The Honorable Richard A. Jones

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

NORTHWEST IMMIGRANT RIGHTS PROJECT, *et al.*,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III, *et al.*,

Defendants.

No. 17-cv-00716 RAJ

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS

NOTE ON MOTION CALENDAR:
July 24, 2017

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I. INTRODUCTION

Northwest Immigrant Rights Project ("NWIRP") routinely makes limited appearances before immigration courts – that is, engages in limited representation of clients before these courts – and would like to go on doing so. Since limited appearances are against the rules promulgated by the Executive Office of Immigration Review ("EOIR") for these courts, NWIRP challenges one of these rules as violating the First Amendment. NWIRP not only challenges this rule as vague and overbroad – challenges easily met by the government (Defendants' Brief in Opposition to Preliminary Injunction ("Dfs.' Opp. Br."), Doc. No. 47, at 12-13, 20-22) – but challenges the bar on limited representation itself as violating the free speech clause of the First Amendment in all of its applications.

NWIRP's challenge to the bar on limited representation is without merit. Federal district courts – including this Court – also bar limited representation, and do not thereby violate the Constitution. Nor should it matter, for First Amendment purposes, that immigration courts are federal administrative courts. Federal administrative courts are just as much courts as Article III courts, and their rules have the same kind and level of authority as those of federal district courts. If this Court's bar on limited representation does not violate the First Amendment, neither does EOIR's.

II. ARGUMENT

A. NWIRP's Challenge.

NWIRP claims that EOIR has violated the First Amendment, both in promulgating (in 2008) and enforcing (in 2017) 8 C.F.R. § 1003.102(t). This rule of court requires representatives of parties in immigration courts to sign documents prepared by them, and to include a "Notice of Appearance" when such documents are filed in court:

> **8 C.F.R. § 1003.102 Grounds.**
> It is deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any practitioner who falls within one or more of the categories enumerated in this section …
>
> (t) Fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative in compliance with applicable rules and regulations when the practitioner:
>
> (1) Has engaged in practice or preparation as those terms are defined in §§ 1001.1(i) and (k), and
>
> (2) Has been deemed to have engaged in a pattern or practice of failing to submit such forms, in compliance with applicable rules and regulations. Notwithstanding the foregoing, in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name …

8 C.F.R. § 1003.102.

NWIRP objects to filing the Notice of Appearance because it obligates an attorney to represent a client until, by leave of court, the attorney is allowed to withdraw. Plaintiffs' Brief in Support of Preliminary Injunction ("Pls.' PI Br."), Doc. No. 37, at 4. As NWIRP complains, "the Rule is not an identification requirement…; instead, it compels attorneys to undertake full representation, and it eliminates their ability to provide limited-scope representation." Pls.' PI Br. at 10. NWIRP further laments that "'[o]nce an attorney has made an appearance, that attorney has an obligation to continue representation until such time as a motion to withdraw or substitute counsel has been granted by the Immigration Court.'" Pls.' PI Br. at 5 (quoting Imm. Ct. Prac. Man. R. 2.3(d)). "NWIRP lacks the resources to provide full representation of each immigrant to whom it currently provides limited services. So, in effect, EOIR's new interpretation of this Rule will force NWIRP to discontinue providing limited legal services to thousands of individuals in removal proceedings." Pls.'s PI Br. at 5. To rid itself of this bar on limited representation, NWIRP

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seeks a nationwide preliminary injunction against it on the ground that, both on its face and as applied here, it violates the free speech clause of the First Amendment. Pls.' PI Br. at 10.

B. United States District Courts, Including This Court, Do Not Allow Limited Representation.

Federal Rule of Civil Procedure 11(a) provides that "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name – or by a party personally if the party is unrepresented." The practice of "[t]he majority of federal courts … emphasize that Rule 11, and the FRCP generally, do not contemplate limited representation. Rule 11 addresses only two contemplated options: full representation or no representation." Jessie M. Brown, *Ghostwriting and the* Erie *Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, 2013 J. Prof. Law. 217, 229 (2013) (citing *Delso v. Trs. for the Ret. Plan for the Hourly Emps. of Merck & Co.*, Civil Action No. 04-3009, 2007 U.S. Dist. LEXIS 16643, *12, *17 (D.N.J. Mar. 5, 2007)).

In this Court, the Local Civil Rules codify this standard interpretation of Rule 11:

> **LCR 83.2 ATTORNEY APPEARANCE AND WITHDRAWAL**
>
> **(a) Entry of Appearance**
> An attorney eligible to appear may enter an appearance in a civil case by signing and filing a Notice of Appearance, complaint, amended complaint, answer, amended answer, Notice of Removal, motion to intervene, or motion for joinder on behalf of the party the attorney represents.
>
> **(b) Withdrawal of Attorneys**
> (1) No attorney shall withdraw an appearance in any case, civil or criminal, except by leave of court, unless the withdrawal complies with the requirements of subsections (b)(2) or (b)(3) …
>
> (5) When a party is represented by an attorney of record in a case, the party cannot appear or act on his or her own behalf in that case, or take any step therein, until after the party requests by motion to proceed on his or her own behalf,…
>
> (7) Unless the attorney withdraws in accordance with these rules, the authority and duty of an attorney of record shall continue after final judgment

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C. Both Article III Courts And Federal Administrative Courts Derive Their Rule-Making Powers From Congress.

All federal courts and tribunals other than the U.S. Supreme Court were established by Congress, and their authority to make rules of court was granted either explicitly or implicitly by Congress. This holds true for both Article III courts and federal administrative courts.

In the Rules Enabling Act of 1934, Congress delegated to the Supreme Court the authority to make the rules of federal district courts. 28 U.S.C.S. § 2072. Federal Rule of Civil Procedure 8 further delegated local rulemaking to the individual district courts.

The authority of the Attorney General of the United States, through the EOIR, to make procedural rules for the immigration courts also comes from Congress. Congress vested all powers of the Department of Justice in the Attorney General, who, as the head of an Executive department, may prescribe regulations. 5 U.S.C. § 301; 28 U.S.C. § 509. The Attorney General placed adjudicatory authority over aliens in EOIR. 28 C.F.R. 0.1; 8 C.F.R. § 1003.0. Inherent in that authority is the necessity to create rules for the administration of court proceedings to ensure a uniform administration of justice. 8 C.F.R. § 1003.12; *see also Westreco, Inc. v. Commissioner*, Docket No. 24078-88, 1990 Tax Ct. Memo LEXIS 554, at*52 (U.S. T.C. Sept. 20, 1990) (finding that as a judicial tribunal, the tax court had inherent power to adopt rules of sound practice) (citing *Thomas v. Arn*, 474 U.S. 140, 146-47 (1985)).

More generally, administrative agencies have authority to prescribe procedures in and determine who may practice before their tribunals. *Koden v. U.S. Dep't of Justice*, 564 F.2d 228, 232-33 (7th Cir. 1977) (discussing the power of an administrative agency to bar or suspend practitioners) (citing *Goldsmith v. U.S. Bd. of Tax Appeals*, 270 U.S. 270 (1926)). This authority may be either explicit through statutory authority or implied. *Id. See, e.g, Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986) ("Agencies have been given the power to police the conduct of

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those who practice before them."). As the U.S. Court of Appeals for the Ninth Circuit has explained:

> Of course, our statutory and inherent powers to regulate attorneys admitted to the Ninth Circuit bar coexist with the separate, independent powers of federal administrative agencies to do the same. *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986) ("Agencies have been given the power to police the conduct of those who practice before them."); see also *Checkosky v. SEC*, 306 U.S. App. D.C. 144, 23 F.3d 452, 456 (D.C. Cir. 1994) (citing *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 122, 70 L. Ed. 494, 46 S. Ct. 215 (1926)); *Koden v. United States Dep't of Justice*, 564 F.2d 228, 233 (7th Cir. 1977) ("It is elementary that any… administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct.")

Gadda v. Ashcroft, 377 F.3d 934, 948 n.8 (9th Cir. 2004).

Nor, of course, are federal administrative courts any less *courts* than are federal district courts. Their judges share the same immunity, *Butz v. Economou*, 438 U.S. 478, 514 (1978), and the Supreme Court has, for Eleventh Amendment purposes, considered them part of the judicial power of the United States. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (holding that the Eleventh Amendment's bar on extending the judicial power of the United States to suits against a state by private parties applied to proceedings before a federal administrative court). In short, there is no reason why the First Amendment should apply any differently to their rules than to those of Article III courts.

D. If EOIR's Bar On Limited Representation Violates The First Amendment, So Does The Same Bar In The Rules Of This Court.

NWIRP never explains how EOIR's bar on limited representation constitutes a speech restriction at all. Indeed, that bar is on attorneys' abandoning clients, and imposes no restriction on what advice attorneys may give them, or the contents of pleadings they submit on their behalf. But even assuming the bar somehow restricts speech, NWIRP's arguments that it violates the

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First Amendment would fail if directed at this Court's bar on limited representation, and fails here.

NWIRP claims that the bar on limited representation merits strict scrutiny (which, NWIRP claims, it does not meet) for two reasons. First, NWIRP argues that because speech in immigration courts is about immigration, the bar is a content-based restriction on speech about immigration. Pls.' PI Br. at 9. This argument is sophistical. True, speech in immigration courts is, at least indirectly, always "about immigration." But the bar on limited representation does not distinguish between that content and any other content, and indeed makes no reference to content at all. *Compare Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (holding that a town sign ordinance was a content-based restriction because it treated political signs *differently* from other signs). It is not as though the bar on limited representation would not apply to attorneys in immigration courts who talked about something other than immigration. Rather, the bar, if it restricts speech at all, restricts it in a particular place, an immigration court, where it just so happens that immigration is what is talked about. And it can be justified, as the government has, as a restriction on speech in that place, with no reference to content, and thus is not a content-based restriction. Defs.' Opp. Br. at 18-19; *see Reed,* 135 S. Ct. at 2227 (defining a content-based restriction as one that "cannot be justified without reference to the content of the regulated speech."). If it were otherwise, a rule governing practice in bankruptcy courts could be challenged as a content-based restriction because it restricted speech about bankruptcy, and (for that matter) this Court's bar on limited representation could be challenged as a content-based restriction on the ground that it restricts speech about civil law.

Second, NWIRP argues that the bar on limited representation should receive strict scrutiny because it restricts speech on a matter of public concern: immigration. Pls.' PI Br. at 9.

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But by that test, the rule against limited representation in this Court would be an overbroad restriction on free-speech rights, since a substantial proportion of cases in federal courts (including this one) are of public concern. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (holding that a law is overbroad if its applications that would penalize protected speech are substantial in relation to its plainly legitimate sweep). Likewise, by NWIRP's test, this Court's rule against limited representation would be unconstitutional as applied to any case of public concern, or involving issues of public concern, in this Court (including this case).

In short, if EOIR's bar on limited representation violates the First Amendment, so does this Court's bar, and that of other federal district courts. And NWIRP has given no reason to believe that either is the case.

Conclusion

For the foregoing reasons, NWIRP's motion for a preliminary injunction should be denied.

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Respectfully submitted,

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