others of their legal rights. For example, in *In re Primus*, 436
6 U.S. 412 (1978), the Court affirmed South Carolina could “not abridge unnecessarily the
7 associational freedom of nonprofit organizations, or their members,” through broad lawyer
8 disciplinary rules. *Id.* at 439; *see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar*
9 *Ass’n*, 389 U.S. 217, 221 (1967) (*Button*’s holding is not “narrowly limited” to “litigation that
10 can be characterized as a form of political expression”). In 2001, the Court affirmed the
11 government cannot “prohibit the analysis of certain legal issues” without violating the First
12 Amendment. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (“*LSC*”). The *Button*,
13 *Primus*, and *LSC* trio of cases confirms that lawyers—and, in particular, non-profit legal
14 organizations—have an unfettered First Amendment right to advise clients and prospective
15 clients about their legal rights.

16 **b. EOIR’s Rule Is a Restriction on Speech, Not Conduct**

17 EOIR claims its Rule regulates conduct, not speech, because it applies to activities like
18 “practice” and “preparation.” As a threshold matter, EOIR’s argument is without merit.
19 “Preparation” includes, and in fact requires, the giving of “advice.” 8 C.F.R. § 1001.1(k). To
20 determine whether NWIRP engaged in “preparation,” EOIR must determine whether NWIRP
21 gave “advice”—which it can do only by examining the content of NWIRP’s speech.

22 Moreover, EOIR’s position contravenes Supreme Court precedent. A restriction on a
23 lawyer giving legal advice is a regulation of speech, not conduct. *See Holder v. Humanitarian*
24 *Law Project*, 561 U.S. 1, 25 (2010) (“*HLP*”) (rejecting as “extreme” the government’s argument
25 that a statute prohibiting lawyers from providing “expert advice or assistance” to terrorist
26 organizations regulated conduct rather than speech). As the Court explained in *HLP*, while a law
27 restricting the giving of legal advice “may be described as directed at conduct ... as applied to

1 plaintiffs the conduct triggering coverage under the statute consists of communicating a
 2 message.” *Id.* at 28 (upholding restriction under strict scrutiny because of national security
 3 implications). “[L]abeling certain verbal or written communications ‘speech’ and others
 4 ‘conduct’ is unprincipled and susceptible to manipulation.” *Wollschlaeger v. Florida*, 848 F.3d
 5 1293, 1308 (11th Cir. 2017) (quoting *King v. New Jersey*, 767 F.3d 216 (3d Cir. 2014)).

6 Nor can EOIR avoid First Amendment scrutiny by characterizing its Rule as a regulation
 7 of the legal profession. The Supreme Court routinely applies “heightened scrutiny to regulations
 8 restricting the speech of professionals.” *Wollschlaeger*, 848 F.3d at 1310. “Being a member of a
 9 regulated profession does not, as the government suggests, result in a surrender of First
 10 Amendment rights.” *Conant*, 309 F.3d at 637 (citing *Button*, 371 U.S. at 433). EOIR’s primary
 11 justification for the Rule is its purported need to regulate attorney conduct. But, “it is no answer
 12 to the constitutional claims ... to say that the purpose of these regulations was merely to insure
 13 high professional standards and not to curtail free expression.” *Button*, 371 U.S. at 438–39.

14 EOIR’s compulsory-representation rule infringes the same First Amendment speech
 15 rights recognized by the Supreme Court in *Button*, *Primus*, *LSC*, and *HLP*. The First
 16 Amendment “protects vigorous advocacy, certainly of lawful ends, against governmental
 17 intrusion,” particularly when offered on a pro bono basis on behalf of an “unpopular minority.”
 18 *Button*, 371 U.S. at 429, 434, 441. NWIRP exists to advocate for the rights of an “unpopular
 19 minority”—immigrants in removal proceedings. And like the NAACP and ACLU, NWIRP’s
 20 services to individual clients are part of the organization’s broader political efforts on behalf of
 21 immigrants’ rights, which implicate free speech, free association, and petitioning rights.⁴
 22 Moreover, by constraining NWIRP’s ability to advise persons in agency proceedings, the Rule
 23 limits NWIRP’s right to provide “vigorous advocacy ... against governmental intrusion”—which
 24 is “even more problematic because ... the client is unlikely to find other counsel.” *LSC*, 531 U.S.

25
 26
 27 ⁴ See *Button*, 371 U.S. at 428–29 (“[T]he activities of the NAACP, its affiliates and legal staff shown on this
 record are modes of expression and association protected by the First and Fourteenth Amendments”); *id.* at 430
 (“[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a
 minority to petition for redress of grievances.”).

1 at 546. As a result, EOIR’s Rule is subject to the “exacting [or strict] scrutiny applicable to
2 limitations on core First Amendment rights.” *Primus*, 436 U.S. at 432.

3 **c. EOIR’s Rule is Subject to Strict Scrutiny Because It Imposes a**
4 **Content-Based Restriction and Targets Political Speech**

5 EOIR’s Rule is subject to strict scrutiny for two separate reasons.

6 *First*, EOIR’s Rule is a content-based speech restriction. A content-based restriction is
7 one that “cannot be justified without reference to the content of the regulated speech.” *Reed v.*
8 *Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). “[A] speech regulation targeted at specific
9 subject matter is content based even if it does not discriminate among viewpoints within that
10 subject matter.” *Id.* at 2229–30. Content-based speech restrictions are presumptively
11 unconstitutional and subject to strict scrutiny. *Id.* at 2226. This is particularly true when the
12 speech consists of legal advice given by an attorney. *See HLP*, 561 U.S. at 27. The Rule singles
13 out a certain form of speech (legal advice) on a specific subject matter (immigration law)
14 directed at unrepresented immigrants in removal proceedings, and curtails it. If NWIRP intends
15 to speak to unrepresented immigrants who seek legal advice, and wants to do so without
16 triggering the compulsory-representation rule, “whether [it] may do so ... depends on what [it]
17 say[s].” *HLP*, 561 U.S. at 27 (2010). This is the essence of an impermissible content restriction.

18 *Second*, strict scrutiny is warranted because the Rule targets political speech on issues of
19 public concern. The Supreme Court “has frequently reaffirmed that speech on public issues
20 occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special
21 protection.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)
22 (internal quotations omitted). This special protection extends to speech “relating to any matter of
23 political, social, or other concern to the community” *Snyder v. Phelps*, 562 U.S. 443, 453
24 (2011) (citations and quotations omitted). Informing immigrants of their legal rights without
25 expecting compensation is “an exercise of political speech.” *See Jean*, 727 F.2d at 983. And
26 when a “law burdens core political speech,” strict scrutiny unquestionably applies. *McIntyre v.*
27 *Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

d. The Rule Cannot Survive Strict Scrutiny

“To survive strict scrutiny ... a statute must: (1) serve compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest.” *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)). The Rule fails every element of that test.

(1) EOIR Cannot Articulate a Compelling Interest in Enforcing the Compulsory-Representation Rule

Because NWIRP asserts both facial and as-applied challenges to the Rule, EOIR must articulate both a compelling interest the Rule generally advances *and* a compelling interest EOIR has in applying the Rule to NWIRP. *See Primus*, 436 U.S. at 434–35 (solicitation rule unconstitutional as applied to lawyer “unless her activity in fact involved the type of misconduct” the rule was intended to prevent; no evidence that misconduct “actually occurred” in her case). EOIR asserts various justifications for its Rule, but none of those justifications are served by the Rule in general or by enforcing the Rule against NWIRP:

First, in enacting the Rule, EOIR explained it wanted “to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship.” 73 Fed. Reg. 76,914; Allen Decl. Ex. A 42:14–16. EOIR required practitioners to enter a notice of appearance when they represent an individual in a proceeding so that it could ensure that “[a]ny practitioner who accepts responsibility for rendering immigration-related services to a client [will] be held accountable for his or her own actions” 73 Fed. Reg. 76, 914. But the Rule is not an identification requirement, and it does nothing to advance professional conduct or increase accountability or transparency; instead, it compels attorneys to undertake full representation, and it eliminates their ability to provide limited-scope representation. EOIR cannot articulate any compelling interest in imposing this all-or-nothing approach.

Moreover, as applied to NWIRP, EOIR admits “the record does not reflect that NWIRP has engaged in any ineffective assistance or anything like that.” Allen Decl. Ex. A 43:14–16. EOIR does not allege misconduct or a need to discipline NWIRP or its attorneys. *Id.* 39:19–20;

1 40:6–15 (EOIR has no information NWIRP was deficient, filed false statements, or engaged in
 2 misconduct). The cease-and-desist letter does not suggest any deficiencies in NWIRP’s legal
 3 services. *See* Dkt 8-1. Absent evidence that misconduct has “actually occurred,” EOIR has no
 4 compelling interest in applying its Rule to NWIRP. *Primus*, 436 U.S. at 435.

5 **Second**, EOIR has suggested the Rule helps to prevent “notario fraud”⁵—the
 6 unauthorized practice of law by “immigration consultants” who charge immigrants and deliver
 7 substandard services (or no services at all). But, again, EOIR’s purported interest in holding
 8 attorneys accountable for misconduct and fraud is not served by barring nonprofit legal
 9 organizations (especially those, like NWIRP, that have been accredited by EOIR and placed on
 10 its pro bono referral lists, *see* Dkt. 3 ¶ 4) from providing limited legal services, especially when
 11 those organizations identify themselves on the papers they assist in preparing.

12 As applied to NWIRP, EOIR’s justification makes even less sense. NWIRP does not
 13 charge fees for *pro se* services to persons in removal proceedings, so any purported interest in
 14 preventing notario fraud is inapplicable. *See* Barón Decl. ¶ 4. In fact, “NWIRP is a critical
 15 partner in helping the State [of Washington] prevent and combat notario fraud,” as it is well-
 16 positioned to learn about and report such abuse given its role as a trusted legal aid provider. Dkt.
 17 18-1 at 7. Ironically, a reduction in NWIRP’s ability to provide limited legal services would
 18 *undermine* the State’s interest in combatting notario fraud. *Id.*; *see also* Allen Decl. Ex. R ¶ 9
 19 (without limited legal services, “[t]he penniless aliens we assist would turn to so-called *notarios*
 20 or, more likely, give up on the asylum process altogether.”); *Id.* Ex. G ¶ 17 (compulsory
 21 representation does not resolve the issue of full representation for all, but instead denies those
 22 who need it “crucial access to basic legal advice.”).

23 **Third**, EOIR suggests it has an interest in preventing the practice of “ghostwriting.” *Id.*
 24 Ex. A 35:17–36:19. A compulsory-representation rule (as opposed to an identification
 25 requirement) does not advance this purported interest. This interest is also not compelling—in
 26

27 ⁵ *See* Am. Bar Ass’n, “Fight Notario Fraud,” http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html (last accessed June 8, 2017).

1 fact, it has been squarely rejected. Limited representation, and specifically the practice of
 2 ghostwriting, “has been endorsed by the [ABA] and jurisdictions nationwide, and can be
 3 accomplished in a manner that maximizes the availability of legal advice (as required by the First
 4 Amendment) to people who sorely need it, while preserving attorney oversight.” Dkt. 20-1, at
 5 11 (and authorities cited therein). Washington courts, for example, “expressly authorize limited
 6 representation to increase the availability of legal services to clients of limited financial means.”
 7 *Id.* (internal citation and quotation omitted).

8 Unlike an identification rule, or rules that impose minimum standards of attorney
 9 competence, the only practical effect of EOIR’s Rule is to eliminate the provision of limited
 10 legal services and impose an all-or-nothing framework of attorney representation in agency
 11 proceedings. EOIR cannot articulate any compelling interest in imposing such a policy on
 12 NWIRP or similarly situated legal aid providers.

13 **(2) The Rule Is Not Narrowly Tailored to Achieve EOIR’s Stated**
 14 **Purpose, Nor Is It the Least Restrictive Means of Doing So**

15 Even if EOIR’s interests were sufficiently compelling, the Rule is not narrowly tailored
 16 to achieve those interests: “strict scrutiny requires a direct rather than approximate fit of means
 17 to ends.” *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1077 (9th Cir. 1999)
 18 (internal quotation marks omitted). The Rule also fails to satisfy the least-restrictive-means test
 19 because it “effectively suppresses a large amount of [constitutionally-protected] speech ... [when]
 20 less restrictive alternatives would be at least as effective in achieving” its purported goal.
 21 *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (quoting *Reno v. ACLU*, 521 U.S. 844, 874
 22 (1997)). “[T]he burden is on the Government to prove that the proposed alternatives will not be
 23 as effective as the challenged statute.” *Id.* That burden is “not merely to show that a proposed
 24 less restrictive alternative has some flaws; its burden is to show that it is less effective.” *Id.* at
 25 669. EOIR cannot satisfy that burden.

26 **First**, the Rule imposes an all-or-nothing paradigm that is not tied to EOIR’s proffered
 27 interest in reducing either attorney misconduct or notario fraud. If an attorney enters an
 appearance, given the difficulty of later withdrawing, she must be prepared to commit to

1 represent the client for the duration of the proceeding. If EOIR wants to hold legal providers
 2 accountable, EOIR could have those providers identify themselves on the filings they prepare—
 3 *which NWIRP already does*. If EOIR seeks to combat notario fraud, eliminating NWIRP’s
 4 ability to provide limited low- or no-cost legal services achieves precisely the opposite: it will
 5 drive individuals to notarios, who will become the only option available. *See* Dkt. 18-1 at 5-6.

6 **Second**, the Rule triggers an appearance requirement based on preliminary lawyer-client
 7 communications that do not implicate EOIR’s standards of professional conduct. For instance,
 8 information exchanged during an individual screening could be construed as “advice,” and
 9 documenting it might be deemed an “auxiliary activity.” Providing legal advice by identifying
 10 avenues for relief and forms to complete, informing clients about deadlines, and advising clients
 11 how to present their case to the court could also run afoul of the Rule. *See* Barón Decl. ¶ 4.
 12 Likewise, NWIRP’s community workshops and KYR presentations may also be subject to the
 13 Rule depending on what NWIRP’s attorneys say during those events. NWIRP plainly does not
 14 intend to form an attorney-client relationship with every person who attends a community event,
 15 but NWIRP attorneys may inevitably provide “advice” and engage in “auxiliary activity,”
 16 especially if they provide assistance, as they usually do, by answering questions after the
 17 presentation and directing individuals to particular forms of relief.

18 **Third**, the Rule is impermissibly vague and overbroad. “The vagueness of [a content-
 19 based restriction] raises special First Amendment concerns because of its obvious chilling effect
 20 on free speech.” *Reno*, 521 U.S. at 871–72. Likewise, any regulation that impacts speech may
 21 be invalidated as overbroad “in cases where the [regulation] sweeps too broadly, penalizing a
 22 substantial amount of speech that is constitutionally protected.” *Forsyth Cnty., Ga. v. Nationalist*
 23 *Movement*, 505 U.S. 123, 130 (1992). The Court in *Button* described the extraordinary threat
 24 created by a vague and overbroad restriction on attorney speech and advocacy:

25 The objectionable quality of vagueness and overbreadth [depends] ... upon the
 26 danger of tolerating, in the area of First Amendment freedoms, the existence of a
 27 penal statute susceptible of sweeping and improper application. These freedoms
 are delicate and vulnerable, as well as supremely precious in our society. The
 threat of sanctions may deter their exercise almost as potently as the actual
 application of sanctions. Because First Amendment freedoms need breathing

1 space to survive, government may regulate in the area only with narrow
2 specificity.

3 *Button*, 371 U.S. at 432–33. EOIR concedes that under the Rule, NWIRP cannot “engage in acts
4 that constitute providing advice and providing actual assistance that is to be presented before the
5 immigration court.” Allen Decl. Ex. A 34:22-35:3. Notably, EOIR cannot clearly define the
6 parameters of “practice,” “preparation,” or “auxiliary activities” that would subject an attorney to
7 discipline. *Id.* 52:23-53:9 (“the moment your actions have advice and constitute auxiliary
8 activities ... [an] appearance is required”); *see also, e.g., id.* 57:14–22. The Rule’s definition of
9 “preparation” is similarly vague: it requires the giving of “advice” and “auxiliary activities,” but
10 neither of these terms is defined. Some *or all* of the above examples of services NWIRP
11 provides could fall within the definition. Tellingly, EOIR could not tell the Court whether an
12 attorney could help someone fill out a form, *id.* 58:1-59:8, or whether answering a question at a
13 legal aid clinic required the attorney to file an appearance, *id.* 32:18-33:24. The Rule’s
14 vagueness is highlighted by EOIR’s reliance on lawyers’ “knowledge and experience of
15 distinguishing between providing legal advice and providing legal information” to define the
16 proscribed conduct. *Id.* 59:13-19. An ambiguous law that leaves unclear whether certain
17 attorney speech is permissible cannot be tolerated. *Button*, 371 U.S. at 432.

18 The Rule is also overbroad because it “sweeps too broadly” and burdens constitutionally
19 protected speech. *Forsyth Cnty.*, 505 U.S. at 130. NWIRP’s community workshops and KYR
20 presentations are two obvious examples. “[W]here a professional is engaged in public dialogue,
21 First Amendment protection is at its greatest.” *Pickup v. Brown*, 740 F.3d 1208, 1227–28 (9th
22 Cir. 2014). “The right of free speech, the right to teach and the right of assembly are ...
23 fundamental rights.” *McIntyre*, 514 U.S. at 336 n.1 (1995). The Rule will certainly burden, if
24 not curtail, NWIRP’s ability to engage in these protected activities.

25 In sum, the Rule is not narrowly tailored to achieve EOIR’s interest, nor is it the least
26 restrictive means of doing so. It therefore fails strict scrutiny.
27

e. **The Rule Cannot Survive Intermediate Scrutiny**

Even if the Court applies intermediate scrutiny, the Rule cannot survive because it is not “narrowly tailored to serve a significant governmental interest and ... [does not] leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The lack of any legitimate interest or tailoring is discussed above, and the absence of “ample alternative channels” is apparent. “NWIRP is the primary non-profit legal services provider for immigrants in removal proceedings in Washington and for detained person in Tacoma,” Dkt. 18-1 at 2, and in many cases, there are no alternative providers for these vulnerable individuals. NWIRP’s work will be sharply curtailed under EOIR’s new all-or-nothing framework. Many immigrants who receive limited legal services will be deprived of those services with no available alternative. The Rule cannot survive intermediate scrutiny.

2. **EOIR’s Compulsory-Representation Rule Violates the Tenth Amendment by Attempting to Broadly Regulate Lawyer Conduct**

The Tenth Amendment “is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution[:] ... that what is not conferred, is withheld, and belongs to the state authorities.” *New York v. United States*, 505 U.S. 144, 156 (1992). NWIRP has standing to bring Tenth Amendment claims because its “injury [stems] from governmental action taken in excess of the authority that federalism defines.” *Bond v. United States*, 564 U.S. 211, 220, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

a. **The Tenth Amendment Vests States with the Exclusive Right to Regulate Lawyer Conduct Outside of Federal Judicial or Agency Proceedings**

The Tenth Amendment unequivocally vests “the right to control and regulate the granting of license to practice law” in the States, not the federal government. *Bradwell v. People of State of Ill.*, 83 U.S. (16 Wall.) 130, 139 (1872). “Since the founding of the Republic, the licensing and regulation of lawyers has been left *exclusively* to the States and the District of Columbia within their respective jurisdictions.” *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (emphasis added). “The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have

1 historically been ‘officers of the courts.’” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460
2 (1978) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). To that end, the “States
3 prescribe the qualifications for admission to practice and the standards of professional conduct.
4 They also are responsible for the discipline of lawyers.” *Leis*, 439 U.S. at 700–01.

5 **b. The Tenth Amendment Limits Federal Agencies’ Ability to Regulate**
6 **the Practice of Law**

7 The Tenth Amendment’s limitations on federal power are strongly implicated whenever
8 a federal agency seeks to regulate the practice of law. *See Sperry v. State of Fla.*, 373 U.S. 379
9 (1963). An agency may regulate persons practicing before it because the agency has an interest
10 in the integrity of its administrative processes. *See Touche Ross v. SEC*, 609 F.2d 570, 581(2d
11 Cir. 1979). However, an agency may not regulate for other purposes or substitute its judgment
12 for that of state licensing agencies in matters that are outside the scope of its expertise. Two
13 factors argue for a narrow definition of permissible agency regulation. First, “agencies bring a
14 mixture of responsibilities and motivations to the discipline process.” Arthur Best, *Shortcomings*
15 *of Administrative Agency Lawyer Discipline*, 31 Emory L.J. 535, 557–58 (1982) (“Best”). They
16 are often not neutral decision-makers. *Id.*, *see also* Public Comment Letter, 2006 WL 4774818
17 at *5 (IRS 2006) (“The relationship between representatives of the Treasury or the IRS and the
18 practitioners whom the Secretary is authorized to regulate is sometimes adversarial; and the
19 Secretary’s authority to dictate how practitioners must conduct themselves might potentially be
20 used to disadvantage unfairly the taxpayers whom those practitioners represent.”). Moreover,
21 the agency’s desire for certain outcomes may lead they agency to improperly impose substantive
22 obligations on attorneys that are disguised as lawyer discipline. *Best* at 536.

23 Second, agencies generally lack expertise in lawyer discipline. Ethics rules are very
24 different from most agencies’ ordinary work. *Id.* at 558; *Kivitz v. SEC*, 475 F.2d 956, 961–62
25 (1973). While the agency may regulate a lawyer’s conduct in a hearing, an agency trying to
26 regulate client counseling “ought to have to justify that scope of attention by demonstrating a
27 clear need for such regulation, as well as by demonstrating its own competence to carry it out.”

1 *Best* at 564. The need for the regulation when the conduct is already regulated by the state, as is
 2 the case here, is especially questionable. *Id.* at 563-64.

3 **c. EOIR’s Rule Advances an Impermissible Purpose and Encroaches**
 4 **Upon the States’ Authority to Regulate Lawyer Conduct**

5 The purpose of EOIR’s “notice of appearance” requirement goes well beyond protecting
 6 the integrity of its own administrative process: it encompasses conduct outside of agency
 7 hearings, and extends to legal advice and assistance provided in confidential consultations. A
 8 lawyer⁶ is subject to discipline by EOIR for failing to enter a notice of appearance when
 9 “engag[ing] in practice *or* preparation.” 8 C.F.R. § 1003.102(t) (emphasis added). Because the
 10 terms “practice” and “preparation” are broad enough to encompass nearly any activity, when
 11 coupled with the difficulty of a lawyer later withdrawing from representation, the Rule
 12 effectively restricts lawyer communication and thereby limits the number of persons able to
 13 obtain *some* form of legal advice. This does not ensure the integrity of agency proceedings.

14 EOIR’s neutrality and competence in this area is questionable, which only further
 15 underscores the need to limit the scope of lawyer conduct it may regulate. As an executive
 16 administrative agency within an Administration that has announced its intent to deport as many
 17 people as possible, as fast as possible, EOIR finds itself in a directly adversarial position to
 18 NWIRP. The Rule will result in fewer immigrants— asylum seekers, unaccompanied children,
 19 detainees, and individuals seeking to reunite with family, among others—receiving the legal
 20 advice they need to competently represent themselves, which furthers the Administration’s goal.
 21 In contrast, the agency cannot show that limiting the number of immigrants who receive legal
 22 advice will improve the competency of attorneys or enhance the agency’s disciplinary efforts.
 23 Some attorneys may provide full representation but provide it poorly; others may provide limited
 24 representation and do it well. The Rule will not change this. Indeed, the Rule will have no
 25 impact on unlicensed notaries (one of the primary disciplinary targets), as they have never been
 26 in a position to enter an appearance with respect to their unlicensed practice of law. It is unlikely

27 ⁶ EOIR further extends its disciplinary grasp to recognized organizations whenever such sanctions are “in the public interest.” § 1003.110(b) (containing a nonexhaustive list of grounds for organizational discipline, including “fail[ure] to adequately supervise accredited representatives”).

1 that the Rule could ever achieve anything beyond minimal and selective enforcement, all while
2 depriving immigrants of critical legal advice.

3 Fortunately, every state, including Washington, has an agency which investigates and
4 disciplines lawyers for misconduct, including lack of competency, and takes disciplinary
5 referrals from courts, state and federal agencies, and individuals. Nothing prevents EOIR from
6 making such a referral. State courts and bar associations are far better positioned to neutrally
7 and competently evaluate the conduct of and, where necessary, discipline their attorneys.

8 **d. EOIR’s Rule Conflicts with the Duties Imposed on Attorneys under**
9 **State Law**

10 Washington and other states following the Model Rules of Professional Responsibility
11 have adopted a rule regarding limited representation that directly contravenes EOIR’s Rule.
12 Washington Rule of Professional Conduct 1.2 specifies that “lawyer may limit the scope of the
13 representation if the limitation is reasonable under the circumstances and the client gives
14 informed consent.” WRPC 1.2(c). As the comments to Rule 1.2 reflect, “the client [has] the
15 ultimate authority to determine the purposes to be served by legal representation,” WRPC 1.2,
16 cmt. [1], and there are a variety of reasons why limited representation may be necessary or
17 desirable, including the client’s limited objectives. *Id.*, cmt. [6]. Moreover, limited
18 representation may, in some circumstances, serve the best interests of both the lawyer and the
19 client, if “a client’s objective is limited to securing general information about the law the client
20 needs in order to handle a common and typically uncomplicated legal problem, the lawyer and
21 client may agree that the lawyer’s services will be limited....” *Id.*, cmt. [7]. EOIR’s Rule,
22 however, disregards Washington’s decision to allow limited representation, thus violating
23 Washington’s sovereign right to regulate attorney conduct.

24 The compulsory-representation rule also conflicts with the attorney’s duty to keep client
25 confidences. When a NWIRP lawyer consults with a client about *future* (or even *potential*)
26 immigration proceedings—be it an asylum application, possible removal, or an adjustment of
27 status—the lawyer’s duty to file a notice of appearance is triggered, even though the client may
not want to disclose the fact they have received legal advice. Lawyers may not, however,

1 “reveal information relating to the representation of a client.” WRPC 1.6(a). It is “a
 2 fundamental principle in the client-lawyer relationship is that, in the absence of the client’s
 3 informed consent, the lawyer must not reveal information relating to the representation.” RPC
 4 1.6, cmt [2]. This ironclad guarantee of confidentiality “applies not only to matters
 5 communicated in confidence by the client but also to all information relating to the
 6 representation, whatever its source.” *Id.*, cmt [3]. Washington has adopted additional comments
 7 to Rule 1.6, reflecting the State’s *expansion* of a lawyer’s duty of confidentiality beyond that
 8 imposed under the Model Rule:

9 The phrase “information relating to the representation” should be
 10 interpreted broadly. The “information” protected by this Rule
 11 includes, but is not necessarily limited to, confidences and secrets.
 12 “Confidence” refers to information protected by the attorney client
 13 privilege under applicable law, and “secret” refers to other
 14 information gained in the professional relationship that the client
 15 has requested be held inviolate or the disclosure of which would be
 16 embarrassing or would be likely to be detrimental to the client.

17 *Id.*, cmt. [21].

18 The challenged regulations eviscerate this duty of confidentiality and leave NWIRP
 19 attorneys with an impossible choice: disclose to the government the fact that a client has
 20 obtained confidential legal advice by filing a notice of appearance, or refuse to appear, thereby
 21 risking disciplinary sanctions. The Rule’s obvious conflict with attorney duties and rights
 22 imposed by state law further shows why the Rule violates the Tenth Amendment.

23 **B. NWIRP Will Suffer Imminent and Irreparable Harm Absent an Injunction**

24 Standing alone, EOIR’s violation of NWIRP’s First and Tenth Amendment rights
 25 “unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th
 26 Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The “loss of First Amendment
 27 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for the
 purposes of the issuance of a preliminary injunction.” *Elrod*, 427 U.S. at 373; *see also San*
Diego Comm. Against Registration & the Draft (Card) v. Governing Bd. of Grossmont Union
High Sch. Dist., 790 F.2d 1471, 1473 (9th Cir. 1986) (“[t]he loss of First Amendment freedoms
 ... [as] [t]he timeliness of political speech is particularly important.”). “Where a plaintiff alleges

1 injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may
 2 be presumed.” *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d
 3 Cir. 2003). On these grounds alone, NWIRP establishes the requisite harm.

4 Moreover, NWIRP’s ability to advance the rights of immigrants in removal proceedings
 5 is severely impacted. Dkt. 4 ¶ 11; Dkt. 3 ¶ 15. For example, the Rule prevents NWIRP from:

- 6 • Interviewing asylum seekers about the harm they suffered in their home country;
 7 advising them of their eligibility for asylum, withholding of removal, or relief under
 8 CAT; explaining which forms they must complete and why it is critical to include
 9 certain facts in those forms; and providing evidence of country conditions that the
 10 individual would not otherwise know to research or be able to access. *Compare* Dkt 14-2
 11 at 6–7 (attorneys may only assist immigrants in obtaining those documents that the client
 12 has “independently determined” are “necessary for their immigration case,” and, in
 13 assisting with forms, may not “provide advice on how to answer a question”), *with, e.g.*,
 14 Dkt. 3 at ¶ 8 (individuals who have “limited education or knowledge of English”), and
 15 *id.* at ¶ 9 (individuals who are “illiterate or speak a rare language”).⁷
- 16 • Reviewing an individual’s notice to appear (charging document) and other documents,
 17 advising them as to their grounds of removability and options of relief, and preparing
 18 corresponding motions or applications for relief. Dkt. 1 at ¶ 3.21(g); Dkt. 4 at ¶ 8
 19 (explaining that NWIRP cannot enter an appearance for removal proceedings in another
 20 state); *id.* at ¶ 16 (citing an example of an individual who needed such assistance).
- 21 • Interviewing an individual about their criminal history and charges of removability,
 22 researching whether a certain conviction constitutes a ground of removability, and
 23 advising how to respond to the factual allegations and charges of removability; helping
 24 draft a motion to terminate proceedings or providing them with already-prepared briefs
 25 on whether certain convictions constitute removable offenses. Dkt. 1 at ¶ 3.21(f); Ex. 3
 26 at ¶ 11 (noting “complex and evolving” nature of such legal analysis).
- 27 • Reviewing the facts of an individual’s prior removal case, advising them of grounds to
 re-open removal proceedings, and helping draft and file a motion to reopen, as expressly
 precluded by the cease-and-desist letter. Dkt. 1 at ¶ 3.21(h); Dkt. 8-1 at 1–2; Dkt. 3 ¶ 10
 (discussing importance of pro se assistance for motions to reopen).

21 Prior to the TRO, in only a two week period, NWIRP was unable to help four non-
 22 detained asylum seekers fill out or physically submit applications in order to meet a statutory
 23 deadline. Dkt. 4 ¶ 16; *see* Compl. ¶ 3.21(d). NWIRP also could not help another non-detained
 24 individual file a motion to change venue without entering an appearance. Dkt. 4 ¶ 9. Every
 25 single day until the Court entered the TRO, NWIRP was forced to refuse to provide limited legal
 26 services to unrepresented persons detained at the NWDC. Barón Decl. ¶ 8; Dkt. 3 ¶ 14.

⁷ This is particularly important for individuals who are facing a one-year deadline, Dkt. 4 at ¶ 7, 8, 12, and for
 27 detained individuals, whose only alternative is to ask for help from a fellow detainee. Dkt. 3 at ¶ 9.

1 NWIRP is also harmed by the fact that volunteer attorneys will no longer be able to take
 2 cases that help NWIRP serve more clients and further its mission. *See* Allen Decl. Exs. V-HH
 3 (detailing likelihood law firms’ pro bono services would cease if the Rule prohibited limited
 4 scope representation). In short, the Rule has a profound and adverse impact on NWIRP’s ability
 5 to carry out its mission.

6 Finally, EOIR’s prohibition against limited pro se assistance translates into irreparable
 7 harm for hundreds of unrepresented individuals in proceedings before the Seattle and Tacoma
 8 immigration courts. *See* Dkt. 4 ¶¶ 12-15; Dkt. 3 ¶¶ 9-11. NWIRP is entitled to assert—and the
 9 court is entitled to rely on—the harm caused to these individuals for purposes of a preliminary
 10 injunction.⁸ *See e.g. Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Craig v. Boren*, 429 U.S. 190
 11 (1976); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510
 12 (1925). The harm is particularly pronounced for detained immigrants who face significant
 13 challenges to obtaining legal representation or evidentiary support for their cases.⁹

14 **C. The Balance of Equities and Public Interest Strongly Favor a Preliminary**
 15 **Injunction**

16 Since this case involves the government, the balance-of-equities factor merges with the
 17 fourth factor, public interest. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir.
 18 2013). As recognized by the Washington State Attorney General, NWIRP “is essential to the
 19 [State’s] mission as the primary provider of free and low-cost immigration assistance in the
 20 State.” Dkt. 18-1 at 2. A limitation of NWIRP’s critical services would be detrimental to the

21 ⁸ A plaintiff with a unique relationship to a third party can assert the rights of others when the plaintiff:
 22 (1) possesses a concrete interest in the outcome of the dispute (NWIRP’s mission to advocate for immigrants);
 23 (2) has a close relationship with the party whose rights it is asserting (attorney client relationship); and (3) there is
 some hindrance to the third party’s ability to protect its own interest (immigrant’s lack of English and unlikely to
 assert representation rights). *See Singleton*, 428 U.S. at 114-15.

24 ⁹ *See* Dkt. 3 ¶ 9; Ingrid Eagly & Steven Shafer, *Special Report: Access to Counsel in Immigration Court*, Am.
 25 Imm. Council, (Sept. 2016), at 6, available at [https://www.americanimmigrationcouncil.org/research/access-](https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court)
 26 [counsel-immigration-court](https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court) (last accessed May 4, 2017) (“[I]n the immigration system noncitizens can be
 27 transferred to detention centers located a great distance from where they reside or were apprehended. This means
 that they are far from their families, lawyers, and the evidence they need to support their cases. Furthermore,
 many detention facilities are located in remote areas.”); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013)
 (“[D]uring removal proceedings noncitizens are not guaranteed legal representation and are often subject to
 mandatory detention, § 1226(c)(1)(B), where they have little ability to collect evidence.”).

1 public interest. *Id.* at 2. And, as the City of Seattle recognizes, “providing funds to enable
2 indigent persons to obtain legal counsel for immigration related matters is a public function,
3 providing necessary support for the poor and infirm.” Allen Decl. Ex. II ¶ 4(g). EOIR’s Rule
4 will significantly impair the public interest of Washington’s state and local governments in
5 ensuring that free and low-cost immigration assistance is available to their residents.

6 When considering “the competing claims of injury and ... the effect on each party of the
7 granting or withholding of the requested relief,” the balance favors NWIRP. *Winter*, 555 U.S. at
8 24 (internal quotation omitted). Here, and most simplistically, the harm caused by *not*
9 continuing the injunctive relief is significantly greater than any possible harm caused by
10 enjoining EOIR from implementing its new interpretation of the nine-year-old Rule.

11 **1. The Public Interest Favors Preventing the Violation of Constitutional** 12 **Rights**

13 “It is *always* in the public interest to prevent the violation of a party’s constitutional
14 rights.” *Melendres*, 695 F.3d at 1002; *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180,
15 1197 (9th Cir. 2011) (“[T]he public interest favors applying federal law correctly.”); *cf.*
16 *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (“Generally, public interest concerns
17 are implicated when a constitutional right has been violated, because all citizens have a stake in
18 upholding the Constitution.”).

19 **2. The Public Interest Favors Allowing Limited Representation**

20 It is decisively in the public interest to have more individuals in the immigration system
21 receive more legal advice. The Rule eviscerates this interest. EOIR’s new interpretation of the
22 Rule will result in preventing NWIRP, and countless other organizations like it, from “helping a
23 highly vulnerable and extremely needy population.” Allen Decl. Ex. L ¶ 8. There is absolutely
24 no doubt that the cease-and-desist letter has already had a chilling effect, and if left unchecked,
25 will almost certainly eviscerate much of the pro bono legal assistance presently available to
26 immigrants. *Id.* Ex. E ¶ 7 (likely have to stop assisting asylum applicants and detained
27 individuals in filling out forms); Ex. R ¶ 9 (program assisting immigrants would cease to exist);
Ex. 8 ¶ 13 (unable to assist with basic filings to prevent *in absentia* orders); Ex. I ¶¶ 9, 10

1 (discontinue consultations with hundreds of individuals per year); Ex. F ¶¶ 5, 7 (prevent week-
 2 long service trip where law students help draft asylum applications and declarations); Ex. D ¶ 9
 3 (clinic does not have capacity to agree to full representation of every individual); Ex. K ¶ 8
 4 (same); Ex. S ¶ 8 (limit or entirely prevent assistance to *pro se* detained and non-detained
 5 immigrants who have no other assistance available); Ex. Q ¶ 9 (if forced to choose “resource
 6 limitations would dictate that we provide them with no services, sometimes with tragic results
 7 for the respondents involved.”); Ex. N ¶¶ 7, 11-12 (lose opportunity to assist asylum seekers in
 8 filing an application and individuals from receiving *in absentia* removal orders); Ex. M ¶ 7
 9 (forced to turn away those who will not be able to find representation elsewhere); Ex. B ¶¶ 5,
 10 10 (limited scope services would be “denied to those immigrants who need it most”); Ex. H ¶ 8
 11 (constrain ability to represent potential class members in limited capacity beyond bond hearings
 12 and provide pro bono assistance on discrete issues); Ex. C ¶ 9 (prevent information and advice to
 13 families and “threatens ability to provide “basic legal information to clients, that cannot be
 14 transmitted via fliers, handouts, or mass presentations”); Ex. L ¶ 7 (unable to help the majority of
 15 clients); Ex. O ¶ 7 (prevent from assisting in preparation of forms and applications and
 16 evaluating and providing advice); Ex. P ¶ 6, 14 (unable to provide advice to questions after KYR
 17 presentations and the order “creates an incentive for children’s advocates such as KIND to
 18 withhold free assistance of the type they have previously rendered to the benefit of unrepresented
 19 children as well as the Court”); Ex. J ¶ 6 (same); Ex. U ¶ 17 (Southern Poverty Law Center’s
 20 program to represent individuals at a detention center where only six percent of detainees have
 21 attorneys would “dramatically reduce the number of clients” it could serve); Ex. T
 22 ¶ 16 (hundreds of detained immigrants would not have any legal representation).

23 Many law firms across the country partner with NWIRP and other similar organizations
 24 to provide limited legal services to immigrants on a volunteer basis. Stifling the ability of law
 25 firms to help clients simply because they “cannot provide full scope direct representation” is
 26 contrary to the public interest and “is counter-productive to the human and humane goal of
 27 helping those in need of legal services.” Ex. Z ¶ 8. EOIR’s interpretation of its Rule will limit,

1 or eliminate entirely, law firms’ abilities to provide limited scope assistance at detention centers,
 2 in legal clinics, and otherwise working in conjunction with NWIRP and groups like them.” *Id.*
 3 ¶ 8; Ex. DD ¶ 16; Ex. X ¶ 10; Ex. CC ¶ 7; Ex. Y ¶ 12; Ex. I ¶ 11; Ex. EE ¶ 14; Ex. GG ¶ 14; Ex.
 4 V. ¶ 19. The law firms provide critical attorney representation to an under-represented
 5 population, but are limited both in the time they have to devote to representation, Ex. W ¶ 11,
 6 and their reliance on NWIRP and similar providers for their expertise to “mentor...attorneys and
 7 provide critical technical assistance to ensure [the firms] are providing the best possible service.”
 8 Ex. Z ¶ 6. *See also* Ex. AA ¶ 12; Ex. BB ¶ 12; Ex. DD ¶ 6; Ex. CC ¶ 12; Ex. Y ¶ 12; Ex. I ¶ 11;
 9 Ex. FF ¶ 4; Ex. EE ¶ 12; Ex. HH ¶ 9; Ex. V ¶ 7.

10 Finally, “[l]imited-scope services ... create efficiencies for the immigration court and
 11 ICE counsel, which would otherwise have to expend significantly greater resources on each
 12 case.” Ex. I ¶ 14. It is against the public interest to “increase the number of individuals
 13 appearing before EOIR without any preparation or understanding of the proceedings” since this
 14 will inevitably “hamper the court’s efficiency.” Ex. I ¶ 10.

15 **D. The Preliminary Injunction Should Provide Nationwide Relief**

16 At the hearing on NWIRP’s motion for a temporary restraining order, EOIR advised the
 17 Court that it would potentially advance its new application of the Rule by issuing similar cease-
 18 and-desist letters to others. Allen Decl. Ex. A 56:17-57:8. This alone justifies the Court in
 19 continuing to enjoin EOIR from enforcing the Rule on a nationwide basis. But, beyond this,
 20 other legal service providers are now facing the chilling effect of EOIR’s order to NWIRP,
 21 fearful that their own, similar conduct could result in disciplinary action. *See id.* Exs. B–U; §
 22 III(C)(2), *supra*. Without the protection afforded by nationwide relief, their services will be
 23 hindered by EOIR’s threat of disciplinary sanctions.

24 **IV. CONCLUSION**

25 NWIRP respectfully asks this Court to convert the temporary restraining order into a
 26 preliminary injunction, allowing NWIRP and others to continue providing vital legal assistance
 27 to unrepresented immigrants while this lawsuit is pending.

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DATED this 8th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2017, I filed the foregoing using CM/ECF which will cause a copy to be sent to the following:

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