The Honorable 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; 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

REPLY IN SUPPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Note on Motion Calendar:
June 30, 2017

Oral Argument: July 24, 2017 at 9:00 a.m.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

TABLE OF CONTENTS

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

TABLE OF AUTHORITIES

Page

Federal Cases

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

State Cases

Federal Regulations

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Rules of Professional Conduct & Related Materials

Other Authorities

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

I. INTRODUCTION

In their motion, Plaintiffs established that EOIR's Rule imposes an all-or-nothing paradigm on immigrant representation. By compelling full representation the moment an attorney agrees to provide *any* limited representation, EOIR's Rule violates both the First and Tenth Amendments. The Rule, untailored to any valid governmental interest, impermissibly restricts protected political speech on the basis of its content and viewpoint. The Rule also impairs the states' sovereign power to regulate the practice of law outside of agency proceedings. Plaintiffs will suffer imminent, irreparable harm without a preliminary injunction. Given the unbounded impact of EOIR's Rule, the overwhelming public interest strongly favors nationwide relief.

EOIR's opposition does not engage with the substance of these arguments. Instead, it skirts the issue, arguing that Plaintiffs overstate the impact of the agency's cease-and-desist order and the underlying Rule because NWIRP's attorneys may still assist unrepresented immigrants—just so long as they don't provide legal representation.[1] This is little comfort, as NWIRP does not seek to provide unspecified social services, but instead, pursuant to its mission, seeks to provide legal representation to immigrants. EOIR's opposition also tries to move the goal posts, claiming that the Rule has been misunderstood—that the Rule is actually far narrower than Plaintiffs, the Court, and the rest of the legal community understand it to be. The Rule, the agency says, only applies to practitioners "who appear before" EOIR, "either in person or through written pleadings." Dkt. 47 at 11. Cloaked in this new, strategic litigating position, EOIR says its Rule now survives constitutional scrutiny.

EOIR is mistaken. The agency cannot disown its prior interpretation and its representations to this Court as an eleventh-hour tactic to avoid injunctive relief. Nor can it adopt an interpretation unmoored from the text and structure of the Rule itself, an interpretation so vague it will leave practitioners guessing at what conduct is proscribed. But, at the end of the day, this new interpretation EOIR advances is hollow—a palliative rebranding of the same flawed interpretation that led to this lawsuit. In short, EOIR's new approach changes nothing.

[1] *See, e.g.*, Dkt. 47 at 25 ("Plaintiffs cannot show that NWIRP is banned from continuing to assist vulnerable immigrant populations."); *id.* ("It does not prohibit Plaintiffs from engaging in many other permissible activities.").

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

EOIR offers several other flawed arguments. It claims it can regulate the conduct of immigration attorneys *outside the courtroom* under the theory that immigration court is a nonpublic forum. It argues preventing the ghostwriting of briefs (a practice Plaintiffs do not engage in) is a compelling interest that justifies otherwise-unconstitutional speech restraints. It asserts two procedural objections, claiming that the omission of an irrelevant citation from Plaintiffs' Complaint is a fatal defect that precludes relief and that Plaintiffs' claims are unripe because Plaintiffs have sought to avoid—rather than suffer—the Rule's harms. Each of these arguments is meritless

Nothing EOIR says in its opposition changes the fundamental truth of this case, or materially changes the facts and law that were present when the TRO was granted. If EOIR is permitted to enforce its unconstitutional Rule, the agency will succeed in depriving Plaintiffs of their right to advocate for immigrant rights, and will deprive thousands of immigrants in Washington—and many more throughout the country—of the low cost or pro bono legal assistance they now receive.

II. ARGUMENT

A. EOIR's Latest Interpretation of the Rule Suffers from Even More Problems than its Last Interpretation—But It Ultimately Changes Nothing

EOIR proposes a new version of its ever-changing interpretation of the compulsory-representation rule. It now claims the Rule is actually bound by an important—but thus-far undisclosed—limiting principle: the Rule's "reference to 'practice' and 'preparation' *only* encompass activities by individuals *appearing* before [the agency]." Dkt. 47 at 11 (emphasis added). In other words, practitioners are free to "practice" and engage in "preparation" as long as they aren't "appearing" before the agency. EOIR does not say what "appearing" in this context means (other than, tautologically, "to appear"). Nonetheless, EOIR argues that the Rule applies to only those appearances which are "either in person or in written pleadings." *Id.* at 11, 12.

As we explain below, the Court should reject EOIR's position for several reasons. First, EOIR effectively asks the Court to disregard the agency's formal interpretation as announced in its 2011 memo, Dkt. 14-2, reaffirmed in its supporting declarations, Dkts. 49 & 50, and explained

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

to the Court in its prior briefing and argument. The agency cannot sweep this overwhelming and contradictory record under the rug because a new interpretation of the Rule now suits their litigation needs. Second, EOIR's new interpretation ignores and contradicts the text and structure of the Rule itself. The agency's novel concept of "appearing through written pleadings" is incongruous and undefined, further amplifying the Rule's existing vagueness problems. Most importantly, EOIR's latest interpretation is nothing more than a placebo—it results in exactly the same prohibitions and harms as the agency's prior formal interpretation.

1. EOIR Invents a New Interpretation of the Rule that Conflicts with Prior Agency Guidance, Prior Representations to Plaintiffs and the Court, and the Agency's Own Declarations

If EOIR's latest interpretation is accepted at face value (which it should not be), EOIR is rewriting history. The agency cannot advance a new interpretation of the Rule that conflicts with its own prior interpretation, particularly not as a litigation strategy to avoid injunctive relief. EOIR's latest interpretation flatly contradicts the agency's prior written guidance, its oral and written representations to Plaintiffs, its briefs and oral argument to the Court, and—ironically—the declarations from agency employees submitted with its opposition brief.

When the Rule was adopted in 2009, EOIR's local court administrator agreed NWIRP could comply by disclosing its assistance with pro se filings by including a statement NWIRP had prepared or assisted in preparing the filing. Dkt. 38 ¶ 5. This practice was accepted by EOIR without objection for 8 years until April 2017. *Id.* EOIR complains there is no "document or written agreement memorializing" this understanding, but does not dispute it. Dkt. 47 at 4.

Fast-forward to 2011: EOIR apparently sent a memo to a third party, not NWIRP, distinguishing between "legal orientation" and "legal representation"—the former being activities the agency sought to fund under its Legal Orientation Program (LOP), and the latter encompassing "practice" and "preparation" it wished to exclude from such funding. Dkt. 14 at 5; Dkt. 14-2. The audience of the memo's guidance is "individuals providing contract service through [EOIR's LOP]," Dkt. 14-2, at 1; however, NWIRP has never used LOP program funding to provide the limited legal services at issue in this case. Nonetheless, according to EOIR, its

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

memo was apparently intended to "clarif[y] for practitioners the [meaning of] 'representation,' *which triggers the notice of appearance requirement.*" Dkt. 14, at 12 (emphasis added).

The memo identifies some of the activities that trigger the compulsory appearance requirement. For example, the memo indicates that, at "self-help workshops," practitioners "cannot assist in the direct preparation of an individual's papers." Dkt. 14-2, at 5. In providing assistance with paperwork during a one-on-one meeting, practitioners cannot "advise the individual on how to answer a question based on a participant's particular factual situation and the applicable law." *Id.* at 6. Practitioners can only provide information that is "information and non-specific to any particular individual's case" and cover "general areas of law and procedure ... in general terms." *Id.* at 2–3. EOIR reaffirmed all of these positions in the Declaration of Steven Lang, filed with its opposition. Dkt. 50 ¶ 68.

In late 2016, NWIRP and EOIR attorneys participated in a conference call where NWIRP educated EOIR about some of the tools NWIRP uses to combat notario fraud, based on the special project it implemented in conjunction with the Washington State Attorney General's Office. 2d Barón Decl. ¶ 2. NWIRP explained that one of the tools it uses is providing workshops to assist unrepresented individuals fill out asylum applications. *Id.* EOIR later requested a follow-up call, in which its disciplinary counsel, Defendant Jennifer Barnes, stated that such workshops could violate the Rule. Dkt. 47 at 8; Dkt. 49 ¶ 49. The agency characterizes this October conversation as "NWIRP ask[ing] for relief from [the Rule]." Dkt. 47 at 8. NWIRP vehemently disagrees with this characterization. 2d Barón Decl. ¶ 3. Indeed, NWIRP had no reason to seek "relief," as the agency had not opposed or sanctioned their work to that point. Moreover, as noted, the call pertained to NWIRP's pro se community asylum workshops and did not address any of the other services NWIRP provides. Notably, under EOIR's new measuring stick, pro se asylum workshops would not seem to constitute "appearing" in a "written pleading"—yet, according to Defendant Barnes, such activities apparently necessitate "relief" from the Rule.

EOIR's sudden insistence that the Rule is limited to in-person or in-writing appearances also contradicts representations the agency made during the hearing on the Plaintiffs' TRO

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

motion before this Court, just six weeks ago:

> THE COURT: So if someone comes to a legal clinic and says, "I have a legal form, I need to fill in the blanks, but I need someone to assist me and give me some coaching or legal advice on what I should include," does that cross the line, in your interpretation?
>
> MR. MERCADO-SANTANA: It depends if the attorney is engaging in providing legal advice and is providing any additional assistance.

Dkt. 36, at 58:6–13.

> THE COURT: And just to be clear -- and I think you've conceded this point -- the regulation does not bar the plaintiffs from making statements at community workshops, the KYR, the know-your-rights events, or legal clinics; is that correct?
>
> MR. MERCADO-SANTANA: That is correct, so long as they don't cross the line to actually providing advice and auxiliary activity, which, in a memo from the Legal Orientation Program, agencies like NWIRP have been provided guidance of where those lines lay.

Id. at 57:14–22.

> MR. MERCADO-SANTANA: … [Lawyers] understand what providing legal advice is. There is clearly a difference in providing legal advice and providing assistance, providing information. There's also a difference between helping somebody prepare forms versus providing an individual substantive information and aid and assistance in order to present -- to apply the facts to the legal law, to the legal framework.
>
> THE COURT: So in your interpretation, you don't think that that presents a chilling effect upon the lawyer or the lawyer's ability to provide representation for their client under those circumstances?
>
> MR. MERCADO-SANTANA: It would not cause an undue burden on the lawyer. Lawyers have the knowledge and experience of distinguishing between providing legal advice and providing legal information. And the EOIR has provided guidance in order to provide -- to provide guidance in order to narrow -- to give a better understanding to practitioners about what is permissible and what is not permissible.

Id. at 58:25–59:19.

At the TRO hearing on May 17, EOIR insisted that providing individualized legal advice to an unrepresented immigrant without entering a notice of appearance was "not permissible" under their Rule—a position which, although unconstitutional, at least tracks the text of the Rule. Now, however, EOIR reverses course, asserting that "the mere act of advising a client triggers no obligation to file a notice of appearance." Dkt. 47 at 24–25.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

EOIR cannot alter its interpretation of the Rule mid-stream to suit its litigation strategy. "The doctrine of judicial estoppel prohibits such flip-flopping." *Manchester v. Ceco Concrete Constr., LLC*, No. C13-832RAJ (Dkt. 69), at 5 (order filed Nov. 24, 2014) (citing *Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). Nor can the agency rely upon a novel interpretation it did not raise until the commencement of litigation. *See SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947) ("a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 n.2 (10th Cir. 2015) ("[T]he BIA order before us didn't invoke this rationale in defense of its decision and so the agency may not now employ it on appeal."). This new position advocated by EOIR offers no assurance the agency's interpretation will not morph again during or after this litigation, nor does it provide clear guidance on when the appearance requirement is triggered. The agency's interpretive flip-flops leave practitioners and the Court in an "awkward position" of guessing what is and is not permitted. Dkt. 36 at 32:18–33:24, 58:6–59:8, 58:19–21.

2. EOIR's Latest Interpretation Ignores the Text and Structure of the Rule, and Offers No Guidance About What Constitutes an "Appearance Through Written Pleadings"

EOIR's new interpretation should be disregarded for another reason: it is unmoored from the text and structure of the Rule itself, and it creates additional ambiguity for practitioners. EOIR claims its latest interpretation arises from "the language of the regulation," Dkt. 47 at 12, but the Rule does not require any sort of appearance through written pleadings, as EOIR suggests. Nor does EOIR define what it means to "appear" before the agency "through written pleadings."

To the extent EOIR tries to cabin the Rule to encompass only acts that constitute "practice," that effort necessarily fails. The Rule, by its plain text, requires a notice of appearance whenever a practitioner "has engaged in practice *or preparation*." The term "preparation," is broadly defined: even EOIR begrudgingly concedes that it "sweep[s] more broadly" than mere "practice." *Id.* at 12. "Preparation" is the "study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities." 8 C.F.R. § 1001.1(k). While

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

preparation can include "the incidental preparation of papers," the definition does not require that the study, advice, or auxiliary activities relate to a written pleading. Under the plain language of the Rule, any acts of preparation trigger the notice-of-appearance requirement.[2] EOIR cannot save the Rule by carving out acts of "preparation" from the notice-of-appearance requirement. It is "a cardinal principle of statutory construction" that a statute must be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

If EOIR's "appearance through written pleadings" means something other than the text of the regulation, EOIR's opposition brief offers no insight as to what that meaning might be; it only further muddies the waters as to what activities are permitted or prohibited. EOIR now claims, contrary to the supporting exhibits to its brief, that the Rule "does not encompass … filling out asylum application forms or other types [of] immigration forms without [sic] that does not go beyond preparing the form." Dkt. 47 at 13; *see also id.* at n.12 (citing the "preparation of forms … when the assistance goes beyond the role of a scrivener" as an example of conduct that "would *not* trigger" the Rule). But as noted above, EOIR previously represented that a notice of appearance is required if, while helping a client "fill out" a form, the practitioner advises the client about what information to include. Dkt. 14-2 at 6. [3]

EOIR reassures the Court that "[i]t 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." Dkt. 47 at 25. But EOIR does not explain when assistance to an unrepresented individual with a particular form transforms into "a filing that embodies the [practitioner's] voice." *Id.* at 25. This is precisely the sort of "awkward

---

[2] Even if the notice-of-appearance requirement applied only to acts constituting "practice" and not "preparation," the Rule's scope would remain unchanged. The definitional portion of the regulation specifies that preparation "constitut[es] practice," 8 C.F.R. § 1001.1(k), so the definition of practice therefore necessarily includes all of the activities that would fall within the definition of "preparation."

[3] EOIR also argues "preparation [] does not cover assistance in the preparation of forms by aiding an individual to fill in the blanks." Dkt. 47 at 4. However, the plain text of the rule provides the telltale qualifier, explaining that preparation "does not include the … service consisting solely of assistance in the completion of blank spaces on printed [agency] forms *by one … who does not hold himself out as qualified in legal matters*." 8 C.F.R. § 1001.1(k) (emphasis added).

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

position" the Court commented on at the TRO hearing: with this sort of "moving target," practitioners "never will know … if they crossed the line[.]" Dkt. 36, at 58:19–21.

* * *

Despite the host of new infirmities created by EOIR's latest interpretation, the agency's eleventh-hour effort to save the Rule is a smokescreen: while appearing more narrow and reasonable than the prior interpretation, the new interpretation changes nothing. Despite the agency's protestations that the Rule is limited to "appearances" before the immigration court, it remains clear that the agency seeks to infringe Plaintiffs' right to provide limited legal services even where NWIRP's attorneys do not appear in person before the immigration court, and even where NWIRP's attorneys do not actually file any documents with the court. The cease-and-desist letter itself specifically points to a motion to reopen in the Tacoma Immigration Court where the NWIRP attorney helped fill out a simple motion, which the detainee subsequently filed on his own.[4] Benki Decl. ¶¶ 6–8. Similarly, Defendant Barnes previously tried to limit NWIRP's ability to provide limited legal services in the context of pro se asylum workshops, wherein NWIRP attorneys advise detainees how to best fill out applications with specific legal advice on formulating their answers and presenting their case. 2d Barón Decl. ¶ 2. No matter what limiting principle EOIR advances, the Rule, and the agency's enforcement of it, remains unchanged—and unconstitutional.

B. Plaintiffs Meet the Criteria for a Preliminary Injunction

1. Plaintiffs' First Amendment Claims Are Likely to Succeed on the Merits

EOIR does not try to justify its Rule under a strict scrutiny analysis, because EOIR cannot meet the exacting standards of such an analysis. Nor does EOIR attempt to distinguish the Supreme Court's controlling precedent—*Button* and *Primus*. Instead, EOIR argues that attorneys have no First Amendment rights because immigration court is a nonpublic forum. Dkt. 47 at 16–

[4] EOIR alleges there was a signature mismatch in the detainee's signature, as if to create the appearance of impropriety and justify their notice-of-appearance requirement (which has nothing to do with signature mismatches). As Ms. Benki explains, the signature mismatch is because the detainee, "like many others, sometimes signs documents using the English translation of his name, while other times using his given name in Spanish." Benki Decl. ¶ 9.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

18. EOIR also advances various rationales justifying its Rule. None of these arguments save the Rule from its unconstitutional fate.

a. EOIR's Nonpublic Forum Analysis is Irrelevant

Cases upholding attorney speech restrictions on the ground that a courtroom is a nonpublic forum have addressed restraints on attorney speech *inside the courtroom*. Here, EOIR seeks to restrain attorney speech by regulating advice and legal assistance that occurs *outside the courtroom*. Indeed, by its nature, the Rule targets attorneys who have not entered an appearance in the case. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Supreme Court held Nevada's regulation on pretrial publicity was void for vagueness. In dicta, the Court observed that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Id.* at 1071. While some subsequent cases involving attorney conduct in courtrooms have categorized courthouses as nonpublic forums, none of the cases EOIR cites extend the concept of a nonpublic forum to out-of-court conduct. *See, e.g.*, *Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992) (deliberate disobedience of the judge's pretrial order not protected speech); *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005) (defending client in court not protected speech).

Courtroom speech is not at issue here. Plaintiffs do not contend they are exempt from the notice-of-appearance requirement when they agree to undertake full representation in a client's case. Nor do Plaintiffs contend EOIR cannot regulate the conduct of attorneys while they are before an immigration judge. That an immigration courtroom may be a nonpublic forum does not, however, give EOIR the right to regulate the conduct and speech of attorneys who engage in legal representation outside of the court. EOIR identifies no authority holding otherwise. EOIR's nonpublic-forum analysis is wholly inapplicable to this matter.

But, even if the nonpublic-forum analysis were to apply, EOIR's regulations fail because they are neither reasonable in light of the purpose served by the forum nor viewpoint neutral. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966–67 (9th Cir. 2002) (requiring

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

regulations fulfill a "legitimate need," a higher standard than rational basis) *abrogated on other grounds by CTIA- The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1122 (9th Cir. 2017). EOIR claims the appearance requirement will make it easier for EOIR to identify attorneys who need to be disciplined. However, easing the agency's burden is not a sufficient justification for infringing First Amendment rights. Moreover, NWIRP self-identifies on pleadings, Dkt. 38 ¶ 5, and EOIR admits it has no instances of disciplinary concern with NWIRP. Dkt. 39-1 at 39:19–20, 40:6–15, 43:14–16. EOIR cannot show a "legitimate need" to impose compulsory representation when a mere self-identification requirement would serve every one of the Rule's rationales as articulated by EOIR. Indeed, Defendants acknowledge there are several alternative ways to modify the Rule so as to avoid infringing on Plaintiffs' First Amendment rights. Dkt. 50 ¶ 85.

Nor is the Rule viewpoint neutral. EOIR implies that the relevant test for viewpoint neutrality is whether it agrees or disagrees with the contents of NWIRP's briefs. Dkt. 47 at 19. In making this argument, EOIR quotes from *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008), asserting that its cease-and-desist letter was clearly not "an effort to suppress expression merely because public officials oppose the speaker's view." Dkt. 47 at 16. EOIR misses the point. While the agency may not intend to suppress any particular *argument* by an immigrant, the Rule's effect will be to reduce the overall volume and quality of pro-immigrant advocacy. The outcome of EOIR's Rule is a restriction on a particular type of speech—legal advice regarding removal proceedings—which in turn limits the number of immigrants Plaintiffs can help. Plaintiffs advocate a consistent pro-immigrant message that is fundamentally opposed to Defendants, who operate a system whose function is to deport immigrants. By diminishing the amount of such speech, EOIR enhances the speech of Plaintiffs' (and their clients') opponents.[5]

[5] It hardly needs noting that in the current political climate, immigrant rights are at the forefront of the political debate in this country. For example, yesterday, at a press conference announcing new anti-immigrant legislation passed in the House, Secretary Kelly of the Department of Homeland Security stated, "[i]t is beyond my comprehension why federal, state, and local officials sworn to enforce the laws of the nation, as I am, would actively discourage or outright prevent law enforcement agencies from upholding the laws of the United States and why they would set public funds aside to pay for the legal representation of illegal aliens who are also lawbreakers." https://www.pscp.tv/NewsHour/1vOGwvyaDdNKB?t=3 at 2:48.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

In Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), the Supreme Court rejected a similar effort to place limits on the advocacy of attorneys opposing the government:

> The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.

LSC, 531 U.S. at 548. Like the restriction in *LSC*, EOIR's rule favors one viewpoint—the government—over another viewpoint and cannot pass muster even in a nonpublic forum.[6]

b. EOIR Fails to Identify any Compelling Interest Advanced by Its Compulsory-Representation Rule

EOIR suggests there are four "purposes" served by its compulsory-representation rule: (1) facilitating EOIR's enforcement of professional conduct rules by identifying the practitioner responsible for representation, Dkt. 47 at 4; (2) ensuring those who represent immigrants before the agency are authorized to practice by the agency, *id.* at 5; (3) helping immigrants lodge claims against an ineffective practitioner (which is the same as the first rationale), *id.* at 6; and (4) eliminating the practice of ghostwriting, *id.* *None* of these rationales is a sufficiently "compelling interest" to survive constitutional scrutiny.[7]

And all of these rationales all boil down to the same thing: EOIR wants to more easily identify the practitioner who appears in court or who drafts a pleading, to ensure the practitioner is authorized to do so and to discipline them for misconduct, if necessary. But when the government's actions infringe on free speech rights—especially political speech—it does not have

[6] EOIR makes an alternative argument that its regulation can be upheld as merely a time, place, and manner restriction, but such a restriction must also be reasonable and content neutral. *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000). EOIR's compulsory representation rule fails for the same reasons it fails the nonpublic forum analysis above.

[7] EOIR's opposition, liberally construed, offers several other possible rationales for its rule. EOIR purports to want to increase the "quality of representation" and "quality of practitioners." Dkt. 47 at 2, 19, 27. EOIR offers no explanation for how its notice-of-appearance requirement increases the quality of representation. It certainly does not explain how a notice-of-appearance requirement, as opposed to an identification requirement, promotes that purported interest more effectively. EOIR has also suggested it has an interest in being "consistent in how it enforces the [Rule]." *Id.* at 10. Of course, consistent enforcement of an unconstitutional restraint does not magically transform that restraint into one that passes constitutional muster. Moreover, "consistent" enforcement is no defense to a constitutional challenge unless the agency can show that the evils the Rule supposedly targets "actually occurred" with NWIRP. *See In re Primus*, 436 U.S. 412, 435 (1978). EOIR cannot do that here.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

the prerogative to simply pick the path of least resistance. "To meet the requirement of narrow tailoring, [EOIR] must demonstrate that alternative measures that burden substantially less speech would fail to achieve the [agency's] interest, not simply that the chosen route is easier. …[T]he prime objective of the First Amendment is not efficiency." *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). Even without the Rule, EOIR may still inquire and conduct investigations regarding malpractice or unauthorized practice of law, even where legal advocates do not identify themselves. Immigration judges can readily ask pro se respondents in court to identify the individual that assisted them in filling out any application or motion. And EOIR can continue to refer unlicensed or unauthorized practitioners to state bar authorities.

Moreover, as NWIRP has explained in its briefing and at oral argument on the TRO motion, *see* Dkt. 36 at 9:13–17, Dkt. 2 at 18, it has taken measures to satisfy any concerns by identifying itself and notifying EOIR of its assistance with any application, motion, or filing. The agency's primary concerns, as articulated, are fully satisfied by an *identification* requirement—a rule obligating attorneys to sign or otherwise identify themselves on filings they help draft.[8]

EOIR's concerns about the practice of ghostwriting are particularly unfounded. As a threshold matter, EOIR tries to apply the formulaic "ghostwriting" label to NWIRP's activities, but this is incorrect. Ghostwriting occurs when an attorney drafts a written product "for and in the name of another" *without* disclosing any participation in that drafting effort.[9] When the attorney discloses her participation in the drafting effort, however, that work cannot be accurately characterized as ghostwriting. This is where EOIR's argument falters: NWIRP does not engage in ghostwriting. It self-identifies and discloses its participation on every filing with the agency. Indeed, ironically, NWIRP's commitment to *avoid* ghostwriting, through self-identification, is what led to the agency's enforcement effort against Plaintiffs. Dkt. 14-1.

[8] EOIR knows how to draft such an identification requirement—indeed, it has, in large measure, already done so. *See* 8 C.F.R. § 1003.102(t)(2). With minimal effort, its regulation could be modified to include an explicit identification requirement.

[9] Merriam-Webster.com, *Ghostwrite*, https://www.merriam-webster.com/dictionary/ghostwrite (June 30, 2017); Wikipedia, *Legal ghostwriting*, https://en.wikipedia.org/wiki/Legal_ghostwriting (June 30, 2017).

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Moreover, EOIR's apparent distaste for the practice of ghostwriting, in and of itself, does not provide a "compelling interest" sufficient to avoid constitutional scrutiny. In 2007, in a formal, published ethics opinion, the ABA's Standing Committee on Ethics and Professional Responsibility determined that the Model Rules of Professional Conduct (on which EOIR's own ethics codes are based) neither prohibited ghostwriting nor required lawyers who participated in ghostwriting to disclose their participation to the tribunal. Formal Op. No. 07-446. Since that time, a flood of state ethics opinions mirrored the ABA's formal conclusion and endorsed the practice of ghostwriting (some requiring self-identification, and some not).[10] The overwhelming consensus of these ethics regulators is that the public benefits of ghostwriting outweigh the harm caused by imposing an "all-or-nothing" model of legal representation, like the one advocated by EOIR. Recent opinions from the Court of Appeals have followed this trend and found no ethical violation results from ghostwriting. *See, e.g.*, *In re Fengling Liu*, 664 F.3d 367, 369 (2d Cir. 2011) (rejecting disciplinary committee's decision to reprimand an immigration attorney for ghostwriting petitions to the Court of Appeals for review of decisions by the Board of Immigration Appeals); *Torrens v. Hood (In re Hood)*, 727 F.3d 1360, 1365 (11th Cir. 2013) (finding no ethical violation in lawyer's completion of a form for a *pro se* bankruptcy petitioner).

Given the strong and recent authority condoning—and, in fact, promoting—the practice of ghostwriting, EOIR cannot say that preventing ghostwriting, in and of itself, is a compelling justification for a restraint on speech. It must, at the very least, articulate *why* ghostwriting in the context of agency proceedings is a particular evil that its compulsory-representation rule is narrowly tailored to eradicate. Again, here EOIR's argument falters.

The appearance requirement offers no advantage over an identification requirement in "protecting a vulnerable population from unscrupulous immigration service providers, [or] 'notarios,' who routinely hide behind ghostwritten filings." Dkt. 47 at 1. Scrupulous and diligent

[10] *See, e.g.*, Ala. Ethics Op. 2010-01; Colo. Bar Ass'n Ethics Comm. Op. 101 (new opinion approved May 21, 2016); D.C. Bar Ass'n Comm. Legal Ethics Op. No. 330 (July 2005); Mich. State Bar Op. No. RI-347 (April 23, 2010); N.C. State Bar Formal Ethics Op. 2008-3 (Jan. 23, 2009); N.J. Advisory Comm on Prof'l Ethics, Op. 713, at 4; NY County Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 742 at 1 (2010) ; Pa. Bar Ass'n Comm. on Legal Ethics & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100, at 11-16; Utah State Bar Ethics Advisory Op. Comm., Formal Op. 08-01 (2008); W.Va. Lawyer Disciplinary Bd. Legal Ethics Op. 2010-01.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

legal providers will identify themselves if required to do so. Unscrupulous ones—notarios—will not, particularly if they are not licensed or authorized to practice before EOIR. Imposing an appearance requirement, instead of an identification requirement, will not magically result in a more effective crackdown on notario fraud. Despite the agency's contention throughout its brief that it seeks to prevent notario fraud, EOIR presents no argument or evidence for how its Rule accomplishes that. With or without any prohibitory regulation, EOIR would not be able to identify unauthorized providers who ghostwrite as a matter of course so as to avoid detection.

Notario fraud will not be prevented by a rule that purports to require notarios to identify themselves and commit to full representation; they will simply ignore the rule, as they are currently doing. On the other hand, "[c]ritical to protecting consumers from [notarios] … is the availability of, and access to, free or low-cost immigration legal services, [and] NWIRP plays a crucial role in meeting this essential need." Br. of *Amicus Curiae* Att'y Gen. of Wash., Dkt. 18-1, at 4–5. In other words, EOIR's enforcement effort is undercutting the very interest it purports to be advancing.

In sum, EOIR's rationales for its compulsory-representation rule do not rise to the level of a "compelling interest" sufficient to satisfy any level of scrutiny under the First Amendment.

2. Plaintiffs' Tenth Amendment Claims Are Likely to Succeed on the Merits

The Rule goes beyond regulating the conduct of lawyers who appear in immigration court. EOIR instead reaches far back into the attorney-client relationship, restraining otherwise-valid legal practice outside of any agency proceeding. EOIR's own cited authorities reinforce that regulating lawyers is a power reserved to the states under the Tenth Amendment.

EOIR cites no authority that a federal agency's professional rules of conduct can infringe on a lawyer's right to practice law in a manner otherwise allowed by state licensing authorities. This void in authority is notable because the licensing and regulation of lawyers are matters left to the states under the Tenth Amendment. *Ind. State Bar Ass'n v. Diaz*, 838 N.E. 2d 433 (Ind. 2005) (Indiana can enjoin unlicensed attorney from engaging in the practice of immigration law); *Oregon State Bar v. Ortiz*, 713 P.2d 1068 (Or. App. 1986) (person assisting in filling out

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

immigration forms subject to Oregon licensing authority). EOIR's reliance on *Sperry v. State of Florida*, 373 U.S. 379 (1963), remains inapposite because that case involved the exact inverse of the situation here. *Sperry* upheld a federal agency's ability to allow an unlicensed practitioner to engage in specific, limited practices before it. In contrast, this case challenges whether a federal agency can prevent a licensed practitioner from engaging in the practice of law, not before the agency, that is otherwise allowed by the state licensing authority. Defendants cannot take refuge in the sweeping authority of the federal government in immigration matters because "[t]he federal power [regarding immigration] is exclusive only in regard to making a determination of who should or should not be admitted in the country and the conditions under which a legal entrant may remain." *Ortiz*, 713 P.2d at 1069.[11]

EOIR's proscription against providing legal advice to a pro se litigant also conflicts with the Rules of Professional Conduct. EOIR's interpretation requires that an attorney who advises a client about how to fill out an immigration form must file a notice of appearance. But, if the client does not want the attorney to reveal the assistance, or the client is not prepared to file the form, EOIR again puts the attorney in an impossible position. The attorney is left only with conflicting and untenable options: (i) file a notice of appearance, as required by EOIR, but face discipline by the state bar for violating RPC 1.2 and 1.6, which allow for limited representation and impose a duty of confidentiality; (ii) abide by the RPCs, but face disciplinary action from EOIR for not filing a notice of appearance; or (iii) simply provide no legal assistance at all to any pro se litigant who might have immigration concerns.

3. NWIRP Establishes Imminent and Irreparable Harm Absent an Injunction

EOIR does not dispute that constitutional violations *per se* result in irreparable harm. Dkt. 37 at 19-20; *see e.g. Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, EOIR's Rule unlawfully restraining Plaintiffs' First Amendment rights alone constitutes irreparable harm. Moreover, Defendants do not dispute that third-party harm can support injunctive relief where a

[11] Moreover, Defendants "uniformity" argument fails on their own admission that practitioners are required to consult their own state bars to ensure their conduct is consistent with those rules, regardless of what the federal government regulations permit. Dkt. 47 at 4 n.2. Defendants similarly acknowledge that they often rely on the states to investigate and discipline any misconduct that occurs in immigration court. Dkt. 49 ¶ 11.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

special relationship exists. Dkt. 37 at 21, n.8. NWIRP has established that an injunction is necessary to prevent significant harm to its ability to effectuate its mission, and to the immigrants who would be deprived of NWIRP's services. *See id.*at 21; Dkts. 39-2 – 39-21. This harm is sufficient for the purposes of a preliminary injunction.

4. The Balance of Equities and Public Interest Strongly Favor a Preliminary Injunction

Plaintiffs' constitutional interests trump EOIR's ever-changing justifications for the Rule. Dkt. 37 at 22. Defendants' proposed justifications for the Rule are not in the public interest. Defendants claim that the Rule promotes judicial efficiency so that immigration judges can identify the author of a filing in order to ask substantive questions, Dkt. 47 at 48; but, an appearance requirement compelling full representation does not advance that justification beyond what is achieved by NWIRP's consistent practice of self-identifying, *see* Dkt. 21 at 6. EOIR disingenuously claims NWIRP's self-identification practice is insufficient because it does not identify the specific attorney responsible for the brief. However, the record belies that claim: EOIR identified one of the two NWIRP attorneys at issue in the cease-and-desist letter; in fact, Ms. Barnes explicitly used Ms. Cheng's name in the letter. *See* Dkt. 1-1 at 2. EOIR never bothered to inquire as to which NWIRP attorney assisted with the other pro se motion.

EOIR does not rebut the evidence offered by Plaintiffs—including declarations from law firms and legal service organizations, *see e.g.* Dkts. 39-2 – 39-34—that requiring full representation and foreclosing limited representation will significantly curtail legal services to immigrants, given the difficulty of withdrawing from that representation. The balance of equities and public interest warrant preliminary injunctive relief.

C. EOIR's Procedural Objections are Frivolous

Neither of the two procedural objections EOIR raises justifies denying preliminary relief. First, the agency claims Plaintiffs should have directly challenged one of the agency's rules of procedure, 8 C.F.R. § 1003.17, in its Complaint. With no supporting authority, EOIR reasons that the omission of this citation from the Complaint is a defect of such magnitude that it precludes otherwise-warranted injunctive relief. "[T]he party who brings a suit is master to decide what law

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

[it] will rely upon." *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014). NWIRP's complaint, its briefing on the prior motion for a TRO, and its present motion all identify and explain how the challenged regulation—8 C.F.R. § 1003.102(t)—operates in conjunction with the definitional language in 8 C.F.R. § 1001.1(i) and (k) to require a notice of appearance by the practitioner, which in and of itself violates the First and Tenth Amendments regardless of whether the practitioner is later permitted to withdraw. If EOIR is enjoined from enforcing 8 C.F.R. § 1003.102(t), the harm will cease. On the other hand, § 1003.17 does not require a notice of appearance based on protected out-of-court conduct, like advice-giving, but rather regulates attorney conduct only when the immigrant "is represented" in a "proceeding before an Immigration Judge." As NWIRP has explained, when it provides limited assistance to immigrants, it does not agree to (and it does not) represent those immigrants in proceedings before an immigration judge. Therefore, § 1003.17 is not at issue here.

Second, EOIR contends Plaintiffs' claims are unripe because Plaintiffs "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." Dkt. 47 at 15. In other words, EOIR believes NWIRP must suffer the harm it seeks to avoid before it can challenge the Rule's validity. Unsurprisingly, the law requires no such thing. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Plaintiffs filed an unchallenged declaration "based on personal knowledge" attesting that withdrawal from immigration cases is not permitted except in exceptional circumstances. *See* Dkt. 4 ¶ 6 ("If an attorney enters a notice of appearance, the immigration court does not allow the attorney to withdraw from the case at a later stage absent exceptional circumstances."). EOIR does not dispute the truth of that; to the contrary, it concedes it by citing to its own precedent. Dkt. 47 at 14.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

D. The Preliminary Injunction Should Provide Nationwide Relief

Defendants do not contest Plaintiffs' request for relief on a nationwide basis given that "[t]here is no general requirement that an injunction affect only the parties in the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir.1987) (nationwide permanent injunction requiring Secretary of Labor to enforce migrant workers protection act). Nationwide relief should be granted here for several reasons:

First, "[w]here a party brings a facial challenge ... a nationwide injunction is appropriate." *Texas v. United States*, 2016 WL 7852330 at * 3 (N.D. Tex. Nov. 20, 2016); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1407–08 (D.C. Cir. 1998) (invalidating rule and enjoining nationwide application); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When … agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

Second, nationwide relief is appropriate in matters of immigration law and policy to ensure nationwide uniformity. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (nationwide injunction upheld because "immigration laws of the United States should be enforced vigorously and uniformly"). An "injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*" *Bresgal*, 843 F.2d at 1170–71 (emphasis in original).

Third, Plaintiffs offer uncontested evidence that EOIR's interpretation of the rule is chilling the speech of other organizations providing similar direct legal representation services to immigrants. Dkts. 39-2 – 39-21. A narrow injunction applying only to Plaintiffs would not cure the constitutional defects in the regulation. *Nat'l Mining Ass'n*, 145 F.3d at 1409.

III. CONCLUSION

NWIRP respectfully asks this Court to 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.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

DATED this 30th day of June, 2017.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Northwest Immigrant Rights Project

By *s/Jaime Drozd Allen*
Michele Radosevich, WSBA #24282
Jaime Drozd Allen, WSBA #35742
James Harlan Corning, WSBA #45177
Robert E. Miller, WSBA #46507
Laura-Lee Williams, WSBA #51358
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: micheleradosevich@dwt.com
jaimeallen@dwt.com
jamescorning@dwt.com
robertmiller@dwt.com
lauraleewilliams@dwt.com

NORTHWEST IMMIGRANT RIGHTS PROJECT
Matt Adams, WSBA #28287
Glenda M. Aldana Madrid, WSBA # 46987
Leila Kang, WSBA #48048
615 2nd Avenue, Suite 400
Seattle, WA 98104-2244
Phone: (206) 957-8611
Fax: (206) 587-4025
E-mail: matt@nwirp.org
glenda@nwirp.org
leila@nwirp.org

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I caused the following to be filed using CM/ECF which will cause a copy to be sent to the following:

Attorneys for Defendants Jefferson B. Sessions, III; United States Department of Justice; Executive Office for Immigration Review; Juan Osuna; Jennifer Barnes

Carlton Frederick Sheffield	carlton.f.sheffield@usdoj.gov
Gisela A. Westwater	gisela.westwater@usdoj.gov
Gladys M. Steffens Guzman	Gladys.Steffens-Guzman@usdoj.gov
Victor M. Mercado-Santana	victor.m.mercado-santana@usdoj.gov

Attorneys for Amicus Attorney General of Washington

Patricio A. Marquez	PatricioM@atg.wa.gov chamenew@atg.wa.gov colleenm1@atg.wa.gov marshac@atg.wa.gov

Attorneys for Amicus American Civil Liberties Union of Washington (ACLU)

Andrew Garcia Murphy	agm@hcmp.com brenda.partridge@hcmp.com
Michael J. Ewart	jake.ewart@hcmp.com angie.perkins@hcmp.com

Attorneys for Amicus Fred T. Korematsu Center for Law and Equality

Benjamin D. Greenberg	greenberg.ben@dorsey.com johnston.natasha@dorsey.com
Sarah Cox	cox.sarah@dorsey.com, johnston.natasha@dorsey.com
Tzu-Huan Augustine Lo	lo.augustine@dorsey.com johnston.natasha@dorsey.com
Shawn J. Larsen-Bright	larsen.bright.shawn@dorsey.com price.molly@dorsey.com
Robert Seungchul Chang	changro@seattleu.edu robert.bob.chang@gmail.com

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Zachary E. Davidson	davidson.zach@dorsey.com, slavik.jackie@dorsey.com
Melissa R. Lee	leeme@seattleu.edu

DATED: June 30, 2017

By *s/ James Harlan Corning*
James Harlan Corning, WSBA #45177

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT; Yuk Man Maggie CHENG,

Plaintiffs,

v.

Jefferson B. SESSIONS III, in his official capacity as U.S. Attorney General; U.S. DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Juan P. OSUNA, in his official capacity as Director of the Executive Office for Immigration Review; and Jennifer J. BARNES, in her official capacity as Disciplinary Counsel for the Executive Office for Immigration Review,

Defendants.

Case No. 2:17-cv-00716

DECLARATION OF ELIZABETH BENKI

I, Elizabeth Benki, declare as follows:

1. I am over the age of eighteen, am competent to testify as to the matters below, and make this declaration based on personal knowledge. I submit this declaration to provide information about the Motion to Reopen Proceedings filed in F.G.B.'s case before the Tacoma Immigration Court. This motion, along with another filing before the Seattle Immigration Court, is the subject of the April 5, 2017 cease-and-desist letter at issue in this lawsuit.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

2. I am a Senior Staff Attorney at the Tacoma Office of the Northwest Immigrant Rights Project ("NWIRP"). I have worked at NWIRP's Tacoma Office since March 2013. I currently supervise two attorneys, two legal advocates, and one law graduate.

3. My work primarily consists of providing direct representation, pro se assistance, orientations, and workshops to individuals who are detained at the Northwest Detention Center ("NWDC"). Someone from our Tacoma office is at the NWDC almost every day to provide a range of legal services.

4. Another attorney from our office, Meghan Casey, first met with F.G.B. on February 18, 2016 to conduct a basic intake and screen his case for any potential relief. At that time, we stated that our office was unable to represent him in his deportation proceedings, but he consented to speaking with us to obtain general information about his case. During this initial meeting, Meghan let him know that he was likely eligible for cancellation of removal under 8 U.S.C. § 1229b(a) and that our office would be referring his case for pro bono representation. When asked for his full name, he stated that it is Felipe G.B., but that he also uses the alias and nickname "Phillip," an English translation of his given name.

5. After our initial meeting on February 18, 2016, F.G.B. sent two letters to our office requesting additional information. In one of these letters, he noted that he was scheduled for a final merits hearing before the immigration judge on June 23, 2016.

6. On May 16, 2016, I met with F.G.B. at the NWDC. During this meeting, F.G.B. told me that the immigration court held an intervening hearing in his case on May 11, 2016. It appeared that Immigration Customs and Enforcement had amended F.G.B.'s charges of removability to argue that he was in fact removable for an aggravated felony conviction, which bars an individual from applying for cancellation of removal and many other forms of relief. The immigration judge issued an order of removal against F.G.B. on May 11, 2016. F.G.B. had requested to speak with our office in order to ask whether he had any options for continuing to fight his case. Based on these facts, I informed F.G.B. that he could attempt to file a motion to reopen his proceedings.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

7. F.G.B. responded that he did not know how to file a motion to reopen before the Immigration Court. I thus provided him with a blank motion template, which states in its footer, "This pro se brief/motion has been prepared with the assistance of the Northwest Immigrant Rights Project." I helped him fill out the form by writing down why he sought to reopen to his proceedings. However, F.G.B. was still uncertain whether he wanted to submit the motion because doing so would prolong his detention. I told him that he would have to make a decision soon because of his impending deportation. I reviewed the contents of the motion by reading it aloud to F.G.B., and after confirming that it was accurate, he signed and dated the motion in front me. I left the signed motion with him so that he could mail it to the immigration court if he decided to fight his case.

8. I was not even aware that F.G.B. filed this pro se motion until I read EOIR's cease-and-desist letter, which alleges that a NWIRP staff member "clearly represented" F.G.B. in the above-described motion to reopen proceedings. Further, the cease-and-desist letter noted that F.G.B.'s signature on the motion did not match his signature on a previous filing, citing this discrepancy as an indication that someone other than F.G.B. may have drafted this document for him.

9. While I filled out by hand the motion to reopen during my meeting with F.G.B. at the NWDC, F.G.B. signed the motion himself, with a full understanding of its content, and he later submitted it on his own to the immigration court. Over the course of our interaction with F.G.B., he had provided our office with several documents for further review of his case, in addition to signing consent forms and handwritten letters. His signatures on these documents illustrate that he, like many others, sometimes signs documents using the English translation of his name, while other times using his given name in Spanish.

I declare under penalty of perjury of the laws of the State of Washington and the United States that the foregoing is true and correct to the best of my knowledge and belief.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Executed this 29th day of June, 2017 in Coral Gables, Florida.

ELIZABETH BENKI, ESQ.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main 206.757.7706 fax

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I caused the following to be filed using CM/ECF which will cause a copy to be sent to the following:

Attorneys for Defendants Jefferson B. Sessions, III; United States Department of Justice; Executive Office for Immigration Review; Juan Osuna; Jennifer Barnes

Carlton Frederick Sheffield	carlton.f.sheffield@usdoj.gov
Gisela A. Westwater	gisela.westwater@usdoj.gov
Gladys M. Steffens Guzman	Gladys.Steffens-Guzman@usdoj.gov
Victor M. Mercado-Santana	victor.m.mercado-santana@usdoj.gov

Attorneys for Amicus Attorney General of Washington

Patricio A. Marquez	PatricioM@atg.wa.gov chamenew@atg.wa.gov colleenm1@atg.wa.gov marshac@atg.wa.gov

Attorneys for Amicus American Civil Liberties Union of Washington (ACLU)

Andrew Garcia Murphy	agm@hcmp.com brenda.partridge@hcmp.com
Michael J. Ewart	jake.ewart@hcmp.com angie.perkins@hcmp.com

Attorneys for Amicus Fred T. Korematsu Center for Law and Equality

Benjamin D. Greenberg	greenberg.ben@dorsey.com johnston.natasha@dorsey.com
Sarah Cox	cox.sarah@dorsey.com, johnston.natasha@dorsey.com
Tzu-Huan Augustine Lo	lo.augustine@dorsey.com johnston.natasha@dorsey.com
Shawn J. Larsen-Bright	larsen.bright.shawn@dorsey.com price.molly@dorsey.com
Robert Seungchul Chang	changro@seattleu.edu robert.bob.chang@gmail.com

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Zachary E. Davidson	davidson.zach@dorsey.com, slavik.jackie@dorsey.com
Melissa R. Lee	leeme@seattleu.edu

DATED: June 30, 2017

By *s/ James Harlan Corning*
James Harlan Corning, WSBA #45177

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

The Honorable 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; 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-RAJ

SECOND DECLARATION OF JORGE L. BARÓN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Jorge L. Barón, declare as follows:

1. I am the Executive Director of the Northwest Immigrant Rights Project (NWIRP). I joined NWIRP as a staff attorney in 2006, and I have served as its Executive Director since April 2008. I have personal knowledge of the facts stated in this declaration and am competent to testify to the same.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

2. In August 2016, then-NWIRP staff attorney Tania Linares Garcia participated in a telephone call with Brea Burgie, the Fraud and Abuse Prevention Counsel of the Executive Office of Immigration Review (EOIR). Ms. Burgie had requested the phone call to learn about NWIRP's efforts to combat notario fraud. Ms. Linares Garcia later described to me that, during that call, she had educated Ms. Burgie about some of the tools we use to combat notario fraud, based on a special project we implemented with support from the Washington State Attorney General's Office. Ms. Linares Garcia had explained to Ms. Burgie that one of the tools we had been using is providing workshops to assist unrepresented individuals in filling out asylum applications. In these workshops, NWIRP attorneys advised attendees how to best fill out applications, and provided them with specific legal advice on formulating their answers and presenting their case.

3. Following this conversation, Ms. Burgie requested a further telephone conversation with NWIRP involving EOIR's Disciplinary Counsel, Defendant Jennifer Barnes. I participated in that call, which took place in October 2016. In the declaration that Ms. Barnes submitted to the Court, she mischaracterizes (in paragraph 49) that telephone conversation. During the call, Defendant Barnes stated that NWIRP could not assist in filling out applications without entering a Notice of Appearance for the individuals whom our staff was assisting. NWIRP expressed its concern with this interpretation, since NWIRP had been helping asylum applicants to fill out forms for many years. NWIRP did not "raise the question of our compliance" with EOIR's disciplinary rules (Dkt. 49 ¶ 49), nor "ask for relief" from EOIR, as the agency alleges in their brief (Dkt. 47, at 8). The only point that NWIRP raised in this regard was that USCIS's Disciplinary Counsel had earlier determined that it would not enforce the regulations against individuals providing pro bono assistance at group events. We inquired as to whether EOIR followed the same practice. Ms. Barnes did not provide a clear answer either way.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed at Seattle, Washington, this 30th day of June, 2017.

Jorge L. Barón

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I caused the following to be filed using CM/ECF which will cause a copy to be sent to the following:

Attorneys for Defendants Jefferson B. Sessions, III; United States Department of Justice; Executive Office for Immigration Review; Juan Osuna; Jennifer Barnes

Carlton Frederick Sheffield	carlton.f.sheffield@usdoj.gov
Gisela A. Westwater	gisela.westwater@usdoj.gov
Gladys M. Steffens Guzman	Gladys.Steffens-Guzman@usdoj.gov
Victor M. Mercado-Santana	victor.m.mercado-santana@usdoj.gov

Attorneys for Amicus Attorney General of Washington

Patricio A. Marquez	PatricioM@atg.wa.gov chamenew@atg.wa.gov colleenm1@atg.wa.gov marshac@atg.wa.gov

Attorneys for Amicus American Civil Liberties Union of Washington (ACLU)

Andrew Garcia Murphy	agm@hcmp.com brenda.partridge@hcmp.com
Michael J. Ewart	jake.ewart@hcmp.com angie.perkins@hcmp.com

Attorneys for Amicus Fred T. Korematsu Center for Law and Equality

Benjamin D. Greenberg	greenberg.ben@dorsey.com johnston.natasha@dorsey.com
Sarah Cox	cox.sarah@dorsey.com, johnston.natasha@dorsey.com
Tzu-Huan Augustine Lo	lo.augustine@dorsey.com johnston.natasha@dorsey.com
Shawn J. Larsen-Bright	larsen.bright.shawn@dorsey.com price.molly@dorsey.com
Robert Seungchul Chang	changro@seattleu.edu robert.bob.chang@gmail.com

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Zachary E. Davidson	davidson.zach@dorsey.com, slavik.jackie@dorsey.com
Melissa R. Lee	leeme@seattleu.edu

DATED: June 30, 2017

By *s/ James Harlan Corning*
James Harlan Corning, WSBA #45177

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax