

Hon. Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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

Plaintiff,

v.

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

Defendants.

Case No. 2:17-cv-00716

DEFENDANTS’ REPLY IN SUPPORT OF  
THEIR MOTION TO DISMISS

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1 This Court should grant Defendants' motion to dismiss Plaintiffs' complaint. This  
2 Court's ruling on the preliminary injunction is not binding as law of the case because of its  
3 preliminary nature. Furthermore, the Court should reject Plaintiffs' invitation to read 8 C.F.R.  
4 § 1003.102(t) i more broadly than the Executive Office for Immigration Review ("EOIR") has  
5 ever done. Rather, any concerns this Court has regarding the constitutionality of the agency's  
6 regulations should be addressed by engaging in a narrow construction of the statute as  
7 consistently proposed by Defendants. Indeed, 8 C.F.R. § 1003.102(t) is amenable to a narrow  
8 reading that avoids constitutional concerns because it can and should be read as applying to  
9 speech conducted either in person or via filings with the immigration court or the Board of  
10 Immigration Appeals ("Board"). This regulation is viewpoint neutral and reasonable in light of  
11 the forum's need to promote quality in the representation of respondents in immigration court  
12 proceedings. Lastly, the regulation does not violate the Tenth Amendment because EOIR has the  
13 inherent and statutory power to regulate the practice of immigration law, including the conduct  
14 of any practitioners before it, nor does the regulation in fact conflict with state rules.  
15 Consequently, this Court should dismiss Plaintiffs' Complaint for lack of jurisdiction and for  
16 failure to state a claim upon which relief may be granted.

## 17 ARGUMENT

### 18 I. Plaintiffs' claims under the First Amendment should be dismissed.

#### 19 a. This Court's ruling on the Plaintiffs' motion for preliminary injunction was 20 a preliminary ruling and is not binding on this Court as the law of the case.

21 While Plaintiffs' first argue that the "law-of-the-case" doctrine precludes the Court from  
22 revisiting issues addressed in its Order granting Plaintiffs' Motion for Preliminary Injunction,  
23 Pls.' Resp., at 4; *see* ECF No. 66, Plaintiffs ignore overwhelming authority holding that  
24 decisions on preliminary injunctions do not constitute binding "law of the case." *See University*  
25 *of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("the finding of fact and conclusions of law  
26 made by a court granting a preliminary injunction are not binding at trial on the merits"); *City of*  
*Angoon v. Hodel*, 803 F.2d 1016, 1024 n. 4 (9th Cir.1986) (determinations corresponding to a  
preliminary injunction do not constitute the law of the case); *Golden State Transit Corp. v. City*

1 of *Los Angeles*, 754 F.2d 830, 832 n. 3 (9th Cir.1985) (“As a general rule, decisions on  
 2 preliminary injunctions do not constitute law of the case and parties are free to litigate the  
 3 merits.”) (internal quotations omitted), *rev’d on other grounds*, 475 U.S. 608 (1986); *see also*  
 4 *Berrigan v. Sigler*, 499 F.2d 514, 519 (D.D.C. 1974) (“The decision of a trial . . . court to grant  
 5 or deny a preliminary injunction does not constitute the law of the case for purposes of further  
 6 proceedings and does not limit or preclude the parties from litigating the merits . . .”).

7 The cases Plaintiffs cite to invoke the “law of the case” doctrine are inapposite. *See* Pls.’  
 8 Resp. at 4-5 (citing *United States v. Arizona*, 10-cv-1413, 2010 WL 11405085, at \*6 (D. Ariz.  
 9 Dec. 10, 2010); and *United States v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004); and *United States*  
 10 *v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986)). Neither *Smith* nor *Houser* involved a ruling on a  
 11 motion for preliminary injunction, and in any event, in both cases the Ninth Circuit *declined* to  
 12 apply the law of the case doctrine. *See Smith*, 389 F.3d at 948-49 (“[A] district court may  
 13 reconsider its prior rulings so long as it retains jurisdiction over the case.”); *Houser*, 804 F.2d  
 14 567-69 (noting “that the doctrine is discretionary, not mandatory,” and that “[a]ll rulings of a  
 15 trial court are subject to revision at any time before the entry of judgment” (internal quotation  
 16 marks omitted)). In *Arizona*, an unpublished district court decision, the court decided on a Rule  
 17 12(b)(6) motion not to revisit issues on which plaintiff had already demonstrated a likelihood of  
 18 success, but even in doing so echoed the Supreme Court’s holding that law of the case did not  
 19 apply to preliminary injunction determinations. 2010 WL 11405085, at \*6 (quoting *Camenisch*,  
 20 451 U.S. at 395). In sum, the law of the case doctrine does not preclude this Court from  
 21 analyzing anew whether Plaintiffs have failed to state a claim on which relief can be granted.

22 **b. Plaintiffs urge this Court to imagine a sweeping interpretation of Rule 102(t)**  
 23 **that has never been applied by EOIR, solely to bolster their First**  
 24 **Amendment claim.**

25 Plaintiffs argue that Defendants have attempted to “[r]estrict [their] [o]ut-of-[c]ourt  
 26 [s]peech to [p]otential [c]lients.” Pls.’ Resp. at 5. But as discussed in Defendants’ Motion to  
 Dismiss, the Complaint fails to allege a single instance in which EOIR has applied Rule 102(t) to  
 communications – either written or oral – that were not actually presented to an immigration

1 court. *See* Defs.’ Mot. at 14-15. Indeed, EOIR’s April 5, 2017 letter cited two specific motions  
2 to reopen apparently authored by NWIRP staff, and it is undisputed that both of these motions  
3 were filed in immigration court. Compl. at ¶ 3.15-17.

4 In their Response, Plaintiffs cite this Court’s Order granting their Motion for Preliminary  
5 Injunction, wherein the Court expressed skepticism about whether Rule 102(t) would apply only  
6 to in-court statements. ECF No. 66, 11, n. 5 (“Attorneys who speak in such a forum – that is, as  
7 a representative inside the courtroom – have presumably filed a notice of appearance.”), *id.*, is  
8 perfectly consistent with Defendants’ position. Indeed, EOIR’s application of Rule 102(t) is  
9 aimed precisely at enforcing this commonsense presumption but with one important clarification  
10 – that attorneys may “speak in a forum” through written as well as oral communication and  
11 therefore must file an appearance when directly communicating to a court by either means. To  
12 the extent that the Court suggested nonpublic forum analysis only applies to statements made  
13 within the physical confines of a courtroom, Defendants urge the Court to reconsider this  
14 position. As discussed in Defendants’ Motion to Dismiss, “[c]ourts have routinely held that  
15 nonpublic forum analysis applies to rules that govern an attorney’s oral *or written* statements *to a*  
16 *court.*” *See* Defs.’ Mot. at 13 (citing cases). Insofar as written pleadings are almost always  
17 prepared outside the physical confines of a courtroom, the cases cited in Defendants’ Motion to  
18 Dismiss establish that nonpublic forum analysis extends to statements directed *to a court*,  
19 regardless of the physical space in which those statements are authored. *Id.* Upsetting this  
20 delicate balance would affect practice before Article III courts – not just immigration courts. *Id.*

21 In their effort to re-interpret Rule 102(t) to better suit their constitutional claims,  
22 Plaintiffs also mischaracterize Defendants’ position. *See* Pls.’ Resp. at 6. Contrary to what  
23 Plaintiffs assert, Defendants do *not* take the position that Rule 102(t) applies to “self-help  
24 workshops, individual consultations, and asylum workshops.” *See id.* As long as the individual  
25 conducting these activities does not submit written statements to the immigration court, they are  
26 free to engage in all of those activities without filing a notice of appearance. As Defendants have  
repeatedly stated, EOIR only applies Rule 102(t) to statements made out of court (in a physical  
sense) if they *presented to* an immigration court – thus constituting in-court speech. By focusing



1 on various scenarios, such as self-help workshops, individual consultations, and asylum  
 2 workshops, to which EOIR has never applied Rule 102(t), Plaintiffs obfuscate the real issue:  
 3 whether nonpublic forum analysis governs documents that are prepared for and actually filed in  
 4 immigration court - the exact in-court speech that led to the April 5, 2017 letter.

5 Plaintiffs' effort to mischaracterize the scope of Rule 102(t) also relies on the Legal  
 6 Orientation Program ("LOP") memorandum that Defendants attached to their Opposition to  
 7 Plaintiffs' Motion for Temporary Restraining Order. *See* Pls.' Resp. at 6 (citing ECF No. 14-2).  
 8 As explained in Defendants' previous filings, the purpose of the LOP memorandum was to  
 9 ensure that organizations receiving LOP funding<sup>1</sup> use that funding to provide legal orientation,  
 10 rather than legal representation, as directed by law.<sup>2</sup> ECF No. 14 at 5; *see* ECF No. 14-2 (citing  
 11 8 U.S.C. § 1362, and 8 C.F.R. § 1003.16(b)). The LOP memorandum plainly states that  
 12 practitioners *may* indeed participate in many of the activities that Plaintiffs claim are at risk, all  
 13 *without* filing a notice of appearance. *See* ECF No 14-2 (explaining that activities which  
 14 generally do not require entry of an appearance include: group orientations, individual  
 15 orientations, distribution of materials, self-help workshops, assistance in obtaining documents,  
 16 and assistance in completing legal forms).

17 Plaintiffs nevertheless cite several passages from the memo out of context in an attempt  
 18 to suggest that EOIR has read the regulations defining "practice" and "preparation" to cover out  
 19 of court speech. Pls.' Resp. at 6. The LOP addresses activities for which a provider may use  
 20 program funds without triggering representation while the regulation addresses conduct that  
 21 reaches an immigration court or the Board and therefore triggers the requirement to file a notice  
 22 of appearance before the appropriate forum. These passages do not support the reading Plaintiffs  
 23 imply. For example, the language in the memorandum Plaintiffs cite regarding "direct  
 24 preparation of an individual's papers" should be read in concert with the next section,  
 25 "Assistance in Obtaining Documents," which states that "LOP presenters *may* assist . . . in  
 26 obtaining personal documents (such as medical or criminal conviction records) under LOP

<sup>1</sup> Plaintiff Northwest Immigrant Rights Project receives LOP funding for its work as LOP provider at the Northwest Detention Center in Tacoma, Washington. *See* ECF No. 50 at ¶ 64.

<sup>2</sup> The LOP memorandum does not prohibit organizations from advocating on behalf of their clients; instead it provides guidance so that program funds are used for their intended purpose. *Id.*

1 funding.” ECF No. 14-2 (emphasis added). Reading these sections together, it is evident that  
 2 “direct preparation of an individual’s papers” refers to authorship of documents to be filed in  
 3 immigration court, and not merely to assistance with obtaining or organizing papers. While  
 4 preparing documents to be filed in immigration court is not compensable under the LOP, it is  
 5 important to note that under Rule 102(t) the preparer would not be required to file a notice of  
 6 appearance unless and until the document is filed with the immigration court or Board. Plaintiffs  
 7 also cite a portion of Steven Lang’s Declaration out of context. *See* Pls.’ Resp. at 6 (citing ECF  
 8 No. 50, at ¶ 68). In the memo, Lang quotes from part of the LOP memorandum he authored and  
 9 notes that practitioners should be “careful not to give legal advice concerning [an] individual’s  
 10 specific case, *see* ECF No. 14-2, at 4. The next sentence of the LOP memorandum, however,  
 11 goes onto clarify that representation occurs when a practitioner prepares a filing for immigration  
 12 court. ECF No. 14-2, at 4 (emphasis added) (representation “does not occur unless the legal  
 13 representative (1) studies the fact of the case, (2) gives legal advice, *and* (3) performs other  
 14 activities, *such as the preparation of forms or a brief for the Immigration Court.*”<sup>3</sup>)

15 In any event, given the purpose of the LOP memorandum – ensuring that government  
 16 funds are used for “legal orientation” and not representation – it makes sense that the document  
 17 conservatively cautions LOP providers to avoid scenarios that begin to approach “legal  
 18 representation.” ECF No. 14-2, at 2 (“The purpose of this memo is to provide guidance in  
 19 distinguishing between services considered ‘legal representation’ and those considered ‘legal  
 20 orientation’ for individuals providing contract services through the . . . Legal Orientation  
 21 Program. The LOP memorandum nevertheless serves to clarify that practitioners may proceed  
 22 with many of the activities Plaintiffs claim are in jeopardy – self-help workshops, individual  
 23 consultations, assistance in completing forms – without the filing of a notice of appearance.”<sup>4</sup>

24  
 25 <sup>3</sup> The LOP memorandum goes on to state that while *all three* of these elements are necessary in order to constitute  
 26 representation under federal regulations, “[p]roviding even one of these three services . . . may lead to circumstances  
 in which an attorney-client relationship is created under local state bar rules.” ECF No. 14-2, at 4.

<sup>4</sup> Plaintiffs also claim that “Defendant Barnes initially contacted NWIRP because she believed NWIRP’s practice of  
 hosting pro se asylum workshops violated the Regulation.” *See* Pls.’ Resp. at 6. Plaintiffs did not allege this fact in  
 their Complaint, and instead offered only a vague allegation that “Defendant Barnes stated that EOIR’s regulations  
 limit organizations, including nonprofit organizations, from assisting pro se individuals in filling out asylum  
 applications.” Compl. at ¶ 3.13.

1           **c. Rule 102(t) is reasonable in light of the purpose its serves, and is viewpoint**  
2           **neutral; Plaintiffs misapprehend the test applicable to nonpublic forums.**

3           While Plaintiffs ostensibly argue that Rule 102(t) “fails to pass muster” even under  
4 nonpublic forum analysis, they arrive at this result only by largely ignoring the test that applies  
5 in nonpublic forum cases and resorting instead to intermediate scrutiny. *See* Pls.’ Resp. at 8-10.  
6 As Plaintiffs seemingly acknowledge, a regulation that governs a nonpublic forum survives a  
7 First Amendment challenge if it is reasonable in light of the purpose served by the forum, and  
8 viewpoint neutral. Pls.’ Resp. at 8-9; *see* Defs.’ Mot. at 18-20.

9           Plaintiffs’ argument as to why Rule 102(t) is not reasonable in light of the purpose served  
10 by the forum is simply that “the regulation is not narrowly tailored to achieve its own ends,” and  
11 that “a less burdensome self-identification requirement would equally serve its purported need.”  
12 Pls.’ Resp. at 8-9. Defendants offered numerous reasons why Rule 102(t) addresses a  
13 “legitimate need.” *See* Defs.’ Mot. at 8-10, 18-20; *Preminger v. Peake*, 552 F.3d 757, 766 (9th  
14 Cir. 2008) (noting that under nonpublic forum analysis, the restriction “must reasonably fulfill ‘a  
15 legitimate need’”). Plaintiffs do not appear to contest any of these points. *See* Pls.’ Resp. at 8-9.  
16 Rather, Plaintiffs simply argue that Rule 102(t) is not reasonable because there may be less  
17 restrictive means of accomplishing the same result. *Id.* The Ninth Circuit has clearly held that  
18 for purposes of nonpublic forum analysis, “the restriction need *not* constitute the least restrictive  
19 alternative available.” *Preminger*, 552 F.3d at 766 (emphasis added) (citing *Swarmer v. United*  
20 *States*, 937 F.2d 1478, 1482 (9th Cir. 1991)). Plaintiffs’ suggestion that EOIR’s objectives could  
21 be served “by far less intrusive requirements” is thus inapposite. *See* Pls.’ Resp. at 9.

22           Plaintiffs similarly misread binding precedent with respect to whether the regulation is  
23 “viewpoint neutral.” Pls.’ Resp. at 9-10. “[I]n a nonpublic forum, the government has the right  
24 to make distinctions in access on the basis of subject matter and speaker identity, as long as *the*  
25 *distinctions are not an effort to suppress expression merely because public officials oppose the*  
26 *speakers view.*” *Preminger*, 552 F.3d at 767 (emphasis added). While Plaintiffs suggest in their  
response that Rule 102(t) is not viewpoint neutral because it applies only to non-government  
practitioners, their Complaint in no way alleges that the regulation was somehow devised as a

1 means of suppressing expression by immigration attorneys. *See generally*, Compl. In any event,  
 2 the rationale behind Rule 102(t) is well-documented in the Federal Register, as Defendants have  
 3 described. *See* Defs.’ Mot. at 8-10 (citing 73 Fed. Reg. 76,914 (Dec. 18, 2008), and 73 Fed. Reg.  
 4 44,178 (July 30, 2008)). Nothing there remotely suggests that the regulation is “an effort to  
 5 suppress expression merely because public officials oppose the speaker’s view.” *Preminger*,  
 6 552 F.3d at 767. To the extent that government lawyers are subject to different ethical rules, that  
 7 difference is attributable to their different role as public servants subject to state ethics rules,  
 8 federal and agency regulations, and not to the viewpoints they may express in court. *See, e.g.*, 28  
 9 U.S.C. § 530B (imposing regulation of government attorneys); 8 C.F.R. § 2635.101 *et seq.*  
 10 (government ethics regulations); 8 C.F.R. § 1003.109 (providing for referral of government  
 11 attorneys accused of ethical violations); 73 Fed. Reg. at 76,917 (discussing regulation of  
 12 government attorneys); 65 Fed. Reg. 39,522 (same). Indeed, by Plaintiffs’ logic, any rule in any  
 13 court that applies differently for government attorneys could be challenged as a form of  
 14 “viewpoint discrimination.”

15 **d. To the extent there is any question about the scope of Rule 102(t), the Court**  
 16 **should adopt a narrowing construction consistent with the agency’s own**  
 17 **application of the Rule.**

18 As stated in Defendants’ Motion to Dismiss, “the doctrine of constitutional avoidance  
 19 requires [the Court] to construe [a] statute [or] regulation, if possible, to avoid a serious  
 20 constitutional question.” Defs.’ Mot. at 16 (citing *Dent v. Holder*, 627 F.3d 365, 375 (9th Cir.  
 21 2010)). Accordingly, the Supreme Court has held that “every reasonable construction must be  
 22 resorted to, in order to save a statute from unconstitutionality.” *DeBartolo Corp., v. Fla. Gulf*  
 23 *Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

24 Plaintiffs’ primary arguments as to why this Court should not adopt a narrowing  
 25 construction are based primarily on the allegations that Defendants have offered inconsistent  
 26 interpretations of the regulation. *See* Pls.’ Resp. at 11-13. Defendants disagree with this  
 assessment,<sup>5</sup> but the issue is ultimately a distraction. Plaintiffs offered no authority for the

<sup>5</sup> In their effort to portray Defendants’ position as “inconsistent,” Plaintiffs rely in large part on statements made by Defendants’ counsel at a Temporary Restraining Order hearing conducted nine days after the filing of the

1 position that a Court’s obligation to consider a reasonably available narrowing construction  
2 diminishes if the government offers varying interpretations of a statute or regulation. *See* Pls.  
3 Resp. at 11-13.

4 The only relevant test – as Plaintiffs acknowledge– is whether the regulation is “readily  
5 susceptible” to a narrowing construction. Pls.’ Resp. at 12. To the extent this Court has  
6 concerns about the scope of Rule 102(t), the Court can avoid the vast majority of these concerns  
7 by construing the rule to apply only to speech – either oral or written communication – that is  
8 directed to the immigration court or the Board. As explained above and in Defendants’ Motion  
9 to Dismiss, courts have routinely held that First Amendment protections apply more narrowly in  
10 the context of speech – whether written or oral – that is actually presented to a court. *See* Defs.’  
11 Mot. at 13 (citing *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1071 (N.D. Cal. 2005), and *Zal v.*  
12 *Steppe*, 968 F. 2d 924, 925-29 (9th Cir. 1992). Accordingly, construing Rule 102(t) in the  
13 manner suggested above would necessarily reduce the degree to which the rule affects First  
14 Amendment protected speech.

15 Notwithstanding Plaintiffs’ argument to the contrary, *see* Pls.’ Resp. at 13-14,  
16 interpreting Rule 102(t) so that it applies only to speech that is directed to the immigration court  
17 or the Board is fully consistent with the language of the regulations. As explained in  
18 Defendants’ Motion to Dismiss (and Defendants’ Opposition to the Plaintiffs’ Motion for  
19 Preliminary Injunction, *see* ECF No. 47, at 12) the term “practice” includes a built-in limitation  
20 in that it only applies to appearances “before . . . any immigration judge, or the Board.” Defs’.  
21 Mot. at 13-14 (citing 8 C.F.R. § 1001.1(i)). Plaintiffs urge the Court to adopt an expansive  
22 reading of the term “preparation,” as set forth in 8 C.F.R. § 1001.1(k), to encompass all forms of  
23 “study, advice, or auxiliary activities,” regardless of whether any materials are ever filed in  
24

25 \_\_\_\_\_  
26 Complaint. Pls.’ Mot. at 11-13. It is entirely reasonable to expect that Defendants would be able to better articulate  
their position in later filings, after having additional time to review how the regulations in question have been  
applied in practice by the agency. Moreover, even at that early hearing, Defendants’ counsel stated on several  
occasions that it was the presentation of materials to the immigration court that triggers the notice of appearance  
requirement. *See e.g.*, ECF No. 39-1, at 34:22 – 35:3 (“NWIRP is still allowed to consult with individuals, to  
provide know-your-rights presentations, they can still prepare forms, they can still engage in many of the average  
activities that they want to engage in so long as they don’t engage in acts that constitute providing advice and  
providing actual assistance *that is to be presented before the immigration court.*”) (emphasis added).

1 immigration court or with the Board. Pls.' Resp. at 14. But the Court need not "graft[] new  
2 words into the [regulation]" in order to limit its scope. *Id.* Rather, the Court need only recognize  
3 that the term being defined at 8 C.F.R. § 1001.1(k) is not simply "preparation," but "preparation,  
4 *constituting practice.*" Indeed, as explained in Defendants' previous filings, a careful reading of  
5 the regulatory definitions of "practice" and "preparation, constituting practice" leads to the  
6 reasonable conclusion that the regulations only extend to those practitioners whose activities  
7 result in communications presented to the immigration court or the Board. *See* ECF No. 47, at  
8 12 (explaining how the terms "practice" and "preparation" should be read in concert).

9 Plaintiffs also suggest that Defendants' narrowing construction is not viable because of  
10 uncertainty about when assistance with completing an asylum form triggers a notice of  
11 appearance requirement. Pls.' Resp. at 11-12. However, the regulations allow assistance with  
12 the preparation of materials to be filed before the immigration court without triggering the notice  
13 of appearance requirement. 8 C.F.R. § 1001.1(k). Defendants' counsel did acknowledge during  
14 the Preliminary Injunction hearing that application of this exception is often fact-specific because  
15 an individual assisting with an asylum form could conceivably populate blank spaces on an  
16 asylum form with legal arguments, which could trigger a notice of appearance requirement. Pls.'  
17 Resp., Ex. A, at 36:5-12 (ECF No. 76-1). Nevertheless, the fact-specific nature of these  
18 determinations is not the "fatal flaw" that Plaintiffs allege in their Response. Pls.' Resp. at 12.  
19 "[U]ncertainty at a statute's margins will not warrant facial invalidation if it is clear what the  
20 statute proscribes in the vast majority of its intended applications." *Cal. Teachers Ass'n v. State*  
21 *Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001). In this case, the narrowing construction  
22 proposed by Defendants makes it clear when a notice of appearance is required in the vast  
23 majority of situations: those who author briefs and motions must file a notice of appearance. On  
24 the other hand, the notice of appearance requirement does not apply to those who simply offer  
25 assistance via self-help workshops and know your rights presentations, as well as those who  
26 offer basic clerical assistance with completing asylum forms.

In sum, the narrowing construction proffered by Defendants is reasonable in light of the regulatory language, and would avoid the vast majority of the Constitutional concerns raised by

1 Plaintiffs. The Court should construe the regulations in this constitutionally adequate manner,  
 2 and should reject Plaintiffs' invitation to purposely reach for a constitutionally suspect  
 3 interpretation. This Court should therefore dismiss Counts I and II of Plaintiffs' Complaint.<sup>6</sup>

4 **II. EOIR's regulation of immigration court practitioners is permitted under the Tenth**  
 5 **Amendment and causes no undue conflict with Washington's power to regulate**  
 6 **lawyers.**

7 Under the Tenth Amendment, the federal government has the ability to regulate practice  
 8 before the immigration courts, including regulation of admission to practice and the conduct of  
 9 practitioners. Plaintiffs rely on an extremely narrow reading of case law and EOIR authority to  
 10 regulate immigration court practice. The case law does not support such a reading.

11 EOIR, as the federal administrator of the immigration court system, has the inherent and  
 12 statutory authority to regulate the practice of immigration practitioners before its tribunals. *See*  
 13 *Defs.' Mot.* at 21 (collecting statutory authority); *see also* ECF 66, at 13 (this Court stated  
 14 "Congress may authorize agencies to regulate attorneys appearing before them"). Consequently,  
 15 Plaintiffs' narrow interpretation of EOIR's authority to regulate immigration practitioners is  
 16 inconsistent with Supreme Court precedent. *Sperry v. Florida ex. rel. Florida Bar*, 373 U.S.  
 17 379, 385 (1963) ("A State may not enforce licensing requirements which, though valid in the  
 18 absence of federal regulation, give the State's licensing board a virtual power of review over the  
 19 federal determination that a person or agency is qualified and entitled to perform certain  
 20 functions, or which impose upon the performance of activity sanctioned by federal license  
 21 additional conditions not contemplated by Congress."). In other words, *Sperry* recognizes that  
 22 the state cannot interfere with a federal agency's power to regulate practice before its federal

23 \_\_\_\_\_  
 24 <sup>6</sup> Plaintiffs inaccurately suggest that Defendants "wait[ed] at least six years after enactment" of Rule 102(t) before  
 25 ever seeking to enforce it. *Pls.' Resp.* at 14. As Plaintiffs are well aware, EOIR has issued warning letters under  
 26 Rule 102(t) in many instances dating back to at least 2012. *See* ECF No. 49-3, 49-7. Plaintiffs' argument that "they  
 did not have reason to know that Defendants would enforce the Regulation to prevent NWIRP from offering limited  
 legal services" is also problematic. *Pls. Resp.* at 18. First, the document that Plaintiffs' repeatedly cite as evidence  
 for EOIR's "new" broad interpretation is the previously discussed LOP memorandum, which was authored in  
 2011. ECF No. 14-2. More fundamentally, the Final Rule adopting section 1003.102(t) in 2008 explicitly declined  
 one commenter's suggestion that "the Department permit limited appearances." *See* 73 Fed. Reg. 76,914, 76,918;  
*Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("On a  
 facial challenge to a regulation, the [statute of] limitations period begins to run when the agency publishes the  
 regulation in the Federal Register.").

1 forum, because the state of Washington only “maintains control over the practice of law within  
 2 its borders *except to the limited extent necessary for the accomplishment of the federal*  
 3 *objectives.*” *Id.* at 402 (emphasis added). In this case, such permissible federal regulation is of  
 4 immigration court practitioners, a field with nationwide and unique concerns. Def. Mot. at 21-22.  
 5 And, Plaintiffs’ narrow interpretation of EOIR’s authority to regulate immigration practitioners  
 6 is inconsistent with courts that have found EOIR’s regulation of the admission and conduct of  
 7 immigration practitioners permissible. *Gadda v. Ashcroft*, 377 F.3d 934, 944-45 (9th Cir. 2004)  
 8 (finding no conflict between EOIR attorney regulation and state regulation); *Romero v. U.S.*  
 9 *Dep’t. of Justice*, 556 F. App’x 365, 370 (5th Cir. 2014) (upholding EOIR authority to restrict  
 10 practice of law by foreign law graduates); *Koden v. U.S. Dep’t of Justice*, 564 F.2d 228, 230,  
 11 234, 235 (7th Cir. 1977) (stating that it is “elementary that any court or administrative agency  
 12 which has the power to admit attorneys to practice has the authority to disbar or discipline  
 13 attorneys” and finding that the immigration court has authority to regulate the conduct of  
 14 immigration practitioners, i.e. representation for a fee and methods of soliciting clients).

15 Plaintiffs attempt to distinguish *Sperry* by alleging that it only involved authorization to  
 16 practice, but not regulation of the conduct of practitioners. Pls.’ Resp. at 21. That distinction  
 17 misreads *Sperry*. *Sperry* upheld the authority of a federal agency under the Tenth Amendment to  
 18 regulate *who* can practice before the agency, *what* conduct those practitioners may engage in,  
 19 and whether practitioners do so competently. 373 U.S. at 383-84, 403-04; *id.* at 402 (Patent  
 20 Office insists “on the maintenance of high standards of integrity,” and failure to comply “may  
 21 result in suspension or disbarment”). Under the Tenth Amendment, EOIR could regulate  
 22 analogous conduct of immigration practitioners.<sup>7</sup> *Cf. Koden*, 564 F.2d at 234 (attorney discipline  
 23 for immigration practitioners need not be “in connection with a proceeding pending” before the  
 24 legacy INS or Board).<sup>8</sup>

25  
 26 <sup>7</sup> To the extent that Plaintiffs raise a “parade of horrors,” alleging that EOIR cannot claim authority to regulate  
 conduct beyond the confines of immigration court, Pls’ Resp. at 22, such fears are unfounded because the regulation  
 at issue applies to in-court activities.

<sup>8</sup> Plaintiffs’ Tenth Amendment arguments, if accepted, ironically would also limit the ability of non-attorneys to  
 practice before immigration courts on behalf of respondents. Def. Mot. at 22; *see also* 23 Fed. Reg. 2670 (Apr. 14,  
 1958). Such a result would have unintended consequences for Plaintiffs and other organizations that provide  
 immigration-related services through accredited representatives. And it would limit out-of-state attorneys’ ability to



1 Ultimately, Plaintiffs do nothing more than manufacture a conflict between Washington’s  
 2 rules authorizing (but not mandating) limited legal practice and EOIR’s rule requiring notices of  
 3 appearance. See Compl. ¶¶ 6.1-7.8. But there is no actual tension between these rules. While  
 4 Rule 1.2(c) of the Washington Rules of Professional Conduct permits limited representation, that  
 5 rule does not provide NWIRP with a carte blanche to engage in limited representation in any way  
 6 it sees fit – it merely permits such practice *in state court* when such practice is reasonable and  
 7 comports with other rules “and other law.” Wash. R. Prof. Conduct 1.2 cmt.8; see also *id.* 1.2(c)  
 8 & cmt. 7 (emphasizing that any limited representation must be reasonable and supported by  
 9 informed consent). And in fact, EOIR allows practitioners to limit their representation to  
 10 discrete aspects of immigration court proceedings by allowing notices of appearances to be filed  
 11 solely for bond proceedings or for appeals before the Board and by providing a mechanism –  
 12 which Plaintiffs do not allege to have tried – for withdrawing (and hence limiting) appearances.  
 13 Def. Mot. at 23 n.10. Any concern regarding the scope of Rule 102(t) can be resolved with a  
 14 narrowing construction of the statute. See *supra* Part I.d. The requirement of a notice of  
 15 appearance does not cause any undue conflict with Washington’s regulation of lawyers licensed  
 16 by that state. And even if it did, as this Court stated, “Congress authorized EOIR to regulate the  
 17 conduct of attorneys appearing before it. 8 U.S.C. §§ 1103(g), 1362. As such, EOIR may  
 18 regulate immigration practitioners. ECF No. 66 at 13. This Court should, therefore, dismiss  
 19 Counts III and IV for failure to state a claim upon which relief may be granted.

20 **CONCLUSION**

21 For the foregoing reasons, this Court should dismiss Plaintiffs’ Complaint.  
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practice immigration law in Washington. *Id.* Significantly, the implications of such an interpretation for regulation of practice before this Court, other Article III courts, and all federal administrative adjudicative bodies.

1 Dated: September 1, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

Dated: September 1, 2017

Respectfully submitted.

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