

## Victory Denied: After Winning On Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad

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### Executive Summary

Today, many immigrants who have won their deportation cases on appeal before a circuit court—a filing called a “petition for review”—are stranded in their countries of origin, with no way to return to the U.S. This problem is caused by the government’s insistence on deporting immigrants who have a legal right to remain in the United States before they have a chance to prove that right in court. Many immigrants try to stop these premature deportations by asking the courts to issue a stay of removal. The government opposes many of these stays, on the theory that if the immigrant wins her appeal while she is outside the country, she can then return to the U.S. As this report demonstrates, this theory is inoperative in practice. Immigrants who win their cases on appeal while abroad are often effectively denied the benefit of their legal victory, as they are ineligible to be returned under the government’s existing “return policy,” or face immense practical obstacles to returning that prevent them from doing so.

This report illustrates how the government’s inadequate return policy, and its persistent unwillingness to repair this policy, negatively affects individual immigrants’ cases and the entire process of judicial review. It also presents newly acquired government documents that show that the government is well aware of deficiencies in the policy, even as it continues to assure courts that the return policy makes stays of removal unnecessary. The introduction of the report provides a brief overview of the issue and explains how the inability to return after winning a case on appeal is detrimental to immigrants. Part I describes the history of the problem, stemming from the Supreme Court case *Nken v. Holder*, 556 U.S. 418, in 2009, through 2014. It explains how the pattern of obfuscation by Executive Branch agencies, in which entities from the Office of the Solicitor General to the Office of Immigration Litigation have misrepresented, dodged, and willfully ignored the scope of the problem, demonstrates how immigrants have never had a meaningful opportunity to return after winning their case on appeal. Though in *Nken*, the Supreme Court based its decision in part on

the assumption that deported immigrants can return to the U.S. after winning their case in court, the report highlights how this assumption was built on a misrepresentation by the Solicitor General in 2009, and how lower courts, attorneys, and immigrants continue to rely on the assumption. The report further explores how courts have never had the opportunity to meaningfully review this policy and this false assumption, as in the years since *Nken*, efforts by the government to repair its own error have been perfunctory. It shows this with evidence from a recent FOIA case against the Department of Justice, which indicates that as late as 2013, the Department of Justice knew that immigrants were struggling to return to the U.S. after winning their appeals cases, and that those unable to return may be unable to continue their cases before an immigration judge, yet still sought to suppress the presentation of the issue before a circuit court of appeals. Meanwhile, the government continues to assure circuit courts that its return procedures are sufficient to prevent irreparable harm to those deported before they win their cases.

Part II illustrates the continuing inadequacies of the return policy with the stories of immigrants who have faced enormous obstacles trying to return to the U.S., despite having won their cases on appeal. It explores how the guiding documents of the return policy – one agency policy directive and a letter from the Office of the Solicitor General – fail to adequately include many immigrants who have meritorious claims for staying in the United States, including asylum-seekers, victims of serious crimes and victims of human trafficking. The report explains how the policy places these immigrants in a double-bind, as they not only are unable to return to the United States to press their claims, they are unable to fight their case from abroad because of jurisdictional problems. The report further highlights how even for those immigrants who are entitled to return to the United States by the terms of the existing policy, the practical and bureaucratic obstacles are so enormous that they can effectively foreclose these immigrants from returning. Indigent immigrants are left out in the cold since they lack the funds to arrange travel back from the places to which they were deported.

Part III provides a recommendation to circuit courts. The report asks courts to presume that removal from the United States before an immigrant's appeal is complete is an "irreparable injury" to her case, such that she should be allowed to stay in the U.S. until her case is finished. The report describes the necessity of this approach for protecting judicial review, given the great difficulty immigrants face getting the benefit of their victory in court once they have already been deported.

### Introduction

Today, many immigrants who have won their deportation cases on appeal before a circuit court—a filing called a "petition for review"—are stranded in their countries of origin, with no way to return to the U.S. This problem persists despite repeated government assurances that a consistently effective return policy exists to bring such individuals back to the United States after they win their petitions for review. These immigrants face a lose-lose situation. The Government obstructs their return through its inadequate return practices and policy, and courts mistakenly deny stays of removal based on judicial language that presumes an unobstructed path to return for those who prevail—language that is on the books solely as a result of the Government's own misrepresentations to the Supreme Court in *Nken v. Holder*.<sup>1</sup> This report presents newly obtained documents from Freedom of Information Act litigation against the Department of Justice<sup>2</sup> to detail the inadequacies of the government's current return policy. These documents include evidence that Justice Department lawyers at the highest level are aware of the ongoing problems with the return policy and the extraordinary difficulty that noncitizens face in pursuing their claims when they are not returned. In addition, this report details the stories of persons who have faced extraordinary obstacles in attempting to return to the U.S., despite the lengthy and vigorous advocacy of their lawyers. The gaps in the return policy demonstrate that in order to ensure individuals get the full benefit of judicial review, courts must treat removal of a petitioner during ongoing litigation as presumptively irreparable harm when adjudicating a stay of removal.

Removal during appeal litigation is an immense harm to immigrants in a number of ways. When

removed, a noncitizen who has been living in the United States for years is forced to leave behind her family, friends, work, and all other ties to this country for the time—often *years*—that it takes for a petition for review to be litigated.

This report focuses on one aspect of the harm that deportees face—the effective deprivation of the benefits of judicial review when a noncitizen is removed prior to the adjudication of a petition for review. Many petitioners who win at the circuit court level are barred from returning to the U.S. by gaps in the return policy or by practical obstacles. First, the Government refuses to assure the return of the indigent and non-lawful permanent residents, such that many noncitizens that prevail on their petitions for review may never have the chance to return at all. Second, for lawful permanent residents (LPRs) the government does not assure return, and even those who can afford to pay their own way face significant practical obstacles to return, including inconsistent priorities and policies between government agencies, lack of information about initiating the return process, and lack of coordination within Immigration and Customs Enforcement (ICE). Lastly, immigration courts on remand will often refuse to hear cases for those who are not returned.

Although government lawyers are fully aware of the obstacles to return, and the misrepresentations that were at the heart of the Supreme Court's statements in *Nken*, they have persisted in implementing a strategy designed to keep the circuit courts from even considering the limitations of the return policy and the implications of those limitations for the issuance of stays of removal. As a result, courts should step in and assure that decisions about stays of removal are based on the actual harm that noncitizens face if they are removed, by presuming that removal is an irreparable harm until the Government can assure that all successful petitioners will be returned.

## I. The *Nken* Misrepresentation, the Government's 2012 Apology, and the Government's Ongoing Efforts to Shield its Actual Policies From Judicial Review

### A. The *Nken* Misrepresentation

The courts of appeals play a crucial role in reviewing the legality of removal orders. Before the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, a noncitizen petitioner automatically received a stay of removal—permission

<sup>1</sup> 556 U.S. 418 (2009).

<sup>2</sup> National Immigration Project of National Lawyers Guild, et al. v. Department of Homeland Security, et al., 11 Civ. 03235 (S.D.N.Y.) (order dated Feb. 24, 2014) (requiring production of documents by April 18, 2014).

to remain in the U.S. temporarily—so that she could pursue her right to judicial review.<sup>3</sup> IIRIRA, however, eliminated such automatic stays while at the same time granting courts jurisdiction to hear appeals from petitioner's abroad.<sup>4</sup> In light of this change, the circuits split over what test to apply in deciding stays of removal for petitioners pending judicial review.<sup>5</sup>

In the 2009 case *Nken v. Holder*, 556 U.S. 418 (2009), the U.S. Supreme Court sought to settle this split. In doing so, it established a four-factor test for circuit courts to apply when deciding whether to grant noncitizen petitioners a stay of removal. The four factors are: (1) whether the noncitizen petitioner has made a strong showing that he is likely to succeed on the merits; (2) whether the petitioner will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties; and (4) where the public interest lies.<sup>6</sup>

The Supreme Court singled out the first two factors—likelihood of success on the merits and irreparable harm—as the most critical.<sup>7</sup> The Court further stated that for a petitioner to establish that she would be irreparably harmed if removed from the U.S., individualized harm had to be shown. The fact of a person being removed from the U.S., despite all the hardships that it naturally entails, could not categorically constitute irreparable harm.<sup>8</sup> In effect, this meant that a noncitizen who was likely to win her removal proceedings and ultimately be able to stay in the U.S., would be deported prematurely and have to spend years fighting her case abroad. In fact, a recent empirical study of 1,646 petition for review cases found that courts denied stays in about half of the appeals that were ultimately granted, meaning that

many immigrants with meritorious claims were needlessly removed from the U.S.<sup>9</sup>

### B. The Government's Apology and New Agency Directive

The Supreme Court's irreparable harm analysis in *Nken* was based on a false understanding: that there was an effective and consistent return policy in place for a petitioner who prevailed on her petition for review while abroad, such that she could return to the U.S. after winning. It was the promise that a petitioner could come back that made removal *not* an irreparable harm in the view of the Court.<sup>10</sup> In reaching this conclusion, the Supreme Court relied on a misrepresentation by the Solicitor General that “[a]liens who are removed may continue to pursue their petitions for review, and those who prevail *can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.*”<sup>11</sup>

In fact, there was no consistently effective return policy that adequately assured the facilitation of all petitioners' returns after winning their appeal. Advocates knew from experience that the Solicitor General's statement could not be true, as there were many stories of clients who would win their appeals from abroad, yet found themselves stranded in another country with no recourse to return to the United States. After District Court Judge Jed Rakoff ordered the Department of Justice to reveal the email communications that underlay the representations made to the Supreme Court,<sup>12</sup> ICE issued “Policy Directive

<sup>3</sup> See 8 U.S.C. § 1105a(a)(3) (1994 ed.) (“The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs.”); see also *Nken v. Holder*, 556 U.S. 418, 424 (2009) for an extended discussion and analysis.

<sup>4</sup> See IIRIRA § 306(b), 110 Stat. 3009-612 (repealing § 1105a and lifting the ban on adjudicating petitions for review once a noncitizen was abroad); 8 U.S.C. § 1252(b)(3)(B) (2006 ed.) (stating that filing a petition for review no longer automatically stays removal).

<sup>5</sup> *Nken v. Holder*, 556 U.S. 418, 423 (2009).

<sup>6</sup> *Id.* at 425-26.

<sup>7</sup> *Id.* at 434.

<sup>8</sup> *Id.* at 435.

<sup>9</sup> Fatma Marouf, Michael Kagan, Rebecca Gill, *Justice On The Fly: The Danger Of Errant Deportations*, 75 Ohio St. L.J. (forthcoming 2014), available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1912&context=facpub>.

<sup>10</sup> “The automatic stay prior to IIRIRA reflected a recognition of the irreparable nature of harm from removal before decision on a petition for review, given that the petition abated upon removal. Congress's decision in IIRIRA to allow continued prosecution of a petition after removal eliminated the reason for categorical stays, as reflected in the repeal of the automatic stay in subsection (b)(3)(B). It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury.” *Id.* at 435.

<sup>11</sup> *Id.* at 435, emphasis added (*quoting* Brief of the Solicitor General at 44). See also Nancy Morawetz, *Convenient Facts: Nken v. Holder, The Solicitor General, And The Presentation Of Internal Government Facts*, 88 N.Y.U. L. Rev. 1600 (2014) (explaining how the Solicitor General's Office was aware of significant gaps in the return policy before briefing and argument in *Nken*).

<sup>12</sup> Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Security, 868 F. Supp. 2d 720, 730 (S.D.N.Y. 2012).

11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens.”<sup>13</sup> This non-binding internal directive sets out policy guidelines for one agency—ICE—on when and how to return prevailing petitioners to the U.S. The directive was followed in April 2012 by a letter from the Solicitor General to the Supreme Court admitting that there was no effective return policy at the time of *Nken*, but claiming that the problem was effectively solved by the new ICE directive.<sup>14</sup> On its face, this directive makes the decision whether to return noncitizens who have prevailed in the circuit courts into a discretionary choice for the agency, offering the greatest discretion in the case of persons like *Nken*, who are seeking relief such as asylum and are not lawful permanent residents. After receiving the Solicitor General's apology, the Court did not revisit the language of the opinion, however, perhaps relying on the promise of the Solicitor General that the Department of Justice's Office of Immigration Litigation (OIL) would present the ICE Directive to courts for review whenever it opposed motions for stays of removal.

### C. The Government's Ongoing Efforts to Shield its Actual Policies from Judicial Review

From the start, the Solicitor General's suggestion that a misrepresentation could be cured by the government's promise to fully inform the circuit courts of its apology and new directive was a problematic plan for curing the misrepresentation in *Nken*. Even assuming OIL had consistently presented the ICE Directive to courts as required by the Solicitor General's letter, this would have been an inadequate solution for ensuring that courts, petitioners and advocates were fully informed about the misrepresentation in *Nken* and the flaws of the Government's return policy. Unlike a court opinion, OIL motions cannot be discovered by petitioners because immigration cases can only be obtained at the specific court house and are not easily available. When deciding whether to apply

for a stay, petitioners will take the erroneous language in *Nken* at face value; there is no indication that this language is wrong through ordinary methods of legal research. As a result, many petitioners may prematurely give up the fight to obtain a stay of removal. This undermines a basic premise of the rule of law, that the language of the law should be clear enough to provide sufficient notice to individuals who are impacted by it.

In practice, OIL failed to provide courts the opportunity to review the return policy, by not consistently informing courts of the SG's Letter and the ICE Directive or proving courts with its own knowledge about the Directive's limitations. This effectively shielded the courts from reviewing the return policy and rectifying its inadequacies. In oppositions to motions to stay throughout 2012 and 2013, the government continued to cite the mistaken language in *Nken*, leaving under-informed courts and petitioners to operate as if this language was completely valid. Well into 2013, courts continued to deny motions for stay of removal based on the false premise of *Nken*'s irreparable harm language.

In late 2013, OIL filed supplementary letters in cases in which they had opposed a stay of removal, explaining that OIL was no longer relying on the erroneous *Nken* language but rather relying on the 2012 ICE Directive. However, these letters were often too little, too late—many were filed after a stay had already been denied based on OIL's original, erroneous opposition briefs, and some were filed after noncitizens already had been removed. They also continued to cite to the Directive as though it would provide an adequate solution for all immigrants who win their petitions for review, despite their knowledge that the Directive could leave prevailing immigrants stranded abroad.<sup>15</sup>

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<sup>13</sup> Directive 11061.1 is available at [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/11061.1\\_current\\_policy\\_facilitating\\_return.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf). The authors of this report—Boston College's Post-Deportation Human Rights Project, the National Immigration Project of the National Lawyers' Guild, and New York University's Immigrant Rights Clinic—were involved in the FOIA litigation that ultimately forced the government's hand. National Immigration Project of the National Lawyers' Guild et al. v. Department of Homeland Security, No. 11 Civ 3235(JSR) (S.D.N.Y.).

<sup>14</sup> Michael R. Dreeben, Deputy Solicitor General, Letter to William Suter, Clerk at 5 (Apr. 24, 2012) (“The government does not believe that any action by this Court is required.”) (hereinafter “SG Ltr.”).

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<sup>15</sup> This spate of letters did not indicate an across the board change in OIL briefing policy to notify courts of the *Nken* problem and the ICE Directive. In early 2014, the authors surveyed recent opposition to motions to stay in the Second and Ninth Circuits. This review found that, rather than rely on the erroneous language in *Nken* or presenting the ICE Directive and SG Letter, OIL was frequently skipping the irreparable injury prong of the stay analysis. That is, opposition to motion to stay briefs frequently avoided analyzing whether an irreparable harm could be suffered at all, focusing instead on the other factors of the stay test. Rather than solving the problem, this leads courts to conduct their own analyses—relying on the language in *Nken*—without any indication that *Nken* was based on a misrepresentation.

#### D. New FOIA Documents and the Ongoing Refusal to Disclose to Courts the Predicament of Prevailing Petitioners Who Are Not Returned

In 2014, the same FOIA litigation that led to the 2012 apology letter revealed the Department of Justice's clear knowledge at the highest levels of the ongoing difficulties faced by persons who are deported before they win their cases in the courts of appeals. After losing three times in proceedings before United States District Judge Jed Rakoff,<sup>16</sup> the government produced Department of Justice documents post-dating the 2012 apology. These documents included communications about how to resolve the case of Jo Desire, a lawful permanent resident who was deported in 2006 and who had been unable to return to the United States under the 2012 ICE directive. His case showed both the difficulty of return and the impossibility of litigating a case from abroad. But rather than recognizing that Jo's case showed the inadequacy of the government's return policy, the Department of Justice chose to simply solve Jo's individual case while shielding the courts from the actual problems with the return policy.

Jo Desire came to the U.S. from Haiti as an LPR in 1967 at age 14, served honorably in Vietnam and lived in the U.S. without incident for 30 years.<sup>17</sup> He received a drug conviction in 1998, was picked up by the Immigration and Naturalization Service in 1999, and ultimately was removed on the ground that his conviction was an aggravated felony.<sup>18</sup> He was held in immigration detention from 1999 until 2006.<sup>19</sup> In 2007, the Ninth Circuit vacated Jo's removal order finding that he had not been convicted of an aggravated felony.<sup>20</sup> On remand, ICE sought to add new charges.

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<sup>16</sup> See Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Security, No. 11-CV-3235, 2012 U.S. Dist. LEXIS 184036 (S.D.N.Y., Dec. 26, 2012) (ordering Department of Justice to search all OIL emails); Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Security, No. 11-CV-3235, 2013 U.S. Dist. LEXIS 68469 (S.D.N.Y. May 5, 2013) (denying government motion for reconsideration); Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Security, No. 11-CV-3235, (Aug. 20, 2013) (oral order) (requiring search of documents through the date of an adequate search).

<sup>17</sup> App. Opening Br. of *Desire v. Holder*, No. 11-15199, Dkt. 2, 2 (9th Cir. May 4, 2011).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> Interview with Kathleen Kahn, on file with author.

<sup>20</sup> App. Opening Br., *supra* note 17, at 3-4.

With the help of a pro bono attorney, Jo argued that the issue of his removability was *res judicata* and that he should not have to fight his removal case again.<sup>21</sup>

When he first won his petition for review, the government informed Jo that if he returned, he would have to arrange his flight and pay for it.<sup>22</sup> However, Jo lacked the funds to purchase a plane ticket. As such, Jo was stranded in Haiti from 2007 until 2013. Throughout the litigation, the government continued to assert that Jo would have to pay for his own return.<sup>23</sup> When the case could not proceed due to Jo's inability to return, the case was administratively closed. Meanwhile, Jo's pro bono lawyers filed a habeas case challenging the new proceedings. When that case was dismissed they appealed to the Ninth Circuit. After briefing and oral argument, the Ninth Circuit ordered the government to file documents showing what was happening in the immigration court proceeding. The government's response included an email exchange in which Jo's lawyer expressed his client's plight:

Your Department's insistence that my indigent client pay for his own travel to defend himself effectively denies him his due process right to appear and defend himself at the removal hearing. Your department removed my client to one of the poorest countries on the planet. He has no means of supporting himself. He is currently having trouble even buying food let alone procuring international travel.<sup>24</sup>

ICE continued to insist that Desire would have to pay for his own travel.

The Ninth Circuit proceeded to issue a second order asking for supplemental briefing on whether Jo could move the immigration court to lift the administrative closure while he was out of the country, whether he would need the government's cooperation, and whether the immigration judge would have EOIR had jurisdiction to conduct reopened proceedings while an Jo was outside the U.S.<sup>25</sup>

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<sup>21</sup> Kahn, *supra* note 19.

<sup>22</sup> *Id.* Documents related to the Desire case were produced in the *NIP v. DHS* FOIA case and are attached to the Declaration of Nancy Morawetz in Support of Petitioner's Reply and in Further Support of His Application for a Stay of Removal, dated June 19, 2014, *Harbin v. Holder*, No. 14-1433 (2d Cir.), available at <http://www.nationalimmigrationproject.org/legalresources.htm#nipnlg> ("Morawetz Dec.").

<sup>23</sup> *Id.*

<sup>24</sup> Morawetz Decl., *supra* n. 22, Ex. B.

<sup>25</sup> FOIA Documents, DOJ-Civil 2141.

The newly disclosed documents show that OIL did not know the answer to whether Jo could litigate his case if he could not afford to return. In other words, it did not even know whether those who fell through the cracks of the return policy had any chance of continuing their cases on remand to an immigration judge. This in itself is an extraordinary fact given that OIL routinely assures circuit courts that being deported does not cause irreparable harm. OIL asked ICE what its position would be on Jo pursuing his case from abroad. The ICE lawyer wrote back that ICE would reserve its right to contest the immigration court's jurisdiction.<sup>26</sup> OIL asked the Executive Office of Immigration Review (EOIR) to consult on this issue.<sup>27</sup> The emails do not provide the response from EOIR, but along the way, someone appears to have recognized the conflict between how EOIR answered this question and the sunny promises being made to the courts. At that stage, the OIL lawyers brought in the lawyers from the Office of the Solicitor General with emails titled: "meeting to discuss Desire and Nken."<sup>28</sup> In particular, OIL understood the conflict between what was happening to Jo and what OIL was telling the courts in the aftermath of *Nken*. One email asked EOIR, "[W]e would like to understand how EOIR's position works with the ICE directive."<sup>29</sup> The email records end soon thereafter due to the date restrictions on the FOIA litigation, but the public record shows what happened. Rather than provide supplemental briefing, the government dropped all charges of removability and agreed to return Jo to the United States. Jo's pro bono lawyer then withdrew her appeal before the Ninth Circuit and the government never had to reveal the limits of EOIR's policies on allowing immigrants who have prevailed to continue to pursue their cases after they have been deported.

After placing the burden of return completely on Jo for 6 years, DHS terminated proceedings against him and transported him to the U.S., for free, on a

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<sup>26</sup> FOIA Documents DOJ-Civil 2659.

<sup>27</sup> FOIA Document DOJ-Civil 2129 (communication between OIL and EOIR about conducting videoconference proceedings in Haiti).

<sup>28</sup> FOIA Document DOJ-Civil 2081 (asking for a meeting including OIL, the Office of the Solicitor General and EOIR to "discuss the issues regarding how cases are handled at EOIR in circumstances – like those presented in the Desire case – where an alien is removed while a petition for review is pending; the alien prevails on the petition for review; and there are further immigration proceedings on remand?").

<sup>29</sup> *Id.*

JPATS (U.S. Marshal Service) plane on October 15, 2013. He was detained for one week in Virginia and then transported to Arizona where he was released with the promise that the government would return him to his previous status as an LPR. The entire process took just over a week, as compared to the years Jo spent languishing in Haiti without the funds to return.<sup>30</sup>

Jo's story illustrates the limited effectiveness of the return policy in assuring meaningful relief through judicial review, even for a person who is a lawful permanent resident and who has the benefit of extraordinary advocacy by pro bono lawyers. In preparation from this report, the authors canvassed other lawyers who are sometimes, like Jo's lawyer, able to obtain relief for their clients eventually through vigorous advocacy. But each of these stories shows the limits of the return policies and the degree to which it relies on extraordinary legal advocacy resources to obtain return for those who prevail in the circuit courts.

## II. The Government's 2012 Apology Letter And 2012 ICE Directive Continue Many Of The Failings Of The Old Policy

### A. The SG Letter and ICE Directive Have Critical Gaps That Restrict The Ability Of Noncitizens To Return To The U.S.

While the Office of the Solicitor General assured the Supreme Court in its 2012 letter that the government now has return procedures that matched their original assertion in *Nken v. Holder*, the ICE Directive does not, by its own terms, provide for consistent and effective return of immigrants.<sup>31</sup> In the key passage of the policy, ICE states:

Absent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S. court of appeals was removed while his or her PFR was pending, ICE will facilitate the alien's return to the United States if either the court's decision restores the alien to lawful permanent resident (LPR) status, or the alien's presence is necessary for continued administrative removal proceedings. ICE will regard the returned alien as having reverted to the immigration status he or she held, if any, prior to the entry of the removal order and may detain the alien upon his or her return to the United States. If the presence of an alien who prevails

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<sup>30</sup> Kahn, *supra* note 19.

<sup>31</sup> *Id.* at 4.

on his or her PFR is not necessary to resolve the administrative proceedings, ICE will not facilitate the alien's return. However, if, following remand by the court to the Executive Office for Immigration Review (EOIR), an alien whose PFR was granted and who was not returned to the United States is granted relief by EOIR or the Department of Homeland Security (DHS) allowing him or her to reside in the United States lawfully, ICE will facilitate the alien's return to the United States.

On its face, the Government's current return policy does not assure the return of people that are not lawful permanent residents (LPRs), including asylum-seekers, victims of human trafficking and victims of serious crimes, and potential recipients of withholding of removal or Convention Against Torture (CAT) relief. Further, as the documents around Jo Desire's case show, it is difficult—and sometimes impossible—for noncitizens to fight their deportation cases from abroad because immigration courts refuse to hear their cases while the petitioners are in another country. Because the ICE Directive does not assure that these immigrants can return to the U.S., their inability to fight their case from abroad leaves them in a legal limbo with no options.

### **1. Asylum-Seekers, Victims of Serious Crimes and Victims Of Human Trafficking Have Limited Access To The Policy**

The ICE Directive limits the return of non-lawful permanent residents who have prevailed in court to situations where ICE deems the person's presence "necessary for continued administrative proceedings."<sup>32</sup> Under this Directive, asylum-seekers, victims of serious crimes and human trafficking who could receive humanitarian visas, and potential recipients of withholding of removal or CAT relief, are not given any assurance that they will be returned to the U.S. after prevailing before a circuit court. Ironically, Jean Marc Nken, the petitioner whose case became the font of the Supreme Court's erroneous language about return procedures, was an asylum-seeker. As such, even he would not be guaranteed return on prevailing under the current ICE policy.

Take Edward's story as an example of the serious challenges a non-LPR faces.<sup>33</sup> Edward is a young man

who was removed following a conviction for joyriding (vehicle taking), which is not a removable offense.<sup>34</sup> He had been living without any status in the U.S. since he was a young child. As a domestic violence survivor, Edward had been granted derivative U visa status, along with his sister and mother. Today, his sister and mother are lawful permanent residents.<sup>35</sup> When Edward was convicted, in 2009, the immigration judge erroneously entered an order of removal on the basis that Edward had entered without inspection, though his U visa was granted prior to the commencement of removal proceedings. Edward appealed his case to the BIA, but lost and was removed to Mexico.<sup>36</sup>

With the help of a pro bono attorney, Edward filed a petition for review at the Ninth Circuit.<sup>37</sup> In 2013, the Ninth Circuit remanded his case to the BIA. Despite having been granted a new opportunity to fight his case in immigration court, Edward faced difficulty returning to the U.S., because though a U visa holder is in lawful status, he is not considered a "lawful permanent resident" and is not assured return under the Directive. The ICE Directive only allows for someone in Edward's situation to return if ICE, in its sole unfettered discretion, deems his return "necessary for continued administrative proceedings."<sup>38</sup> Edward faced considerable resistance from ICE in his attempt to return. He was eventually allowed to return due to vigorous advocacy by his attorney. See Part III.B.2, *infra*.

Yet, it was vital for certain claims for relief that Edward be present in the U.S. For example, Edward could not make an application for an extension of U visa status, since it is only available to "[n]on-immigrants in the United States."<sup>39</sup> This meant that if Edward's U-visa status expired while he was in Mexico, he would permanently lose one avenue of relief, despite his victory at the circuit court. Finally, being stranded in Mexico, a country Edward had not resided in since he was a child, took an economic and emotional toll on him and his family that could easily

<sup>32</sup> Directive 11061.1 Facilitating the Return to the United States of Certain Lawfully Removed Aliens ¶ 2.

<sup>33</sup> The petitioner's name has been changed in order to preserve his privacy.

<sup>34</sup> Interview with Andrew Knapp, on file with author.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Directive 11061.1 Facilitating the Return to the United States of Certain Lawfully Removed Aliens ¶ 2.

<sup>39</sup> See page 1 of the Instructions for Form I-539 at <http://www.uscis.gov/files/form/i-539instr.pdf> (emphasis added); 8 U.S.C. § 1184(p)(6).

be remedied by allowing Edward to return to the U.S. to finish his removal proceedings.

Edward's is not the only case in which the Government argued that the petitioner could not qualify for relief due to his or her absence from the U.S. In one case in the Ninth Circuit, the Government argued that because the petitioner had already been removed from the U.S., his withholding of removal relief became moot.<sup>40</sup> The Government's argument would essentially foreclose relief for those who might prevail on a withholding claim—a form of humanitarian relief that allows individuals who fear losing their life or freedom to remain in the U.S.

## 2. The ICE Directive Closes Off Relief for Some Immigrants Due to the Immigration Courts' Frequent Refusal to Hear Cases Involving Persons Who are Abroad

In theory, an individual who is not assured return under the ICE Directive could litigate her removal case from abroad. However, in practice this is extraordinarily difficult, because it depends on EOIR being willing and able to conduct hearings for persons who are out of the country. Rather than being willing to go forward in these cases, EOIR has often taken the position that it lacks jurisdiction, or has administratively closed proceedings—an action that places that case on the inactive calendar. As the emails in Jo Desire's case show, the Department of Justice is well aware of the importance of this issue: if people cannot litigate unless they are returned, and DHS sets up policy and practical obstacles to return, then many people who win their cases are effectively denied any benefit of judicial review. Nonetheless, the Department of Justice continues to pretend that the ICE directive is adequate to assure relief for petitioners who win their cases in court.

Attorneys have reported having their clients' cases administratively closed after winning a petition for review, because immigration judges viewed those cases as inactive until the immigrants returned to the U.S. In one case, Steven was removed to El Salvador while his case was pending at the Ninth Circuit.<sup>41</sup> When he won his case in court, and his case was remanded

to an immigration judge, Steven tried to fight his removal case from abroad.<sup>42</sup> However, when Steven sought to litigate his case from El Salvador, the immigration judge presiding over his case had it administratively closed because Steven was not in the U.S.<sup>43</sup> Frustrated by the judge's action, his attorney persuaded the ICE attorney to jointly move to have the case re-calendared. This is not a procedural action a pro se client would have been able to execute and it depended on the assent of the ICE attorney. Ultimately, the judge did re-calendar the case, but because Steven is not physically present in the United State to fight his case, the judge still considers his case a non-priority.<sup>44</sup> This situation leaves Steven in legal limbo—unable to litigate his case without returning, but facing enormous impediments to return.

Another example of the administrative closure problem is the case of Gideon Idowu. Gideon is an asylum-seeker from Nigeria who had worked as a contract linguist for the FBI; he feared that if he returned to Nigeria, he would be targeted by the organized crime figures he had helped investigate and prosecute.<sup>45</sup> Despite his predicament, ICE removed him to Nigeria, where he did face threats from organized crime members.<sup>46</sup> After fighting for several years to get his case reopened and appealing his case to the circuit court,<sup>47</sup> an immigration judge reopened his case in 2013. Upon reopening the case, though, the judge stated, “[A]s the Court is without authority to order Respondent returned to the United States, the Court will not set another hearing as it appears that would be futile. Rather, the Court finds the best course of action is to administratively close Respondent's proceedings.”<sup>48</sup> Worse, ICE then argued that Gideon's case should be terminated, leading the judge to terminate Gideon's proceedings rather than adjudicate his asylum claim.<sup>49</sup> This case illustrates the same critical obstacle as Steven's—when an immigrant has ongoing removal proceedings before an immigration

<sup>40</sup> Resp. Mot. to Dismiss for Lack of Jurisdiction, *Hernandez-Anaya v. Holder*, No. 12-73139, at 9 (9th Cir. Aug. 16, 2013) (“Before the Court is only the issue of whether Hernandez's removal to Mexico should be deferred [based on withholding of removal]. Yet Hernandez fails to explain how his removal to Mexico can be deferred, when he has already been removed to Mexico.”).

<sup>41</sup> This petitioner's name has been changed in order to preserve his privacy.

<sup>42</sup> Interview with Holly Cooper, on file with author.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Mot. Reopen Removal Proceedings and Rescind *In Absentia* Removal Order at 1, *Matter of Idowu* (EOIR Apr. 5, 2012), on file with authors.

<sup>46</sup> *Id.* at 4.

<sup>47</sup> See *Idowu v. Attorney Gen. of the United States*, No. 12-12937 (11th Cir.).

<sup>48</sup> Decision And Order Of The Court, *Matter of Idowu* (EOIR Apr. 1, 2013), on file with authors.

<sup>49</sup> Letter of Jessica Chicco, on file with authors.

judge while he is outside the country, the immigration judge will many times administratively close the case rather than allow the immigrant to have his day in court. Ultimately, Gideon benefited from a strong pro bono attorney who helped him to persuade ICE to file a joint motion to reconsider the immigration judge's termination.<sup>50</sup> After vigorous advocacy, he was returned to the U.S. to continue his asylum case.<sup>51</sup>

These stories, and news from other practitioners that immigration judges have administratively closed certain cases when petitioners are abroad, highlight how EOIR often will not hear cases when noncitizens are outside of the United States.<sup>52</sup> Cases like these undermine the entire notion that noncitizens will not suffer irreparable harm after being removed—regardless of what the ICE Directive states, if noncitizens are not assured return and cannot even litigate their cases from abroad, they are prevented from gaining the benefit of their victory at the circuit court.

From the emails about Jo Desire's case, it is clear that the Justice Department is aware of EOIR's policy on cases in which the person is out of the country. Yet, the government has so far refused to disclose the sections of these emails that state that policy. In the case of Jo Desire, the Ninth Circuit ordered the Government to apprise the court about EOIR's position on whether it retained jurisdiction in a case where the person had been removed and faced ongoing proceedings on remand.<sup>53</sup> Because the government reversed course, returned Jo and dropped the new proceedings, OIL avoided revealing to the courts of EOIR's view on whether it even has the power to adjudicate a case when ICE refuses to return a noncitizen that prevailed in the courts.

Although the exact contours of EOIR's current position remain unknown, the FOIA documents disclose OIL's past understanding of the ability of person to litigate from abroad. In one newly disclosed email from before *Nken*, the very OIL attorney who was the point person from the government's

briefs in *Nken* refers to a case where the case was remanded to the immigration judge “who has no jurisdiction, because the guy is still in Mexico.”<sup>54</sup> If that is in fact the current position of EOIR, it is clear that every gap in the ICE directive and every practical hurdle to return leads to an impossible situation in which persons who win their cases are deprived of relief.

Besides destroying a valid form of relief for some petitioners, the stance of immigration courts that will not adjudicate cases of those who have prevailed in the courts directly contravenes the Supreme Court's logic in *Nken*, which underpins the entirety of the current return and stay policies. In *Nken*, the Supreme Court presumed that removal is not irreparable harm because prevailing litigants could be made whole.<sup>55</sup> Yet, if noncitizens are removed on the theory that they can litigate from abroad, then lose their opportunity for relief *because* they are abroad, petitioners fall into a legal black hole—there is no way for them to get the benefit of judicial review of a potentially erroneous decision to remove them.

#### **B. Even When Petitioners Are Eligible to Return Under the ICE Policy, the Obstacles They Face Are Enormous**

Many noncitizen petitioners also face significant practical problems when attempting to return. Even with proactive and supportive advocates at their side, petitioners have trouble returning due to inconsistent priorities between agencies, confusion within the ICE bureaucracy, lack of initiative on the part of the government, and the financial burden imposed on them which in the case of indigent petitioners, can effectively foreclose them from returning to the United States.

Attorneys surveyed for this report who succeeded in returning their clients to the U.S. note that they had trouble securing the cooperation of ICE, obtaining the right documents for their clients to re-enter the country, and finding a point person in the relevant

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<sup>50</sup> Joint Mot. to Remand, Matter of Idowu (EOIR Oct. 3, 2013).

<sup>51</sup> Letter of Jessica Chicco, on file with authors.

<sup>52</sup> Andrew Knapp, *supra* note 13, also reported concerns that his case would be administratively closed because his client was abroad.

<sup>53</sup> Order of the Court in *Desire v. Holder*, No. 11-15199, ECF No. 39 (9th Cir., filed May 16, 2013).

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<sup>54</sup> FOIA document DOJ Civil 1697 (Aug. 29, 2007), on file with author).

<sup>55</sup> “Before IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States. Accordingly, an alien who appealed a decision of the BIA was typically entitled to remain in the United States for the duration of the judicial review. This was achieved through a provision providing most aliens with an automatic stay of their removal order while judicial review was pending.” *Nken* at 424.

agencies to help them start the return process.<sup>56</sup> The situation for unrepresented noncitizens is worse, as they may have difficulty even learning of the ICE policy. These practical barriers indicate that the government's existing procedures do not amount to a consistently effective policy for *all* noncitizens, as in many cases aggressive, lengthy advocacy is necessary to ensure petitioners are returned—a quality of advocacy to which many petitioners do not have access.

### 1. Indigent Petitioners Cannot Return Under The ICE Directive

The ICE Directive requires individuals to pay the cost of their own return, creating an insurmountable hurdle for indigent petitioners.<sup>57</sup> These petitioners are likely to be disproportionately pro se, as they most likely would not be able to afford to pay for counsel.

Jo Desire's case illustrates this problem. Although the Ninth Circuit vacated his removal order, Jo could not return to the U.S. because he could not afford to purchase a plane ticket. Jo spent years in Haiti, where he was ill-equipped to earn the money needed to buy a plane ticket back to the United States. It was only when the government faced the possibility of having to reveal the problem Jo faced in litigating his case that it relented and arranged for Jo to be flown back on a government plane.

Jo's case highlights how the financial burden the return policy imposes on indigent petitions essentially puts them in the untenable position of winning in court yet losing the opportunity to live in the United States. The government, which chooses to use its resources to deport persons with pending appeals, has both the resources and the capability to return such individuals—but chooses not to do so.

### 2. Other Agencies Do Not Follow ICE's Directive, And Immigrants Bear The Cost Of Inter-Agency Disunity

The ICE Directive outlining the government's return policy fails to address the many other governmental actors who are necessary to return a noncitizen petitioner. Both the Department of State and U.S. Customs and Border Protection (CBP) play critical roles in returning deported noncitizens, and coordination failures or

outright refusal to cooperate by either can effectively defeat the promise of return.

The Department of State has no formal guidance ensuring its cooperation in returning noncitizens despite the crucial role that it plays in the return process. To return, a noncitizen must pick up a temporary transportation letter from an embassy or consulate (though these transportation letters are issued by DHS). The government's only action to ensure the Department of State's cooperation with ICE's return policy has been a single cable sent in April 2012 to embassies and consular offices, requesting that officials refer return inquiries to ICE and await parole notification.<sup>58</sup> The Department of State has not codified it in the Foreign Affairs Manual—the Department's official operative directives—or incorporated it within any other permanent policy directive.<sup>59</sup> Because noncitizens are often returning in order to attend immigration hearings, timing is essential—a delay could seriously harm the case.<sup>60</sup> In the case of Marta, a transportation letter sat in the mailroom of an embassy for days before staff discovered that the noncitizen was in fact authorized by ICE to return.<sup>61</sup> In that case, Marta—who has since received cancellation of removal under the Violence Against Women Act—was scheduled to return to the U.S. after winning her case before a circuit court. A local ICE officer mailed the transportation letter to the embassy eleven days before Marta was scheduled to return. It was only through the attorney's follow-up calls and pressure that the embassy attaché found the letter, on the day that Marta was scheduled to leave. Her hearing in immigration court in the U.S. was the next day.<sup>62</sup> Had she missed her hearing, she could have faced serious consequences, including removal in absentia—essentially losing her removal case. Had she been pro se, it is likely that the letter would never have been discovered, and she would have missed her court date. Marta's case is one example of how bureaucratic obstacles at the level of the embassy or consulate could have not only delayed her return to the United States, but imperiled her removal case entirely.

Even if a petitioner obtained all necessary documentation, there is no assurance that CBP officers

<sup>56</sup> In a survey of immigration attorneys conducted by the authors, the majority of those who responded stated that 1) obtaining a point of contact to assist with return, 2) securing ICE cooperation, and 3) lack of coordination between agencies were significant problems.

<sup>57</sup> See ICE FAQ at ¶ 18.

<sup>58</sup> See Cable from Secretary of State to All Diplomatic and Consular Posts 40718 (Apr. 24, 2012), SG Ltr., Appx. E.

<sup>59</sup> See Foreign Affairs Manual, available at <http://www.state.gov/m/a/dir/regs/fam>.

<sup>60</sup> Letter of Bruce Nestor, on file with author.

<sup>61</sup> *Id.* The name of this petitioner has been changed in order to preserve her privacy.

<sup>62</sup> *Id.*

would permit the petitioner entry into the United States. The ICE Directive authorizes parole as the mechanism through which prevailing noncitizens are allowed to enter the U.S.<sup>63</sup> This use of parole is problematic in that parolees may be treated as arriving aliens and therefore subject to grounds of inadmissibility under 8 U.S.C. § 1182(a) and detention without a bond hearing.<sup>64</sup> Moreover, CBP's parole procedures were never designed for the return policy or for these kinds of cases, so CBP's instructions on parole still provide that border officials can override a prior decision to grant entry into the United States.<sup>65</sup>

In addition, CBP and private airlines may not recognize the transportation letter petitioners use to return to the U.S., thus delaying or perhaps preventing petitioners' return. In the case of Vladimir Perez Santana, airline staff in the country of origin did not recognize the transportation letter as a valid document, and would not let Vladimir on the plane. Vladimir is an LPR who had been living in the United States since he was ten years old.<sup>66</sup> He was convicted of a marijuana offense and removed to the Dominican Republic. During his post-deportation exile, the Supreme Court decided *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), in which it found that an analogous marijuana sale offense was not an aggravated felony. With the help of a dedicated attorney, Vladimir appealed to the First Circuit and, on remand, the Board of Immigration Appeals reopened his immigration case.<sup>67</sup> When he attempted to return five months later—after assembling the necessary documentation and payment, including a transportation letter from the State Department—he could not board the plane. Flying out in a timely manner is especially pressing because transportation letters expire quickly. Vladimir was lucky enough to have counsel, who could call and advocate for him to board a plane the next day.<sup>68</sup> But for pro se petitioners, a setback like this can pose an enormous bureaucratic obstacle petitioners have no experience in navigating.

Another example of how bureaucratic hurdles pose a significant problem for petitioners is the case of Andrew, a petitioner with LPR status who was removed to Haiti.<sup>69</sup> By chance, Andrew met a lawyer who specialized in immigration matters when both volunteered for relief efforts in the aftermath of the earthquake in Haiti in 2010.<sup>70</sup> After a review of Andrew's A-file, his lawyer filed a motion to reopen on a claim of ineffective assistance of counsel.<sup>71</sup> The judge granted the motion and remanded the case to the BIA. Andrew's lawyer attempted to coordinate with EOIR and ICE to bring him back due to the type of relief they sought—Andrew's personal testimony would be key to getting relief.<sup>72</sup> After weeks of communication, the assistant ICE field director informed Andrew's lawyer on a Thursday evening that Andrew had an appointment with the U.S. embassy in Haiti the following Monday morning, and that his flight would depart to the U.S. that Monday afternoon.<sup>73</sup>

Andrew's lawyer knew that the U.S. embassy in Haiti was chaotic, and that it was extremely unlikely that Andrew would get his documents in time to make his afternoon flight.<sup>74</sup> The travel document would only be valid for a short period of time and Andrew and his lawyer already had purchased the airline ticket, so they needed to get his travel document Monday morning. The attorney personally flew down to Port Au Prince in order to go to the embassy with Andrew. Describing the morning of the consulate appointment, she said, "[I]n Haiti . . . just driving a mile can take an hour. . . . There were around 300 people in the embassy and I pushed my way to the front."<sup>75</sup> Luckily, when she spoke to an officer regarding Andrew's travel document, it was produced within 1.5 hours. At the airport in Port Au Prince and in the U.S., the attorney advocated for Andrew when interacting with border agents to ensure that he got through.<sup>76</sup> Without her insistent and extraordinary efforts, it is entirely possible Andrew

<sup>63</sup> Directive 11061.1 ¶ 3.1.

<sup>64</sup> See 8 C.F.R. § 1003.19(h)(2)(i)(B).

<sup>65</sup> See CBP Directive No. 3340-043, The Exercise of Discretionary Authority, available at [http://www.nationalimmigrationproject.org/legalresources/NIPNLG\\_v\\_DHS/CBP%20Parole%20Directive%20\(Partially%20Redacted\)%20-%20Sept%203%202008.pdf](http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20(Partially%20Redacted)%20-%20Sept%203%202008.pdf).

<sup>66</sup> *Santana v. Holder*, 731 F.3d 50, 51 (1st Cir. 2013).

<sup>67</sup> *Id.*

<sup>68</sup> Letter of Kathleen Gillespie, on file with author.

<sup>69</sup> Interview with Holly Cooper, on file with author. The name of this petitioner has been changed in order to preserve his privacy.

<sup>70</sup> *Id.*

<sup>71</sup> Although Andrew's case proceeded on a motion to reopen rather than petition for review, the same bureaucratic challenges are present.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

would not have been able to enter at all, imperiling his merits case. If Andrew had not been able to return, he may have never been able to fully realize the benefit of his win on appeal by having his case fully heard on remand.

Similarly, Edward, the U visa recipient who had been wrongfully removed as a person without status, faced bureaucratic obstacles even once he was approved to return. After ICE officers agreed to bring Edward back through advance parole, it was a haphazard process. First, although Edward had a valid Mexican passport when he was first deported, the passport expired by the time ICE scheduled his return.<sup>77</sup> Although advance parole allows an individual to return to the US without a passport, CBP told Edward that since his had expired, he would have to obtain a new one. This forced Edward to travel thousands of miles back to the town of his birth in order to obtain a new passport.<sup>78</sup> Due to corruption in the passport office of his hometown, Edward had difficulty obtaining a new passport as he could not afford to bribe the passport officers. Unable to obtain a new passport, he returned to the border only to be told that a passport was not necessary for his return.<sup>79</sup> CBP's confusion cost Edward significant time and effort, and is indicative of the widespread bureaucratic miscommunication that creates barriers to return.

### 3. ICE Decentralization Makes Coordinating Action Difficult, And ICE Discretion Makes Return Uncertain For Noncitizens

Even within ICE, the Directive vests power in local offices and is dependent on a makeshift organizational structure to coordinate local action. Because the ICE Directive does not specify a central office to supervise all aspects of a return from the flight to providing the necessary documents, it is practice for local ICE officers to make these determinations. This makeshift process effectively hands control over returning a successful petitioner to the same agency responsible for having removed the individual.<sup>80</sup>

ICE reserves for itself the right to determine when and under what circumstances to return non-LPRs due to the unrestricted scope of the language in

the ICE Directive. ICE retains the discretion to determine whether returning non-LPRs is "necessary for continued administrative proceedings." Consequently, the same agency that executes a petitioner's removal also has the discretionary power to not to return her, which would deny her the ability to testify in her own defense. This broad language grants ICE, a party to the removal proceeding, unfettered discretion to refuse to return a successful litigant and gives ICE the power to force a petitioner to proceed with her case from abroad.<sup>81</sup>

Even for LPRs, in ICE's view, ICE agents have the discretion to override the Directive's policy statement on return if they desire. The ICE Directive vests final discretion in ICE officers due to the open-ended nature of some of its terms. It states that it will return individuals who are restored to LPR status "absent extraordinary circumstances," but does not define which circumstances are extraordinary or who is responsible for making that determination.<sup>82</sup> The ICE FAQ document elaborating on the government's policy is similarly unhelpful, defining "extraordinary circumstances" as those that "include, *but are not limited to*, situations where the return of the alien presents serious national security considerations or serious adverse foreign policy considerations."<sup>83</sup> Both "national security considerations" and "adverse foreign policy considerations" are broad and undefined concepts. Beyond this, ICE acknowledges that "extraordinary circumstances" are "not limited to" the already broad universes of national security and foreign policy, leaving the term open-ended.<sup>84</sup> The Department of Justice reinforces this view of agency discretion. In one newly released email from 2013, the "OIL Director" states that "since the petitioner is a former LPR, ICE *may* be obliged to facilitate his return to the US if the case is remanded." The email continues that this should be noted in the email to ICE.<sup>85</sup> Tellingly, OIL did not direct ICE that it would be obliged to facilitate return for the former LPR.

<sup>77</sup> Knapp, *supra* note 13.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> ICE FAQ ¶¶9-10 (noting merely that a request submitted to ERO Outreach, the central ICE community liaison office, to be returned will be routed to the "appropriate ICE offices").

<sup>81</sup> *Accord* Marin-Rodriguez v. Holder, 612 F.3d 591, 593 (7th Cir. 2010) ("It is unnatural to speak of one litigant withdrawing another's motion").

<sup>82</sup> ICE Directive 11061.1 ¶2.

<sup>83</sup> ICE FAQ 3, <http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/faq.htm> (emphasis added).

<sup>84</sup> *Id.*

<sup>85</sup> FOIA documents, DOJ-Civil 1200 (May 8, 2013), on file with author.

The lack of coordination and high levels of discretion afforded ICE officers allow considerable room for ICE agents to contradict their own policy. One example is the case of Philip, a lawful permanent resident of the U.S. who has resided in the United States since 1966.<sup>86</sup> Philip was charged with an aggravated felony and removed to Serbia. With the help of an attorney, he filed a petition for review, which was granted by the Seventh Circuit.<sup>87</sup> His case has now been remanded to the BIA for further proceedings. Given that Philip's case has been remanded, he should be able to return. The ICE Directive specifically states that LPRs will be returned and their status restored "absent extraordinary circumstances."<sup>88</sup> However, when Philip's lawyer attempted to coordinate his return to the United States with an ICE-ERO (Enforcement and Removal Operations) officer, she was stonewalled. The officer stated, "After consultation with the Office of Chief Counsel (OCC), the request to facilitate the respondent's return is premature. ERO does not facilitate the return to the United States of an alien whose case is pending on appeal at the Board."<sup>89</sup> This directly contradicts the ICE Directive, and it forces to Philip to wait even longer to return, despite waiting abroad during his lengthy appeal process. Cases like Philip's demonstrate how even long-time lawful permanent residents can have their ability to return to the U.S. obstructed by the open-ended language of the ICE Directive.

The Directive suggests that ICE will coordinate its efforts through the Public Advocate. But the position of the Public Advocate was defunded by Congress in 2013, and members of Congress continue to criticize any effort to fund an alternative office to serve even its coordinating function.<sup>90</sup>

### III. In Light Of The Government's Ongoing Unwillingness To Provide a Comprehensive and Workable Return Policy, Courts Must Clarify That Removal Constitutes Irreparable Harm

Circuit courts have the ability—and responsibility—to consider the existing inadequacies of the return policy

and evaluate whether those inadequacies are significant enough that courts should categorically presume that removal is an irreparable harm. In *Nken*, the Supreme Court envisioned return practices and procedures that would allow a prevailing petitioner to return to continue fighting her case in the U.S. Such practices and procedures did not exist then, and do not exist now. Case law shows that when an erroneous statement is made in a judicial opinion, that statement need not be considered binding on lower courts.

Moreover, only courts can act to make clear the correct application of the stay standard in light of the government's misrepresentation statement of law in in *Nken*—not ICE or the Office of Immigration Litigation (OIL) as ICE's representative. Though it is now clear that the irreparable harm language in *Nken* was based on a misrepresentation—and that even today, effective return procedures do not exist that would support the erroneous *Nken* language—petitioners, attorneys, and even courts are left to rely on *Nken's* mistaken language. Without action by courts, no correction to the erroneous language in *Nken* can be discovered by ordinary means of legal research.

It is appropriate for courts to issue opinions clarifying the irreparable harm standard in light of the Government's actual return policy. In circumstances where language in a prior case was on an issue not fully litigated, was mistaken, or was dicta, that language is not binding on courts. As the Supreme Court long has recognized, *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision.<sup>91</sup> Moreover, as the Ninth Circuit has recognized, unstated assumptions on non-litigated issues are not precedential holdings that bind future decisions.<sup>92</sup> The Court's analysis of the irreparable harm prong of the stay standard in *Nken* and its statement that removal did not cause irreparable harm

<sup>86</sup> Letter of Maria Baldini, on file with author. This petitioner's name has been changed in order to preserve his privacy.

<sup>87</sup> *Id.*

<sup>88</sup> ICE Directive 11061.1.

<sup>89</sup> Baldini, *supra* note 68.

<sup>90</sup> See H.R. 3732, 113th Cong. § 1 (2013), available at: <https://beta.congress.gov/113/bills/hr3732/BILLS-113hr3732ih.pdf>.

<sup>91</sup> See *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993). See also *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (citations omitted); *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) ("We are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"); *Humphrey's Executor v. United States*, 295 U.S. 602, 627-628, 55 S.Ct. 869, 79 L.Ed. 1611 (1935) (rejecting dicta, "[W]hich may be followed if sufficiently persuasive but which are not controlling").

<sup>92</sup> See *Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1234 (2007); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985); *Matter of Baker*, 693 F.2d 925, 925-26 (9th Cir. 1982).

because “those who prevail can be afforded effective relief by facilitation of their return”<sup>93</sup> were predicated on a significant mistake of fact, and therefore have no binding force. Thus, circuit courts have the ability to issue a new opinion free from the constraints of the erroneous language in *Nken*.

In addition, circuit courts have the responsibility to issue such an opinion. Litigants and courts, especially pro se litigants, look to court opinions to understand legal standards. When the only available judicial discussion is based on a misstatement, both parties and courts can be misled about the risks of removal pending a petition for review. A published opinion is necessary in order to ensure that noncitizens are provided with a meaningful opportunity to seek a stay and thereby a meaningful access to relief following judicial review. Such an opinion must acknowledge the *Nken* misrepresentation and establish that removal is presumptively an irreparable harm so long as the government's return policy is inadequate. In the high stakes scenario of stays of removal – where the government seeks to remove a petitioner before the court has adjudicated the legality of the removal – any limitation on return for a prevailing petitioner is not merely a setback, but an effective denial of meaningful judicial relief. As this report shows, the current policy cannot assure the return of all petitioners who prevail. In order to avoid rendering the judicial review process a nullity, courts must consider the litigant's actual effective ability to return when it evaluates the existence of irreparable harm.

As the Supreme Court emphasized in *Nken*, the efficacy of judicial review for noncitizen petitioners hinges on the ability of the petitioner to return.<sup>94</sup> In order to protect the efficacy of judicial review, circuit courts should take affirmative steps to resolve the problem of ineffective return, rather than waiting for DHS to improve its policy or for OIL to properly brief the issue.

### Conclusion

Given the gross inadequacy of the government's return policy and the problematic state of the law since *Nken*, it is all the more crucial for the circuit courts to reassess their application of the irreparable harm prong of the stay standard. Unlike the Court's understanding during *Nken*, it is now known that the government

does not have effective practices and procedures for returning noncitizens who win on appeal—even after the 2012 ICE directive. This change justifies circuit courts in revisiting the irreparable harm analysis, and finding that in order to protect meaningful access to judicial review unless and until all parts of the government create a workable return policy that assures that prevailing petitioners can enjoy the benefits of judicial review, removal should be understood as an irreparable harm.

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The primary authors of this report are Tianyin Luo and Sean Lai McMahon, under the supervision of Professor Nancy Morawetz. The views expressed in this report are the views of the authors and do not necessarily reflect the views of New York University School of Law.

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<sup>93</sup> *Nken*, 556 U.S. at 434.

<sup>94</sup> *Nken v. Holder*, 556 U.S. 418, 434 (2009).