Flor Bermudez, Esq.
Transgender Law Center
P.O. Box 70976
Oakland, CA 94612
(510) 380-8229

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
[redacted]	)	**File No:** [redacted]
a.k.a. [redacted]	)	
Respondent	)	
In Removal Proceedings	)	

RESPONDENT'S BRIEF

This appeal is not appropriate for affirmance without opinion, under 8 C.F.R. § 1003.1(e)(4), and should be reviewed by a three-member panel, under 8 C.F.R. § 1003.1 (e)(6).

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I. STATEMENT OF THE FACTS

[redacted], a.k.a. [redacted] ("Respondent"), is a 47-year-old native and citizen of [redacted]. Oral Decision 1, March 29, 2017; Hr'g Tr. 2:20, November 17, 2016. She has been a lawful permanent resident of the U.S. since 1989. Hr'g Tr. 2:24. Respondent is a transgender woman. A transgender person is someone whose gender identity does not correspond to their sex assigned at birth. In [redacted]'s case, she was assigned male at birth, but she does not identify as male. [redacted] dresses and identifies as a woman.[1]

At the Individual Master Hearing on November 17, 2016, the Immigration Judge asked Respondent, "Is there any reason you cannot return to [redacted]" and Respondent answered, "I have problems regarding my life. They want to take my life." Hr'g Tr. 3:23-4:1-5, November 17, 2016. The questioning continued:

> Respondent: I have problems regarding my life. They want to take my life.
> Immigration Judge: Who?
> Respondent: The person who assaulted me the 6th of January of this year.
> Immigration Judge: [ma'am], you've been here since 1989. Isn't that correct?
> Respondent: Yes, sir.
> Immigration Judge: Have you been back to [redacted] since 1989?
> Respondent: No, sir.
> Immigration Judge: Then why are you afraid of going to [redacted] when you were assaulted in this country this year?
> Respondent: Because the person who assaulted me went to [redacted].
>
> Hr'g Tr. 4:1-18, November 17, 2016.

The Immigration Judge did not at this point, nor as soon as she expressed fear or later in the hearing, inform Respondent that she "may apply for asylum in the United States or withholding of removal," nor did he "make available the appropriate application forms; and [a]dvise of the privilege of being represented by counsel at no expense to the government," due

[1] Respondent is detained and is currently working with Transgender Law Center to file a Motion to Remand and an I-589. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (Board of Immigration Appeals may approve a motion to reopen based upon establishing a prima facie case for the relief sought; if previously unavailable, material evidence is presented; and where the ultimate relief is discretionary, Board may grant the relief in the exercise of discretion).

to her having "expresse[d] fear of persecution or harm upon return to any of the countries to which the [Respondent] might be removed" to. *See* 8 C.F.R. § 1240.11(c)(1)(i-iii). Instead the Immigration Judge stated, "All right, [ma'am]. Now, [ma'am], you're eligible to apply for cancellation of removal." Hr'g Tr. 4:18-20. The Immigration Judge also erroneously stated in his Oral Decision, "Respondent designated [redacted] as the country of removal and expressed *no* fear of returning there." Oral Decision 2, March 29, 2017 (emphasis added).

Because gender is a social and cultural construction, and the world and U.S. societies are organized around systems such as laws that are designed to reinforce social norms, those who transgress traditional gender norms face criminalization, stigma, discrimination, and violence. *See* National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey 5* (2017). Transgender people, especially transgender people of color and immigrants, face severe violence and are extremely marginalized in the political, social, and economic realms. *Id.* at 3-4. Transgender people are twice as likely to live in poverty than the general population (three times as likely for transgender people of color) with nearly a third reporting past or present homelessness. *Id.* at 4. The estimated unemployment rate for transgender people is three times higher than the general population (for transgender people of color, four times higher). *Id.* Transgender women are also disparately incarcerated as a result of the survival economies, including sex work, that they are often forced to engage in to stay alive. *Id.* at 163-164.

Respondent has a number of convictions, including several prostitution arrests that were a result of prevalent targeting and criminalization of transgender bodies. When the Government's Attorney asked Respondent about the circumstances of her prostitution arrests during the March 29, 2017 continuation of the Individual Master Hearing, Respondent explained that the officers who arrested her provided "[n]o reason. They just said [she] was dressed in a very sexy manner."

See Hr'g Tr. 37:2-16, March 29, 2017. The Immigration Judge interrupted the attorney's line of questioning and asked, "May I?...[Ms.] [redacted], were you dressed like a man or a woman?" *See* Hr'g Tr. 37:5-16, March 29, 2017. Respondent stated she was dressed "as a woman" and when asked "did you often dress like a woman?" Respondent replied, "All the time." *Id.* The Immigration Judge took note of Respondent's gender identity as female in the Oral Decision and Order regarding the Cancellation of Removal, stating, "Respondent also admitted to the Court that she regularly dresses in women's clothes and that at least one of the arrests was because the police officer thought she 'dressed sexily.'" Oral Decision 6, March 29, 2017. The Immigration Judge made the following comment in his oral decision, "the Court does not make any negative connotation for respondent's lifestyle, but simply notes that as the basis of [her] three arrests and subsequent convictions for prostitution." Oral Decision 6 n.3, March 29, 2017.

On March 29, 2017, when Respondent asked for alternate immigration relief, "Can you give me voluntary departure," the Immigration Judge stated, "No, [ma'am], I can't." Hr'g Tr. 75:15-18. The Immigration Judge then asked if Respondent had any other questions, "So, [ma'am], do you have any other questions?" Respondent plainly asked, "May I qualify for any other type of program?" and the Immigration Judge incorrectly answered, "No, [ma'am]. No, [ma'am], not here." Hr'g Tr. 75:18-23.

II. ISSUE PRESENTED

A. Whether the Immigration Judge erred by failing to inform Respondent of her apparent eligibility for asylum under INA § 208 or withholding under INA § 241(b)(3) in direct violation of 8 C.F.R. § 1240.11(c)(1) and due process.

III. PROCEDURAL HISTORY

The Department of Homeland Security ("DHS") issued a Notice to Appear against Respondent on October 20, 2016. Oral Decision 1-2, March 29, 2017. The notice alleged Respondent was subject to removal under Section 237(a)(2)(B)(i) of the Act due to a February 27, 2015 conviction of possession of methamphetamine in Tarrant County, Texas. Oral Decision 2.

Respondent's Individual Master Hearing before the Immigration Judge took place on November 17, 2016, January 17, 2017, and March 29, 2017. Respondent was unrepresented, appeared *pro se* and the proceedings were interpreted from Spanish to English. Oral Decision 2, March 29, 2017. Respondent applied timely for cancellation of removal under 240A(a) of the Act as recommended by the Immigration Judge. Oral Decision 2.

The Immigration Judge found Respondent removable by clear and convincing evidence on March 29, 2017. Oral Decision 2, March 29, 2017. The Immigration Judge incorrectly stated, "Respondent designated [redacted] as the country of removal and expressed no fear of returning there," and explained Respondent's application was a matter of discretion. Oral Decision 2-4. In the decision, the Judge noted a pending charge as well as lesser convictions. Oral Decision 5-6.[2] The Immigration Judge denied the cancellation of removal based on "giving full credit to respondent's positive factors," and weighing them against Respondent's prior convictions and pending charge. Oral Decision 7-8. The Immigration Judge also denied respondent's request for voluntary departure. Oral Decision 9 n.4.

Respondent, through pro bono counsel, now files this timely brief on appeal.

[2] Respondent's pending charge was "tampering with a consumer product causing serious bodily injury;" however, this is no evidence of the circumstances of the charge. *See* Oral Decision 6, March 29, 2017.

IV. STANDARD OF REVIEW

The Board of Immigration Appeals ("Board") has general appellate jurisdiction over appeals of decisions by immigration judges in removal proceedings. 8 C.F.R. § 1003.1(b)(3) (2013). On appeal to the Board, factual findings by the Immigration Judge are reviewed under the "clearly erroneous" standard of review. *Id.* § 1003.1(d)(3); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews all other issues on appeal, including any question of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(i).

V. SUMMARY OF ARGUMENT

The Immigration Judge erred by failing to inform Respondent that she is apparently eligible for asylum under INA § 208 or withholding under INA § 241(b)(3) in direct violation of 8 C.F.R. § 1240.11 and due process. Immigration Judges have an absolute statutory duty to inform immigrants that they "may apply for asylum in the United States or withholding of removal," "make available the appropriate application forms; and [a]dvise [them] of the privilege of being represented by counsel at no expense to the government," if the person "expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed." *See* 8 C.F.R. § 1240.11(c)(1)(i-iii).

In the instant case, Respondent told the Immigration Judge that she was afraid for her life if she returned to [redacted]. When the Immigration Judge asked, "Is there any reason you cannot return to [redacted], [ma'am]?" Respondent stated, "I have problems regarding my life. They want to take my life." Hr'g Tr. 3:25, 4:1, November 17, 2016. The Immigration Judge took no action to fulfill his duty under 8 C.F.R. § 1240.11(c)(1) after Respondent clearly expressed fear of

persecution or harm upon return to [redacted]. *Id.* To the contrary, the Immigration Judge remained silent and only presented Respondent with the possibility of applying for cancellation of removal, without mentioning the possibility of asylum or withholding. Hr'g Tr. 4:19-20, November 17, 2016.

The Immigration Judge again failed to comply with 8 C.F.R. § 1240.11(c)(1) when Respondent was asked to describe the circumstances surrounding one of three illegal prostitution arrests, Respondent unequivocally stated that she "dress[es] as a woman" "[a]ll the time." Hr'g Tr. 38:13-18, March 29, 2017. Upon learning this information, the Immigration Judge abruptly and inexplicably stopped his line of questioning, stating, "Okay. We've established that. Thank you." *Id*. At this moment, the Immigration Judge should have reasonably understood Respondent is a transgender woman who would be a member of a particular social group. This information coupled with the previously expressed fear of persecution or harm upon return to [redacted] made this an even more clear opportunity to comply with his statutory and absolute obligation to inform Respondent that she may apply for asylum in the United States or withholding of removal. Yet, the Immigration Judge once again failed to inform Respondent about her apparent eligibility for asylum and withholding under 8 C.F.R. § 1240.11(c)(1).

The Immigration Judge also violated Respondent's due process rights because he failed to inform Respondent about her apparent eligibility for asylum and withholding under 8 C.F.R. § 1240.11(c)(1), inappropriately asked questions assessing the merits of apparent eligibility for asylum and withholding, and effectively precluded Respondent, who appeared *pro se*, from being able to receive a full and fair hearing. The Immigration Judge's failure to provide information on applying for asylum and withholding in response to Respondent's express

assertion of fear of returning to [redacted], Hr'g Tr. 3:23-4:1-5, November 17, 2016, also violated the clear language of 8 C.F.R. § 1240.11(c)(1).

Additionally, after Respondent expressed fear for her life during the November 17, 2016, hearing, the Immigration Judge asked a series of questions that inappropriately inquired into the merits of Respondent's possible asylum and withholding claim. The Immigration Judge's inappropriate questions violated due process because Respondent did not have a reasonable opportunity to present evidence on her own behalf. *See* 8 C.F.R. 1240.10(a)(4); *see also Matter of E-F-H-L-*, 26 I&N Dec. 319, 320-21 (BIA 2014).

When the Immigration Judge received new information regarding Respondent's gender identity that reasonably should have caused him to conclude that Respondent was a member of a particular social group, the Immigration Judge failed to provide information about applying for asylum and withholding, in violation of his due process duty to *pro se* Respondent to provide procedural information and a reasonable opportunity to present evidence. *See Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000); *see also Agyeman v. INS*, 296 F.3d 871, 884-85 (9th Cir. 2002); *see also* 8 C.F.R. 1240.10(a)(4); *Matter of E-F-H-L-*, 26 I&N Dec. at 320-21.

The Immigration Judge also violated due process when he inappropriately assessed all other forms of relief without a full and fair hearing. At the end of the March 29, 2017 hearing, Respondent plainly asked, "May I qualify for any other type of program?" Hr'g. Tr. 75:21. The Immigration Judge responded: "No, [ma'am]. No, [ma'am], not here." *Id.* By precluding Respondent from applying for these forms of relief, the Immigration Judge himself effectively made a decision to deny Respondent's claims without substantial evidence, again in violation of Respondent's due process right to a full and fair hearing on her possible application for asylum, withholding, or possibly relief under the Convention Against Torture. *See Colmenar v. INS*, 210

F.3d 967, 971 (9th Cir. 2000); *see also Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620-21 (9th Cir. 2006); *see also Matter of E-F-H-L-*, 26 I&N Dec. at 320-21.

The Immigration Judge's repeated failures to afford Respondent adequate due process affect the outcome of the proceedings, and thus are prejudicial to the Respondent. *See Agyeman*, 296 F.3d at 884-85. These errors were prejudicial and harmful to Respondent and are fundamentally unfair because she would have applied for asylum, withholding of removal, and possibly relief under the Convention Against Torture, and thus the outcome of the proceeding may have been affected by the Immigration Judge's violation. *See id.*

Therefore, Respondent respectfully requests that the Board remand this proceeding so that Respondent can apply for such relief.

VI. ARGUMENT

A. Procedural Matters

1. The Immigration Judge's Decision Is Inappropriate for Affirmance Without Opinion.

The underlying decision by the Immigration Judge is not appropriate for affirmance without opinion under 8 C.F.R. § 1003.1(e)(4)(i), the Board may affirm without opinion only if the Board:

> determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) the issues on appeal are squarely controlled by existing Board or federal court precedent to a novel factual situation; or (B) the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

8 C.F.R. § 1003.1(e)(4)(i).

Here, the result reached in the decision under review was incorrect because, in failing to inform Respondent that she is apparently eligible for asylum under INA § 208,

or withholding under INA § 241(b)(3), the Immigration Judge violated applicable regulations and existing Board, federal court precedent, and due process. By failing to inform Respondent of potentially available relief under INA § 208, or INA § 241(b)(3), the Immigration Judge denied Respondent an opportunity to apply for such relief and failed to fully and fairly develop the record and inappropriately asked questions assessing the merits of apparent eligibility for asylum and withholding, in violation of due process principles. Both of these errors are both material and harmful and, therefore, warrant the Board's full review. For these reasons, the immigration Judge's decision is inappropriate for affirmance without opinion.

2. This Appeal Should Be Reviewed by a Three-Member Panel.

This appeal calls for review by a three-member panel of the Board, and Respondent respectfully requests such a review. Pursuant to 8 C.F.R. § 1003.1(e)(6), cases may be assigned for review by a three-member panel if there is the "need to review a decision by an immigration judge…that is not in conformity with the law or with applicable precedents," or if there is the need to reverse the decision of an immigration judge…other than a reversal under § 1003.1(e)(5)." 8 C.F.R. § 1003.1(e)(6)(iii) and (vi).

Respondent's case calls for review by a three-member panel because the Immigration Judge's decision is not in "conformity with the law or with applicable precedents" because applicable regulations and existing Board and federal court precedent require the Immigration Judge to inform Respondent of relief for which she was statutorily eligible, and to afford Respondent adequate due process. 8 C.F.R. § 1003.1(e)(6)(iii). Respondent's case presents a "need to reverse the decision of an immigration judge," which is not the result of intervening precedent, legislation, or regulation and therefore,

does not meet the requirements for reversal by a single Board member under 8 C.F.R. § 1003.1(e)(5). Therefore, Respondent's appeal meets the requirements of section 1003.1(e)(6)(iii) and a three-member panel is appropriate.

B. The Immigration Judge Erred by Failing to Inform Respondent of Respondent's Apparent Eligibility for Asylum Under INA § 208, Withholding Under INA § 241(b)(3), in Direct Violation of 8 C.F.R. § 1240.11(c)(1) and Due Process.

1. The Immigration Judge Had a Duty, Under 8 C.F.R. § 1240.11(c)(1), to Notify Respondent that She Was Apparently Eligible for Asylum or Withholding and He Took No Action to Fulfill this Duty.

An Immigration Judge's statutorily imposed and absolute duty to advise of asylum or withholding is activated the moment an alien subject to removal expresses fear of or harm upon return to any country. Pursuant to 8 C.F.R. § 1240.11(c)(1):

> If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 1208.14 of this chapter, the immigration judge shall:
>
> (i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;
> (ii) Make available the appropriate application forms; and
> (iii) Advise the alien of the privilege of being represented by counsel at no expense to the government...

8 C.F.R. § 1240.11(c)(1)(i-iii).

In this case, Respondent clearly expressed fear of persecution or harm upon return to [redacted]: "I have problems regarding my life. They want to take my life." Hr'g Tr. 3:24, 4:1, November 17, 2016. The Immigration Judge recognized Respondent's fear, and acknowledged it when he asked, "why are you afraid of going to [redacted][?]", after which Respondent informed him, "[b]ecause the person who assaulted me went to [redacted]." Hr'g Tr. 4:14-18.

At this point the Immigration Judge was bound to "[a]dvise [Respondent] that she may apply for asylum in the United States or withholding of removal to those countries; [m]ake available the appropriate application forms; and [a]dvise the alien of the privilege of being represented by counsel at no expense to the government." 8 C.F.R. § 1240.11(c)(1)(i-iii). However, the Immigration Judge failed to fulfill these mandates and he did not "[a]dvise [Respondent] that she may apply for asylum in the United States or withholding of removal to those countries; [m]ake available the appropriate application forms; and [a]dvise the alien of the privilege of being represented by counsel at no expense to the government." *Id.* To the contrary, the Immigration Judge remained silent and only presented Respondent with the possibility of applying for cancellation of removal, without mentioning the possibility of asylum or withholding. Hr'g Tr. 4:19-20, November 17, 2016.

At the conclusion of the Individual Master Hearing on March 29, 2017, the Immigration Judge again had an opportunity to meet his duty under 8 C.F.R. § 1240.11(c)(1), but violated it by plainly denying there was possible eligibility for any alternative relief. Respondent expressly inquired about other forms of relief, asking, "May I qualify for any other type of program?" Hr'g Tr. 75:20-23, March 29, 2017. To which the Immigration Judge replied, "No, [ma'am]. No, [ma'am], not here." *Id*.

Failure to notify an alien of apparent eligibility for statutory relief under the INA constitutes reversible error. *See Asani v. INS*, 154 F.3d 719 (7th Cir. 1998) (remanded where Immigration Judge failed to notify respondent of apparent eligibility for suspension of deportation under INA § 244); *Matter of Cordova*, 22 I&N Dec. 966 (BIA 1999) (remanding for failure to advise of apparent eligibility for voluntary departure under INA § 240B); *Matter of Ulloa*, 22 I&N Dec. 725 (BIA 1999) (remanding for failure to advise of apparent eligibility for

waiver of inadmissibility under INA § 213). "[T]he IJ has an absolute duty to inform a deportee of his apparent eligibility to apply for the benefit of suspension of deportation," and the courts "do not look with favor upon [EOIR] violation of its own regulations." *Asani*, 154 F.3d at 729 (citing *Duran v. INS.*, 756 F.2d 1338, 1342 (9th Cir. 1985)).

2. The Immigration Judge Violated 8 C.F.R. § 1240.11(c)(1) when Respondent Told the Immigration Judge that She Was Afraid to Return to Her Home Country, [redacted], and He Failed to Inform Her of Her Apparent Eligibility for Asylum or Withholding.

On November 17, 2016, during the first day of the Individual Master Hearing, Respondent clearly expressed fear to return to her home country, [redacted]. When the Immigration Judge asked, "Is there any reason you cannot return to [redacted], [ma'am]?" Respondent stated, "I have problems regarding my life. They want to take my life." Hr'g Tr. 3:23-25, 4:1, November 17, 2016.

In response to this information, the Immigration Judge acknowledged the assertion of fear, but took no action other than to state Respondent's eligibility for cancellation of removal. Hr'g Tr. 4:20, November 17, 2016. This inaction and failure to advise is a direct violation of the Immigration Judge's duty under the statute mandating that upon expressing "fear of persecution or harm upon return[ing]" to a particular country, an "immigration judge *shall* advise the alien that he or she may apply for asylum…or withholding of removal." 8 C.F.R. § 1240.11(c)(1)(i) (emphasis added).

3. The Immigration Judge Violated 8 C.F.R. § 1240.11(c)(1) when He Failed to Reasonably Conclude that Respondent, a Transgender Woman, Is a Member of a Particular Social Group and Yet Again Failed to Inform Her of Her Apparent Eligibility for Asylum or Withholding.

When Respondent was asked to describe the circumstances surrounding several illegal prostitution arrests she was subjected to, Respondent explained that the officers who arrested her

"just said [she] was dressed in a very sexy manner." Hr'g Tr. 38:2-16, March 29, 2017. The Immigration Judge interrupted the Government Attorney's questioning and he directly asked Respondent, "Were you dressed like a man or a woman?" *Id.* Respondent stated she was dressed "as a woman" and when the Immigration Judge further inquired "did you often dress like a woman?" Respondent replied, "All the time." *Id.*

Upon learning this information, the Immigration Judge abruptly and inexplicably stopped his line of questioning, stating, "Okay. We've established that. Thank you." Hr'g Tr. 38:13-18, March 29, 2017. At this moment the Immigration Judge should have reasonably understood Respondent is a transgender woman who would be properly considered a member of a particular social group and could be eligible for asylum or withholding. Failure to advise as to Respondent's possible eligibility for asylum or withholding is in direct violation of the Immigration Judge's absolute duty under 8 C.F.R. § 1240.11(c)(1).

4. Respondent's Due Process Rights Were Violated Because the Immigration Judge Failed to Inform Respondent of Her Apparent Eligibility for Immigration Relief, in Direct Violation of 8 C.F.R. § 1240.11(c)(1), Inappropriately Asked Questions Assessing the Merits of Her Apparent Eligibility for Asylum and Withholding, and Effectively Precluded Respondent (Proceeding Pro Se) from Being Able to Receive a Full and Fair Hearing.

a. The Immigration Judge Violated Due Process when Respondent Told the Immigration Judge that She Was Afraid to Return to Her Home Country, [redacted], and He Failed to Mention Apparent Eligibility for Asylum or Withholding.

Respondent's due process right to a full and fair hearing on the merits is well established by applicable case law.

> "The Fifth Amendment guarantees due process in deportation proceedings." Thus, "an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." [A decision] will be reversed on due process grounds if (1) the proceeding was "'so fundamentally unfair that the alien was prevented from reasonably presenting his case,'" and (2) the alien demonstrates prejudice, "which means that the outcome of the proceeding may have been affected by

the alleged violation."

Ibarra-Flores, 439 F.3d at 620-21 (citing *Colmenar*, 210 F.3d at 971) (internal citations omitted). Accordingly, an immigration judge has a heightened responsibility toward *pro se* respondents to provide accurate information about the proceedings. *See Jacinto*, 208 F.3d at 728 (determining that the Immigration Judge failed to explain that the respondent could testify even if she did not represent herself and that she could present affirmative testimony in narrative form, which constituted failure to adequately explain hearing procedures, which constitutes denying a full and fair hearing in violation of due process); *see also Agyeman*, 296 F.3d at 884-85 (determining that an Immigration Judge misinformed a respondent by providing inadequate explanations of what he had to prove, alternative ways to establish eligibility, and what evidence he could produce, which was a denial of a full and fair hearing in violation of due process); *Matter of E-F-H-L-*, 26 I&N Dec. at 320-21 ("The Immigration Judge erred in denying the respondent's applications for asylum and withholding of removal without first conducting an evidentiary hearing or giving him an opportunity to present evidence or witnesses in his behalf.").

The Immigration Judge violated due process when he failed to provide accurate information regarding Respondent's apparent eligibility for asylum and withholding to Respondent who was proceeding *pro se* because not knowing about the possibility to apply for asylum and withholding precluded her from having a full and fair hearing on the merits of her asylum, withholding, or possibly Convention Against Torture eligibility.

The Immigration Judge's failure to mention the apparent eligibility for asylum and withholding also violated Respondent's right to present evidence in support of her asylum, withholding, or possible Convention Against Torture claims. Respondents in immigration proceedings are entitled to a reasonable opportunity to present evidence on their own behalf. *See*

8 C.F.R. § 1240.10(a)(4) ("[T]he immigration judge shall… advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government."); *see also Matter of E-F-H-L-*, 26 I&N Dec. at 320-21. The Immigration Judge's failure to mention Respondent's apparent eligibility for asylum and withholding not only precluded Respondent from the opportunity to apply for relief, precluding Respondent from the constitutionally required opportunity to have a full evidentiary hearing as a result of her application for asylum, withholding, or possibly Convention Against Torture further violated her due process rights.

The Immigration Judge's failure to mention Respondent's apparent eligibility for asylum and withholding also violated Respondent's right to a neutral decision based on substantial evidence. *See Colmenar*, at 967 (finding an immigration judge's refusal to allow a respondent to testify about key events related to his case or to testify about anything included in his written statement was a failure to be a neutral fact-finder, which was a denial of a full and fair hearing in violation of due process); *see also Ibarra-Flores*, 439 F.3d at 620-21 (deciding an immigration judge's refusal to order INS to produce evidence in its possession that a respondent needed to prove his case constituted a failure to decide the case based on substantial evidence, which constitutes a denial of a full and fair hearing in violation of due process). Thus, the Immigration Judge's failure to inform Respondent that she "may apply for asylum in the United States or withholding of removal," "make available the appropriate application forms; and [a]dvise [her] of the privilege of being represented by counsel at no expense to the government," once she "expresse[d] fear of persecution or harm upon return to any of the countries to which the alien might be removed" in violation of 8 C.F.R. § 1240.11(c)(1)(i-iii), unconstitutionally precluded

Respondent from receiving a decision based on the merits for asylum and withholding, for which she was apparently eligible.

b. The Immigration Judge Violated Due Process when He Inappropriately Asked Questions Assessing the Merits of Respondent's Asserted Fear of Returning to [redacted].

After Respondent expressed fear for her life during the November 17, 2016 hearing, the Immigration Judge asked a series of questions that inappropriately inquired into the merits of Respondent's possible asylum and withholding claim:

> Respondent: I have problems regarding my life. They want to take my life.
> Immigration Judge: Who?
> Respondent: The person who assaulted me the 6th of January of this year.
> Immigration Judge: Sir, you've been here since 1989. Isn't that correct?
> Respondent: Yes, sir.
> Immigration Judge: Have you been back to [redacted] since 1989?
> Respondent: No, sir.
> Immigration Judge: Then why are you afraid of going to [redacted] when you were assaulted in this country this year?
> Respondent: Because the person who assaulted me went to [redacted].

Hr'g Tr. 4:1-18.

The Immigration Judge's inappropriate questions violated due process because Respondent did not have a reasonable opportunity to present evidence on her own behalf regarding her expressed fear and her possible asylum, withholding, or possible Convention Against Torture claims. *See* 8 C.F.R. 1240.10(a)(4); *see also Matter of E-F-H-L-*, 26 I&N Dec. at 320-21.

Additionally, by inquiring into the merits of Respondent's fear and thus her apparently available asylum and withholding claim, the Immigration Judge may have effectively made a decision on the merits to deny Respondent's asylum and withholding claims, which would have violated her due process right to a neutral decision based on substantial evidence. *See Colmenar*, 210 F.3d at 971; *see also Ibarra-Flores*, 439 F.3d at 620-21.

c. The Immigration Judge Violated Due Process when He Should Have Reasonably Concluded that Respondent, a Transgender Woman, Is a Member of a Particular Social Group, and the Judge Failed to Inform Her of Her Apparent Eligibility for Asylum and Withholding.

During the March 29, 2017, hearing, the Immigration Judge received new information regarding Respondent's gender identity that reasonably should have caused him to conclude that Respondent was a member of a particular social group: transgender women. Respondent stated she was dressed "as a woman" and when asked "did you often dress like a woman?" Respondent replied, "All the time." Hr'g Tr. 38:2-16, March 29, 2017. The indication that Respondent was likely a member of a particular social group should have been further support for Respondent's apparent eligibility for asylum and withholding. Still, the Immigration Judge failed to provide information about applying for asylum and withholding, in violation of his due process duty to provide procedural information to *pro se* Respondent. *See Jacinto*, 208 F.3d at 728; *see also Agyeman*, 296 F.3d at 884-85. The Immigration Judge's failure to provide information regarding apparent eligibility for asylum or withholding also precluded Respondent from having a reasonable opportunity to present evidence on her own behalf for her potential asylum, withholding, or Convention Against Torture claims, in violation of due process. *See* 8 C.F.R. 1240.10(a)(4); *see also Matter of E-F-H-L-*, 26 I&N Dec. at 320-21.

d. The Immigration Judge Violated Due Process when He Inappropriately Assessed All Other Forms of Relief Without a Full and Fair Hearing.

Finally, at the end of the March 29, 2017 hearing, Respondent plainly asked, "May I qualify for any other type of program?" Hr'g. Tr. 75:21. "In response to the direct question, the Immigration Judge once again failed to provide the information he was required to provide. Hr'g. Tr. 75:23. The Immigration Judge responded: "No, [ma'am]. No, [ma'am], not here." *Id.*

By making this premature and unconstitutional conclusion, the Immigration Judge failed to provide Respondent with a reasonable opportunity to present evidence on her own behalf because his decision precluded the opportunity to apply for asylum, withholding, or possibly under the Convention Against Torture, which would have included an evidentiary hearing. *See* 8 C.F.R. 1240.10(a)(4); *see also Matter of E-F-H-L-*, 26 I&N Dec. at 320-21. Consequently, by precluding Respondent from applying for these forms of relief, the Immigration Judge himself effectively made a decision on the merits to deny Respondent's claims without substantial evidence, again in violation of Respondent's due process right to a full and fair hearing. *See Colmenar*, 210 F.3d at 971; *see also Ibarra-Flores*, 439 F.3d at 620-21.

5. The Immigration Judge's Failure to Inform Respondent, in Direct Violation of 8 C.F.R. § 1240.11(c)(1) and Due Process, Is Prejudicial Because Respondent Is Apparently Eligible and Would Have Applied for Such Relief.

The Immigration Judge's repeated failures to afford Respondent adequate due process affect the outcome of the proceedings, and thus are prejudicial to Respondent. *See Agyeman*, 296 F.3d at 884-85. Prejudice can be inferred and does not require the applicant to "explain exactly what evidence he would have presented" in support of his application. *Id.* at 885 (quoting *Colmenar*, 205 F.3d at 972). Prejudice can be inferred in Respondent's case because the record is abundantly clear that Respondent was not aware of her ability to apply for asylum or withholding, and Respondent would have applied if adequately afforded a reasonable opportunity to do so. Because she did not apply, Respondent had no chance to receive asylum, withholding, or possibly relief under the Convention Against Torture.

Respondent specifically inquired as to whether she would be eligible for any type of relief, in addition to cancellation of removal. *See e.g.* Hr'g Tr. 75:21-3 (Respondent asked, "May I qualify for any other type of program?" to which the Immigration Judge replied, "No,

[ma'am]. No, [ma'am], not here."). These statements indicate that at her hearings on November 17, 2016, January 17, and March 29, 2017, she was unaware of opportunities for these forms of relief and that she would have applied for them. Given that Respondent was not aware of her apparent eligibility for asylum or withholding, information regarding the opportunity to apply would have assisted her materially.

If the Immigration Judge had complied with this duty under 8 C.F.R. § 1240.11(c)(1), Respondent would have been given the opportunity apply for asylum or withholding or possibly relief under the Convention Against Torture. Thus, the Immigration Judge's failure to provide the information to which Respondent was entitled was prejudicial because it precluded her from the possibility of receiving a full evidentiary hearing or relief under asylum, withholding, or possibly relief under the Convention Against Torture.

Therefore, Respondent respectfully requests the Board vacate the Immigration Judge's order and remand the case for further consideration of Respondent's case.

VII. CONCLUSION

For the foregoing reasons, the Board should vacate the Immigration Judge's order of removal and remand the case to the Immigration Judge with instructions to consider Respondents eligibility for relief under INA § 208, INA § 241(b)(3), and 8 C.F.R. § 208.18, and to consider Respondent's application for relief in accordance with due process.

Respectfully submitted this 2nd day of August, 2017.

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Flor Bermudez, Esq.
Transgender Law Center
P.O. Box 70976
Oakland, CA 94612

(510) 380-8229