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; JUAN OSUNA, in his official capacity as 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

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Northwest Immigrant Rights Project ("NWIRP") provides free and low-cost legal services to more than 10,000 immigrants each year through its 70 staff members and more than 350 volunteer attorneys. NWIRP provides these services to noncitizens in deportation (removal) proceedings before the Executive Office for Immigration Review and to those who are not in such proceedings but seek to apply for immigration benefits from U.S. Citizenship and Immigration Services—benefits that include asylum, family visas, naturalization, visas for

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survivors of trafficking and other violent crimes, and Temporary Protected Status. NWIRP offers various different legal services depending on the needs of each client, the type of relief sought, and the resources NWIRP has available. These services range from full representation to brief counseling, and they take place on an individualized basis, in legal clinics, in group assistance events, and at community outreach functions.

Over the past several weeks, the Executive Office for Immigration Review, the U.S. Department of Justice, and the individual Defendants (collectively, "EOIR") have set out to restrict NWIRP's ability to offer this assistance. Relying on a new and novel interpretation of its 2008 rule governing attorney misconduct, EOIR now insists on a Hobson's choice: either NWIRP must commit to full legal representation of ***every*** immigrant in removal proceedings it presently assists (which is plainly impossible), or NWIRP must refrain from providing them ***any*** form of legal assistance—not even a brief consultation. EOIR's cease-and-desist order to NWIRP will deprive thousands of immigrants—including asylum seekers and unaccompanied children—of the chance to consult with a NWIRP lawyer to evaluate their potential claims for legal residence. EOIR's interpretation will also deprive otherwise unrepresented immigrants of legal advice they need to understand United States law, and assistance with navigating the immigration court system.

EOIR's new edict purports to control not just the appearance of attorneys in removal proceedings but their communications with clients (and even potential clients) and other limited assistance provided outside of an active EOIR proceeding. The vague and overbroad rule, and EOIR's application of it to NWIRP, violates (1) the First Amendment, by restricting NWIRP's rights to free speech, free association, and to petition the government, and (2) the Tenth Amendment, by invading the power reserved to the State of Washington (and other states) to regulate the practice of law. And, because individuals in deportation proceedings are not provided with appointed counsel and most of them cannot afford to pay for private counsel, EOIR's actions will ultimately prevent many immigrants from receiving ***any*** legal assistance at all.

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Plaintiffs now bring this lawsuit for declaratory and injunctive relief, and respectfully ask this Court to halt EOIR's unconstitutional overreach.

I. PARTIES

1.1 Plaintiff NWIRP is a Washington nonprofit public benefit corporation with its principal place of business in Seattle, Washington, and with additional offices in Tacoma, Wenatchee, and Granger, Washington. NWIRP was founded in 1984. Its mission is to promote justice by defending and advancing the rights of immigrants through direct legal service, systemic advocacy, and community education.

1.2 Plaintiff Yuk Man Maggie Cheng is a NWIRP staff attorney licensed to practice law in Washington by the Washington Supreme Court. As a licensed Washington attorney, she is subject to regulation and supervision by the Washington Supreme Court and by the Washington State Bar Association, a state agency.

1.3 Defendant Jefferson Beauregard Sessions III is the United States Attorney General and head of the United States Department of Justice. Sessions is sued in his official capacity.

1.4 Defendant United States Department of Justice ("DOJ") is an executive department of the United States charged with enforcing federal law.

1.5 Defendant Executive Office for Immigration Review is a federal office/agency within and overseen by DOJ, and is responsible for adjudicating immigration cases. EOIR issued the cease-and-desist letter at issue in this case.

1.6 Defendant Juan Osuna is the Director of EOIR. Osuna is sued in his official capacity.

1.7 Defendant Jennifer Barnes is an employee of EOIR and holds the title of Disciplinary Counsel. Barnes is sued in her official capacity.

II. JURISDICTION & VENUE

2.1 This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, as this civil action arises under the laws of the United States, and pursuant to 28 U.S.C. § 1361, as this

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action seeks to compel an officer or employee of the United States, or an agency thereof, to perform a duty owed to Plaintiffs. The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702.

2.2 This Court has personal jurisdiction over all Defendants, and venue is proper in this district, pursuant to 28 U.S.C. § 1391(e).

III. FACTS

A. NWIRP Plays a Critical Role in Providing Legal Assistance to Immigrants

3.1 NWIRP is the primary nonprofit legal services provider for immigrants in removal proceedings in Washington State and for persons detained at the Northwest Detention Center ("NWDC"), an immigration prison in Tacoma, Washington. NWIRP staff attorneys provide direct representation in hundreds of cases and organize pro bono representation for more than 200 additional cases each year.

3.2 NWIRP screens more than 1,000 potential clients per year. In 2016 alone, NWIRP screened 641 individuals who were potentially eligible for asylum.

3.3 NWIRP also provides "Know Your Rights" ("KYR") presentations, community workshops, and individual consultations to unrepresented individuals.

3.4 NWIRP relies on grants and charitable contributions to provide limited services to unrepresented immigrants. These services include helping immigrants file motions to terminate proceedings, motions to change venue, and motions to reopen old removal orders before EOIR. NWIRP also assists hundreds of clients in preparing various application forms seeking relief from removal, including applications for asylum, family visas, cancellation of removal, special immigrant juvenile status, and U & T visas for victims of trafficking and violent crimes.

3.5 Due to time, cost, and other resource constraints, NWIRP can provide limited or full representation to clients in only a small fraction of the total screenings it performs. Full representation in removal proceedings can entail the preparation and filing of a) required procedural and substantive motions; b) applications and briefing for all forms of relief for

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which the applicant is eligible; and c) extensive documentation of key facts in the case, including reports on country conditions, testimony by an expert or lay witness, and evaluations by psychologists or other medical professionals. Removal proceedings often involve multiple hearings over the course of several years.

3.6 For every individual it screens, NWIRP provides personal consultations to advise the individual of procedural requirements and to help identify potential defenses and forms of relief.

3.7 Of the individuals it screens, NWIRP places, on average, over 200 cases per year with pro bono attorneys. In 2016, NWIRP placed 242 cases with pro bono attorneys, with 103 of those cases in removal proceedings. Through the first four months of 2017, NWIRP placed 137 cases for direct representation with pro bono attorneys, with 73 of those cases in removal proceedings.

B. EOIR Threatens NWIRP with Disciplinary Sanctions for Providing Limited Legal Assistance to Unrepresented Immigrants

3.8 On December 18, 2008, EOIR published new rules of professional conduct governing "practitioners who appear before [EOIR]," creating additional categories of attorney misconduct that are subject to disciplinary sanctions. *See* Professional Conduct for Practitioners, 73 Fed. Reg. 76,914 (Dec. 18, 2008), codified at 8 C.F.R. §§ 1001, 1003 & 1292. One of these rules, 8 C.F.R. § 1003.102(t), establishes that EOIR may impose disciplinary sanctions against any attorney representing noncitizens before the agency who fails to file a notice of entry of appearance (on Form EOIR-27 or -28).

3.9 EOIR's rule defines representation very broadly. The rule requires attorneys to submit a notice of appearance where they have engaged in "practice" or "preparation," as defined in 8 C.F.R. § 1001.1:

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

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> (k) The term ***preparation,*** constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.

3.10 Notably, the immigration court does not permit limited appearances[1] or unilateral withdrawals in removal proceedings. Once an attorney files a notice of appearance, the attorney must represent the immigrant for the entirety of the removal case before the immigration judge (or, if on appeal, before the Board of Immigration Appeals). The attorney may only withdraw with leave of the court, and leave is granted only in exceptional circumstances.

3.11 When these new rules were adopted, NWIRP met with the local immigration court administrator to discuss how the rule would impact the services NWIRP provides to pro se individuals. NWIRP agreed that it would notify the court when it assisted with any pro se motion or brief by including a subscript or other clear indication in the document that NWIRP had prepared or assisted in preparing the motion or application. This convention was accepted, and no concerns were raised by the local immigration courts or by EOIR in the intervening nine years.

3.12 In August 2016, the EOIR's Fraud & Abuse Prevention Counsel, Brea C. Burgie, contacted NWIRP to coordinate efforts on combatting "notario fraud."[2] Using funding received from the Washington State Attorney General's Office, NWIRP had already implemented a special project addressing notario fraud. NWIRP discussed with Ms. Burgie the

[1] The one exception, created in 2015, allows for a limited appearance only for the purpose of representing a respondent in a custody (bond) proceeding. *See* Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59,500 (Oct. 1, 2015) (amending 8 C.F.R. § 1003.17).

[2] The American Bar Association (ABA) describes this problem as "immigration consultants who are engaging in the unauthorized practice of law" by using "false advertising and fraudulent contacts [and] hold[ing] themselves out as qualified to help immigrants obtain lawful status, or perform[ing] legal functions such as drafting wills or other legal documents." *See* ABA, *Fight Notario Fraud*, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html.

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tools it uses to combat such fraud, including community education outreach, KYR presentations, and asylum workshops. The aim of these tools is to provide avenues, besides notarios, for unrepresented people to seek assistance in filling out immigration applications when they cannot afford the representation of an immigration attorney.

3.13 Ms. Burgie then requested a follow-up call with NWIRP to discuss the asylum workshops. She noted that Defendant Jennifer Barnes, EOIR's Disciplinary Counsel, would participate in the call. In the subsequent call on October 11, 2016, Defendant Barnes stated that EOIR's regulations limit organizations, including nonprofit organizations, from assisting pro se individuals in filling out asylum applications.

3.14 On April 13, 2017, NWIRP received a letter from Defendant Barnes on behalf of EOIR's Office of General Counsel, stating EOIR was aware that NWIRP had assisted at least two pro se applicants in filing motions without first filing notices of appearance with the immigration court. Defendant Barnes instructed NWIRP to "cease and desist from representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed with each client that NWIRP represents." A copy of the letter is attached hereto as ***Exhibit 1***.

3.15 Attached to Defendant Barnes's letter were two motions to reopen that NWIRP assisted pro se immigrant clients in preparing: one submitted to the Seattle Immigration Court, and another submitted to the Tacoma Immigration Court at the NWDC. Both motions clearly identified NWIRP as assisting the pro se individual in preparing the motion.

3.16 The motion filed with the Tacoma Court was a one-page template motion in which a NWIRP advocate assisted the detained person by handwriting in the substance of the basis for the detained person's request for a new hearing. The pro se individual later submitted the motion through the internal mailing system at the detention center.

3.17 The motion filed with the Seattle Court was prepared and submitted on behalf of a pro se individual by Plaintiff Maggie Cheng, a NWIRP staff attorney specializing in asylum cases. The motion explained the reasons why the client had missed a prior hearing, which had led the immigration court to issue an order of removal in absentia. In addition, the motion

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explained that the respondent is prima facie eligible for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The motion stated that "Northwest Immigrant Rights Project is assisting [the respondent] in submitting this motion to reopen." The motion included an application for asylum, withholding, and CAT protection. The motion also clearly identified Plaintiff Cheng as the attorney preparing the application, and it included Plaintiff Cheng's contact information. After the motion to reopen was denied, Plaintiff Cheng submitted a notice of appearance with EOIR agreeing to directly represent the respondent in appealing the decision to the Board of Immigration Appeals.

C. EOIR's Threat to Impose Disciplinary Sanctions for Limited Legal Assistance Will Cripple Pro Bono Legal Aid to Immigrants

3.18 There is no right to appointed counsel in immigration court, other than for detained individuals with serious mental illness or disorders.[3] According to a recent national study, only 37 percent of individuals appearing before immigration court are represented; in Washington state, 65 percent of individuals are represented before the immigration court in Seattle, and only 8 percent in Tacoma.[4] As of May 4, 2017, there are approximately 8,882 pending cases before the Seattle and Tacoma immigration courts.[5]

3.19 Access to legal counsel critically affects an individual's likelihood of success in removal proceedings. Non-detained individuals represented by counsel are five times more likely to submit applications for relief and over three times more likely to succeed than their unrepresented counterparts; even more significantly, detained individuals with representation are over ten times more likely to seek and succeed on their applications for relief when compared to their unrepresented counterparts.[6] Yet, pro se immigrants—even those who are

[3] *See* INA § 240(b)(4)(A) (providing right to counsel "at no expense to the Government"); *Franco-Gonzalez v. Holder*, 767 F. Supp.2d 1034, 1058 (C.D. Cal. 2011) (finding that mentally disabled immigrant detainees are entitled to appointed counsel at the government's expense).

[4] *See* Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* 5 (Sept. 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[5] *See* TRAC Immigration, "Immigration Court Backlog Tool," *available at* http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 4, 2017).

[6] *See* Eagly & Shafer, *supra* n.3, at 10–20.

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detained—are not entitled to any assistance in preparing and filing forms or briefs with EOIR. Further, although 8 C.F.R. § 1003.33 requires that all written documents be submitted in English, EOIR provides no translation assistance to persons in removal proceedings.

3.20 NWIRP seeks to meet the high demand for legal counsel through its staff and pro bono volunteer attorneys, but there remain a vast number of individuals whom NWIRP cannot represent or place with a pro bono attorney, or who require vital services before NWIRP has the opportunity to evaluate their capacity for full representation.

3.21 NWIRP seeks to ameliorate the significant disadvantage faced by unrepresented persons in removal proceedings by providing limited services to hundreds of unrepresented individuals each year to whom it cannot provide full representation. Some of these services include:

a. Provision of general information about the immigration court system, such as an overview of court procedures, the elaborate procedural requirements for filing applications with the immigration court, and the consequences of failing to appear for a hearing;

b. Individual consultations to review the facts of a particular person's case, including assistance with record requests, to identify potential forms of relief and paths to legal status;

c. Assistance in preparing applications for relief from removal, including i) applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"); ii) applications for cancellation of removal for lawful permanent residents under 8 U.S.C. § 1229b(a); iii) applications for cancellation of removal for non-permanent residents under § 1229b(b); iv) applications for U and T non-immigrant status for victims of violent crimes and human trafficking; and v) applications for family petitions;

d. In the case of asylum seekers in particular, expedited assistance in preparing asylum applications, as immigrants are required to file asylum applications

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with the immigration court within one year of arrival in the United States—a deadline many are often unaware of until they are screened by NWIRP;

e. Assistance in gathering evidence and preparing packets of materials on country conditions for detained individuals seeking asylum, withholding of removal, and relief under CAT;

f. Assistance in filing motions to terminate removal proceedings where DHS charges individuals as being deportable for certain criminal or immigration violations that arguably do not constitute grounds of removability;

g. Assistance in filing motions to change venue, which require detailed pleadings and statements of relief—a service that is particularly important for individuals who have relocated to Washington after being detained and released near the border, as their cases are still scheduled to continue at the border and most will be ordered removed in absentia if they fail to travel to their court hearing; and

h. Assistance in filing motions to reopen cases where persons previously ordered removed, often times in absentia, face imminent removal from the United States unless they immediately file a motion to reopen.

3.22 When assisting individuals with these matters, NWIRP explains the scope of the services that it will and will not provide to make sure the individual understands the nature of the assistance. In every case where NWIRP is able to provide only limited services and not full representation to a client, NWIRP obtains the client's informed consent to that limitation, consistent with Washington Rule of Professional Conduct 1.2(c).

3.23 NWIRP cannot comply with EOIR's cease-and-desist letter without greatly curtailing its services to immigrants. It does not have—and could not possibly be expected to have—the resources to provide full representation to every person who is potentially eligible for relief.

3.24 In fact, as written, EOIR's letter casts into doubt whether NWIRP can continue to consult with unrepresented persons, screen cases for referral to volunteer attorneys, or

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conduct workshops and presentations. Due to this uncertainty, NWIRP is now compelled to choose between halting most of the services it provides to immigrants or continuing to provide those services under threat of disciplinary sanctions. EOIR's letter has a considerable chilling effect on NWIRP's activities, impairing NWIRP's ability to advocate for the statutory and constitutional rights of immigrants.

3.25 EOIR's interpretation of its administrative rule fundamentally violates the First Amendment rights of NWIRP and its attorneys to communicate and associate with their clients, and to petition the government. It also encroaches upon the power reserved to Washington (and other states) to regulate the practice of law—a power that belongs exclusively to the States under the Tenth Amendment.

3.26 For these reasons, NWIRP now brings this lawsuit to enjoin EOIR from further constitutional violations.

IV. FIRST CAUSE OF ACTION—VIOLATION OF THE FIRST AMENDMENT (AS APPLIED)

4.1 The First Amendment to the United States Constitution guarantees Plaintiffs the rights to free speech, to free assembly, and to petition the government.

4.2 Plaintiffs exercise these rights when they screen, consult with, advise, and otherwise assist immigrants in need of legal services.

4.3 EOIR's new and overbroad interpretation of 8 C.F.R. § 1001.1(i) and (k), as incorporated into 8 C.F.R. § 1003.102(t), violates the First Amendment by curtailing Plaintiffs' exercise of their First Amendment rights.

4.4 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law for EOIR's wrongful conduct. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

V. SECOND CAUSE OF ACTION—VIOLATION OF THE FIRST AMENDMENT (FACIAL)

5.1 The First Amendment to the United States Constitution guarantees Plaintiffs the rights to free speech, to free assembly, and to petition the government.

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5.2 Plaintiffs exercise these rights when they screen, consult with, advise, and otherwise assist immigrants in need of legal services.

5.3 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), violates the First Amendment because it is a vague, overbroad, and unduly burdensome restriction on Plaintiffs' rights to free speech, to free assembly, and to petition the government.

5.4 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), also violates the First Amendment because it burdens the constitutionally protected speech of third parties, including others similarly situated to Plaintiffs and the clients and potential clients of Plaintiffs.

5.5 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

VI. THIRD CAUSE OF ACTION—VIOLATION OF THE TENTH AMENDMENT (AS APPLIED)

6.1 The Tenth Amendment prohibits the federal government from exercising powers not expressly delegated to it by the Constitution, and reserves those powers to the States or to the people.

6.2 Regulation of the practice of law is a matter reserved to the States. While the federal government may regulate the conduct of attorneys who appear in federal administrative proceedings, it may not promulgate or enforce general regulations affecting the conduct of lawyers outside the scope of such proceedings, such as regulations that purport to prohibit consulting with and/or providing limited services to pro se immigrants.

6.3 Many of NWIRP's services—giving KYR presentations, consulting with unrepresented persons, identifying defenses and forms of relief, advising persons regarding procedural steps for obtaining relief, screening and evaluating cases, making referrals, and assisting with forms and applications—are all part of the general practice of law. In the performance of these services, NWIRP attorneys may agree to represent a client and appear in a

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federal administrative proceeding—or they may not. But these services occur outside the confines of an EOIR administrative proceeding.

6.4 The Supreme Court of the State of Washington regulates the practice of law in Washington. In furtherance of that power, the Supreme Court adopted the Washington Rules of Professional Conduct ("WRPCs"), which govern the conduct of Washington-licensed lawyers and their relationships with clients. Relevant here:

a. WRPC 1.2(c) allows lawyers to limit the scope of representation with the informed consent of the client;

b. WRPC 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client absent informed consent; and

c. WRPC 6.5(a) provides special consideration for pro bono representation, specifically where lawyers provide short-term limited legal services under the auspices of a not-for-profit organization such as NWIRP.

6.5 EOIR's new and overbroad interpretation of 8 C.F.R. § 1001.1(i) and (k), as incorporated into 8 C.F.R. § 1003.102(t), violates the Tenth Amendment by purporting to restrict and unduly burden Plaintiffs in their general practice of law before they have appeared or agreed to represent a client in an agency proceeding. EOIR's interpretation also violates the Tenth Amendment because it conflicts with a Washington lawyer's rights and obligations established by the State as set forth in the WRPCs.

6.6 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

VII. FOURTH CAUSE OF ACTION—VIOLATION OF THE TENTH AMENDMENT (FACIAL)

7.1 The Tenth Amendment prohibits the federal government from exercising powers not expressly delegated to it by the Constitution, and reserves those powers to the States or to the people.

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7.2 Regulation of the practice of law is a matter reserved to the States. While the federal government may regulate the conduct of attorneys who appear in federal administrative proceedings, it may not promulgate or enforce general regulations affecting the conduct of lawyers outside the scope of such proceedings, such as regulations that purport to prohibit consulting with and/or providing limited services to pro se immigrants.

7.3 Many of NWIRP's services—giving KYR presentations, consulting with unrepresented persons, identifying defenses and forms of relief, advising persons regarding procedural steps for obtaining relief, screening and evaluating cases, making referrals, and assisting with forms and applications—are all part of the general practice of law. In the performance of these services, NWIRP attorneys may agree to represent a client and appear in a federal administrative proceeding—or they may not. But these services occur outside the confines of an EOIR administrative proceeding.

7.4 The Supreme Court of the State of Washington regulates the practice of law in Washington. In furtherance of that power, the Supreme Court adopted the WRPCs, which govern the conduct of Washington-licensed lawyers and their relationships with clients.

7.5 In 1983, the American Bar Association promulgated Model Rules of Professional Conduct ("MRPCs"), which have since been adopted by 49 states and the District of Columbia.

7.6 Various WRPCs and MRPCs are implicated by EOIR's action here, namely:

a. WRPC 1.2(c) and MRPC 1.2(c) allow lawyers to limit the scope of representation with the informed consent of the client;

b. WRPC 1.6(a) and MRPC 1.6(a) prohibit a lawyer from revealing information relating to the representation of a client absent informed consent; and

c. WRPC 6.5(a) and MRPC 6.5(a) provide special consideration for pro bono representation, specifically where lawyers provide short-term limited legal services under the auspices of a not-for-profit organization such as NWIRP.

7.7 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), violates the

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Tenth Amendment by restricting and unduly burdening Plaintiffs in their general practice of law before they have appeared or agreed to represent a client in an agency proceeding. EOIR's interpretation also violates the Tenth Amendment insofar as it conflicts with lawyers' rights and duties established by the States as set forth in the WRPCs and the MRPCs.

7.8 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

VIII. FIFTH CAUSE OF ACTION—DECLARATORY JUDGMENT (28 U.S.C. § 2201)

8.1 An actual controversy has arisen between Plaintiffs and EOIR. The parties have genuine and opposing interests, which are direct and substantial.

8.2 A judicial determination of the parties' rights and other legal relations would provide final and conclusive relief. Absent such a determination, Plaintiffs will continue to suffer invasion of their constitutional rights due to EOIR's wrongful conduct.

8.3 Plaintiffs are entitled to a declaration that EOIR cannot lawfully enforce 8 C.F.R. § 1003.102(t).

8.4 In the alternative, Plaintiffs are entitled to a declaration that EOIR cannot lawfully enforce 8 C.F.R. § 1003.102(t) against Plaintiffs or any staff or volunteer attorney under Plaintiffs' direction and control.

PRAYER FOR RELIEF

Plaintiffs respectfully pray for the following relief:

A. That the Court find and declare:

(i) 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), is vague, overbroad, unduly burdensome, and violates the First and Tenth Amendments to the United States Constitution; and

(ii) To the extent EOIR relies on 8 C.F.R. § 1001(i) and (k), as incorporated into 8 C.F.R. § 1003.102(t), to sanction, purport to sanction, or otherwise discipline Plaintiffs and all other similarly situated attorneys for a) conduct unconnected with any agency

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proceeding or b) the provision of limited services related to an agency proceeding in which the attorney has not agreed to represent a client in the proceeding, EOIR violates the First and Tenth Amendments to the United States Constitution;

B. That the Court enter an order permanently enjoining Defendants, their officers, agents, representatives, servants, employees, successors and assigns, and all other persons in active concert or participation with them, from:

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

(ii) Enforcing or threatening to enforce 8 C.F.R. § 1003.102(t); or, in the alternative,

(iii) Enforcing or threatening to enforce 8 C.F.R. § 1003.102(t) against Plaintiffs and all other similarly situated attorneys for a) conduct unconnected with any agency proceeding or b) the provision of limited legal services in which the attorney has not appeared or otherwise agreed to represent a client in an agency proceeding;

C. That EOIR be required to pay to Plaintiffs both the costs of this action and reasonable attorneys' fees incurred by Plaintiffs in pursuing this action, pursuant to 5 U.S.C. § 504, 28 U.S.C. § 2412, and any other statute or other rule of law or equity which permits such an award; and

D. That Plaintiffs be awarded such other, further, and additional relief as the Court deems just and equitable.

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DATED this 8th day of May, 2017.

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NORTHWEST IMMIGRANT RIGHTS PROJECT

By s/ *Matt Adams*
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U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

Disciplinary Counsel

5107 Leesburg Pike, Suite 2600
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April 5, 2017

Mr. Matt Adams, Esq.
Northwest Immigrant Rights Project
2601 N. Pinal Pkwy
615 2nd Ave., Suite #400,
Seattle, Washington 98104

RE: **Northwest Immigrant Rights Project**
D2017-0104

Dear Mr. Adams:

It has recently come to the attention of this office that at least one staff member from the Northwest Immigrant Rights Project (NWIRP) has attempted to advocate on behalf of F , and ; A ; *et. al.*, before the Executive Office for Immigration Review (EOIR) Immigration Courts, without entering a Notice of Entry of Appearance Form EOIR-28.

On June 7, 2016, a Motion to Reopen Proceedings was filed at the Tacoma Immigration Court in Mr. s case. The motion contained a notation that NWIRP assisted in the preparation of the *pro se* motion. On November 18, 2016, a Motion to Reopen Proceedings was filed at the Seattle Immigration Court in Ms. ;'s case. The motion stated that it was being filed with the assistance of NWIRP and included an asylum application prepared by NWIRP Staff Attorney Maggie Cheng. In each of these cases, no one from NWIRP entered a Notice of Appearance.

In order to represent[1] individuals in matters before an Immigration Judge, a person must

[1]"Representation" as defined in 8 C.F.R. §1001.1(j) includes "preparation" and "practice." "Preparation" as defined in 8 C.F.R. §1001.1(k) means the study of the facts of a case and the applicable laws coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedures. "Practice" as defined in 8 C.F.R. § 1001.1(i) means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document,

file a Notice of Entry of Appearance Form EOIR-28. *See* 8 C.F.R. § 1003.17(a). EOIR may impose disciplinary sanctions against a practitioner who fails to file a Notice of Entry of Appearance, pursuant to the Rules and Procedures of Professional Conduct for Practitioners. *See* 8 C.F.R. § 1003.102(t). By holding attorneys accountable for their conduct, this rule makes it possible for EOIR to impose disciplinary sanctions on attorneys who do not provide adequate representation to their clients.

Here, at least one staff member from NWIRP clearly represented Mr. [redacted] and Ms. [redacted] by engaging in "preparation" and "practice" of their motions to reopen. In addition, Mr. [redacted] s signature on his Motion to Reopen appears to be inconsistent with his signature on December 21, 2015, requesting a custody redetermination by an Immigration Judge. This difference could indicate that someone other than Mr. [redacted] drafted his motion to reopen.

We conclude that NWIRP's practice of representing aliens before EOIR without filing the appropriate Notice of Entry of Appearance form is in violation of federal regulations. We ask that NWIRP cease and desist from representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed with each client that NWIRP represents.

Sincerely,

Jennifer J. Barnes

Jennifer J. Barnes
Disciplinary Counsel

Enclosures: *Matter of* [redacted]
Motion to Reopen, dated May 16, 2016;
Notice of Custody Determination, dated December 21, 2015; and,

Matter of [redacted]
Motion to Reopen with Attachments, dated November 14, 2016.

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paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WASHINGTON 98421

In the Matter of (_____ (print your name here) Respondent.	A _____ (write your A number here) **IN REMOVAL PROCEEDINGS** **DETAINED**

Motion to Reopen

I, [redacted], proceeding *pro se*, wish to reopen my case. On 5/4/16, the jdg I conceded the charges to add an agg felony. I did not receive notice of this (many times immigration debates or NOA's have problems with the mail). I did not understand what was happening at the hearing and it went very quickly. I didn't understand what an agg felony was and how to fight it. I want to fight my LPR cancellation case because my USC sister has end stage renal disease & I would like to see if I can give her a kidney transplant. Please allow me to reopen my case.

Respectfully submitted on: _____
Date

_____
Signature

Respondent, *pro se*

TMS
4 9 16

This pro se brief/motion has been prepared with the assistance of the Northwest Immigrant Rights Project. 1

CU 6/15

CERTIFICATE OF SERVICE

I, _____ do hereby certify that I
(print your name here)

Y Mailed
Hand delivered
Served electronically on the Chief Counsel's Office located in the NWDC at seattleocecfilings@dhs.gov
Placed in the ICE drop box inside the main entrance to the Northwest Detention Center

a true and correct copy of the attached to:

Chief Counsel
Immigration and Customs Enforcement
1623 East J Street, Suite 2
Tacoma, WA 98421

Date: _____ Signed: _____

DEPARTMENT OF HOMELAND SECURITY
NOTICE OF CUSTODY DETERMINATION

Alien's Name: _____ _____ A-File Numbe _____

Date: 12/21/2015

Event ID: _____ Subject ID: _____

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

- [X] Detained by the Department of Homeland Security.
- [ ] Released (check all that apply):
  - [ ] Under bond in the amount of $ _____
  - [ ] On your own recognizance.
  - [ ] Under other conditions. [Additional document(s) will be provided.]

GLADISH, MICHAEL _____
Name and Signature of Authorized Officer

12/21/2015 09:12 AM
Date and Time of Custody Determination

SDDO
Title

- Yakima, WA Sub-Office 3701 River Road Yakima, WA US 98902
Office Location/Address

You may request a review of this custody determination by an immigration judge.

- [X] I acknowledge receipt of this notification, and
- [X] I do request an immigration judge review of this custody determination.
- [ ] I do not request an immigration judge review of this custody determination.

_____ 12-21-15
Signature of Alien — Date

The contents of this notice were read to _____ (Name of Alien) in the SPANISH (Name of Language) language.

CURTIS, KC 6085 _____
Name and Signature of Officer

N/A
Name or Number of Interpreter (if applicable)

DO
Title

NON-DETAINED

P

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matters of:	)	IN REMOVAL PROCEEDINGS
	)	**(lead)**
Respondents.	)	

RESPONDENTS' *PRO SE* MOTION TO REOPEN AND RESCIND *IN ABSENTIA* ORDER

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matters of:	)	IN REMOVAL PROCEEDINGS
a,	)	
,	)	
	)	
Respondents.	)	

RESPONDENTS' MOTION TO REOPEN AND RESCIND *IN ABSENTIA* ORDER

Respondents , and her two minor children, spectfully request this Court to reopen their proceedings and rescind their *in absentia* orders of removal based on exceptional circumstances excusing their failure to appear.

PROCEDURAL HISTORY

M rez and her two minor children entered the United States o , and expressed fear of return to their home country of Guatemala. The family was paroled into the United States on October 9, 2014. On August 25, 2015, due to inability to conduct a credible fear interview in Ms. Ramirez's native language of Mam, the Asylum Office decided to refer the matter to the Immigration Court. [USCIS Memo, at 10.] On August 25, 2015, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA") against the respondents, charging them as removable pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "the Act"). [NTA.] In support of the charges, DHS alleged that the respondents: (1) are not citizens or nationals of the United States; (2) are natives and citizens of

Guatemala; (3) applied for admission to the United States at Nogales, AZ, o [illegible]; and (4) are ineligible for admission to the United States because, at the time of admission, they were not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry documents required by the Act. [*Id.*]

At master calendar hearing held on July 19, 2016, the respondents appeared *pro se* before the Court. The matter was continued to September 21, 2016, for a Mam interpreter. Respondent again appeared *pro se*, and the matter was continued to November 9, 2016. [Notice of Hearing ("NOH"), 9/21/16.] Respondent was instructed to bring her asylum application to her next hearing. [*Id.*] The Court noted that if the Form I-589 was filed at the next hearing, it will be deemed timely filed by the Court. [*Id.*]

Respondents failed to appear for their November 9, 2016, hearing, and the Court ordered them removed in absentia to Guatemala. [Order of the IJ, 11/9/16.] The Northwest Immigrant Rights Project is assisting her in submitting this motion to reopen.

ARGUMENT

A court may, upon its own motion at any time, or upon motion of DHS or the alien, reopen any case in which it has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. 8 C.F.R. § 2003.23(b)(1).

A. The motion to reopen is timely and is not numerically barred.

Generally, the Court may reopen an order entered *in absentia* if a motion to reopen is filed within 180 days after the date of the order of removal, and the respondent demonstrates that the failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C)(i). Here the Court issued the *in absentia* orders on November 9, 2016. Therefore, the motion to reopen is timely in that it was filed within 180 days of the final administrative decision. Because this is

respondents' first motion to reopen, this motion is not numerically barred under 8 C.F.R. § 1003.23(b)(1).

B. Respondents can demonstrate that their failure to appear was due to exceptional circumstances.

Respondents regrettably missed their court hearing due to a mistranslation of their hearing notice, causing them to believe that their hearing was set for later in November.

Respondent expressed fear of return to Guatemala when she sought admission into the United States in October 2014. [I-867B.] More than ten months later, the Asylum Office finally determined that they were unable to conduct a credible fear interview due to lack of a Mam interpreter, and "that an NTA would be issued to avoid undue delay in the processing of the case and to afford the applicant all possible avenues to have her claim of fear heard." [USCIS Memo, at 11.] The Notice to Appear was issued on August 25, 2015. However, due to Court backlog, respondents were not scheduled for their initial master calendar hearing until July 19, 2016. [NOH, 4/6/16.] Respondents appeared at their long-awaited July 19, 2016, hearing, only to have their hearing continued for another three months to September 2016 for a Mam interpreter. [NOH, 7/19/16.]

At the September hearing, the Court set for a hearing on November 9, 2016. [NOH 9/21/16.] Unfortunately, respondent z could not remember her exact court date in November. [Decl., at 9.] She could not read the hearing notice given to her by the Court as she is illiterate and uneducated. [*Id.*] She therefore asked someone to translate the hearing notice for her. [*Id.*] However, the person she had asked mistranslated the notice and told her that her hearing was on November 20, 2016. [*Id.*] Respondent was thus misled to believe that her hearing was on the 20th.

Mistakenly believing that her hearing was on November 20th, Respondent was scheduled for an appointment with the Northwest Immigrant Rights Project (NWIRP) on November 10, 2016, to assist her with completing Form I-589 for submission at her next hearing. [*Id.*] When she went to her appointment, NWIRP reviewed her case, contacted the EOIR hotline, and discovered that she had missed her hearing the previous day, and had been ordered removed in absentia. [*Id.*]

Respondent was shocked to learn that she had missed her court date. [*Id.*] She had every intention to attend her court hearing. [*Id.*] Respondent dutifully attended prior hearings and updated her address with the Court. There was no indication that the respondent sought to interfere with or otherwise delay her proceedings. Rather, she had patiently waited for the government to process her case. Far from avoiding her court obligations, she had made an appointment with legal services and intended to submit her asylum application at her next hearing. Had she known that her hearing was on November 9th, she would not have made an appointment to complete her asylum application for the day after her hearing. Upon learning of her removal order, respondent files this motion to reopen at the earliest opportunity (after the federal holiday and weekend). Respondent thus acted diligently in her immigration matters, and should not be faulted for the mistake of another. The mistranslation of her hearing notice qualifies as an exceptional circumstance excusing her failure to appear. After waiting so long to have her asylum claim heard, respondent would not have just abandoned her claim with the safety of her family at stake, and affirms that she definitely would have attended her hearing had she known that it was on the 9th. [*Id.*]

C. Respondent is prima facie eligible for relief.

Respondent M z, is *prima facie* eligible for relief in the form of asylum, withholding of removal, and protection under the Convention Against Torture.

Respondent submits Form I-589, Application for Asylum and Withholding of Removal, with this motion. In light of the fact that her one-year filing deadline had long passed due to government delay, the Court noted that it would deem her asylum application as timely filed if it was submitted by her next hearing. [NOH, 11/9/16.] Respondent had intended to submit her asylum application at her next hearing, mistakenly believing that it was on November 20th. Respondent respectfully requests that the Court honor its previous statement and accept her concurrently filed application as timely filed.

is eligible for asylum as a victim of domestic violence. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) suffered past persecution and can establish a well-founded fear of future harm by her ex-partner and father of her children. 's ex-partner "physically, verbally, and sexually abused [her.] He was also physically abusive towards the children." [Form I-589, at 16.] rez has tried to leave her abuser, but her abuser found her and threatened to take away her children. [*Id.*] hus had to take her children and flee Guatemala to escape her abuser. [Decl., at 9. credibly fears that her partner would harm and possibly even kill her for leaving him, and carry out his threat to take her children. [Form I-589, at 16.]

Based on the foregoing, respondents respectfully request this Court to rescind the *in absentia* order of removal and reopen their matter, such that an pursue her asylum claim. In the alternative, respondents request this Court exercise its *sua sponte* authority to reopen this matter.

Respectfully submitted this 14th day of

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