Exhibit A

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

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

I. INTRODUCTION

The First Amendment protects an attorney's right to advise people of their legal rights. It also protects the right of attorneys to form associations in order to engage in political advocacy and expression—and, in turn, to shape that advocacy and expression to amplify the

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particular messages they wish to convey. Finally, it protects the right of these associations to offer legal advice to some people but not others, to select the topics on which advice is given, and to select the contexts in which advice is given. These rights apply with particular force to nonprofit organizations such as the Northwest Immigrant Rights Project ("NWIRP"), which offers free legal services to immigrants as a form of political expression and association. Indeed, protection from undue government interference with the type of political expression and association in which NWIRP is engaged sits at the heart of the First Amendment.

Although there is a long history of attempted government interference with these rights in the name of regulating the legal profession, including in the Jim Crow South, the United States Supreme Court has recognized and rejected these attempts for what they are: unconstitutional attempts to control the political expression of non-profit legal advocacy organizations.

Here, the Executive Office for Immigration Review ("EOIR") seeks to prevent *pro bono* NWIRP attorneys from consulting with immigrants unless the attorneys make, in every case, a full and formal appearance on behalf of those immigrants in court. EOIR would require NWIRP attorneys to formally represent immigrants in virtually all of their proceedings in Immigration Court, or refrain from offering them legal assistance at all. The regulations EOIR seeks to enforce constitute a severe, unjustifiable, and unconstitutional restriction on communications between NWIRP and the immigrants it serves. EOIR's actions have already had the immediate effect of denying critical legal services to people of limited means. Because EOIR's regulations jeopardize the First Amendment rights of nonprofit legal organizations across the country and will continue to cause irreparable harm to vulnerable people, the American Civil Liberties Union of Washington ("ACLU-WA") urges the Court to grant NWIRP's Motion for Temporary Restraining Order.

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II. INTEREST OF AMICUS CURIAE

As described in the motion for leave to file that accompanies this brief, ACLU-WA is a statewide, nonpartisan, nonprofit organization of over 75,000 members and supporters dedicated to the preservation of civil liberties. ACLU-WA works in courts, legislatures, and communities to preserve the individual rights and liberties guaranteed to all people by the Constitution and laws of the United States. ACLU-WA frequently participates as amicus curiae in cases involving civil liberties, including cases involving First Amendment and immigrant rights. In order to promote its organizational mission and the interests of its members, ACLU-WA engages in community education and frequently provides limited legal services to people in Washington State. It has an interest both in protecting its own First Amendment right to shape its advocacy as well as the First Amendment rights of similar nonprofit organizations.

III. BACKGROUND

ACLU-WA adopts the factual background set forth in NWIRP's Motion for Temporary Restraining Order. TRO Mot., Dkt. # 2, at 2–5.

IV. ARGUMENT

The Court should grant NWIRP's Motion for Temporary Restraining Order. EOIR's regulations, as now interpreted and enforced by EOIR, constitute an impermissible restriction on NWIRP's First Amendment rights, and the First Amendment rights of the immigrants it serves. EOIR's broad regulations condition the provision of virtually any advice on a full and formal notice of appearance—and because NWIRP (like all similar non-profits) does not have the resources to fully represent everyone it serves, the regulations will cut off a great deal of constitutionally protected speech. The immigrants NWIRP now helps with limited legal services will be forced to (a) pay another attorney to represent them fully; (b) find another attorney to represent them fully on a *pro bono* basis; or—*much more likely*—(c) go without legal assistance. These are not remotely adequate substitutes for the services NWIRP

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provides, and EOIR can regulate attorney conduct in other ways that will not thwart the provision of constitutionally protected legal advice.

EOIR's regulations are also unconstitutionally vague. Reasonable attorneys cannot be certain what "advice" might trigger an obligation to make a full and formal appearance in an immigrant's "case," leaving EOIR tremendous latitude to interpret and arbitrarily enforce its regulations—as it does now almost nine years after they were adopted. Vagueness in the context of the First Amendment is particularly dangerous: these regulations will chill the provision of constitutionally protected legal advice and raise the specter of arbitrary or, worse, targeted enforcement.

A. The First Amendment Guarantees NWIRP the Right to Advise Immigrants Pursuant to its Mission.

The First Amendment protects attorneys when they advocate "lawful means of vindicating legal rights" and advise people of their legal rights. *In re Primus*, 436 U.S. 412, 432 (1978) (quoting *NAACP v. Button*, 371 U.S. 415, 437 (1963)). When this activity is done in furtherance of a nonprofit's organizational objectives, this is "expressive and associational conduct at the core of the First Amendment's protective ambit." *Id.* at 424. Conversely, an individual's "right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition."[1] *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005) (quotations and citation omitted). Beginning in the 1960s, the United States Supreme Court has consistently defended these rights against government attempts to curtail them in the name of regulating the legal profession.

[1] These rights extend to noncitizens, *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), who are entitled to representation in removal proceedings by counsel of their own choosing not only under the First Amendment, but also under the Fifth Amendment's guarantee of Due Process, *e.g.*, *Biwot v. Gonzalez*, 403 F.3d 1094, 1098 (9th Cir. 2005), and by statute, *see* 8 U.S.C. § 1362. The First Amendment concerns raised here bear on an immigrant's ability to exercise these rights.

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In *NAACP v. Button*, for example, Virginia attempted to enforce laws regulating the "improper solicitation of legal business" in a manner that impeded the NAACP's efforts to identify and advise litigants seeking "legal redress for infringements of their constitutionally guaranteed and other rights." 371 U.S. at 417–29. The Court held that the NAACP's mission-driven litigation activities were "modes of expression and association" protected by the First Amendment, and that Virginia could not prohibit them "under its power to regulate the legal profession." *Id.* at 428–29. "Because First Amendment freedoms need breathing space to survive," the Court wrote, "government may regulate in the area only with narrow specificity." *Id.* at 433. Accordingly, a state may not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439.

The Court later applied these principles to cases where states were impermissibly enforcing attorney professional conduct rules that interfered with union efforts to secure legal services for their members. *See, e.g.*, *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964). These included rules in Virginia designed to regulate solicitation and the unauthorized practice of law, *Trainmen*, 377 U.S. at 2; similar rules in Illinois, *United Mine Workers*, 389 U.S. at 218; and rules in Michigan against negotiating limits on legal fees, *United Transp. Union*, 401 U.S. at 577–78. The Court recognized the states' authority to regulate the practice of law, but repeatedly emphasized the exercise of that authority "cannot ignore the [First Amendment] rights of individuals." *Trainmen*, 377 U.S. at 6; *accord United Transp. Union*, 401 U.S. at 580–81; *United Mine Workers*, 389 U.S. at 222. The Court further observed that lawyers "have a like protection which the State cannot abridge." *Trainmen*, 377 U.S. at 8.

In *In re Primus*, the Court again applied these First Amendment principles to protect an ACLU cooperating attorney against bar discipline for advising a person of her legal rights and directing her to free legal assistance. 436 U.S. at 439. The ACLU attorney was

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counselling women who had been forcibly sterilized by the state of South Carolina as a condition of receiving continued Medicaid coverage. *Id.* at 414–17. The South Carolina Bar argued that the attorney's activities violated its prohibitions on solicitation. *See id.* at 434–35. The Court acknowledged that South Carolina was entitled to fashion reasonable rules specifically targeting harmful practices by lawyers, but the Court held unconstitutional South Carolina's application of its rules to the ACLU's protected activities. *Id.* 438–39. The Court reiterated what it said in *Button*: "Because of the danger of censorship through selective enforcement of broad prohibitions, and because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity." *Id.* at 432–33 (citations and quotations omitted).

Since these cases, courts have continued to recognize that "[a]ttorneys have rights to speak freely subject only to the government regulating with 'narrow specificity.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Button*, 371 U.S. at 433). *Accord Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (en banc) *aff'd on other grounds*, *Jean v. Nelson*, 472 U.S. 846 (1985) (attorneys have First Amendment rights to inform individuals of their rights, and certainly when done "as an exercise of political speech without expectation of remuneration"). Courts also continue to recognize the corresponding First Amendment right to hire and consult an attorney. *E.g.*, *Mothershed*, 410 F.3d at 611; *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

Although these rights extend to nonprofit and paid legal services alike, *see*, *e.g.*, *DeLoach*, 922 F.2d at 620, and to both individuals and groups, *e.g.*, *Denius*, 209 F.3d at 954, courts defend these rights especially vigorously when they have involved "the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU," *In re Primus*, 436 U.S. at 439.[2] NWIRP is just such an organization.

[2] EOIR cites *Jacoby & Meyers* for the proposition that attorneys "as attorneys" do not enjoy these rights when they are not advocating for their own cause. Opp'n, Dkt. #14, at 8 (quoting *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of N.Y.*, 852 F.3d 178,

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It is often engaged in the "defense of unpopular causes and unpopular defendants," and in litigation as "a form of political expression and political association." *Id.* at 427–28 (citations and quotations omitted). Its activities are entitled to the most robust First Amendment protection.

B. EOIR's Regulations Are Not a Permissible Restriction on First Amendment Rights.

NWIRP argues forcefully that EOIR's regulations are a content-based speech restriction targeted only at legal advice provided to unrepresented immigrants involved in immigration proceedings. TRO Mot., Dkt. #2, at 9–10. Content-based restrictions are presumptively unconstitutional, and are subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). EOIR argues that its regulations are content-neutral. Opp'n, Dkt. #14, at 11.

EOIR's regulations are unconstitutional and should be enjoined in any event. EOIR can regulate the speech at issue "only with narrow specificity." *In re Primus*, 436 U.S. at 433. It does not do so here. Nor do EOIR's regulations leave open "ample alternative channels for communication of the information," as required under even intermediate scrutiny. *Mothershed*, 410 F.3d at 611.

1. The regulations are not narrowly tailored.

The government may regulate the speech at issue "only with narrow specificity." *In re Primus*, 436 U.S. at 433. Indeed, because "broad prophylactic rules in the area of free expression are suspect . . . precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 432 (citations and quotations omitted). A regulation is not narrowly tailored under these standards if it results in the "unnecessary

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186 (2d Cir. 2017)). But that is not the law in the Ninth Circuit. *See Conant*, 309 F.3d at 637. Additionally, *Jacoby & Meyers* recognizes the First Amendment rights of organizations such as NWIRP, *see* 852 F.3d at 184-189 (citing *Button* and *In re Primus* and recognizing the "expressive value of certain types of associational litigation"), even though it treats differently "for-profit law firms that serve their clients' interests as a business." *Id.* at 188.

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abridgement" of First Amendment rights. *Id*. at 432. Given EOIR's stated goals, its regulations burden substantially more speech than is necessary.[3]

In its letter to NWIRP, EOIR explains that its regulations "hold[] attorneys accountable for their conduct" and "make[] it possible for EOIR to impose disciplinary sanctions on attorneys who do not provide adequate representation to their clients." *See* Compl., Dkt. #1, Ex. 1 at 2. These goals are a legitimate government interest, but EOIR's enforcement letter forces NWIRP to choose between representing an immigrant fully and formally, and offering the immigrant no substantive assistance at all. Indeed, because of the regulations' broad terms, including "advice" (which could include non-legal advice) and "case" (which includes activities preceding the filing of any petition or application), the regulations will have a powerful chilling effect on NWIRP's client screening and community outreach activities—activities that may ultimately have nothing to do with any immigration proceedings. *See* Compl., Dkt. #1, ¶ 3.24. ("EOIR's letter casts into doubt whether NWIRP can continue to consult with unrepresented persons, screen cases for referral to volunteer attorneys, or conduct workshops and presentations.").

Citing a memorandum prepared by its Legal Orientation Program, EOIR claims that "Washington State attorneys may engage in a variety of services that do not trigger the Notice of Appearance Requirement." Opp'n, Dkt. #14, Ex. B. Whether the memorandum is intended to govern the actions of practitioners (including NWIRP) even outside the Legal Orientation Program, or offered by the government to guide practitioners seeking to understand EOIR's regulations, it confirms the regulations' unconstitutionality. Washington State attorneys subject to that memorandum are relieved of the notice of appearance requirement only as long as they refrain from giving anyone any *actual legal advice*. *See*

[3] EOIR's regulations fail regardless of whether the required tailoring is characterized as strict scrutiny, *see, e.g., United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 964-65 (9th Cir. 2008), or intermediate scrutiny permitting only regulation "not substantially broader than necessary to achieve the government's interest," *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1045 (9th Cir. 2002) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989)).

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Dkt. #14, Ex. B. Attorneys may do "group orientations," as long as they are "non-specific to any particular individual's case." *Id.* at 3. Otherwise, the attorney risks "appear[ing]." *Id.* Similarly, attorneys may conduct "individual orientations," but must "be very careful not to give legal advice concerning the individual's specific case." *Id.* Attorneys may help immigrants obtain documents, but only for "unrepresented individuals who have independently determined that such documents are necessary for their immigration case, and who have made all diligent efforts to obtain these materials themselves." *Id.* at 6. EOIR recommends that attorneys delegate even these "clerical tasks to other staff," though, "in order to distance themselves further from any appearance of representation, practice, or preparation activities." *Id.* at 7. Attorneys may also help immigrants complete legal forms, but cannot help the immigrants actually "select specific immigration forms" or "provide advice on how to answer a question." *Id.* Help with preparing any papers might constitute the performance of "auxiliary activities" that could trigger the notice of appearance requirement. *Id.* at 6. "Self-help workshops" are of course permitted, but EOIR recommends against conducting such workshops one-on-one. *Id.* As these guidelines show, EOIR's regulations very much present an "all or nothing" choice to NWIRP and others, and thwart the very types of litigation activities and political expression that are "at the core of the First Amendment's protective ambit." *In re Primus*, 436 U.S. at 424.

EOIR's rules thus cover a broad range of constitutionally protected speech that may have only the most attenuated connection to immigration proceedings EOIR seeks to regulate. If EOIR's goal is to monitor the conduct of attorneys in immigration proceedings, its regulations must be drafted with much "narrow[er] specificity" to avoid violating the First Amendment.[4] *Button*, 371 U.S. at 433.

[4] If EOIR's goal is to monitor attorney conduct outside the context of immigration proceedings, that function is reserved for the states. *See* TRO Mot., Dkt. #2, at 16–21.

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EOIR's regulations also unnecessarily burden speech because EOIR does not permit limited representation in immigration proceedings. Cheng Decl., Dkt. #4, ¶ 6; *Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986) ("there is no 'limited' appearance of counsel in immigration proceedings").[5] Simply by permitting appropriate forms of limited representation, EOIR could easily eliminate the "all or nothing" choice it now offers to NWIRP and other attorneys—in fact, for nine years, NWIRP noted its assistance when it helped *pro se* litigants with documents (but did not make a formal appearance), and for nine years EOIR sent them no "cease and desist" letters.[6] No harm ever resulted.

Limited representation has been endorsed by the American Bar Association[7] and jurisdictions nationwide,[8] and can be accomplished in a manner that maximizes the availability of legal advice (as required by the First Amendment) to people who sorely need it, while preserving attorney oversight. Here in Washington, for example, the Rules of Professional Conduct and Superior Court Civil Rules expressly authorize limited representation "to increase the availability of legal services to clients of limited financial means." 3A Karl B. Tegland, *Washington Practice, Rules Practice* at 249, 258–62 (6th ed. 2013). Attorneys may make limited appearances in court to participate only in discrete proceedings, Civil Rule (CR) 71.1(b), or may help *pro se* litigants draft and file papers without noting that appearance to the court at the time of filing, CR 11(b). Even though a Washington attorney is not required to note her assistance, CR 11(b) places her on notice that,

[5] *See also* Form EOIR-28, https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf

[6] Other jurisdictions authorize similar notation procedures. *See, e.g.*, Colorado C.R.C.P. 11(b) (requiring an attorney to put their name and contact information on any paper they help a *pro se* litigant draft); Massachusetts Supreme Judicial Court Order Regarding Limited Assistance Representation, May 1, 2009 (outlining procedures for limited representation, and authorizing attorney-assisted *pro se* filings with the notation "prepared with assistance of counsel").

[7] *See* American Bar Association, Resolution 108 (Feb. 11, 2013), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf

[8] *See, e.g.*, American Bar Association Standing Committee on the Delivery of Legal Services, An Analysis of Rules that Enable Lawyers to Service Self-Represented Litigants: A White Paper (Aug. 2014), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf

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by helping a *pro se* litigant, the attorney makes the same certifications to the court that she makes when she signs the pleadings herself. Courts around the country permit these and other ways of offering limited representation to *pro se* litigants, while holding attorneys to their ethical obligations.[9]

Furthermore, EOIR has already approved NWIRP's work in Immigration Courts through a pre-screening process EOIR uses to designate "accredited representatives" and "recognized organizations."[10] NWIRP is one of the 950 recognized organizations nationwide, and is therefore known to EOIR and already subject to EOIR regulation.[11]

In short, EOIR can take any number of steps to ensure adequate oversight of attorneys practicing in Immigration Courts, but it *cannot* use the method it has chosen here. It cannot constitutionally condition NWIRP's right to consult with immigrants on a full and formal appearance in court. "Where political expression or association is at issue," courts do "not tolerate[] the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *In re Primus*, 436 U.S. at 434. Because EOIR's regulations have the effect of cutting off far more constitutionally protected speech than is necessary to achieve EOIR's goals, EOIR's regulations are not narrowly tailored, and cannot be enforced here.

2. The regulations do not leave open ample alternatives

Under even intermediate scrutiny, regulations must also leave open "ample alternative channels for communication of the information." *Mothershed*, 410 F.3d at 611. Here, this requirement acts both to protect an immigrant's First Amendment "right to hire and consult an attorney," *id.*, and critically, to protect NWIRP's ability to achieve its advocacy goals on

[9] *See, e.g.*, American Bar Association Standing Committee on the Delivery of Legal Services, An Analysis of Rules that Enable Lawyers to Service Self-Represented Litigants: A White Paper (Aug. 2014), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf

[10] Department of Justice, Recognition & Accreditation (R&A) Program (Apr. 11, 2017), https://www.justice.gov/eoir/recognition-and-accreditation-program

[11] Department of Justice, Recognized Organizations and Accredited Representatives Roster (May 8, 2017), https://www.justice.gov/eoir/page/file/942301/download

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immigration related issues: "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *In re Primus*, 436 U.S. 431–32. EOIR's regulations fail to leave open ample alternatives for the provision of legal advice to immigrants.

NWIRP helps far more immigrants through its limited services than it does through direct representation. It helps more than 10,000 immigrants each year, Compl., Dkt. #1, at 1, but can place only 200 cases each year with *pro bono* attorneys, *id.* ¶ 3.7. If NWIRP must stop providing services to the thousands of immigrants it cannot represent directly, NWIRP's work—and its organizational objectives—will be curtailed dramatically.

The immigrants themselves will also lack alternatives. Immigrants who do not have access to limited legal services must (a) pay another attorney to represent them fully; (b) find another attorney to represent them fully on a *pro bono* basis; or (c) go without legal assistance at all. Options (a) and (b) simply are not available to most of the thousands of immigrants who receive legal assistance from NWIRP each year. In fact, EOIR maintains a list of pre-screened organizations and attorneys who provide free legal services to immigrants in Washington. It lists two providers in the entire state: NWIRP and one other organization, with a single office in Seattle, that represents only minors and unaccompanied children.[12] If limited legal services are not available, immigrants will largely go without legal assistance at all, or will fall prey to people peddling substandard legal advice. *See* Cheng Decl., Dkt. #4, ¶ 15. These are not adequate "ample alternative channels" for the communication of legal advice.

Where communities with limited resources and options are involved, the Supreme Court has recognized that there "often will be no alternative source for the client to receive vital information respecting [their] rights" if *pro bono* legal representation is unavailable.

[12] Department of Justice, List of Pro Bono Legal Service Providers: Washington (Apr. 2017), https://www.justice.gov/eoir/file/ProBonoWA/download

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Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546–47 (2001). Regulations that needlessly restrict access to such legal services are unconstitutional. *See id.* at 546–49. EOIR's "all or nothing" regulations are unconstitutional for that reason, and because they severely restrict NWIRP's ability to fulfill its organizational mission. The Court should enjoin the regulations' enforcement.

C. EOIR's Regulations are Impermissibly Vague

EOIR's regulations are invalid for the independent reason that they are impermissibly vague. A regulation can be impermissibly vague for either of two reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Indeed, where the First Amendment right to provide legal advice is implicated, the government must regulate with "narrow specificity" to avoid dangers associated with the "selective enforcement of broad prohibitions." *In re Primus*, 436 U.S. at 432–33.

Key terms in EOIR's regulations are impermissibly vague. The term "advice" is not qualified in any way. 8 C.F.R. § 1001.1(k). It is not limited to "legal advice offered in connection with a case" or even "legal advice" (as opposed to non-legal advice). Other terms, such as "auxiliary activities," are also undefined. *Id.* Once NWIRP attorneys learn the facts of any immigrant's "case," they cannot offer any substantive assistance to that person without running the risk that they will ultimately be required to fully and formally represent that person in an immigration proceeding. This risk significantly and impermissibly chills even the most preliminary speech between NWIRP and the immigrants it exists to serve.

The term "case" is also impermissibly vague, and makes concerns about providing "advice" even more acute. A "case" includes proceedings in Immigration Court, but it also includes "preparation for or incident to such proceeding, including preliminary steps . . . preliminary to the filing." 8 C.F.R. § 1001.1(g). Given this definition, NWIRP cannot

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confidently offer any assistance even to immigrants who have no proceedings pending. If NWIRP attorneys offer advice to an immigrant who then leaves the NWIRP offices and sometime later files, *pro se*, an application or petition, NWIRP may well be required to make a full and formal appearance that neither NWIRP nor the client wants NWIRP to make.[13]

Given these legitimate concerns, EOIR's regulations are unconstitutionally vague. Fear of violating them will chill NWIRP's outreach to immigrants, and will result in the suppression of constitutionally protected speech well outside EOIR's power to regulate (for example, advice NWIRP might ordinarily give regarding non-legal services available to immigrants). EOIR will also have unconstitutionally broad latitude to enforce its rules arbitrarily, as it does now. After nine years, EOIR has suddenly decided to target NWIRP—and apparently only NWIRP—for engaging in conduct previously allowed, and for offering legal assistance EOIR does not allege was inadequate. EOIR's regulations are unconstitutional.

V. CONCLUSION

The First Amendment protects the rights to give and obtain legal advice. EOIR's regulations violate those rights by imposing a condition that is not narrowly tailored, does not leave open ample alternatives, and is impermissibly vague. If EOIR's regulations are not enjoined, immigrants previously served by NWIRP will go without legal assistance entirely,

[13] As NWIRP explains, this conflicts with the client's right to control the scope of an attorney's representation under RPC 1.2. *See* TRO Mot., Dkt. #2, at 19-20. A compulsory appearance may also conflict with a client's right to confidentiality under RPC 1.6. *See id.* People are entitled to consult attorneys without the risk of an unauthorized and undesirable disclosure. Compulsory disclosure rules may make people less willing to exercise their First Amendment rights to consult with counsel.

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and similar nonprofit work around the country will be at risk for comparable regulation. For decades, courts have prevented the enforcement of similar regulations in analogous circumstances. The Court should follow suit, and should grant NWIRP's Motion for Temporary Restraining Order.

DATED this 12th day of May, 2017.

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By s/ Jake Ewart

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CERTIFICATE OF SERVICE

I hereby certify that on 12th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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