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; 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.

No. 2:17-cv-00716

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Noted for Consideration:
September 1, 2017

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I. INTRODUCTION

On May 17, 2017, this Court entered a temporary restraining order (TRO), enjoining Defendants from enforcing 8 C.F.R. § 1003.102(t) (the "Regulation") and their "cease and desist" directive to Northwest Immigrant Rights Project ("NWIRP"), through which Defendants had sought to prevent NWIRP from providing legal assistance to thousands of immigrants each year. Dkt. 33. On July 27, the Court converted the TRO into a preliminary injunction. Dkt. 66. In so doing, the Court determined that"[t]his case falls neatly within the [Supreme Court] precedent … embod[ying] the principle that non-profit organizations may not be threatened when advocating lawful means of vindicating legal rights." *Id.* at 5 (internal quotation marks omitted).

Undeterred, Defendants are back for a third bite at the apple. Their Motion to Dismiss largely repeats (in some cases, verbatim) the same flawed arguments they advanced in prior briefing—even though the Court has already rejected these arguments. Defendants' Motion fails to articulate any compelling reason why the Court should dismiss any of Plaintiffs' claims:

First, Defendants' Regulation—which, they do not deny, effectively prevents Plaintiffs from providing limited assistance to immigrants in removal proceedings—is subject to strict scrutiny. Defendants "must demonstrate a compelling interest that is narrowly tailored 'to avoid unnecessary abridgement' of First Amendment freedoms." Dkt. 66, at 8 (quoting *In re Primus*, 436 U.S. 412, 432 (1978)). Defendants cannot avail themselves of the lesser scrutiny applied to non-public forum restrictions, as the Regulation interferes with protected, out-of-court speech, like self-help presentations, individual meetings, and asylum workshops. In any case, the Regulation cannot survive even minimal scrutiny under a non-public forum analysis. The Regulation imposes unreasonable restrictions unmoored from its stated purpose (or any other legitimate purpose), and it is not viewpoint-neutral, as it burdens only attorneys who represent immigrants and not government lawyers.

Second, Defendants cannot save their Regulation by asking the Court to rewrite it for them. Although Defendants suggest the Regulation can be rescued by a "narrowing construction," they fail to offer a viable one. In fact, the only interpretation they offer is one of

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pure caprice—that each interaction between an attorney and client is "extremely fact-specific," and only Defendant Barnes can judge if that interaction "crosses the line," something she will "know" when she "see[s] it."[1] Corning Decl. Ex. A at 38:10–14. Although Defendants reassure the Court that the Regulation can be confined to only "in court" speech, this promise is illusory: it contradicts the text of the Regulation. Moreover, as Defendants apparently interpret it, the "in court" limitation *still* prohibits Plaintiffs from offering out-of-court legal assistance to immigrants. Clever labels aside, this new "limitation" cannot pass constitutional muster.

Third, Defendants cannot avail themselves of the statute of limitations to evade a facial challenge to their Regulation. As the Ninth Circuit and other courts within this Circuit have recognized, the statute of limitations does not bar First Amendment challenges to a regulation's constitutionality, particularly when the harm caused by vagueness and overbreadth is persistent and ongoing. Moreover, even if the statute of limitations did apply, Plaintiffs' cause of action did not accrue until April 2017, when Plaintiffs first became aware Defendants intended to enforce the vague and overbroad language contained in the Regulation. Defendants are barred from arguing for an earlier accrual date, as they expressly accepted and acceded to NWIRP's practice of self-identification until April 2017. And, in any event, the limitations period restarts each day that it is enforced against Plaintiffs.

Fourth, the Court should not dismiss Plaintiffs' Tenth Amendment claims. Plaintiffs' claims are not—as Defendants have argued—a contest for supremacy between Defendants' right to regulate immigration-court practice and Washington State's legal ethics rules. Rather, the core issue presented in these claims is how far *beyond* the immigration court Defendants may extend their regulatory reach without trampling the States' sovereign power to regulate the general practice of law. Here, the Regulation restricts, among other things, purely out-of-court speech

[1] "I know it when I see it," is Justice Potter Stewart's oft-quoted foray into defining a standard for pornography. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart J., concurring). Less remarked upon, but no less noteworthy, is Justice Stewart's decision to later recant that test, in which he and two of his colleagues admitted they were "manifestly unable to describe [pornography] in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., joined by Stewart and Marshall, JJ., dissenting). Defendants' "we know it when we see it" approach to practitioner discipline suffers from the same infirmity.

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and conduct—advice and communication between an attorney and a client (including prospective clients). These privileged communications may or may not culminate in an appearance or representation before the immigration court, but the Regulation ignores that distinction. The Regulation is not—as it must be—circumscribed to the narrow arena in which Defendants can permissibly regulate. Even if Plaintiffs' Tenth Amendment claims were insufficient to satisfy the stringent standard for preliminary injunctive relief, they survive the much lesser standard applicable to a motion to dismiss.

If the Court grants Defendants' Motion, Defendants will succeed in depriving Plaintiffs of their ability to advocate for immigrant rights. They will also deprive thousands of immigrants in Washington—and many more throughout the country—of the high-quality legal assistance they now receive from non-profit legal providers.

II. BACKGROUND

The Court is familiar with Plaintiffs' Complaint and the relevant facts. Dkt. 66, at 2–4. Rather than repeating them here, Plaintiffs incorporate the factual recitation set forth in their preliminary-injunction motion, Dkt. 37, at 1–5, which contains only facts pled in the Complaint, reasonable inferences therefrom, and facts in supporting declarations that are "consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

On the other hand, most of Defendants' factual recitation is based, not on the Complaint, but on the declaration of Defendant Jennifer Barnes. *See* Dkt. 67, at 2–5. Defendants may not rely on their own factual contentions and material outside (or not incorporated by reference into) the Complaint in bringing a Rule 12(b)(6) motion to dismiss. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Defendants' factual recitation is therefore improper.[2]

[2] Presumably, Defendants will argue in reply that they can rely on their own factual contentions and material because they also seek dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction (which, although not stated, appears to rest on their statute-of-limitations argument). It is true that Rule 12(b)(1) motions allow for consideration of material outside the pleadings. *See Green v. United States*, 630 F.3d 1245, 1248 n.3 (9th Cir. 2011). But motions to dismiss based on 28 U.S.C. § 2401(a)'s limitations provision are not jurisdictional motions, and therefore must be brought under (and subject to the limitations of) Rule 12(b)(1). *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770–71 (9th Cir. 1997).

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III. LEGAL STANDARD

On a Rule 12(b)(6) motion to dismiss, the Court assumes the truth of the complaint's factual allegations and credits all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). If the plaintiff points to factual allegations that "state a claim to relief that is plausible on its face," the complaint avoids dismissal if there is "any set of facts consistent with the allegations in the complaint" that would entitle the plaintiff to relief. *Twombly*, 550 U.S. at 563, 568; *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under this standard, Defendants' motion fails.

IV. ARGUMENT

A. The Court Should Not Dismiss Plaintiffs' First Amendment Claims After Concluding, Less than a Month Ago, that Plaintiffs Were Likely to Succeed on These Claims.

In seeking dismissal of Plaintiffs' First Amendment claims, Defendants advance many of the same arguments they relied on, unsuccessfully, in opposing entry of the TRO and preliminary injunction. *See* Dkt 14, at 8–12; Dkt. 47, at 11–22. Given the more stringent requirement to demonstrate a likelihood of success on the merits for a preliminary injunction, the Court should not reexamine on a motion to dismiss those "claims with regard to which the Court previously found that Plaintiff[s] had demonstrated a likelihood of success." *United States v. Arizona*, 2010 WL 11405085, at *6 (D. Ariz. Dec. 10, 2010). Moreover, because the Court already twice ruled that Plaintiffs have demonstrated a likelihood of success on the merits on their First Amendment claims, *see* Dkts. 33 & 66, the law-of-the-case doctrine counsels against revisiting these claims now. *See United States v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004) ("Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court . . . in the same case.") (internal quotation marks omitted); *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) ("[R]econsideration of legal questions previously decided should be avoided."). Asking this Court to wholly revise its interpretation of law applied in an earlier motion, without providing the Court "strong and reasonable [grounds for deciding] that the earlier ruling was wrong," violates the purpose and intent of the doctrine. *Smith*, 389 F.3d at 949. Defendants offer no compelling reason for the Court to revisit these rulings.

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In any event, however, each of Defendants' arguments lack merit and should be rejected.

1. Defendants' Efforts to Restrict Plaintiffs' Out-of-Court Speech to Potential Clients Is Subject to Strict Scrutiny, Not a Nonpublic Forum Analysis.

Defendants insist the Regulation, promulgated by the Executive Office for Immigration Review ("EOIR"), exclusively regulates "in-court" speech. Because courtrooms are (according to Defendants) nonpublic forums, Defendants reason that EOIR's Regulation should receive only minimal First Amendment scrutiny. Dkt. 67, at 12–15. Defendants are mistaken for several reasons:

First, Defendants ignore the Court's prior ruling applying strict scrutiny to Plaintiffs' First Amendment claims. Dkt. 66, at 8. In that ruling, the Court determined not only that the Regulation failed strict scrutiny, but that the breadth of the Regulation "dooms it even under intermediate scrutiny." *Id.* at 12. Despite the Court's unambiguous conclusion to the contrary, Defendants persist in arguing that only minimal scrutiny should apply because the Regulation restricts speech in a nonpublic forum—the courtroom. *See* Dkt. 67, at 12. But in granting Plaintiffs preliminary injunctive relief, the Court rejected the argument that "EOIR applies Section 1003.102(t) only to in court statements," *see* Dkt. 47, at 11, stating:

> Of course, this cannot be the case. Attorneys who speak in such a forum—that is, as a 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.

Dkt. 66, at 11 n.5. Defendants offer no compelling rationale for why the Court should reverse its prior conclusion that the challenged Regulation is subject to—and fails—strict scrutiny.

Second, legal advice and other speech in the context of providing limited representation to immigrants in removal proceedings are essential to vindicating the rights of an unpopular minority. This fact alone mandates strict scrutiny. *See id.* at 5 ("This case falls neatly within the . . . authority embod[ying] the principle that non-profit organizations may not be threatened when 'advocating lawful means of vindicating legal rights.'") (quoting *NAACP v. Button*, 371 U.S. 415, 437 (1963)). This argument has been extensively briefing in connection with the prior motions, so Plaintiffs will not repeat it again here. *See* Dkt. 2, at 6–10; Dkt. 21, at 4; Dkt. 37, at 6–9.

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Third, even accepting Defendants' questionable premise that a courtroom is a nonpublic forum, the Regulation unquestionably reaches and restricts conduct that occurs outside that forum. By its own terms, the Regulation prohibits "advice" given to clients when the lawyer has not committed to full representation. 8 C.F.R. §§ 1001.1(k), 1003.102(t). This "advice" includes speech between a lawyer and client outside a courtroom and never directed to a court. Defendants' own interpretive guidance confirms that the Regulation restrains attorneys' speech to their clients in out-of-court, confidential meetings. *See* Dkt. 52, at 9. EOIR's guidance memorandum on its Legal Orientation Program ("LOP")—which interprets the definitions of "practice" and "preparation" in 8 C.F.R. § 1001.1(i) & (k)—advises practitioners they cannot, for example, "assist in the direct preparation of an individual's papers" at a "self-help workshop," Dkt. 14-2, at 6, or "advise [an] individual how to answer a question [on a form] based on a participant's particular factual situation and the applicable law," *id.* at 7. Defendants admit their Regulation prevents a practitioner from "giv[ing] legal advice concerning [an] individual's specific case," unless the practitioner appears and agrees to full representation. Dkt. 50 ¶ 68. In fact, Defendant Barnes initially contacted NWIRP because she believed NWIRP's practice of hosting *pro se* asylum workshops violated the Regulation. *See* Dkt. 54 ¶¶ 2–3; Dkt. 47, at 8; Dkt. 49 ¶ 49.

Self-help workshops, individual consultations, and asylum workshops are quintessential out-of-court activities; yet, Defendants indisputably seek to restrict Plaintiffs' speech in these situations. Defendants cite no authority to support their argument that regulation of *out-of-court* speech not directed to a court is subject to an *in-court* nonpublic forum analysis—because it is not. Defendants' admitted intention to regulate out-of-court speech renders any nonpublic forum analysis irrelevant.

Defendants try to avoid this inescapable conclusion by arguing, essentially, that the Regulation does not mean what it says. Defendants argue that, despite the plain and unambiguous language of the Regulation, it nonetheless is somehow limited to "in-court speech." *See* Dkt. 67, at 14–15. Defendants even proffer a limiting principle, found nowhere in the text of the

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Regulation, that they only restrict "activities by which someone *speaks to* or *interacts with* the immigration court either through in-person or written discourse." *Id.* at 8 (emphasis in original). As Plaintiffs previously explained, Defendants' attempt to redraft the Regulation through their briefing, to limit the rule to "in-court speech," suffers from a number of fatal defects, including Defendants' own prior—and inconsistent—statements on how the Regulation is to be interpreted. *See* Dkt. 52, at 8–13.

Nonetheless, to bolster their new "in-court speech" limiting principle, Defendants say NWIRP has failed to "allege a single instance in which EOIR has applied [the Regulation] in the broad manner that Plaintiffs purportedly fear." Dkt. 67, at 14. In essence, Defendants are contending that Plaintiffs' lawsuit is premature because (i) Defendants' disciplinary threat to NWIRP stemmed from NWIRP's assistance with written documents that were ultimately filed with the immigration court (even though NWIRP did not file the motion to reopen submitted to the Tacoma court, but instead only assisted the individual to fill out the one page template motion), and (ii) Defendants have not (yet) enforced the regulation against NWIRP for out-of-court advice to a client.

Plaintiffs' challenge is not premature. Plaintiffs may challenge potential applications of the statute prior to enforcement because the even the potential for future enforcement chills protected speech. "It is clear that a plaintiff 'does not have to await the consummation of threatened injury to obtain preventive relief'" because it "is sufficient for standing purposes that the plaintiff intends to engage in 'a course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000) (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). This is particularly true, as here, "when the threatened enforcement effort implicates First Amendment rights …." *Id.* at 1155. As a result, "[f]ederal courts most frequently find pre-enforcement challenges justiciable when the challenged statutes allegedly 'chill' conduct protected by the First Amendment." *Id.* at 1156 (quoting *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997)); *see also Milavetz, Gallop &*

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Milavetz, P.A. v. United States, 559 U.S. 229, 234 (2010) (considering an as-applied pre-enforcement challenge brought under the First Amendment). EOIR's threat of disciplinary sanctions is more than sufficient to meet this standard. Further chilling Plaintiffs' speech is the fact that the regulatory language cited in the cease-and-desist letter is facially overbroad and vague, reaching conduct far beyond the courtroom. *See* Dkt. 66, at 11 ("The Regulation is not only too broad, it is impermissibly vague."); *see also* Dkt. 67, at 15–16 (acknowledging and citing case law to support that an overbroad or vague law restraining speech is facially unconstitutional).

In sum, Defendants cannot show their Regulation is entitled to the lower level of scrutiny that applies to nonpublic forum restrictions. The Regulation is a fundamental restraint on protected speech, and it therefore receives strict scrutiny—a standard it cannot survive.

2. Even Under a Nonpublic Forum Analysis, the Regulation Fails to Satisfy Minimal Scrutiny.

Even if a nonpublic forum analysis were relevant (it is not), EOIR's Regulation still fails to pass muster. It is neither reasonable in light of the purpose it serves nor viewpoint neutral. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966–67 (9th Cir. 2002) (requiring regulations fulfill a "legitimate need," a higher standard than rational basis), *abrogated on other grounds by CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1123 (9th Cir. 2017).

First, the Regulation is not reasonable in light of the purpose served. As this Court noted, the primary purpose of the Regulation identified by Defendants is to ensure quality representation by attorneys appearing before the immigration court. Dkt. 66, at 9. That purpose is not served with an all-or-nothing notice of appearance requirement because it "is questionable whether an actual notario or ne'er-do-well would have so clearly identified himself such that EOIR could attempt enforcement in the same way." *Id.* at 10. NWIRP already identifies itself on documents. *Id.*; Dkt. 49 ¶¶ 50–52; Dkt. 37, at 13. And Defendants do not contest that NWIRP provides high-quality legal assistance to immigrants. Simply put, the "Regulation is not narrowly tailored to achieve its own ends." Dkt. 66, at 10. Defendants cannot show a "legitimate need" for compelling full representation when a less-burdensome self-identification requirement would equally serve its purported need.

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The "multiple purposes" for the Regulation that Defendants otherwise identify in their motion are equally poor fits for the compulsory-representation rule they adopted. "[A]llowing EOIR to identify the practitioner responsible for representation," Dkt. 67, at 8, makes sense—*if the practitioner has agreed to fully represent the client*. But, if not, compelling full representation just so the agency can identify a practitioner who has engaged in limited representation is wildly disproportionate: it's the procedural equivalent of performing brain surgery with a sledgehammer. And EOIR's remaining rationales for its Regulation—ensuring only authorized practitioners are representing immigrants, *id*. at 9, preserving claims of ineffective assistance, *id.*, and discouraging ghostwriting, *id.* at 10—all boil down to the same thing: EOIR wants to be able to identify a practitioner who assists a respondent with a written submission to the immigration court. This objective could be served by far less intrusive requirements, like requiring self-identification or simply asking the respondent to identify his or her attorney (or, in many cases, the notario engaged in unauthorized practice of law). Defendants fail to advance any rationale—legitimate or otherwise—to justify their attempt to compel full representation when they plainly have other, better tailored, and less burdensome avenues to achieve their purported goals.

Second, the Regulation is not viewpoint neutral. The only practical effect of the compulsory-representation requirement is to reduce the overall volume and quality of pro-immigrant advocacy. *See* Dkt. 52, at 10. Defendants cannot, by regulation, "insulate [their] own [practices] from legitimate judicial challenge." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). Moreover, the Regulation facially discriminates based on viewpoint because it applies only to attorneys representing immigrants, not to attorneys representing the government. "Viewpoint discrimination concerns arise when the government intentionally tilts the playing field for speech; reducing the effectiveness of a message, as opposed to repressing it entirely, thus may be an alternative form of viewpoint discrimination." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004). The Regulation eliminates limited-scope representation and thereby limits the permissible advocacy for only *one side* of the adversarial process—the same side that seeks vindication of the civil rights for an unpopular minority. The Regulation does not apply to

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the government's attorneys, who are not required to file a notice of appearance and who routinely engage in limited representation. *See* 8 C.F.R. § 1003.101(b) (defining "practitioner" for the purposes of § 1003.102 as "any attorney...who does not represent the federal government"); *see also id.* § 1003.109 (providing no reciprocal restriction on government attorneys).

The government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992). Such restrictions are, on their face, viewpoint-based. *See id.*; *see also Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 281 n.10 (2d Cir. 1997) ("The Supreme Court's decisions dealing with viewpoint discrimination evidence particular hostility to restrictions specifically intended to suppress the circulation of the arguments on one side of a particular debate."); *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003) ("Imposing a financial burden on one viewpoint while permitting the expression of another free of charge runs afoul of [the First Amendment]."). Plaintiffs advocate a consistent, pro-immigrant message. By diminishing the volume and availability of Plaintiffs' speech—but not the speech of their litigation opponents—EOIR effectively tilts the playing field in Defendants' favor. This sort of viewpoint-based discrimination dooms the Regulation under any level of scrutiny.

3. The Regulation Is Not "Readily Susceptible" to a Narrowing Construction.

Defendants argue that Plaintiffs' claims should be dismissed because the Regulation is subject to a narrowing construction. Courts may impose a narrowing construction only if a statute or regulation "is readily susceptible to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997) (internal quotation marks omitted). A statute or regulation is "readily susceptible" to a narrowing construction if the text (or other source of agency intent) identifies a "*clear line*" that the court can draw. *Id.*; *see also, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05 (1985) (invalidating obscenity statute only to the extent that word "lust" was actually or effectively excised from statute). There is no such clear line here, and Defendants do not attempt to draw one. Indeed, the Regulation is so vague that Defendants have offered several competing and conflicting interpretations of it in just the three months since this lawsuit was filed.

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See Dkt. 66, at 11. The Regulation simply is not "readily susceptible" to any valid narrowing construction.

a. EOIR Cannot Suggest Any Feasible Narrowing Construction.

Defendants' failure to suggest a limiting construction (beyond the moniker of "in-court speech") illustrates that the Regulation is ***not*** "readily susceptible" to such a construction. *See Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1084 (4th Cir. 2006) (noting absence of *suggested* limiting construction in a prior ruling suggested that the statute was not readily susceptible to limiting construction). Defendants themselves have struggled to offer a definitive interpretation of their own regulation. At the hearing on Plaintiffs' TRO motion, they could not tell the Court whether an attorney could help fill out a form, Dkt. 39-1, at 58:1–59:8, or whether answering a question at a legal aid clinic required the attorney to file an appearance, *id.* at 32:18–33:24. Similarly, at the hearing on Plaintiffs' preliminary injunction motion, Defendants could not tell the Court whether providing guidance in the preparation of an asylum form would trigger the notice of appearance requirement. Corning Decl. Ex. A at 35:19–40:10.

Defendants have also repeatedly sought to deflect responsibility for interpreting the Rule, which further suggests there is no viable limiting construction here. First, Defendants suggested that practitioners themselves should be responsible for defining the parameters of the Regulation because their "knowledge and expertise distinguishing between providing legal advice and providing legal information" is sufficient to define whether certain attorney speech triggers the notice of appearance requirement. Dkt. 39-1, at 59:13–19. When that suggestion was rejected, Defendants then tried to defer, repeatedly, to Defendant Jennifer Barnes, suggesting that the Regulation requires "fact-specific" inquiries best left to her discretion. Corning Decl. Ex. A at 37:4–6 (whether providing guidance for an I-589 form constitutes preparation is a "fact-specific questions that [Ms.] Barnes and the attorneys that work with her would be responsible for."); *id.* at 38:10–14 (defining when assistance with a form transitions from speech to legal advice "would be extremely fact-specific, and you kind of have to see it to know when it crosses the line. That's what [Ms.] Barnes' job is."). The Court recognized this fallacy when it remarked to Defendants'

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counsel, "It causes grave confusion, doesn't it, for practitioners to know what is in Ms. Barnes' mind or how she's going to interpret it. There is no further definitions, clarifications or explanations in the process." *Id.* at 40:21–24. Defendants have not resolved this fatal flaw.

After repeatedly failing to pass the interpretive buck, first to practitioners and then to Ms. Barnes, Defendants now want the Court to bail them out by rewriting the Regulation for them.

The Court should decline this invitation.

b. Defendants' Inconsistent Interpretations Demonstrate the Regulation Cannot Be Given a Narrowing Construction.

Even if the Court were inclined to task itself with narrowing the Regulation, Defendants' inconsistent interpretations of the Regulation show that the Regulation is *not* "readily susceptible" to a narrowing construction. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479, n.26 (1995) (noting that a statute is not "readily susceptible" to a narrowing construction if Congress has sent inconsistent signals as to where the line or lines should be drawn). When the Regulation was adopted in 2008, the agency's representative—the local court administrator—agreed NWIRP could comply with the Regulation and disclose its assistance with pro se filings by including a statement that NWIRP prepared or assisted in the filing. Dkt. 1 ¶ 3.11; Dkt. 38 ¶ 5. But, in 2011, EOIR sent a memo to a third party indicating that, in providing assistance with paperwork during a one-on-one meeting, practitioners cannot "advise the individual on how to answer a question based on a participant's particular factual situation and the applicable law" without filing a notice of appearance in order to comply with the Regulation. Dkt. 14-2, at 6. The Memo also stated that practitioners could only provide information that is "non-specific to any particular individual's case" and cover "general areas of law and procedure…in general terms" without filing a notice of appearance. *Id.* at 2–3. Then, in late 2016, Defendant Jennifer Barnes suggested during a conference call with NWIRP attorneys that NWIRP's workshops intended to assist unrepresented individuals fill out asylum applications—a quintessential out-of-court activity—could violate the Regulation. Dkt. 54 ¶¶ 2–3; Dkt. 47, at 8; Dkt. 49 ¶ 49.

Not only are EOIR's *past* interpretations of the Regulation inconsistent, its interpretations *in this litigation* have been equally inconsistent. For example, during the hearing on Plaintiffs'

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TRO motion, EOIR stated that the Regulation does not bar NWIRP from making statements at community workshops or legal clinics, "so long as they [NWIRP] don't cross the line to actually providing advice and auxiliary activity." Dkt. 36, at 57:14–22. Then, in opposing Plaintiffs' preliminary injunction motion, Defendants again changed their interpretation of the Regulation, contending it applied only to "activities by which someone *speaks to* or *interacts with* the immigration court either through in-person or written discourse." Dkt. 47, at 12. Now, in their Motion to Dismiss, Defendants again change their interpretation, suggesting—without any authority or meaningful guidance—that the notice of appearance requirement extends only to "in-court speech." Dkt. 67, at 16.[3]

Defendants' inability to pick and stick to a single interpretation shows that no valid narrowing construction exists.

c. The Regulation Cannot Be Narrowed to Restrict Only In-Court Speech Unless Completely Redrafted.

Defendants' suggestion that the Court interpret the Regulation to encompass only "in-court speech," Dkt. 67, at 16, would require the Court to rewrite the Regulation in a way that is precluded by its plain language. A statute or regulation is not "readily susceptible" to a narrowing construction if it needs to be rewritten to conform to constitutional standards. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Moreover, the Court cannot adopt an interpretation of a statute if that interpretation conflicts with or is precluded by its plain language. *S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1144 (9th Cir. 1998).

The plain language of the Regulation requires a notice of appearance whenever a practitioner "has engaged in practice or preparation." 8 C.F.R. § 1003.102(t)(1). The term preparation is expansively defined to encompass the "study of the facts of a case and the applicable laws, couple with the giving of advice and auxiliary activities." 8 C.F.R. § 1001.1(k). This definition does not limit the study, advice, or auxiliary activities to only those activities

[3] Defendants' new "in-court speech" limiting principle appears to be a marked shift from their previous reliance on the far more stringent prohibitions set out in their guidance memorandum, Dkt. 14-2, as reaffirmed in the declarations of various agency personnel, Dkts. 49 & 50, and at the TRO hearing, Dkt. 36, at 57:14–22; 58:6–13; 58:25–59:19.

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involving or culminating in "in-court speech." The only way such activities could be limited to in-court speech would be if the Court grafted new words into the statute—words that conflict with the existing plain language. This is not construction; it is wholesale rewriting.

Moreover, even if it could be done, grafting a "in court" limitation into the Regulation would still violate the First Amendment. Defendants admit they interpret "in-court speech" to cover such limited services as assisting persons in deportation proceedings with completing forms and basic requests for relief. If the Regulation requires NWIRP to file a notice of appearance and binds it to take on the entire case each time it offers these limited services, it will no longer have the capacity to offer such services at all. The Regulation would continue to bar NWIRP from "advocating lawful means of vindicating legal rights." *Button*, 371 U.S. at 437.

4. Plaintiffs' Facial Challenges to the Regulation Are Not Barred by the Statute of Limitations.

Defendants claim the statute of limitations bars Plaintiffs' facial challenges. Apparently, Defendants believe they can interpret a regulation in an unconstitutional manner and threaten disciplinary sanctions, and, as long as they wait at least six years after enactment before engaging in such conduct, the statute of limitations will shield them from judicial review. Unsurprisingly, neither the case law they cite nor the case law they ignore supports their position.

To obtain a dismissal on statute of limitations grounds, the defendant carries the burden of "establishing the absence of a genuine issue of fact" with regard to the statute of limitations. *Lehman Bros. Holdings, Inc. v. Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1197 (W.D. Wash. 2011). Defendants cannot meet this burden here because (1) facial First Amendment challenges to a regulation are never barred by a statute of limitations; and (2) even if they were, Plaintiffs' facial challenges were brought within the limitations period.

a. The Statute of Limitations in 28 U.S.C. § 2401(a) Does Not Apply to Facial Challenges for Vagueness and Overbreadth Under the First Amendment.

Plaintiffs' facial challenge rests on the vagueness and overbreadth in the text of the Regulation. *See* Dkt. 1 ¶ 5.3; Dkt. 2, at 13–14; *see also* Dkt. 66, at 11 (concluding the "Regulation is not only too broad, it is impermissibly vague."). Facial First Amendment

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challenges are intended to remedy "a continuing injury based upon the statute's on-going effect on protected speech." *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1364–65 (C.D. Cal. 1995) ("[S]trong policy reasons militate in favor of permitting facial challenges to statutes that impinge upon protected First Amendment rights ….").[4] "[V]agueness in the law is particularly troubling when First Amendment rights are involved." *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006). A vague law—like the Regulation here—"may trap the innocent by not providing fair warning," and it "impermissibly delegates basic policy matters" to those charged with enforcement "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). In the First Amendment context, a vague regulation is intolerable because it "operates to inhibit the basic exercise of [First Amendment] freedoms," which "inevitably lead[s]" those it affects "to steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotation marks omitted).

Against this backdrop, Defendants cite no actual authority for the proposition that the statute of limitations bars a facial First Amendment challenge, particularly one based on the vagueness or overbreadth of a law. Defendants' careful selection of dicta from easily distinguishable cases actually illustrates the flaw in their argument. For example, the claims in both *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714–16 (9th Cir. 1991), and *Francois v. Johnson*, 2014 WL 1613932, at *4 (D. Ariz. April 22, 2014), involved allegations of

[4] To prevail on their facial challenge, Plaintiffs do *not* need to show—as with non-First Amendment facial challenges—that there are "no set of circumstances" in which the Regulation could be lawful. The "no set of circumstances" test for facial challenges, which is traceable to "dictum" in *United States v. Salerno*, 481 U.S. 739, 745 (1987)—and which has since been questioned, *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999)—does not apply to facial First Amendment challenges for vagueness and overbreadth. *Salerno*, 481 U.S. at 745 (if statute has both valid and invalid applications, this "is insufficient to render [the statute] wholly invalid, *since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment*") (emphasis added); *see also Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (*Salerno*'s "no set of circumstances" test applies to "facial challenge[s] outside the context of the First Amendment"). Facial First Amendment challenges are exempt from this stringent test because vague speech restrictions pose an ongoing and persistent harm to all who could fall subject to it, irrespective of whether the statute could be applied lawfully in a particular circumstance. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). This is why Plaintiffs, to prevail on their facial First Amendment challenge, need only show that the challenged law "reaches a substantial amount of constitutionally protected conduct." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n.7 (9th Cir. 2001) (internal quotation marks omitted), as the Regulation does here.

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erroneous agency decision-making, not facially unconstitutional enactments. Similarly, the claims in both *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990), and *Oksner v. Blakely*, 2007 WL 3238659, at *6 (N.D. Cal. Oct. 31, 2007), involved allegations that an agency exceeded its authority in *promulgating* a rule or regulation, as opposed to allegations of facial unconstitutionality within the rule or regulation itself. This distinction is key, as courts have occasionally dismissed as untimely *procedural* challenges to a regulation, but not First Amendment challenges to the same regulation. *See, e.g.*, *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1318 (Fed. Cir. 2008).

A vague or overbroad speech restriction can *always* be challenged on First Amendment grounds, irrespective of any limitations period, because the restraint poses ongoing and continuous harm. A number of courts in the Ninth Circuit have expressly held that statutes of limitations do not apply to First Amendment facial challenges precisely because of this ongoing harm. *See Napa Valley Publ'g Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1184 (N.D. Cal. 2002) (statute of limitations "does not apply to the facial challenge of a statute that infringes First Amendment freedoms as such a statute inflicts continuing harm"); *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996) ("[A] statute that, on its face, violates the First Amendment's guarantee of free speech inflicts a continuing harm. Either a person is punished for speaking or refrains from speaking for fear of punishment. The harm continues until the statute is either repealed or invalidated."); *Summit Media, LLC v. City of Los Angeles*, 530 F. Supp. 2d 1084, 1090 (C.D. Cal. 2008) ("The statute of limitations does not apply to the facial challenge of a statute that infringes First Amendment freedoms as such a statute inflicts a continuing harm."). While not reaching the ultimate issue, the Ninth Circuit has "express[ed] serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations." *Maldonado v. Harris*, 370 F.2d 945, 955 (9th Cir. 2004). Other Circuits have expressed the same doubts. *See Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991) ("[I]t is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period . . . ."). Defendants point to no

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case in which a court dismissed a facial First Amendment challenge on the basis of the statute of limitations.

As the Court previously concluded, the Regulation is "impermissibly vague," and has "a distinct potential for dampening the kind of 'cooperative activity that would make advocacy of litigation meaningful,' as well as for permitting discretionary enforcement against unpopular causes." Dkt. 66, at 11 (quoting *In re Primus*, 436 U.S.412, 433 (1978)). This harm will persist "until the statute is either repealed or invalidated." *3570 East Foothill Blvd.*, 912 F. Supp. at 1278. The statute of limitations does not insulate the Regulation from this Court's review.

b. Even If Plaintiffs' Facial Challenges Were Subject to the Statute of Limitations, the Claims Are Timely.

Even if Plaintiffs' facial challenges were subject to the statute of limitations (they are not) EOIR erroneously contends that the limitations period began to run in 2008, when the Regulation was enacted and published in the federal registrar. Not so.

"Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Maldonado*, 370 F.3d at 955 (quoting *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001)). In the context of facial challenges to statutes and regulations outside of the takings context, the plaintiff's injury "does not occur until the statute 'is enforced'" against the plaintiff. *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 n.7 (9th Cir. 1994), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997).

The case of *Scheer v. Kelly*, 817 F.3d 1183, 1188 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 240 (2016), is particularly instructive. In *Scheer*, an attorney alleged that the California State Bar's disciplinary rules were facially unconstitutional because they did not provide for meaningful judicial review. The State Bar moved to dismiss, arguing that the attorney's claim was untimely because it was filed more than two years (the applicable limitations period) after the rule was enacted. *Id.* at 1186. The Ninth Circuit rejected the State Bar's argument, holding that the limitations period did not begin to run until the California Supreme Court, citing the State Bar's rules, denied the attorney's petition for review. *Id.* at 1188. The Court noted that while the

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existence of the rule "might have arguably put [the attorney] 'on notice' of the State Bar's alleged violations in some sense, as she was a lawyer at the time," the attorney did not "know[] or ha[ve] reason to know of the actual injury" until the State Bar's rule was *enforced* against her by the California Supreme Court. *Id.*

Here, the earliest possible point that Plaintiffs knew or had reason to know of the Regulation's injurious effect was April 13, 2017. That was the date NWIRP received a letter from Defendant Barnes, which instructed it to "cease and desist from representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed," and which threatened discipline if NWIRP failed to do so. Dkt. 1 ¶ 3.14; Dkt. 8-1. Until that letter, Plaintiffs did not know or have reason to know that Defendants would enforce the Regulation to prevent NWIRP from offering limited legal services

To the extent Defendants believe Plaintiffs knew or should have known of the injury caused by the Regulation prior to April 2017, it does not affect the limitations period. The statute of limitations for Plaintiffs' facial challenges starts anew each day Defendants seek to enforce the statute. *Wallace v. New York*, 40 F. Supp. 3d 278, 302 (E.D.N.Y. 2014) ("[T]he clock on any challenge to the constitutionality of a statute, whose continued application works an ongoing constitutional violation, starts to run anew, every day that the statute applies."). In *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 518, 521–22 (6th Cir. 1997), the Sixth Circuit held that a due process claim challenging a law that restricted access by trucks to a particular county road was timely despite Ohio's two-year statute of limitations. Although the claim was brought "more than two years after" the enactment of the law, it was brought "less than two years after" the law ceased to apply. *Id.* at 518. The court concluded that the law barred the plaintiff from "using the roads in question on an ongoing basis, and thus actively deprived [the plaintiff] of its asserted constitutional rights every day that it remained in effect. *Id.* at 522 (emphasis added); *see also Maldonado*, 370 F.3d at 955–56 (holding that a First Amendment challenge to a California statute on outdoor advertising was not time-barred, because the "continuing enforcement of the statute" permitted the plaintiff "to raise a facial challenge to the statute at any

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time"); *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom Wilder v. Va. Hops. Ass'n*, 496 U.S. 498 (1990) (agreeing with the district court that, since its enactment, Virginia's "current reimbursement plan" perpetrated an "ongoing" violation of the supremacy and due process clauses, and, thus, the applicable limitations period "would not have begun to run until the violation ended"). Thus, despite Defendants' contention that Plaintiffs should have been aware of the injury at the time of enactment, the limitations period effectively restarted when Defendant Barnes sent NWIRP a cease-and-desist letter in April 2017.[5]

Even if the Court were to find that the limitations period began running at the time of the Regulation's enactment, and that it has never restarted (which is essentially what Defendants argue), the Court should still decline to dismiss on statute-of-limitations grounds. Because the limitations provision in 28 U.S.C. § 2401(a) "is not jurisdictional," it is subject to "traditional exceptions such as equitable tolling, waiver, and estoppel." *Cedars-Sinai Med. Ctr.*, 125 F.3d at 770. As alleged in Plaintiffs' Complaint, when the Regulation was first adopted, NWIRP met with EOIR's local administrator, who agreed that NWIRP could comply with the Regulation by merely disclosing its assistance with pro se filings by including a statement that NWIRP prepared or assisted in the filing.[6] Dkt. 38 ¶ 5. At a minimum, this raises factual questions of whether the statute of limitations should be tolled based on Defendants' representations to NWIRP. Thus, even if the Court adopts Defendants' position that the limitations period began in 2008, factual issues preclude dismissal at this stage of the proceedings.

B. Plaintiffs State a Tenth Amendment Claim Because the Regulation Restricts Conduct Beyond the Limited Forum Defendants Can Permissibly Regulate.

Plaintiffs have already briefed, extensively, the validity of their Tenth Amendment claims. *See* Dkt. 2, at 16–21; Dkt. 21, at 7–9; Dkt. 37, at 15–19; Dkt. 52, at 14–15. Because of the vastly different standards and burdens required in seeking a preliminary injunction, as

[5] Even if the Court were to start (and not reset) the limitations period at the date EOIR issued its LOP memorandum that proscribed various forms of limited legal assistance, that memo is dated July 11, 2011. *See* Dkt. 14-2, at 1. As a result, even under this rigid formulation, Plaintiffs' claims would still be timely.

[6] This practice was accepted by EOIR without objection for eight years until April 2017. Dkt. 38 ¶ 5. EOIR complains there is no "document or written agreement memorializing" this understanding, but does not dispute it. Dkt. 47, at 4. At no time did EOIR indicate that Ms. Barnes's approval was necessary; nor was there any reason for Plaintiffs to assume it was needed.

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opposed to a motion to dismiss, the fact that the Court did not grant a preliminary injunction on Plaintiffs' Tenth Amendment claims is not dispositive. *See United States v. Arizona*, 2010 WL 11405085, at *6 (D. Ariz. Dec. 10, 2010) (the standard for determining a likelihood of success is more stringent that the standard for determining whether plaintiffs have stated a claim); *compare Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (preliminary injunction requires a likelihood of success on the merits) *with Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007) (motion to dismiss requires the court to assume the truth of the complaint's factual allegations and all reasonable inferences arising from those allegations).

The Court has concluded—and Defendants do not contest—that the "licensing and regulation of lawyers has been left exclusively to the States." *Leis v. Flynt*, 439 U.S. 438, 442 (1979); *see* Dkt. 66, at 12. When the federal government intrudes upon the States' exclusive "responsib[ility] for the discipline of lawyers," *Leis*, 439 U.S. at 442, it must do so with narrow precision. Defendants assert that EOIR, as a federal agency, has "the inherent power to regulate legal practice before" it. Dkt. 67, at 29 (citing *Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379, 383–84 (1963)). This is generally true—but only so long as such regulation is *limited* to practice before the agency.

But, here, EOIR's Regulation is *not* limited to conduct that constitutes "practice before" the agency. Instead, the Regulation imposes a burdensome compulsory-representation requirement whenever a licensed practitioner engages in "study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities." 8 C.F.R. § 1001.1(k). Neither the text of the Regulation nor EOIR's interpretation of it limits the agency's disciplinary reach to just the advice-giving activities that occur after a practitioner appears before the agency. Indeed, the giving of legal advice customarily occurs within the private confines of an attorney-client relationship, not before the agency, and occasionally before an appearance is ever entered. Defendants cite no authority (and there is none) that permits them, in the guise of regulating practice before the agency, to reach more broadly and regulate routine attorney conduct outside of agency proceedings.

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Defendants also fundamentally misread *Sperry*. *Sperry* concerned the narrow issue of whether a nonlawyer, when explicitly authorized to practice as a patent agent before the U.S. Patent & Trademark Office, could do so in spite of the Florida bar's efforts to restrict practice of law by nonlawyers. 373 U.S. at 381–82. Relying on the long history of nonlawyer practice before the Patent Office and the overwhelming necessity of continuing that practice, the Court found it "implicit … that registration in the Patent Office confers a right to practice before the Office without regard to whether the State within which the practice is conducted would otherwise prohibit such conduct." *Id.* at 388. Thus, *Sperry* stands for the unremarkable proposition that a federal agency may, in its own limited forum, authorize non-lawyers to perform certain activities irrespective of a state's general power to regulate unlicensed practice of law. More broadly, though, *Sperry* reaffirmed that the regulation of the practice of law is "a matter otherwise within the control of the State." *Id.* at 403–04.

This case is precisely the *inverse* of *Sperry*. Here, a federal agency (EOIR) seeks to effectively prohibit (not permit) unbundled legal advice that is otherwise allowed (not forbidden) by the relevant state bar association. And while that advice *might* (but need not necessarily) pertain to some aspect of a current immigration proceeding, the advice occurs entirely outside of that proceeding—in a private setting. Neither *Sperry* nor any other case gives Defendants the power they have arrogated to themselves to control a lawyer's general practice of law when the lawyer has not appeared and submitted herself to the agency's jurisdiction in a particular matter.

Defendants rely on a false dichotomy in characterizing Plaintiffs' Tenth Amendment claims. They frame these claims as presenting an intractable conflict between the agency's nationwide "rules governing practice before the immigration courts" and the "professional conduct rules … of one state." Dkt. 67, at 21–22. According to Defendants, the States' power to regulate the practice of law must always yield to the federal government's "uniform national set of rules," *id.* at 21, and EOIR remains free to regulate practitioners differently than Washington State. Whether true or not, this misses the point. Plaintiffs' Tenth Amendment claims do not

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require the Court to decide whose ethics rules reign supreme. The issue here is precisely how far EOIR can regulate without encroaching upon the States' power to regulate the practice of law.

Even assuming EOIR has the general power to regulate practitioners who appear before it, the scope of that regulation must be reasonably related to EOIR's legitimate interest in controlling the proceedings before it. No serious argument can be made that EOIR's power to regulate practitioners allows EOIR to regulate practitioners on matters that, while affecting the practitioner, do not concern the proceedings before the agency. EOIR could not, for example, use its authority to preclude immigration practitioners from practicing other areas of law, nor could it fix the rates those practitioners charge for their services or limit the amount of time practitioners spend advising clients. EOIR's power to regulate practitioners is not unchecked. To the extent EOIR purports to reach conduct beyond its own proceedings and govern more generally the practice of law—the confidential communication between and the advice from a lawyer to a client—it reaches too far.

Here, EOIR has reached well beyond the confines of "practice before" the agency, encroaching upon the general regulation of the practice of law—a power reserved to the states. At most, Defendants have successfully "blurred the line," Dkt. 66, at 11, about the exact conduct they seek to regulate, by claiming the Regulation applies "only to in-court activities." Dkt. 67, at 21–24. For purposes of this motion, the scope of the Regulation and the agency's (ever-shifting) interpretation of it is a factual question must be resolved in Plaintiffs' favor. *See Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009).

V. CONCLUSION

For the reasons discussed above, Defendants fail to meet their burden, and their Motion to Dismiss should be denied.

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DATED this 28th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 28th day of August, 2017.

s/ *James Harlan Corning*
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