

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT
RIGHTS PROJECT, et al.,

Plaintiffs,

v.

JEFFERSON B SESSIONS, III, et al.,

Defendants.

CASE NO. C17-716 RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiffs Northwest Immigrant Rights Project’s (“NWIRP”) and Yuk Man Maggie Cheng’s Motion for Preliminary Injunction.¹ Dkt. # 37. The Government opposes the Motion.² Dkt. # 47. On July 24, 2017, the Court heard oral arguments on the matter. Dkt. # 64. For the reasons set forth below, the Court **GRANTS** Plaintiffs’ Motion and converts the temporary restraining order into a preliminary injunction pursuant to the terms stated below.

¹ The Court refers to the Plaintiffs collectively as “NWIRP” or “Plaintiffs.”

² The Court refers to the Defendants collectively as “EOIR” or “the Government.”

II. BACKGROUND

Washington nonprofit Northwest Immigrant Rights Project (“NWIRP”) provides free and low-cost legal services to thousands of immigrants each year. Dkt. # 1. The Executive Office for Immigration Review (“EOIR”), an office within the Department of Justice (“DOJ”), oversees the adjudication of immigration cases. *Id.* at ¶ 1.5. In seeking to improve immigrants’ access to legal information and counseling, EOIR provides an electronic list of pro bono legal services providers. With regard to Washington, EOIR’s entire list of recognized pro bono organizations includes one group—NWIRP. Dkt. ## 2 at 17, 3 (Warden-Hertz Decl.) at ¶ 4.

In December 2008, EOIR published new rules regulating the professional conduct of attorneys who appear in immigration proceedings. Specifically, EOIR reserved the right to “impose disciplinary sanctions against any practitioner who . . . [f]ails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative . . . when the practitioner has engaged in practice or preparation as those terms are defined in §§ 1001.1(i) and (k)” 8 C.F.R. § 1003.102(t) (hereinafter, “the Regulation”). EOIR defines “practice” and “preparation” as follows:

The term practice means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board [of Immigration Appeals].

The term preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely

1 of assistance in the completion of blank spaces on printed
2 Service forms by one whose remuneration, if any, is nominal
3 and who does not hold himself out as qualified in legal matters
4 or in immigration and naturalization procedure.

5 8 C.F.R. § 1001.1(i), (k).

6 The purpose of these amendments was to protect individuals in immigration
7 proceedings by disciplining attorneys when it is within “the public interest; namely, when
8 a practitioner has engaged in criminal, unethical, or unprofessional conduct or frivolous
9 behavior.” Professional Conduct for Practitioners—Rules and Procedures, and
10 Representation and Appearances, 73 Fed. Reg. 76914-01, at *76915 (Dec. 18, 2008).
11 With these new rules, EOIR sought “to preserve the fairness and integrity of immigration
12 proceedings, and increase the level of protection afforded to aliens in those
13 proceedings. . . .” *Id.*

14 NWIRP recognizes the importance of attorney accountability, especially in the
15 immigration context. Indeed, NWIRP became an ally to EOIR in its efforts to combat
16 “notario fraud.”³ Dkt. # 1 (Complaint) at ¶ 3.12. However, NWIRP also recognizes that
17 the Regulation poses challenges because NWIRP does not have the resources to
18 undertake full representation of each potential client. *Id.* at ¶¶ 3.5, 3.21-3.23. To address
19 these challenges, NWIRP alleges that it “met with the local immigration court
20 administrator” soon after the Regulation was adopted to discuss the Regulation’s impact
21 and “agreed that it would notify the court when it assisted with any pro se motion or brief
22 by including a subscript or other clear indication in the document that NWIRP had
23
24

25
26
27 ³ “Notario fraud” refers to “immigration consultants who are engaging in the unauthorized
practice of law by using false advertising and fraudulent contacts and holding themselves out as qualified
to help immigrants obtain lawful status, or performing legal functions such as drafting wills or other legal
documents.” Dkt. # 1 (Complaint) at 6 (internal punctuation omitted).

1 prepared or assisted in preparing the motion or application.” *Id.* at ¶ 3.11; *see also* Dkt. #
2 38 (Baron Decl.) at ¶ 5.

3 Nearly nine years after promulgating the Regulation, EOIR sent a cease and desist
4 letter to NWIRP asking the nonprofit to stop “representing aliens unless and until the
5 appropriate Notice of Entry of Appearance form is filed with each client that NWIRP
6 represents.” Dkt. # 1 (Complaint) ¶ 3.14. EOIR’s letter acknowledged that the disputed
7 forms on which NWIRP assisted “contained a notation that NWIRP assisted in the
8 preparation of the *pro se* motion.” Dkt. # 1-1.

9 NWIRP filed suit against EOIR and others seeking injunctive relief from the
10 enforcement of the Regulation. *See generally* Dkt. # 1 (Complaint). In moving for a
11 temporary restraining order (“TRO”), NWIRP sought to maintain the status quo until the
12 parties could be heard on a motion for preliminary injunction. Dkt. # 21.

13 On May 17, 2017, the Court heard oral arguments on the TRO. Dkt. # 31. The
14 Court questioned the parties and discovered, among other things, that the Government
15 had no evidence that NWIRP had engaged in substandard legal representation. Dkt. # 36
16 (Transcript of TRO Hearing) at 39.

17 Finding that Plaintiffs met their burden under the TRO standard, the Court granted
18 the TRO. Dkt. # 33. The parties are now before the Court to argue whether the Court
19 should convert the TRO into a preliminary injunction.

20 **III. LEGAL STANDARD**

21 Plaintiffs seek a preliminary injunction enjoining the Government from enforcing
22 the notice of appearance regulation codified at 8 C.F.R. § 1003.102(t)(1). “A preliminary
23 injunction is an extraordinary and drastic remedy; it is never awarded as of right”
24 *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation and internal quotation marks
25 omitted). To obtain a preliminary injunction, the moving party must establish that: (1) it
26 is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence
27

1 of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is
2 in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

3 Alternatively, “serious questions going to the merits” and a balance of hardships
4 that tips sharply towards the plaintiffs can support issuance of a preliminary injunction,
5 so long as plaintiffs also show that there is a likelihood of irreparable injury and that the
6 injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
7 1127, 1135 (9th Cir. 2011).

8 **IV. DISCUSSION**

9 Plaintiffs allege claims for facial and as-applied violations of the First and Tenth
10 Amendment. The Court will discuss the merits of each claim below.

11 **A. First Amendment**

12 At issue are Plaintiffs’ actions in offering pro bono legal assistance to immigrants
13 subject to removal proceedings. Such actions fall within the protections afforded by the
14 First Amendment. *See In re Primus*, 436 U.S. 412, 426 (1978) (“Subsequent decisions
15 have interpreted *Button* as establishing the principle that ‘collective activity undertaken to
16 obtain meaningful access to the courts is a fundamental right within the protection of the
17 First Amendment.’”) (citations omitted); *United Transp. Union v. State Bar of Mich.*, 401
18 U.S. 576, 580 (1971) (finding that the First Amendment protected the Union’s ability to
19 give legal advice or counsel to an injured worker or his family concerning a FELA
20 claim); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (“Attorneys have rights to
21 speak freely subject only to the government regulating with ‘narrow specificity.’”) (citing
22 *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963)).

23 This case falls neatly within the precedent set by the Supreme Court in *Button* and
24 its progeny. This line of authority embodies the principle that non-profit organizations
25 may not be threatened when “advocating lawful means of vindicating legal rights.”
26 *Button*, 371 U.S. at 437. In *Button*, the Supreme Court invalidated a Virginia statute
27 aimed at proscribing “solicitation of legal business by a ‘runner’ or ‘capper,’ [which

1 included] in the definition of ‘runner’ or ‘capper,’ an agent for an individual or
2 organization which retains a lawyer in connection with an action to which it is not a party
3 and in which it has no pecuniary right or liability.” *Id.* at 423. Virginia claimed that the
4 statute’s purpose was to “further control the evils of solicitation of legal business.” *Id.* at
5 424. The NAACP had for many years, without incident, openly solicited legal business
6 to further desegregation efforts. *Id.* at 423. But Virginia courts found that these activities
7 were prohibited under the new iteration of the statute. *Id.* at 426. The Supreme Court
8 saw through this targeted enforcement, recognizing “a record devoid of any evidence of
9 interference by the NAACP in the actual conduct of litigation, or neglect or harassment
10 of clients[.]” *Id.* at 433. Though acknowledging Virginia’s otherwise valid efforts to
11 restrain the “oppressive, malicious, or avaricious use of the legal process for purely
12 private gain,” the Supreme Court rejected those efforts as applied to the NAACP. *Id.* at
13 443. The statute’s justifications were simply not applicable to the NAACP’s actions and
14 they highlighted the reality of that era:

15 [T]he militant Negro civil rights movement ha[d] engendered
16 the intense resentment and opposition of the politically
17 dominant white community of Virginia; litigation assisted by
18 the NAACP ha[d] been bitterly fought. In such circumstances,
19 a statute broadly curtailing group activity leading to litigation
20 may easily become a weapon of oppression, however
21 evenhanded its terms appear. Its mere existence could well
22 freeze out of existence all such activity on behalf of the civil
23 rights of Negro citizens.

24 *Id.* at 435–36.

25 In *United Transportation Union v. State Bar of Michigan*, the Supreme Court
26 emphasized the broad application of *Button*. There, the Court refused to allow the
27 Michigan State Bar to enjoin the Union “from engaging in activities undertaken for the

1 stated purpose of assisting their fellow workers, their widows and families, to protect
2 themselves from excessive fees at the hands of incompetent attorneys in suits for
3 damages under the Federal Employers' Liability Act." *United Transp. Union*, 401 U.S. at
4 577. The Court reversed the Michigan Supreme Court's narrow holdings, finding that the
5 First Amendment broadly protects groups who "unite to assert their legal rights as
6 effectively and economically as possible." *Id.* at 580. In doing so, the Court rejected the
7 State Bar's insistence on a restrictive interpretation of the injunction; such an
8 interpretation was so vague that it would "jeopardize the exercise of protected freedoms."
9 *Id.* at 581. *United Transportation Union* made clear that "collective activity undertaken
10 to obtain meaningful access to the courts is a fundamental right within the protection of
11 the First Amendment." *Id.* at 585.

12 Non-profit organizations whose "primary purpose[is] the rendition of legal
13 services" share equally in the fundamental protections of association and expression
14 described in *Button*. *In re Primus*, 436 U.S. at 427 (internal quotations and citations
15 omitted). In *Primus*, the Supreme Court leaned heavily on the precedent set by *Button* to
16 invalidate South Carolina's professional ethics rule against solicitation. *In re Primus*,
17 436 U.S. 412. The Court had no issue extending the protections set forth in *Button* to an
18 attorney associated with the ACLU because, in that context, the organization was
19 interchangeable with the NAACP: both organizations educate the public, lobby for
20 specific civil-rights related causes, and devote time and resources to specific litigation
21 involving those civil-rights related causes. *Id.* at 427. Like it did in *Button*, the Court
22 acknowledged the political undercurrent—wherein pregnant mothers were threatened
23 with sterilization to maintain their Medicaid benefits—and the ACLU's engagement "in
24 the defense of unpopular causes and unpopular defendants." *Id.* at 427. The Court
25 recognized that the ACLU's litigation practice "has defined the scope of constitutional
26 protection in areas such as political dissent, juvenile rights, prisoners' rights, military law,
27 amnesty, and privacy." *Id.* at 427-28. Building on the conclusions from *Button*, the

1 Court embraced the idea that “efficacy of litigation as a means of advancing the cause of
2 civil liberties often depends on the ability to make legal assistance available to suitable
3 litigants.” *Id.* at 431. With these circumstances in mind, the Court concluded that South
4 Carolina’s disciplinary rule invaded “the generous zone of First Amendment protection
5 reserved for associational freedoms.” *Id.* at 431-32. Without “proof of any of the
6 substantive evils” that the rule aimed at preventing, South Carolina’s vague disciplinary
7 rule failed to withstand strict scrutiny. *Id.* at 433. The Court was quick to qualify its
8 ruling by reiterating that states are free to reasonably regulate members of their Bars, but
9 such regulations must be “narrowly drawn” to proscribe conduct that “in fact is
10 misleading, overbearing, or involves other features of deception or improper influence.”
11 *Id.* at 438. Many times these regulations may be upheld as applied to individuals seeking
12 pecuniary gain; it is doubtful, though, that such regulations will be applicable to non-
13 profit organizations such as the ACLU or NAACP. *See, e.g., Ohralik v. Ohio State Bar*
14 *Ass’n*, 436 U.S. 447 (1978).

15 Though framed around the protected freedoms of association and expression, these
16 cases nonetheless support Plaintiffs’ position. Therefore, to survive the Motion, the
17 Regulation “must withstand the ‘exacting scrutiny applicable to limitations to core First
18 Amendment rights.’” *In re Primus*, 436 at 432 (quoting *Buckley v. Valeo*, U.S. 1, 44-45
19 (1976)). To do so, the Government must demonstrate a compelling interest that is
20 narrowly tailored “to avoid unnecessary abridgment” of First Amendment freedoms. *Id.*

21 NWIRP is a non-profit organization that provides education to the community,
22 advances its cause through systemic advocacy, and provides legal assistance to
23 immigrants navigating the legal system, often in the context of removal proceedings.
24 Dkt. ## 1 (Complaint) at ¶¶ 1.1, 3.1-3.3; 37 at 12. NWIRP is the primary non-profit legal
25 services provider in Washington State, making it essential to low-income and indigent
26 immigrants. Dkt. # 37 at 12. The Government agrees that the work done by NWIRP and
27 similar non-profit organizations is crucial and admirable. Dkt. ## 36 (Transcript of TRO

1 Hearing) at 37-38, 45; 47 at 11-13 (explaining EOIR's commitment to ensuring that
2 immigrants have available quality representation). Moreover, the Government does not
3 dispute NWIRP's contention that the Regulation would deprive this "vulnerable
4 population" of representation, essentially leading to an increase in avoidable deportations.
5 Dkt. ## 47 at 11; 39-35 (Murray Decl.) at ¶ 4. The dichotomy between the Government's
6 recognition of the importance of legal representation and acknowledgment that the
7 Regulation will result in decreased services lays bare an uncomfortable reality. The
8 effect of the Regulation as interpreted by the Government will be the inevitable chipping
9 away at attorneys' fundamental rights. Under the circumstances of this case, EOIR is
10 blindly seeking to impose its rules and regulations and spin precedent in a manner
11 inconsistent with fairness. As W.E.B. DuBois once wrote, "[r]ule-following, legal
12 precedence, and political consistency are not more important than right, justice and plain
13 common-sense."

14 Similar to the states in *Button* and *Primus*, the Government justifies its Regulation
15 by citing a host of evils associated with attorneys failing to file notices of appearances.
16 Dkt. ## 47 at 14-17, 49 (Barnes Decl.) at ¶ 28-39. The Court does not deny that the
17 Government's stated concerns are relevant to ensuring high quality representation in the
18 immigration courts. In fact, the Court applauds the existence of regulations that seek to
19 protect the rights of a vulnerable class of people. The Court does not find that *Button* and
20 its progeny foreclose the Government's authority to regulate the conduct of lawyers,
21 generally. However, the Government may not regulate in a way that chills the ability of
22 non-profit organizations to obtain meaningful access to the courts, especially when that
23 access is sought to advance civil-rights objectives. In this context, the Government may
24 regulate "only with narrow specificity." *In re Primus*, 436 U.S. at 425 (citing *Button*, 371
25 U.S. at 433). The Government has not done so in this instance.

26 The Government's key objective in promulgating and enforcing the Regulation is
27 to prevent notarios, as well as incompetent, unethical, unauthorized, or fraudulent

1 individuals from exploiting the plight of vulnerable immigrants. Dkt. ## 36 (Transcript
2 of TRO Hearing) at 42, 47 at 15. Central to enforcement is the Government’s ability to
3 identify the practitioner who engaged in the unethical behavior and hold this individual
4 accountable. *Id.* at 14-15. Here, the Government lacks any evidence that NWIRP
5 committed wrongdoing or provided subpar representation to immigrants. Dkt. # 36
6 (Transcript of TRO Hearing) at 39-40; *see, generally*, Dkt. # 47. Moreover, even if there
7 were evidence, the Government had no trouble identifying the author of the documents.
8 There is no evidence or record before the Court of NWIRP having ever failed to clearly
9 advise the immigration court of its participation in any litigation. NWIRP
10 unambiguously identified itself on documents and indicated whether the organization
11 provided assistance. Dkt. ## 49 (Barnes Decl.) at ¶¶ 50-52, 37 at 14. Because of this,
12 EOIR was able to contact NWIRP’s Legal Director. Dkt. # 49 (Barnes Decl.) at ¶ 54. It
13 is questionable whether an actual notario or ne’er-do-well would have so clearly
14 identified himself such that EOIR could attempt enforcement in the same way. Even if
15 the Government’s reasons for the Regulation could rise to a compelling level, the
16 Regulation is not narrowly tailored to achieve its own ends.⁴ As in *Button*, the
17 Government has failed to advance any substantial regulatory interest, in the form of
18 substantive evils flowing from NWIRP’s activities, which can justify the broad
19 prohibitions which it has imposed. *See Button*, 371 U.S. at 442-43. Nothing in the
20 record justifies the breadth and vagueness of the Government’s interpretations of the
21 Regulation.

22
23
24
25 ⁴ During the hearing on the TRO, the Government argued that NWIRP’s transparency is not
26 enough. The Government wished to have “the name, the address of the attorney or practitioner, they can
27 list a bar license number, so that the parties can verify whether there is actual bar membership.” Dkt. # 36
(Transcript of TRO Hearing) at 41. As such, it appears that NWIRP could adjust its stamps in a way that
allows EOIR to identify the author with more precision without submitting to full representation.

1 The Regulation is not only too broad, it is impermissibly vague. The Government
2 created a moving target with regard to the definition of “practice” or “preparation.”
3 Section 1001.1(k) describes “preparation” as “the study of the facts of a case and the
4 applicable laws, coupled with the giving of advice and auxiliary activities,” which could
5 include the mere “incidental preparation of papers.” 8 C.F.R. § 1001.1(k). NWIRP
6 sought guidance from EOIR regarding which actions constitute “preparation” such that
7 an attorney would need to file a notice of appearance. Dkt. # 52 at 9. EOIR indicated
8 that workshops aimed at assisting immigrants complete asylum forms may trigger the
9 Regulation. *Id.* During the TRO hearing, the Government was unable to offer a static
10 definition or example of “preparation,” instead claiming that experienced lawyers will
11 “understand what providing legal advice is.” Dkt. # 36 (Transcript of TRO Hearing) at
12 58-59. In this case, the “I know it when I see it” approach is outside the realm of “narrow
13 specificity” required by the First Amendment. In its brief opposing a preliminary
14 injunction, the Government sought to delineate what NWIRP could do without triggering
15 the notice of appearance requirement. Dkt. # 47 at 23. But the Government immediately
16 blurred the line by asserting that “EOIR applies section 1003.102(t) only to in court
17 statements,” thereby claiming the Regulation affects only those speaking in a nonpublic
18 forum. *Id.* at 27, 42.⁵ “Precision of regulation must be the touchstone in an area so
19 closely touching our most precious freedoms.” *Button*, 371 U.S. at 438. “In sum, the
20 [Regulation] in [its] present form [has] a distinct potential for dampening the kind of
21 ‘cooperative activity that would make advocacy of litigation meaningful,’ as well as for
22 permitting discretionary enforcement against unpopular causes.” *In re Primus*, 436 U.S.
23 at 433 (quoting *Button*, 371 U.S. at 438).

24
25
26 ⁵ Of course, this cannot be the case. Attorneys who speak in such a forum—that is, as a
27 representative inside the courtroom—have presumably filed a notice of appearance. It seems, then, that
the Regulation must be triggered prior to an attorney’s in-court appearance.

1 A regulation withstands intermediate scrutiny only if is “justified without
2 reference to the content of the regulated speech, [is] narrowly tailored to serve a
3 significant governmental interest, and . . . leave[s] open ample alternative channels for
4 communication of the information.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014)
5 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Government’s
6 failure to narrowly tailor the Regulation or “leave open ample alternative channels for
7 communication of the information” dooms it even under intermediate scrutiny. *Id.* EOIR
8 presents NWIRP with a Hobson’s choice: NWIRP must either fully represent or fully
9 refuse to represent an immigrant. Or, NWIRP could maintain the status quo by offering
10 immigrants limited representation and face serious consequences. On the other hand,
11 EOIR is equipped to promulgate or interpret regulations in ways that satisfy its
12 significant interest in promoting accountability without invading the First Amendment’s
13 guarantees. As such, the Regulation cannot withstand intermediate scrutiny; Plaintiffs
14 are likely to succeed on their First Amendment claim.

15 The majority of briefing—both by the parties and amici—focuses on how this
16 Regulation affects NWIRP and similarly situated non-profit organizations. Dkt. ## 37,
17 40, 47. The Court can conceive of situations—most likely when private attorneys
18 represent immigrants with expectation of remuneration—in which EOIR could
19 constitutionally enforce the Regulation. *Foti v. City of Menlo Park*, 146 F.3d 629, 635
20 (9th Cir. 1998), *as amended on denial of reh’g* (July 29, 1998). For that reason, the Court
21 limits its ruling at this early stage to Plaintiffs’ as-applied challenge.

22 **B. Tenth Amendment**

23 Plaintiffs argue that the Regulation violates Washington’s right to regulate its
24 attorneys under the Tenth Amendment. Dkt. # 37. Regulating and licensing attorneys is
25 a matter left to the states. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). “But ‘the law of the
26 State, though enacted in the exercise of powers not controverted, must yield’ when
27

1 incompatible with federal legislation.” *Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S.
2 379, 384 (1963) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

3 It is well established that Congress may authorize agencies to regulate attorneys
4 appearing before them. *See Sperry*, 373 U.S. 379; *Goldsmith v. U.S. Bd. of Tax Appeals*,
5 270 U.S. 117 (1926); *Koden v. U.S. Dep’t of Justice*, 564 F.2d 228 (7th Cir. 1977);
6 *Touche Ross & Co. v. Sec. & Exch. Comm’n*, 609 F.2d 570 (2nd Cir. 1979). In such
7 cases,

8 A State may not enforce licensing requirements which,
9 though valid in the absence of federal regulation, give the
10 State’s licensing board a virtual power of review over the
11 federal determination that a person or agency is qualified and
12 entitled to perform certain functions, or which impose upon
13 the performance of activity sanctioned by federal license
14 additional conditions not contemplated by Congress.

15 *Sperry*, 373 U.S. at 385.

16 Congress authorized EOIR to regulate the conduct of attorneys appearing before it.
17 8 U.S.C. §§ 1103(g), 1362. As such, EOIR may impose requirements on its practitioners
18 that Washington does not. Accordingly, Plaintiffs’ argument that EOIR may not regulate
19 attorneys differently than Washington is unlikely to succeed on the merits. As noted,
20 however, Plaintiffs’ likelihood of success on their First Amendment claim is sufficient to
21 warrant the entry of a preliminary injunction.

22 **C. Irreparable Harm**

23 Plaintiffs have met their burden to show they have suffered and will continue to
24 suffer irreparable harm. This Order makes clear that Plaintiffs’ “First Amendment rights
25 were either threatened or in fact being impaired at the time relief was sought.” *Elrod v.*
26 *Burns*, 427 U.S. 347, 373 (1976). “The loss of First Amendment freedoms, for even
27

1 minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* (citing *New*
2 *York Times Co. v. U.S.*, 403 U.S. 713 (1971)).

3 Prior to the Court’s issuance of a TRO, and in order to abide by the Government’s
4 cease and desist letter, Plaintiffs refrained from assisting at least four individuals. Dkt.
5 ## 37 at 30, 4 at ¶ 12. Were the injunction lifted, Plaintiffs would likely encounter
6 additional harm in being deprived of continuing their mission. *Button*, 371 U.S. at 435
7 (“It makes no difference whether such prosecutions or proceedings would actually be
8 commenced. It is enough that a vague and broad statute lends itself to selective
9 enforcement against unpopular causes.”).⁶

10 That Plaintiffs may withdraw representation with leave of court is no solution. *See*
11 Dkt. # 47 at 34. Quite simply, “[t]his misses the point.” *Legal Servs. Corp. v. Valazquez*,
12 531 U.S. 533, 546 (2001). As applied to NWIRP, the Regulation threatens to “smother[]
13 all discussion looking to the eventual institution of litigation on behalf of the rights of
14 members of an unpopular minority.” *Button*, 371 U.S. at 434. Just as NWIRP lacks
15 resources to undertake full representation of each immigrant, it likely lacks resources to
16 undertake full representation and then seek withdrawal. Moreover, if attorneys were able
17 to assume full representation and then withdraw with impunity, the evils that EOIR seeks
18 to remedy might instead be exacerbated.

19 **D. Balance of Equities & Public Interest**

20 Plaintiffs have met their burden to show that the balance of equities and public
21 interest weigh in favor of granting the preliminary injunction. The parties agree that
22 providing quality representation to vulnerable immigrants is a high priority. Moreover,
23 the Government is not harmed by allowing NWIRP and other similarly situated
24 organizations from continuing to provide competent representation. This is especially
25

26
27 ⁶ As the myriad of attached declarations attest, NWIRP and other organizations may lose
the ability to receive aid in furthering their cause. *See* Dkt. # 39 (Allen Decl.).

1 true in light of the Court's narrow ruling that authorizes EOIR to enforce the Regulation
2 against those private attorneys who may actually be engaging in the evils so described.
3 Finally, "it is always in the public interest to prevent the violation of a party's
4 constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citations
5 and internal quotation marks omitted).

6 **V. PRELIMINARY INJUNCTION**

7 1. Plaintiffs' Motion for Preliminary Injunction (Dkt. 37) is **GRANTED**.

8 2. Defendants Jefferson B. Sessions III, the United States Department of
9 Justice, the Executive Office for Immigration Review, Juan Osuna, and Jennifer Barnes,
10 and all of their officers, agents, servants, employees, attorneys, successors, assigns, and
11 persons acting in concert or participation with them are hereby **ENJOINED** and
12 **RESTRAINED** from:

13 (a) Enforcing the cease and desist letter, dated April 5, 2017, from Defendant
14 Barnes and EOIR's Office of General Counsel to NWIRP; and

15 (b) Enforcing or threatening to enforce 8 C.F.R. § 1003.102(t) against Plaintiffs
16 and all other attorneys under their supervision or control, or who are otherwise associated
17 with them.

18 3. The Preliminary Injunction is granted on a nationwide basis as to any other
19 similarly situated non-profit organizations who, like NWIRP, self-identify and disclose
20 their assistance on *pro se* filings. Therefore, the Court prohibits the enforcement of 8
21 C.F.R. § 1003.102(t) during the pendency of this preliminary injunction on a nationwide
22 basis.

23 4. No security bond is required under Federal Rule of Civil Procedure 65(c).

24 5. This preliminary injunction shall remain in effect until further Order of this
25 Court.

26 //

27 //

