Hon. Richard A. Jones

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; JAMES MCHENRY,[1] in his official capacity as Acting 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.

Case No. 2:17-cv-00716

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Noted on Motion Calendar and Hearing:

June 30, 2017

[1]Under Federal Rule of Civil Procedure 25(d), current Acting Director of EOIR James McHenry is substituted for former Director Juan Osuna.

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I. INTRODUCTION

Plaintiffs, Northwest Immigrant Rights Project ("NWIRP"), ask this Court to constitutionally overturn the balanced priorities of the Executive Office for Immigration Review ("EOIR") – increasing the availability of representation in immigration court proceedings, while ensuring the quality of such representation – and replace it with NWIRP's *ad hoc* practice of ghostwritten briefs. But such a reprioritization – premised on the idea that the rules should not apply to NWIRP practitioners because they claim to provide competent representation and therefore do not need EOIR oversight – is neither constitutionally-mandated nor directly related to the relief NWIRP requests.

EOIR's viewpoint- and practitioner-neutral requirement to file a notice of appearance and sign a brief when "representing" an individual in immigration court is based on the requirements of Federal Rule of Civil Procedure 11, which promote accountability, transparency, and candor in federal district courts—concerns even more salient in immigration courts. Any exemption for NWIRP from this regulation is not required by the First or Tenth Amendments. NWIRP's requested relief– an injunction against EOIR's enforcement of its professional conduct rule, 8 C.F.R. § 1003.102(t)—would lead to decreased transparency and accountability in immigration proceedings, and undermine the progress that EOIR and stakeholders like NWIRP have achieved in protecting a vulnerable population from unscrupulous immigration service providers, both licensed attorneys and unlicensed practitioners commonly referred to as "notarios," who routinely hide behind ghostwritten filings.

In response to the historically, widely-recognized poor quality of immigration representation, EOIR, the agency tasked with administering the nation's immigration court system, adopted rules and procedures to promote both the *availability* of pro bono and low cost representation and the *quality* of representation for individuals appearing in immigration courts. To further these priorities, EOIR oversees a host of programs facilitating nationwide pro bono and low cost immigration practice by practitioners (both attorneys and non-attorneys), and also facilitates greater access to information by funding educational programs, among other initiatives. Concurrently, to further its goal of competent representation in immigration

proceedings, EOIR has adopted a system built on transparency and accountability and has consistently administered these regulations since their adoption, as evidenced by EOIR's issuance of numerous similar letters – to private practitioners as well as practitioners associated with non-profit organizations – since early 2009 without resulting in the dire harms invoked by Plaintiffs. By requiring practitioners to file a notice of appearance, sign a brief, and accept EOIR's professional conduct rules when they speak to an immigration court through a written filing, EOIR facilitates its ability to regulate practice before it. There is simply no precedent for striking down an appearance requirement like EOIR's under the First or Tenth Amendments.

Even if NWIRP believes that not filing a notice of appearance might allow it to increase the number of people it can assist, such an interest does not outweigh EOIR's strong interest in ensuring the quality of representation provided to those appearing before the immigration courts. This Court should therefore deny Plaintiffs' motion for a preliminary injunction. First, Plaintiffs are unable to establish that EOIR's professional conduct rule violates the First or Tenth Amendment. As stated above, requiring a practitioner to file a notice of appearance, sign a brief, and accept EOIR's professional conduct rules is a reasonable requirement that helps EOIR identify practitioners and enforce its professional conduct rules without impairing NWIRP's speech rights or unduly infringing on Washington's sovereignty. Second, NWIRP cannot establish that the requirement irreparably harms it. Section 1003.102(t) is not an "all-or-nothing" or "compulsory representation rule;" indeed, most activities referenced by Plaintiffs and their declarants are not impacted by EOIR's application of section 1003.102(t). Lastly, EOIR and the public have a strong interest in allowing the agency to rely on the notice of appearance requirement in order to promote quality of representation.

II. BACKGROUND

A. EOIR's Historical Commitment to Increasing the Availability of Representation Before Immigration Courts and the Board

EOIR has taken significant steps to address the "critical and ongoing shortage of qualified legal representation for underserved populations in immigration cases before federal administrative agencies." *See* 80 Fed. Reg. 59,514, 59,529 (Oct. 1, 2015). EOIR has authorized

greater numbers of non-attorney professionals to represent indigent and low income immigrants through recognized nonprofit organizations, Lang Decl. ¶¶ 13-58, 81 Fed. Reg. 92,346 (Dec. 19, 2016), 80 Fed. Reg. 59,514; created a program to appoint counsel to represent detainees with serious mental disorders or defects, Lang Decl. at ¶¶ 56-58; facilitated the expansion of *pro bono* representation by providing a List of Pro Bono Legal Service Providers given to every individual in immigration court proceedings, *id.* at ¶¶ 38-43, 80 Fed. Reg. 59,503 (Oct. 1, 2015), created and overseen the BIA Pro Bono Project, Lang Decl. at ¶¶ 50-55, promoted best practices with immigration court staff and pro bono groups, such as those included under the immigration courts' 2008 "Guidelines for Facilitating Pro Bono Legal Services," *id.* at ¶¶ 45-49; and changed its regulations to allow separate appearances in the specific context of custody and bond proceedings to encourage more attorneys and accredited representatives to represent respondents in those specific proceedings. 80 Fed. Reg. 59,500 (Oct. 1, 2015), 79 Fed. Reg. 55,659 (Sept. 17, 2014), Lang Decl. at ¶ 13-22.

B. The Notice of Appearance requirement is critical for EOIR's management of removal proceedings, Attorney Discipline Program, and fraud prevention.

To protect the integrity of proceedings in immigration court and ensure that individuals in such proceedings receive competent counsel, the Board of Immigration Appeals ("Board") has authority to impose disciplinary sanctions on practitioners who appear before the Board, the immigration courts, or the Department of Homeland Security, "if it is in the public interest to do so." 8 C.F.R. § 1003.101(a). Only practitioners authorized to practice in immigration court may appear on behalf of a respondent in immigration court proceedings. 8 C.F.R. § 1291.1(a). These practitioners include attorneys regardless of their state of licensing and several categories of non-attorney representatives, *id.*, including "accredited representatives," i.e. authorized non-lawyer professionals who are associated with a recognized nonprofit or similar organization. 8 C.F.R. § 1292.1(a)(4), (f).

EOIR requires that in any proceeding before the immigration court in which the respondent is represented, the representative must file a notice of appearance (Form EOIR-28). 8 C.F.R. § 1003.17. Failure to do so constitutes chargeable disciplinary misconduct, 8 C.F.R.

§ 1003.102(t), with the additional proviso that "in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name," *id.* § 1003.102(t)(2). Discipline under this charge applies when the practitioner engages in "practice" or "preparation" before the immigration court. *id.* § 1003.102(t)(1). "Practice" is defined as "act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client" before the immigration courts. 8 C.F.R. § 1001.1(i). "Preparation" is "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities."[1] 8 C.F.R. § 1001.1(k). Preparation, however, does not cover assistance in the preparation of forms by aiding an individual to fill in the blanks.[2] *Id.*

The notice of appearance and signature requirements serve multiple purposes. First, the notice of appearance and signature facilitates EOIR's enforcement of its rules of professional conduct by allowing EOIR to identify the practitioner responsible for representation. 73 Fed. Reg. 76,914, 76,915 (Dec. 18, 2008) ("It is difficult for EOIR to enforce those standards when practitioners fail to enter a notice of appearance or sign filings made with EOIR."); 73 Fed. Reg. 44,178, 44,183 (July 30, 2008) ("[T]he difficulties in pursuing a practitioner for discipline for participating in the preparation of false or misleading documents are apparent when the practitioner fails to submit a completed notice of entry of appearance form."); *Singh v. INS*, 315

[1] One commenter argued that the agency's definition of practice and preparation should serve as the basis for a uniform statute on unauthorized practice of immigration law. Shannon, Careen, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 Cardozo L. Rev. 437, 480 (2011).

[2] States have recognized that the preparation of forms with legal significance – including immigration forms –amounts to legal practice when the assistance goes beyond the role of a scrivener. *See, e.g.*, *Franklin v. Chavis*, 640 S.E.2d 873, 876 (S.C. 2007) ("Even the preparation of standard forms that require no creative drafting may constitute the practice of law if one acts as more than a mere scrivener."); *State ex rel. Ind. State Bar Ass'n v. Diaz*, 838 N.E.2d 433, 443-46 (Ind. 2005) (the selection and preparation of immigration forms was practice of law); *Iowa Sup. Ct. Comm'n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W. 2d 679, 681-84 (Iowa 2001) (assistance in the preparation of forms that went beyond the role of a scrivener was unauthorized practice of law); *Perkins v. CTX Morg. Co.*, 969 P.2d 93, 97-98 (Wash. 1999) (the selection and preparation of legal instruments is practice of law) *Or. State Bar v. Ortiz*, 713 P.2d. 1068, 1070-71 (Or. Ct. App. 1986) (non-attorney who was not authorized to practice before immigration agencies engaged in practice of law by doing more than filling in blanks under direction of a customer). But while preparing a form may constitute "the practice of law" in some jurisdictions, it would not be considered practice before the immigration courts – and thus would not trigger the requirement of filing a notice of appearance – without the practitioner having substantively shaped the content of a form filed with an immigration court. 8 C.F.R. § 1003.102(t); *see* Lang Decl. ¶¶ 66-69; Barnes Decl. ¶ 46; *infra* at 13.

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F.3d 1186, 1189 (9th Cir. 2003) (stating that Board "has a substantial interest in assuring that, at any given time, there is no ambiguity as to who has been given, and who has accepted, the responsibility of representing a party before it"). In the immigration context, such accountability is especially important because many individuals who hold themselves out as immigration attorneys lack minimal competence, are unethical, or are not authorized to represent individuals in immigration court. *Morales-Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (noting "wide-spread awareness of these abhorrent practices" of "unlicensed notarios and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation"); McKeown, M. Margaret, & Allegra McLeod, *The Counsel Conundrum*: *Effective Representation in Immigration Proceedings*, 288 ("some individuals may be better served without counsel than by the assistance of an incompetent attorney or unqualified nonlawyer"), *in* Ramij-Nogales, J., Schoenholtz, A., & Schrage, P., eds., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (New York: NYU Press, 2009). The notice of appearance contains language requiring the practitioner to attest, under penalty of perjury, that they are authorized to practice, are in compliance with the rules of professional conduct. Exs. A-B (Forms EOIR 27 and EOIR-28). The court staff, immigration judges, or the Board can rely on the notice of appearance and signature to identify and report practitioners who violate any of the EOIR rules of professional conduct. Maggard Decl. ¶¶ 4-6; Barnes Decl. ¶¶ 3-4, 11, 33-36, 44-45, 48, 54.

Second, the notice of appearance and signature requirement provides EOIR with the ability to ensure that only those individuals authorized to practice before the immigration courts in fact represent foreign nationals before the immigration courts. *See* 73 Fed. Reg. at 76,915 (adding the words "practice" and "preparation" to 8 C.F.R. § 1003.102(t)); 34 Fed. Reg, 12,213, 12,213 (May 22, 1969) (stating term "preparation" added to "curb the illegal practice of law by non-lawyers"). With the notice of appearance, attorneys and non-attorney representatives provide their bar membership and EOIR registration number, respectively. Exs. A-B.[3] EOIR

[3] Additionally, the EOIR-28 notice of appearance requires representatives in immigration court to attest, under penalty of perjury, not only to their authorization to practice, but also to their compliance with EOIR's professional conduct rules, and to publication of discipline if imposed. *See* Exs. A-B. EOIR added this language to ensure that practitioners will make their clients aware of the scope of representation. 80 Fed. Reg. 59,501.

can then verify that the practitioner is authorized to practice before the immigration courts and reduce the risk of disciplined practitioners or unauthorized "notarios" taking on new clients or appearing on their behalf in immigration court or before the Board. EOIR would then be able to take appropriate action against individuals who do take on new clients when they are not authorized to practice before the immigration courts or the Board. Barnes Decl. ¶¶ 35-38.

Third, the notice of appearance and signature requirement helps a respondent to lodge claims against an ineffective practitioner, and preserve claims for potential relief. In immigration court proceedings, a respondent who received ineffective assistance of counsel may have his immigration court proceedings reopened, if the respondent files a bar complaint. *See generally Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917 (9th Cir. 2015) (discussing ineffective assistance of counsel claims). A notice of appearance makes it easier for the respondent to establish that a particular practitioner represented him, and to file the bar complaint. *See Matter of Reyes-Francisco*, 2009 WL 3818017, at *1 (BIA Nov. 4, 2009) (unpublished) (rejecting ineffective assistance of counsel claim made against attorney who is part of law firm that represented respondent but who never entered notice of appearance).

Fourth, the notice of appearance and signature requirement discourages the practice of "ghostwriting" and ensures the practitioner's candor to the tribunal and full accountability for the legal positions taken. Section 1003.102(t) is modeled after Rule 11 of the Federal Rules of Civil Procedure, which requires that an attorney sign pleadings filed with federal district courts. 73 Fed. Reg. at 44,183; Barnes Decl. ¶¶ 31-32. The federal courts, like EOIR, generally prohibit ghostwriting because allowing a client to file pro se a document actually written by an attorney raises issues of candor to the court. *See, e.g.*, *Villagordoa Bernal v. Rodriguez*, No. 16-cv-152-CAS, 2016 WL 3360951, at *7 (C.D. Cal. June 10, 2016) ("[T]he parties are reminded that ghostwriting of *pro se* filings is, of course, inappropriate and potentially sanctionable conduct." (citing *Ricotta v. Calif.*, 4 F. Supp. 2d 961, 986 (S.D. Cal. 1998))); *Tift v. Ball*, No. 07-cv-276-RSM, 2008 WL 701979, at *1 (W.D. Wash. Mar. 12, 2008) ("It is therefore a violation for attorneys to assist *pro se* litigants by preparing their briefs, and thereby escape the obligations imposed on them under Rule 11."); *Laremont-Lopez v. S.E. Tidewater Opportunity Ctr.*, 968 F.

Supp. 1075, 1078-79 (E.D. Va. 1997) (explaining that ghostwriting causes confusion regarding representation, interferes with the administration of justice, constitutes a misrepresentation to the court under Rule 11, and while "convenient for counsel," disrupts the proper conduct of proceedings); Barnes Decl. ¶¶ 37-39.[4] Ghostwriting also prevents immigration judges from conducting oral arguments on legal issues and permits unauthorized practice of law. *See Walker v. Pac. Maritime Ass'n*, 2008 WL 1734757, at *2 (N.D. Cal. April 14, 2008).

EOIR learns about potential disciplinary action through complaints from immigration judges, Board members and the public. *See e.g.* Barnes Decl., ¶¶ 3-4, 41, 50-51 & Barnes Decl. Exs. 8-10; Maggard Decl., ¶¶ 4, 6. In cases where the Disciplinary Counsel receives complaints regarding practitioner conduct, the Disciplinary Counsel will conduct a preliminary inquiry.[5] 8 C.F.R. § 1003.104(a)-(b), Barnes Decl., ¶ 11, 41 The Disciplinary Counsel, in her discretion, may take actions to resolve the dispute without a need for formal disciplinary proceedings that could result in sanctions.[6] 8 C.F.R. § 1003.104(c); Barnes Decl. ¶¶ 6, 11-21 However, if the EOIR Disciplinary Counsel determines that "sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct," she will initiate formal disciplinary proceedings with the Board. 8 C.F.R. § 1003.105(a); Barnes Decl. ¶ 7, 13, 22, 47. Since it was promulgated, EOIR has consistently enforced section 1003.102(t) where the Disciplinary Counsel finds a violation of 8 C.F.R. § 1003.102(t). Barnes Decl. ¶¶ 40-48. Since January 20, 2009, the Disciplinary Counsel has sent at least 31 letters to practitioners that she identified as having potentially violated section 1003.102(t), based on complaints or other information received. *Id.* at ¶ 43.

[4] In *In re Liu*, 664 F.3d 367, 369 (2d Cir. 2011), the Second Circuit declined to sanction an immigration attorney for ghostwriting appellate briefs to the Circuit, in part because Rule 11 only applies in federal district courts. *Id.* at 372 n.5. However, the *Liu* Court recommended that the Second Circuit amend its local rules to address the issue of ghostwriting. *Id.* at 373 n.7.

[5] In the event that EOIR uncovers that an individual is not authorized to practice before the immigration court, it may refer the case to the Fraud and Abuse Prevention Counsel for investigation and possible prosecution. *See* 8 C.F.R. § 1003.0(e)(2).

[6] Sanctions are *only* issued if formal disciplinary proceedings are initiated *and* there is finding by an adjudicating official that there has been a violation. *See* 8 C.F.R. § 1003.101(a).

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C. The Disciplinary Counsel's Letter to NWIRP regarding its practice of ghostwriting briefs for filing with the immigration courts.

NWIRP is a non-profit organization based in the State of Washington that provides various legal services to that State's migrant population. Compl. ¶ 1.1. NWIRP employs a large number of attorneys, some of whom are not licensed to practice law in Washington, as well as several accredited representatives and support staff. NWIRP – Staff, https://www.nwirp.org/about-nwirp/staff/ (last visited June 23, 2017). NWIRP also employs "legal advocates," but their website does not these explain these individuals' qualifications. *Id.*

In their Complaint, Plaintiffs allege that around December 2008 when EOIR promulgated section 1003.102(t), NWIRP met with an unidentified "local immigration court administrator"[7] to discuss the impact of this rule on NWIRP's work. Compl. ¶ 3.11. NWIRP claims that a "convention was accepted" that NWIRP would notify the court of its assistance with *pro se* motions or applications by denoting that an unidentified individual associated with NWIRP had prepared or assisted in the preparation. *Id.* NWIRP does not state who represented NWIRP in those alleged talks, nor provide or identify any document or written agreement memorializing this "convention." NWIRP also fails to allege that the Disciplinary Counsel, tasked with governing EOIR practitioner conduct, was aware of or endorsed NWIRP's practice. *Compare* Barnes Decl. ¶¶ 49-59.

In an October 11, 2016 conversation with EOIR's Disciplinary Counsel and Fraud and Abuse Prevention Counsel, NWIRP asked for relief from section 1003.102(t). NWIRP mentioned the organization's recognition to sponsor non-lawyer accredited representatives. Barnes Decl. ¶ 49. The Disciplinary Counsel explained that even competent attorneys can make mistakes, and as such, section 1003.102(t) must be applied uniformly to all immigration practitioners. *Id.*; *see also* 8 C.F.R. §§ 1003.101(b), 1292.3 (accredited representatives are subject to the same EOIR professional conduct rules as other practitioners).

[7] Court administrators supervise a local immigration court's clerical and technical employees and other staff as part of managing the court's daily activities, *see* Immigr. Court Practice Manual § 1.3(b), which include acceptance of filings, *see id.* § 3.1(d)(1)—as distinct from the Disciplinary Counsel's authority regarding practitioner conduct and discipline, *see* 8 C.F.R. § 1003.104(b).

Subsequently, on November 1, 2016, the court administrator for the Tacoma Immigration Court forwarded a *pro se* motion to EOIR's Fraud and Abuse Prevention Counsel that contained the notation indicating that NWIRP provide assistance. Barnes Decl. ¶ 50. The referral from Tacoma also noted "potential fraud," in that the signature in the motion did not appear to be the same signature as appeared on another document filed by the same respondent. Barnes Decl. Ex. 8. On January 5, 2017, EOIR's Disciplinary Counsel received another inquiry, this time from the Seattle Immigration Court, concerning another *pro se* motion with a similar notation. Barnes Decl. ¶ 51 & Ex. 9. Neither notation indicates who within NWIRP provided that assistance, or whether the assistance was provided by an attorney or an accredited representative, or whether the preparer is authorized to practice before the immigration courts.

In response to these filings, on April 5, 2017, the Disciplinary Counsel sent Matt Adams, in his capacity as Legal Director for NWIRP, a letter "ask[ing] that NWIRP cease and desist from representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed with each client that NWIRP represents." Barnes Decl. ¶¶ 52-55 & Ex. 10. In that letter, the Disciplinary Counsel stated that it recently came to her attention that NWIRP has attempted to advocate for two individuals in immigration court by preparing filings for court without entering a Notice of Appearance.[8] *Id.* The letter explained to NWIRP that the Notice of Appearance requirement allows EOIR to hold "attorneys accountable for their conduct" and that it "makes it possible for EOIR to impose disciplinary sanctions on attorneys who do not provide adequate representation to their clients." *Id.* The letter did not impose any disciplinary sanction on NWIRP or any of its attorneys for violating EOIR regulations;[9] and it did not instruct NWIRP to cease engaging in activities not involving representation, e.g. other legal work on behalf of Washington's foreign national community or to cease providing assistance under the Legal Orientation Program (LOP). Barnes Decl. ¶ 46. The Disciplinary Counsel sent the letter to NWIRP's legal director because the notations did not identify an individual practitioner. Barnes Decl. ¶ 55.

[8] The letter noted that the inconsistent signatures in one case "could indicate that someone other than [respondent] drafted his motion to reopen." *Id.*

[9] Only an adjudicating official or the Board can impose sanction when formal disciplinary proceedings have been initiated. *See* 8 C.F.R. § 1003.101(a).

On May 2, 2017, NWIRP asked EOIR to rescind its April 5, 2017, letter because it believed the letter unduly restricted its work. Ex. C, Letter from Matt Adams, Legal Director, NWIRP, to Jennifer Barnes, Disciplinary Counsel, EOIR (May 2, 2017). EOIR's General Counsel responded to NWIRP's letter on May 8, 2017. Ex. D, Letter from Jean King, General Counsel, EOIR, to Matt Adams (May 8, 2017). In the response, EOIR stated that while it is committed to supporting programs assisting individuals in immigration court proceedings, "EOIR must be consistent in how it enforces the Rules of Professional Conduct." *Id.* EOIR explained the history behind the Notice of Appearance requirement to NWIRP, highlighting that the regulation "is meant to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship." *Id.* EOIR also noted that NWIRP is an LOP provider that has had access to EOIR's guidance distinguishing between providing legal assistance and legal representation and that "EOIR has not made any changes to its policies affecting this guidance." *Id.* EOIR highlighted that "in no way [does EOIR] wish[] to impede the important work done by organizations like [NWIRP]," but it stands by the April 5, 2017, letter. *Id.*

III. STANDARD FOR PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy never awarded as of right. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a preliminary injunction, a party must ordinarily demonstrate: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in favor of preliminary relief, and (4) that an injunction is in the public interest. *Id.* Petitioner must satisfy each factor. *Id.* Although the Ninth Circuit still employs a "sliding scale" approach to the four factors, *see Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011), the moving party must show a likelihood of irreparable harm to warrant preliminary relief. *See Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 1000 (9th Cir. 2011).

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IV. ARGUMENT

A. Plaintiffs cannot establish they are likely to succeed on the merits of their claims.

1. The notice of appearance requirement as enforced and implemented by EOIR is consistent with constitutional requirements.

a. Section 1003.102(t)(1) extends only to individuals who appear before the immigration court or the Board, either in person or through written pleadings.

Plaintiffs' Complaint, and by extension, their Motion for Preliminary Injunction, is predicated on at least two incorrect factual assertions: (1) that EOIR recently adopted a "new and novel interpretation" of section 1003.102(t)(1); and (2) that the rule "purports to control not just the appearance of attorneys in removal proceedings but their communications with clients (and even potential clients) and other limited assistance provided outside of an active EOIR proceeding." ECF No. 1, at 2. Neither of these assertions is true.

Since January 20, 2009, when the regulation entered into force, EOIR has consistently taken the position that section 1003.102(t)(1)'s reference to "practice" and "preparation" only encompasses activities by individuals appearing before the immigration court or the Board, i.e. a failure to personally sign and file a complete and accurate Notice of Entry of Appearance before an immigration court or the Board, and/or a failure to sign a motion, brief or other document ultimately filed before an immigration court or the Board. Indeed, EOIR has issued numerous letters to practitioners, some of which have specifically questioned the practice of ghostwriting a legal document– in other words, appearing in immigration court via a written pleading. Barnes Decl. ¶¶ 40-48. Likewise, the April 5, 2017 letter that gave rise to this litigation specifically cites two motions evidently authored by NWIRP personnel that were filed in immigration court, and notes that it is "NWIRP's practice of representing aliens *before EOIR*" that is of primary concern. ECF No. 1-1, at 2 (emphasis added). Thus, while NWIRP describes broad categories of "limited services" that they believe are now at risk, *see* ECF No. 1, at 9-10, EOIR has not required a notice of appearance for activities that do not constitute an appearance before an immigration court or the Board . Barnes Decl. at ¶ 46.

EOIR's reading of section 1003.102(t)(1) as requiring the filing of a notice of appearance only by an individual who appears before the immigration court – either in person or in written pleadings – is fully consistent with the language of the regulation itself. Section 1003.102(t)(1) states that the notice of appearance requirement is triggered when an individual "[h]as engaged in practice or preparation as those terms are defined in §§ 1001.1(i) and (k)." 8 C.F.R. § 1003.102(t)(1). Importantly, "practice" is defined in section 1001.1(i) as "the act or acts of any person *appearing in any case*, either in person or through *the preparation* or filing of any brief or other document . . . on behalf of another person or client before or with DHS, or any immigration judge, or the Board." (emphasis added). The term "practice," for purposes of section 1003.102(t)(1), is thus plainly limited to instances in which a person actually appears in some manner before an immigration judge or the Board. *Id*. While the term "preparation," as defined under section 1001.1(k), appears to sweep more broadly, it is important to note that the term being defined is not simply "preparation," but rather "*preparation, constituting practice*." 8 C.F.R. § 1001.1(k) (emphasis added). Likewise, the definition of "practice" in section 1001.1(i) explicitly acknowledges the possibility that one may "appear in [a] case . . . through the *preparation* . . . of any brief or document." 8 C.F.R. § 1001.1(i). Thus, for purposes of section 1003.102(t)(1), "preparation" is best read as defining the term as it used in the definition of "practice" set forth in section 1001.1(i). In this context, the two terms read together only apply to activities by which someone *speaks to* or *interacts with* the immigration court either through in-person or written discourse.

To the extent that section 1003.102(t)(1) is ambiguous, the Court should interpret the regulation narrowly to avoid any constitutional concerns. "[T]he doctrine of constitutional avoidance requires [the Court] to construe [a] statute [or] regulation, if possible, to avoid a serious constitutional question." *Dent v. Holder*, 627 F.3d 365, 375 (9th Cir. 2010). To the extent Plaintiffs' argue that section 1003.102(t)(1) is facially unconstitutional based on vagueness or overbreadth, the Court should adopt a "narrowing construction." *See United States v. Linick*, 195 F.3d 538, 542 (9th Cir. 1999) ("In evaluating the constitutionality of a regulatory scheme, we should presume any narrowing construction . . . to which the law is fairly

susceptible." (internal citations omitted). And in assessing whether a narrowing construction is available, "administrative interpretation of a regulation is "highly relevant to [the Court's] analysis." *Id*. (internal quotation marks omitted).

The Court should evaluate Plaintiffs' constitutional challenges to section 1003.102(t)(1) based on the scope of the regulation as applied by the agency itself. NWIRP suggests that at least eight categories of activities will be chilled by the requirement to file a notice of appearance. Complaint ¶ 3.21. But NWIRP casts the net too far.[10] For example, section 1003.102(t)(1) does not encompass the provision of general information about the immigration court system,[11] individual consultations which identify potential forms of relief,[12] translation of information[13] or filling out asylum application forms or other types immigration forms without that does not go beyond preparing the form.[14] Rather it is only when a practitioner *appears* in immigration court – either in person or via a written pleading– that the notice of appearance requirement is triggered. Plaintiffs' broad reading of section 1003.102(t)(1) bears no relationship to how EOIR has actually applied the regulation and serves only to bolster their constitutional challenges.

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[10] NWIRP should reasonably be aware that most services it provides are not encompassed by § 1003.102(t). On July 11, 2011, the Director of EOIR's Office of Legal Access Programs (OLAP) provided the contractor for the Legal Orientation Program (LOP), who subcontracts task orders to various nonprofit organizations such as NWIRP, guidance as to activities that are not "representation" as defined at 8 C.F.R. §§ 1.1(m) and 1001.1(m). ECF No. 14-2, p. 7; Lang Decl. ¶¶ 66-69. Because the definition of "representation" at 8 C.F.R. §§ 1.1(m), 1001.1(m), like 8 C.F.R. § 1003.102(t), cross-references "practice" and "preparation" in 8 C.F.R. §§ 1.1(i), 1001.1(k), activities that do not constitute "representation" under 8 C.F.R. § 1001.1(m) should also not trigger the notice of appearance requirement under 8 C.F.R. § 1003.102(t). Lang Decl. ¶¶ 67, 69; Barnes Decl. ¶ 46.

[11] *See* Lang Decl. ¶ 68(a), (c). Indeed, most of Plaintiffs' declarants proffer this acceptable activity. *See* Phelps Decl. ¶ 6; Chan Decl. ¶¶ 6, 8; Weissman-Ward Decl. ¶ 6; Little Decl. ¶7; Dos Santos Decl. ¶ 4; Sennett Decl. ¶ 7; Keller Decl. ¶¶ 4(a), 6-7; Kreimer Decl. ¶¶ 6-7; Kelly Decl. ¶ 4; Zoltan Decl. ¶ 4; Zukin Decl. ¶¶ 3-4; Werner Decl. ¶ 9; Frahn Decl. ¶ 6, 8-9. Regarding "know your rights" presentations, *see* Stolz Decl. ¶ 6(a); London Decl. ¶ 3; Bildhaur Decl. ¶ 6; Zoltan Decl. ¶ 4; Zukin Decl. ¶¶ 3-4; Pennington Decl. ¶¶ 5, 8, 12; Fleming Decl. ¶ 6; Medway Decl. ¶ 3.

[12] *See* Lang Decl. ¶ 68(b). *See also* Bauer & Cabot Decl. ¶ 5; Sennett Decl. ¶ 6; Keller Decl. ¶¶ 4(a-b)(d), 6; Stolz Decl. ¶ 6(a); Roche Decl. ¶ 6; Little Decl. ¶ 3; London Decl. ¶ 5; Kelly Decl. ¶ 5(c); Ahmad Decl. ¶¶ 4, 6; Keller Decl. ¶ 4(a); Kreimer Decl. ¶ 6; Marcus Decl. ¶ 12; Pennington Decl. ¶¶ 4-5, 11, 12; Werner Decl. ¶¶ 7-8; Fleming Decl. ¶¶ 12, 14; Josef Decl. ¶ 7; Slater Decl. ¶¶ 4-6; Kathawala Decl. ¶¶ 8, 10; Medway Decl. ¶ 3; Soloway & Weiss Decl. ¶¶ 7-9; Frahn Decl. ¶¶ 6, 8, 9; Soreff Decl. ¶¶ 4-9; Miller Decl. ¶¶ 6-7; Miao Decl. ¶¶ 4-5; Chan Decl. ¶ 6.

[13] *See* ECF No. 14-2, p. 7 § 7(a). *See also* Pennington Decl. ¶ 14; Medway Decl. ¶ 8.

[14] *See* Lang Decl. ¶ 68(d), (e). *See* Bildhauer Decl. ¶ 3; Zoltan Decl. ¶ 4; Marcus Decl. ¶¶ 6-7, 12; Pennington Decl. ¶¶ 5, 14; Kathawala Decl. ¶ 10; Frahn Decl. ¶ 9; Phelps Decl. ¶ 3, 5; Weissman-Ward ¶ 8; Dos Santos Decl. ¶ 4-5; Bauer & Cabot Decl. ¶ 5; Sennett ¶ 3; Kreimer Decl. ¶ 7; Kelly Decl. ¶ 3; Keller ¶ 5; Ahmad Decl. ¶ 5.

b. To the extent NWIRP challenges the lack of a limited scope representation mechanism in immigration court, that claim is not properly pleaded in the Complaint and invalidating section 1003.102(t) would not achieve relief.

The Complaint lists five causes of action: (1) & (2) facial and as-applied First Amendment challenges, (3) & (4) facial and as-applied Tenth Amendment challenges, and (5) a request for declaratory relief under 28 U.S.C. § 2201. For each of these causes of action, Plaintiffs identify 8 C.F.R. § 1001.1(i) or (k) – i.e., the definitions of "practice" and "preparation" – as incorporated into 8 C.F.R. § 1003.102(t), as the regulations they believe are constitutionally infirm. Compl., at 11-15. While the Complaint makes passing reference to the fact that "the immigration court does not permit limited appearances," *see* ECF 1, at 6, Plaintiffs never directly attack the regulatory basis for that rule. In fact, it is not the notice of appearance requirement in section 1003.102(t)(1) that results in the "compulsory representation" alleged by Plaintiffs, but rather the regulation governing attorney appearances and withdrawals.

The regulation governing attorney appearances, 8 C.F.R. § 1003.17, provides that "[i]n any proceeding before an Immigration Judge in which the alien is represented, the attorney or representative shall file a Notice of Appearance on Form EOIR-28 with the Immigration Court." As for withdrawing as counsel, the same regulation provides that "[w]ithdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee." 8 C.F.R. § 1003.17(b). Relying on a previous version of the same regulation, the Board observed in *Matter of Velasquez* that "there is no 'limited' appearance of counsel in immigration proceedings." 19 I. & N. Dec. 377, 384 (BIA 1986) (citing 8 C.F.R. §§ 292.1, 292.4, 292.5(a) (1986)); *see Cabrera-Gutierrez v. Holder*, 427 F. App'x 581 (9th Cir. 2011) (quoting *Matter of Velasquez*).

Plaintiffs' failure to challenge either 8 C.F.R. § 1003.17(a) or *Matter of Velasquez* in their Complaint is significant. First, NWIRP's challenges to a purported "compulsory representation rule" should be rejected as outside the scope of the complaint. *N. Arapaho Tribe v. LaCounte*, No. CV-16-11-BLGS-BMM, 2017 WL 908547, at *2-4 (D. Mont. Mar. 7, 2017). Indeed, while

their Motion for Preliminary Injunction ostensibly challenges section 1003.102(t)(1)'s notice of appearance requirement, NWIRP repeatedly makes clear that its actual intention in this case is to challenge "EOIR's compulsory representation rule." ECF 37, at 10, 18. For example, while attempting to explain why 8 C.F.R. § 1003.102(t)(1) is "not narrowly tailored to achieve EOIR's stated purpose," NWIRP argues that "*the Rule* imposes an all-or-nothing paradigm that is not tied to EOIR's proffered interest in reducing either attorney misconduct or notario fraud." *Id*. at 12 (emphasis added). But "the rule" that arguably precludes attorneys from engaging in limited representation is 8 C.F.R. § 1003.17, not 8 C.F.R. § 1003.102(t)(1). Indeed, EOIR's responses to comments at the time that section 1003.102 became effective illustrate that the issue of limited representation was outside the scope of that rule. 73 Fed. Reg. at 76,919 (stating that issues regarding limited representation were outside the scope of proposed rules). In other words, NWIRP devotes considerable effort to attacking 1003.102(t) for failing to address an issue – limited scope representation – that was never the basis for the rule in the first place. Likewise, the Complaint's near silence as to 8 C.F.R. § 1003.17 necessarily limits what the Court should consider at the preliminary injunction phase. *N. Arapaho Tribe*, 2017 WL 908547, at *2-4.

Additionally, even assuming that NWIRP's Complaint challenges a "compulsory representation rule," such a challenge should be rejected as unripe. *See Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). In deciding whether a case is ripe, the Court should consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. *Id*. Plaintiffs' challenge to the "compulsory representation rule" is unripe because they have not offered any evidence that they have ever attempted to withdraw from a case, much less been denied the opportunity to do so by an immigration judge. The Immigration Court Practice Manual states only that "[w]hen an attorney wishes to withdraw from representing an alien, and the alien has not obtained a new attorney, the attorney must submit a written or oral motion to withdraw. Immigr. Ct. Practice Manual, Ch. 2.3(i)(ii) ("Withdrawal of counsel"); *Matter of Rosales*, 19 I. & N. Dec. 655, 657 (BIA 1988). Plaintiffs' assertion that leave to withdraw is

only granted in "exceptional circumstances" ECF 37, at 4-5, is not cited and unfounded.[15] The Court would therefor benefit from further development of the record on this matter before attempting to assess the degree to which EOIR's regulation of appearances actually inhibits NWIRP's activities.[16] *See Ohio Forestry Ass'n Inc.*, 523 U.S. at 733.

2. Plaintiffs have not established that they are likely to succeed under their First Amendment Claims.

a. EOIR may regulate practice before immigration courts, which like any courtroom, are nonpublic forums.

"In assessing a First Amendment claim relating to speech on government property, the first step is to 'identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.'" *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985)), *abrogated on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008); *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005) (First Amendment rights "have always depended largely on the nature of the forum."). "If the forum is public, speakers can be excluded . . . only when the exclusion is necessary to serve compelling state interest and the exclusion has been narrowly drawn to achieve that interest." *Sammartano*, 303 F.3d at 965 (internal quotation marks omitted). On the other hand, "[i]f the forum is *nonpublic*, a more lenient standard applies and the government may restrict access 'as long the restrictions are reasonable and are not an effort to suppress expression merely because the public officials oppose the speakers view." *Id*. (emphasis added).

Under the framework for forum analysis set forth by the Supreme Court in *Cornelius*, courts have routinely held that courtrooms are nonpublic forums. *Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring) ("a courtroom is not a public forum . . . in free speech analysis" because "[a]lthough courtrooms have always been devoted to debate, they have never

[15] Even this Court regulates when an attorney may withdraw his or her legal representation and mandates that an attorney who has appeared in a civil case may not withdraw "except by leave of court." LCR 83.2(b).

[16] In addition, rather than attacking neutral regulations of the legal practice on constitutional grounds, NWIRP could submit a petition for rulemaking in which it asks the agency to address its concerns regarding limited representation and unbundled legal services in the immigration context. *See Compassion Over Killing v. FDA*, 849 F.3d 849, 854 (9th Cir. 2017). For a policy change like the NWIRP seeks, this would be the proper route.

been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law. The First Amendment does not allow an attorney to speak beyond those confines."); *Mezibov*, 411 F.3d at 718 ("The courtroom is a nonpublic forum where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir. In fact, the courtroom is unique even among nonpublic fora because within its confines we regularly countenance the application of even viewpoint-discriminatory restrictions on speech.") (internal citations omitted)); *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1071 (N.D. Cal. 2005) (holding, in a case where plaintiff raised claims regarding "the scope of an attorney's right to freely express himself through words or conduct, *whether by arguing in a courtroom [or] filing an action . . .*" that "in a non-public forum such as a courthouse, content-based restrictions on speech are permissible as long as they are reasonable in light of the purpose served by the forum and viewpoint neutral") (emphasis added); *Hendricks v. Pierce Cnty.*, No. C13-5690, 2015 WL 6031646, at *3 (W.D. Wash. Oct. 15, 2015). As the Supreme Court has held, "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (observing also that "lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be."). Because EOIR applies section 1003.102(t) only to in court statements, the regulation essentially serves as a disclosure requirement for those who wish to speak in a nonpublic forum; the regulation in no way restricts the content of any practitioner's speech once they have properly identified themselves.

None of the cases on which NWIRP relies involved a nonpublic forum, as is the case here. *See* ECF 37, at 6-9 (citing *inter alia*, *NAACP v. Button*, 371 U.S. 414 (1963); *In re Primus*, 436 U.S. 412 (1978); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) ("*LSC*"). Both *Button* and *Primus* involved state bar regulations on solicitation of clients, which are out of court activities. *Button*, 371 U.S. at 423-25; *In re Primus*, 436 U.S. at 418-21. In *LSC*, which involved a First Amendment challenge to conditions attached to funding for a legal assistance program, the Supreme Court specifically applied "limited forum" analysis standards – not non-public forum standards – on the ground that the government could not use subsidies to "effect [a]

serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." In contrast, this case arises in connection with conduct before a tribunal where there is no government-imposed viewpoint-based restriction on NWIRP's advocacy other than that "the attorney may only speak to the extent that his client's rights allow him to speak." *Zal*, 968 F.2d at 932 (Trott, J., concurring) (citing *Gentile*, 501 U.S. at 1071). EOIR's notice of appearance requirement does not restrict the content of NWIRP's representation of a client.

Nor do any of the other cases on which Plaintiffs rely support the view that a regulation that applies only to in-court speech is subject to strict scrutiny. Rather, nonpublic forum analysis applies, and under *Cornelius*, the test is whether the regulation is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46); *Diloreto v. Downey Unif. Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999) ("The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speakers viewpoint.").

b. Plaintiffs' as-applied challenge to section 1003.102(t)(1) is likely to fail because EOIR's rule is reasonable and viewpoint neutral.

Plaintiffs' as-applied challenge to section 1003.102(t)(1) amounts to an assertion that NWIRP has a First Amendment right to participate in the conduct that prompted the April 5, 2017 letter: ghostwriting briefs or motions for submission to the immigration court without filing a notice of appearance. *See United States v. Kaczynski*, 551 F.3d 1120, 1126 (9th Cir. 2009) ("An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." (citation and quotation marks omitted)). Plaintiffs are unlikely to succeed on their as-applied First Amendment challenge because EOIR's requirement that those who author immigration court filings must enter a notice of appearance and sign them is both reasonable "in light of the purpose served by the forum" – a judicial forum that seeks to promote quality representation and accountability – and viewpoint neutral. *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008) (citing *Cornelius*, 473 U.S. at 806).

EOIR's application of section 1003.102(t)(1) to NWIRP was viewpoint neutral. The April 5, 2017 letter does not in any way address the contents of the briefs that NWIRP personnel apparently authored. Barnes Decl. ¶ 50-54 & Ex. 10; Ex. D. Rather, the letter was issued because a NWIRP staff member authored the motions without entering a notice of appearance or signing them. *Id*. EOIR did not prevent NWIRP from expressing *any* viewpoint whatsoever. *Id*. To the contrary, the regulation merely requires that practitioners who author briefs for filing in immigration court disclose their representation by filing a notice of entry of appearance. EOIR's letter was clearly not "an effort to suppress expression merely because public officials oppose the speaker's view." *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008) (citing *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). EOIR's application of section 1003.102(t)(1) to NWIRP was thus viewpoint neutral. *Id*.

Requiring the author of pleadings to enter a notice of appearance is also reasonable given the form's need increase the quality of representation and discourage ghostwriting. EOIR modeled its notice of appearance requirement after Rule 11, which has been interpreted to prohibit ghostwriting. 73 Fed. Reg. at 44,183. As discussed above, ghostwriting causes confusion regarding representation, *Laremont-Lopez*, 968 F. Supp. at 1078-79, allows attorneys to evade responsibility and accountability for their arguments presented to a court, *Ricotta*, 4 F. Supp. 2d at 986, 73 Fed. Reg. 76,919, prevents immigration judges and the Board from examining the arguments presented by the parties via oral arguments, facilitates the unauthorized practice of law by notarios, *Walker*, 2008 WL 1734757, at *2 & n.2, a particular problem in immigration court, *see* McKeown and McLeod at 296-97, and makes it more difficult for immigrant respondents to lodge ineffective assistance claims and preserve relief. *See supra* at 6-7. EOIR's application of section 1003.102(t)(1) to NWIRP in light of its interest in preventing ghostwriting is entirely reasonable in the context of this forum. *Cornelius*, 473 U.S. at 806; *accord Perry Educ. Ass'n*, 460 U.S at 49 (in a nonpublic forum, the government has "the right to make distinctions in access on the basis of subject matter and speaker identity"); *Pilsen Neighbors Cmty Council v. Netsch*, 960 F.2d 676, 686 (7th Cir. 1992) (declining to apply strict scrutiny because the disclosure requirements only applied to a nonpublic forum).

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Alternatively, this Court should uphold the regulation as a content-neutral time, place, and manner regulation. Indeed, such regulations are routinely upheld as reasonable exercises of a court's power to regulate those who practice before it. *Mothershed v. Justices of the Sup. Ct.*, 410 F.3d 602, 611 (9th Cir. 2005). In the same manner, EOIR has the authority to regulate the conduct of practitioners who appear before it. *See infra* Part IV.A.3.a. The agency's interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

Contrary to Plaintiffs' assertion, section 1003.102(t)(1) is content-neutral. "The principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1043 (9th Cir. 2002); *see also Hill v. Colo.*, 530 U.S. 703, 719-20 (2000) (holding that state statute was content neutral because: (1) it was not a "regulation of speech" but instead a regulation of "where some speech may occur," (2) it was not adopted "because of disagreement with the message it conveys," and (3) state's interest was unrelated to the content of the demonstrator's speech, and could be justified without reference to the content of the speech). EOIR's application of section 1003.102(t)(1) to NWIRP is content neutral because the regulation only serves to require that NWIRP practitioners file a notice of appearance and sign documents filed with the immigration court. This same rule applies regardless of the content of the briefs and motions that NWIRP prepares, and the rule was in no way adopted based on a disagreement with certain speech.

c. Plaintiffs' facial challenge is likely to fail because 1003.102(t)(1) can and should be read so as to only apply to actual appearances – either in person, or in writing – before the immigration court or the Board.

A facial challenge to a statute or regulation under the First Amendment must establish either: (1) that the statute or regulation is "unconstitutional in every conceivable application" or (2) that it "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally

overbroad." *Kaczynski*, 551 F.3d at 1124. A facial challenge may assert that a statute or regulation is unconstitutionally vague, as Plaintiffs do here. *Adamian v. Jacobsen*, 523 F.2d 929, 933 (9th Cir. 1975) ("The closely related First Amendment doctrines of vagueness and overbreadth permit a defendant to assert the invalidity of a statute because of its potential encroachment on First Amendment freedoms, even in cases where the defendant's conduct itself is unprotected by the First Amendment.").

NWIRP's contention that "[t]he Rule is . . . overbroad because it 'sweeps too broadly' and burdens constitutionally protected speech," *see* Mot. at 14, is easily dismissed because contrary to their arguments, section 1003.102(t)(1) does not encompass the activities they cite in support of their overbreadth argument. *See* Mot at 14 (arguing that the regulation is overboard because it encompasses community workshops and know your rights presentations); *See supra* Part IV.A.1.a. Plaintiffs have therefore failed to show that they are likely to succeed on an overbreadth argument. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) ("[A] court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct . . . [and] [i]f it does not, then the overbreadth challenge must fail.").

EOIR's application of section 1003.102(t)(1) also forecloses any claim that the regulation is unconstitutionally vague. "In the First Amendment context, facial vagueness challenges are appropriate if the statute clearly implicates free speech rights." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001). A statute's vagueness exceeds constitutional limits only if its "deterrent effect on legitimate expression is . . . both real and substantial, and if the statute is [not] readily subject to a *narrowing construction*." *Young v. Amer. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (emphasis added). Section 1003.102(t)(1) is readily subject to a narrowing construction. As explained above, *see supra* Part IV.A.2.a, the regulation does not clearly implicate NWIRP's free speech rights because it governs only in-court speech, where free speech rights "are at their constitutional nadir." *Mezibov*, 411 F.3d at 718.

Plaintiffs failed to show they are likely to succeed on their claim that section 1003.102(t)(1) is facially invalid. Given the reasonable and constitutionally adequate application

of section 1003.102(t)(1), the Court should decline to invoke the "strong medicine . . . of facial vagueness invalidation." *Hum. Law Project v. U.S. Dep't of Treas.*, 463 F. Supp. 1049, 1058 (C.D. Cal. Nov. 21, 2006).

3. Plaintiffs are unlikely to establish that the Tenth Amendment prohibits EOIR from requiring the filing of a notice of appearance.

a. EOIR has the inherent authority to establish uniform regulations governing practitioners, including attorneys and non-attorneys, who practice before the immigration courts.

Federal agencies have the inherent power to regulate legal practice before federal administrative tribunals. *Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379, 383-84 (1963). "It is elementary that any court or administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct." *Koden v. U.S. Dep't of Justice*, 564 F.2d 228, 233 (7th Cir. 1977). Such a power derives from the forum's inherent power to discipline practitioners and the practitioners' status as an officer of the court to which it is granted admission. *See In re Snyder*, 472 U.S. 634, 643 (1985) (recognizing court's "inherent authority to suspend or disbar lawyers"). In *Sperry*, the Supreme Court overturned a state sanction against an attorney practicing before the Patent Office – a federal agency – because that practice was authorized by federal law. 373 U.S. 383-84. In that case, the Supreme Court recognized that while the state has a valid interest in regulating legal practice within its borders, the state must yield to federal rules that permit practice before federal administrative forums. *Id.*

As a federal administrative tribunal, EOIR has the authority to impose reasonable rules governing practice before the immigration courts without unduly impairing Washington's ability to admit and regulate attorneys. Congress delegated to the Department of Justice the responsibility of establishing an immigration court system and regulations governing those proceedings. 6 U.S.C. § 521(a) (establishing EOIR); 8 U.S.C. §§ 1101(b)(4) (placing immigration judges within EOIR to conduct specified proceedings), 1103(g) (placing EOIR within the Department of Justice and delegating power to establish and regulate immigration

proceedings); 65 Fed. Reg. 39,513, 39,524 (June 27, 2000) (asserting agency authority to establish uniform discipline rules "under the broad rulemaking authority of the Attorney General and the federal government's preemptive powers,"); *Romero v. U.S. Dep't. of Justice*, 556 F. App'x 365, 368 (5th Cir. 2014); *Koden*, 564 F.2d at 235. In doing so, EOIR implemented rules to regulate practice before the immigration courts. 8 C.F.R. § 1003.101-1003.111.

Even more, immigration is an area of nationwide concern, compelling EOIR's need for a uniform national rule governing immigration practice. *Cazarez Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004). States have recognized that EOIR has authority to regulate practice before immigration courts – even recognizing that federal law permits individuals whom the state does not allow to practice law to practice before immigration agencies. *See, e.g. Diaz*, 832 N.E.2d at 446 (recognizing state must accommodate the federal interest in regulating practice by certain non-lawyers before immigration agencies); *Ortiz*, 713 P.2d at 1069 (acknowledging federal preemption of regulation setting classes of people authorized to practice immigration law in immigration proceedings). Additionally, immigration practice carries concerns unique to that area of law that justify uniform disciplinary procedures. *E.g., Matter of Krivonos*, 24 I. & N. Dec. 292, 293 (BIA 2007) (declining to reinstate attorney who was expelled from practice due to a conviction for immigration-related fraud after he was reinstated to practice in federal court because his crime struck at the heart of immigration law). Lastly, the rules governing immigration practitioners recognize a state role in the disciplinary process. 8 C.F.R. § 1003.103(a)(1) (allowing reciprocal discipline with states).

If this Court were to find that the Constitution prohibits EOIR from adopting different professional conduct rules than that of one state, EOIR could effectively lose its ability to oversee the practice of attorneys and non-attorney representatives before the immigration court. Additionally, such a decision would also affect EOIR's ability to allow attorneys to practice before an immigration court if the individual is not licensed in the state where the immigration court sits, *see* 8 C.F.R. § 1001.1(f); 73 Fed. Reg. at 44,180, and its ability to allow non-attorneys to practice before immigration courts, 8 C.F.R. § 1001.1(j). A finding that state bar rules

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override any conflicting federal rules of practice would likely decrease the availability and quality of practitioners available in immigration courts and to the Board.

b. EOIR's rules governing attorney practice and requiring filing of a notice of appearance do not cause an undue conflict with state rules.

EOIR's ability to regulate practice before the immigration courts, and specifically to require the filing of notices of appearance by practitioners, has ample support and causes no undue conflict with Washington rules of professional conduct. Plaintiffs' assertion of a conflict with Washington rules does not show otherwise.

Requiring a notice of appearance does not result in an undue conflict with Washington's rule allowing limited representation.[17] While Rule 1.2(c) of the Washington Rules of Professional Conduct permit limited representation, the rule's use of the word "may" demonstrates that such limitation is not mandatory. *See Scannell v. City of Seattle*, 648 P.2d 435, 704-05 (Wash. 1982) (explaining that use of the word "may" connotes permissive conduct). The comments of Rule 1.2 explain that any request for limited services is not mandatory, but it must be reasonable, comport with other rules, "and other law." Wash. R. Prof. Conduct 1.2 cmt.8; *see also id.* 1.2(c) & cmt. 7 (emphasizing that any limited representation must be reasonable and supported by informed consent). And contrary to NWIRP's representations, EOIR permits attorneys to withdraw with leave of court – as federal district courts and many jurisdictions do. *See supra* Part IV.A.1b.

NWIRP's claim that the notice of appearance requirements conflict with their Washington duty of confidentiality is also unfounded because it is based on the incorrect premise that merely advising an individual triggers the filing of a notice of appearance. Mot. at 19. As discussed above, the mere act of advising a client triggers no obligation to file a notice of

[17] In practice, EOIR permits some forms of "limited representation" as a practitioner may choose to represent a respondent in bond proceedings but not removal proceedings, or decline to continue representation on appeal. *See* 79 Fed. Reg. 55,659, 55,660 (Sep. 17, 2014) (allowing representation only for custody redetermination hearings); 8 C.F.R. § 1003.38(g) (separate notice of appearance for an administrative appeal). While an increasing number of jurisdictions have decided to adopt limited scope representation rules, Plaintiffs have not cited any cases which remotely suggest that attorneys have a constitutional right to engage in such representation, or that the Constitution bars federal immigration courts from adopting practice rules that differ from a state's rules.

appearance. *See supra* at 13; 8 C.F.R. § 1003.102(t); Barnes Decl. ¶ 46. It is only when there is representation before the immigration court – whether in person or through a filing that embodies the representative's voice – that the representation must be disclosed.

To the contrary, the enforcement of the notice of appearance requirement furthers the shared interest of EOIR and Washington to curb the unauthorized practice of the law in the immigration context. *See* ECF No. 18 (Washington alleging interest in combating notario fraud); *supra* Part II.B (EOIR interest in combating unauthorized practice of immigration law). And EOIR's Disciplinary Counsel has worked closely with Washington to discipline attorneys in the state. Barnes Decl. ¶11 n.3. The regulation requiring a notice of appearance does not violate the Tenth Amendment.

B. Plaintiffs' harm, if any, is nothing more than minimal.

Plaintiffs must demonstrate with specificity an irreparable harm that is *likely* and *immediate* in the absence of an injunction. *Winter*, 555 U.S. at 22; *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Harm is irreparable when, as the name suggests, the harm cannot be undone by a later order by the court. *See Sampson v. Murray*, 415 U.S. 61, 90, (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm."). Plaintiffs assert that they are harmed by the regulation's claimed infringement on NWIRP and its lawyers' freedom of speech and their claimed inability to carry out NWIRP's mission, as well as harm to third parties not before this court. Mot. at 30-31. These claims do not satisfy the standard for irreparable harm for several reasons.

First, NWIRP vastly overstates the alleged consequences of EOIR's letter and EOIR's interpretation of the applicable regulation on NWIRP's provision of legal services. *See supra* Part IV.A.1. Plaintiffs cannot show that NWIRP is banned from continuing to assist vulnerable immigrant populations. The letter – which is not a final or even intermediate disciplinary action as it imposed no sanction at all – addresses only the complained-of conduct: the preparation of legal pleadings and/or motions without filing notices of appearance or signing them. *See supra* Part II.B. It does not prohibit Plaintiffs from engaging in many other permissible activities. *See*

supra at 13. Accordingly, there is no showing that Plaintiffs cannot, or are substantially chilled in, carrying out their mission as a result of EOIR's letter.

Second, to the degree the letter discourages NWIRP from ghostwriting pleadings, being required to enter a notice of appearance or sign a brief is not irreparable harm that justifies issuing a preliminary injunction. Plaintiffs claim that not being able to ghostwrite for *pro se* individuals will result in "irreparable harm for hundreds[,]" *id.* at 31, but the irreparable injury standard measures the harm to plaintiffs, not to third parties. *L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1200 (9th Cir. 1980) (identifying "irreparable injury *to plaintiff*" as preliminary injunction factor (emphasis added)).

The rule that irreparable injury must be the plaintiff is consistent with notions of Article III standing, which ensure that the party bringing suit has suffered an injury-in-fact, or, at minimum, that the plaintiff's interests are aligned with those it seeks to represent. *Cf. Pony v. Cnty. of Los Angeles*, 433 F.3d 1138, 1147 (9th Cir. 2006) ("A litigant is granted third-party standing because the tribunal recognizes that her interests are aligned with those of the party whose rights are at issue and that the litigant has a sufficiently close connection to that party to assert claims on that party's behalf."). There is no evidence to support Plaintiffs' claims that those who NWIRP represents in immigration court proceedings prefer limiting NWIRP's assistance to out-of-court advice and ghostwriting since NWIRP's practices would not render them accountable to the immigration courts, thus removing a layer of protection to their clients. *See* 73 Fed. Reg. at 76,915 (discussing difficulty of enforce of professional responsibility rules when practitioner fails to file notice of appearance); 73 Fed. Reg. at 44,183 (same); *Matter of Reyes-Francisco*, 2009 WL 3818017, at *1 (highlighting difficulty of respondent asserting ineffective assistance of counsel claim against attorney who did not file notice of appearance). Moreover, those in immigration court who are not represented by NWIRP would certainly be impacted if EOIR's transparency rule was invalidated and replaced by a regime allowing anyone, including notaries, to ghostwrite with impunity. Lastly, application of this regulation against NWIRP helps ensure that only authorized NWIRP practitioners appear in immigration court proceedings either by pleadings or in person.

Any claim of constitutional deprivation asserted by respondents in removal proceedings who are supposedly unable to benefit from NWIRP's services must be raised in those proceedings or on judicial review thereof before the appropriate court of appeals. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031-35 (9th Cir. 2016) (requiring that right-to-counsel and other legal or constitutional claims arising from immigration removal proceedings must be raised in those administrative proceedings or on judicial review thereof). It is improper for Plaintiffs to rely on alleged harms to others—particularly those that could not be raised in the first instance in this Court—as a basis for their request for emergency relief. Finally, the cited harm to NWIRP clients is speculative and there is no concrete evidence that the harm, should it come to pass, would be irreparable. *Caribbean Marine Servs.*, 844 F.2d at 674 ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). Plaintiffs have not shown the likely and imminent irreparable injury necessary to warrant entry of a preliminary injunction enjoining enforcement of the notice of appearance requirement.

C. The public interest and balance of equities weigh against a preliminary injunction.

Where the Government is the opposing party, the balance of equities and public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Indeed, "the public interest favors applying federal law correctly." *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011). Here, the last two factors heavily weigh in favor of the government.

As explained above, EOIR's ability to promote compliance with the notice of appearance requirement at 8 C.F.R. § 1003.102(t) furthers the sound administration and efficiency of immigration court proceedings, in line with EOIR's efforts to promote both the availability and quality of practitioners, in a way that also protects respondents. *See generally* Lang Decl., ¶¶ 5-12; Maggard Decl., ¶¶ 4-6. Requiring that all practitioners file a notice of appearance makes clear to the immigration court and the respondent in immigration court proceedings who is responsible to advocate for the respondent and subject to discipline for any misconduct. *Singh*, 315 F.3d at 1189; 73 Fed. Reg. at 44,183. Such clear knowledge by the parties of who represents a respondent would facilitate the respondent's ability to obtain future relief if the practitioner engages in ineffective assistance. *See supra* at 6. Even more, the public has a strong interest in

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promoting quality of representation by enforcing reasonable standards of conduct in the nation's immigration courts, a goal furthered by the notice of appearance requirement. *See supra* Part II.A.

EOIR's restrictions on limited representation and ghostwriting also serve the efficiency of the courts. Immigration judges and Board members who receive ghostwritten pleadings or briefs cannot seek complete and accurate information, or have questions answered, regarding such pleadings or briefs, because the respondent, left to explain complex legal arguments set forth in the filings on his or her own, often cannot do so and the actual author cannot be identified. *See supra* at 6-7; Maggard Decl. ¶ 4. In these situations, immigration judges must decide whether to grant continuances - further delaying an already overly-taxed system or make a determination without any clarifying and supporting arguments.[18] Furthermore, statements in ghostwritten filings may not match the statements of the respondent at the merits hearings, potentially hindering the respondent's credibility. Moreover, ghostwriting can harm the vulnerable respondent because incompetent advocates who seek to evade accountability for their brief or, even competent advocates who perform less than competently or diligently can have truly negative impacts on a respondent's ability to seek and receive immigration relief. *See* 76 Fed Reg 76,915 ("This rule seeks to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded by aliens in those proceedings by defining additional categories of behavior that constitute misconduct."); McKeown and McLeod at 292-97. Without notification and identification, an ineffective assistance of counsel claim can be denied. *See Matter of Reyes-Francisco*, 2009 WL 3818017, at *1.

Plaintiffs claim that, but for limited representation, the pro bono legal assistance programs "w[ould be] eviscerate[d.]" Mot. at 32. Filing a notice to appear, Plaintiffs contend, would adversely affect the public because they would not be allowed to withdraw their representation but for establishing exceptional circumstances and this, in turn, would lessen the number of individuals that would receive their legal advice. *Id.* Still, Plaintiffs do not present any evidence showing the difficulty in withdrawing as counsel once they file a Notice of

[18] Unlike a federal district court, an immigration judge does not have the authority to directly compel a practitioner to appear in immigration court via an order to show cause. *See* Maggard Decl. ¶ 4.

Appearance. The Board has been clear in the steps to be taken in order to successfully withdraw and establishing "exceptional circumstance" is not one of them. *See Matter of Rosales*, 19 I. & N. Dec. at 657, Immigr. Ct. Practice Manual, Ch. 2.3(i)(ii). Yet, Plaintiffs fail to explain why such motions will be systematically denied.

NWIRP's *ad hoc* solution—that a *pro se* brief denote NWIRP's organizational assistance, without identifying a specific practitioner—is unworkable and legally unenforceable under current regulations. *See* Barnes Decl. ¶¶ 57-59. First, the *pro se* respondent remains responsible for including the notation— but EOIR professional conduct rules do not require the respondent to include the notation in the way NWIRP desires. *Id.* at ¶ 57. The Disciplinary Counsel only has authority regarding "practitioners," not respondents. *See e.g.* 8 C.F.R. § 1003.101(b), § 1103.105. Second, NWIRP's notation does not note the specific practitioner who provided the assistance, frustrating the rule's goal to identify and correct practitioner misconduct. Barnes Decl. ¶¶ 58.

It is contrary to the public interest to prohibit EOIR from regulating the practice of law before its courts. After all, EOIR's interest in regulating who speaks before it through the filing of legal forms and/or pleadings is to protect a vulnerable sector of the public from the potentially devastating results of improper filing, fraud, and the unaccountability of individuals who craft inadequate legal arguments on their behalf. EOIR's need "that, at any given time, there is no ambiguity as to who has been given, and who has accepted, the responsibility of representing a party before it," *Singh*, 315 F.3d at 1189, is a strong compelling interest. As one commentator argued, "The highest standards of the legal profession must be preserved. This is possible only under strict supervision of the regulating authorities. An attorney whose practice is not regulated becomes no better than a notario. Rules are set for the legal profession not just to set minimum standards of conduct, but to protect the clients, who become the victims of unauthorized practitioners." Charles H. Kuck & Olesia Gorinshteyn, *Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in Sperry v. Florida*, 35 Wm. Mitchell L. Rev. 340, 358 (2008).

V. CONCLUSION

EOIR is committed to promoting both the availability of representation and the quality of that representation. Its enforcement of the notice of appearance and signature requirement of section 1003.102(t) is an essential tool for EOIR to promote the *quality* of representation by those who practice before its immigration courts and the Board. Promoting quality of representation in a practitioner and viewpoint neutral manner – as EOIR has done here – does not hinder NWIRP's First Amendment rights to advocate for their clients. Promoting quality of representation does not hinder Washington's interest in regulating the legal profession in a way that violates the Tenth Amendment. NWIRP does not suffer irreparable harm by EOIR's practice to require a notice of appearance for practitioners that appear before its immigration courts or the Board. Indeed, the public is well-served by having a rule that seeks to protect respondents in immigration court proceedings by promoting transparency and guaranteeing accountability of those practitioners who appear before EOIR. The Court should therefore deny NWIRP's motion for a preliminary injunction and allow EOIR to continue its work to protect individuals in immigration court proceedings by ensuring that those who practice before its immigration courts and the Board meet minimal standards of competence.

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Dated: June 26, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 26, 2017

Respectfully submitted.

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