

PRACTICE ADVISORY¹

April 27, 2015

**RETURN TO THE UNITED STATES AFTER PREVAILING ON A
PETITION FOR REVIEW OR MOTION TO REOPEN OR RECONSIDER**

Table of Contents

I.	Introduction.....	2
II.	Background.....	2
III.	ICE’s Return Directive and Implementation Challenges.....	4
IV.	Navigating the Return Process.....	8
	A. Initial Considerations: Client Communication and Document Collection.....	8
	B. Contact and Regular Follow Up with ICE.....	9
	C. Mechanics of ICE-Facilitated Return.....	10
V.	Federal Court Options.....	11
	A. Overview.....	11
	1. Litigation to Address ICE’s Refusal to Respect a Federal or Administrative Court Order.....	11
	2. Create a Paper Trail.....	13
	B. Where and What to File.....	13
	1. Complaint for Declaratory and Injunctive Relief (District Court).....	13
	a. <i>Administrative Procedure Act Claims</i>	14
	b. <i>Constitutional and Statutory Due Process Claims</i>	14
	c. <i>Mandamus</i>	15
	2. Motions Requesting Return (Circuit Court).....	15
	3. Mandamus (Circuit Court).....	15
VI.	Suggested Strategies for Avoiding <i>In Absentia</i> Orders in Removal Proceedings for Respondents Stranded Abroad.....	16
V.	Conclusion	17
	Sample Email to ICE ERO.....	18

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This advisory originally was issued on December 21, 2012 by Trina Realmuto, Jordan Wells, Alina Das, and Beth Werlin. The advisory was updated by Trina Realmuto, Elizabeth Davis, Molly Lauterback, and Beth Werlin.

I. Introduction

This practice advisory contains practical and legal suggestions for individuals seeking to return to the United States after they have prevailed on a petition for review or a motion to reopen or reconsider to the immigration court or Board of Immigration Appeals (BIA). This advisory begins with an overview of relevant developments over the past few years, including the government’s issuance of a return directive in February 2012 and subsequent developments. It then covers administrative steps to return a prevailing litigant under the directive. Finally, it summarizes potential litigation options if the government refuses to facilitate or unreasonably delays return, and strategies for avoiding in absentia orders in administrative proceedings while pursuing return. The end of the advisory includes a sample email to initiate return and a list of links to the documents referenced herein.

Notwithstanding the return directive, arranging return continues to be a haphazard process—even for individuals who fit squarely within the categories of noncitizens that the Department of Homeland Security (DHS) acknowledges may return.² As documented in a July 2014 report, “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.”³ Attorneys continue to regularly report demoralizing combinations of intransigence, confusion, and lack of coordination on the part of the agencies involved in facilitating returns. Given the significant impediments attorneys report with this process, litigants before the court of appeals are advised to request that the court order return as part of its order granting a petition for review. Litigants who prevail on a petition for review or before an immigration court or the BIA are also advised to keep detailed records of efforts to arrange return in the event that federal court action to compel return becomes necessary.

II. Background

Practitioners long have reported the lack of a policy for returning clients to the United States after they prevailed in the courts. It thus came as a surprise in 2008, when the Office of the Solicitor General (OSG) represented to the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009), that the government had a “policy and practice” of providing “effective relief” to noncitizens who prevail in their cases after being removed, by facilitating their return.⁴ In its opinion, the Court relied on this representation in concluding that, for a stay of removal, “the burden of removal alone cannot constitute the requisite irreparable injury.”⁵

² See [ICE Policy Directive](#), Number 11061.1 (Feb. 24, 2012).

³ Tianyin Luo and Sean Lai McMahon, [Victory Denied: After Winning On Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad](#), New York University School of Law Immigrant Rights Clinic, at ii (July 2014).

⁴ Brief for Respondent at 44, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681).

⁵ See *Nken*, 556 U.S. at 435 (citing Brief for Respondent at 44).

Subsequently, immigration advocates filed Freedom of Information Act (FOIA) requests for information regarding the alleged policy, and when the agencies failed to turn over records, they filed a lawsuit against DHS, the Department of Justice (DOJ), and the Department of State (DOS).⁶ The FOIA lawsuit revealed that the OSG had misrepresented the existence of a return policy to the Supreme Court.⁷

In the wake of these revelations, DHS rushed to demonstrate to the Supreme Court and lower courts that they subsequently had put an effective return policy in place. On February 24, 2012, Immigration and Customs Enforcement (ICE) issued a policy [directive](#) purporting to “describe[] existing ICE policy”—although notably the directive does not reference any pre-existing policies. Then in April 2012, ICE issued guidance in the form of [Frequently Asked Questions \(FAQ\)](#) regarding implementation of the February 2012 “policy.”⁸ The key government contact for facilitating return was listed as the ICE Public Advocate. At the same time, then Secretary of State Clinton sent a [cable](#) to embassies and consular offices, instructing them to refer return inquiries to ICE and to process parole notifications for persons DHS determines merit return.

With the purported “policy” barely in place, on April 24, 2012, the [OSG sent a letter](#) to the Supreme Court, acknowledging its incorrect representations in *Nken*. In the letter, the OSG urged the Court not to revisit the portion of its opinion that relied on those representations, averring that “[t]he government does not believe that any action by this Court is required,” given its client-agency’s recent announcements.⁹

⁶ Complaint at 1, *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t. of Homeland Sec.*, No. 11-CV-3235 (S.D.N.Y. filed May 12, 2011). The plaintiffs were the National Immigration Project of the National Lawyers Guild (NIPNLG), the American Civil Liberties Union, the Immigrant Defense Project, the Boston College Post-Deportation Human Rights Project, and Professor Rachel Rosenbloom. The New York University School of Law Immigrant Rights Clinic represented plaintiffs.

⁷ See [Nat’l Immigration Project of the Nat’l. Lawyers Guild v. U.S. Dep’t. of Homeland Sec.](#), 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012).

⁸ [Frequently Asked Questions](#) about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (2012) (Previous FAQ). This Previous FAQ is attached as Appendix D to the Letter from Michael R. Dreeben, cited in footnote 9 below. It has since been amended.

⁹ Letter from Michael R. Dreeben, Deputy Solicitor General, to Hon. William K. Suter, Clerk of the Supreme Court (Apr. 24, 2012) (“OSG Letter”). Several immigration groups that had appeared as *amici curiae* in *Nken* responded with a letter asking the Court to “withdraw[] the parts of its *Nken* opinion that relied on representations that the government now acknowledges were inaccurate.” [Letter](#) from Paul R.Q. Wolfson and Adam Raviv to Hon. William K. Suter, Clerk of the Supreme Court (May 4, 2012). Only the OSG’s letter—not the letter from *Nken*’s *amici*—was acknowledged as received by the Court. See [Nken v. Holder, No. 08-681](#).

In 2013, Congress voted to defund the position of ICE Public Advocate,¹⁰ whom the Previous FAQ had identified as the coordinator of the return process.¹¹ ICE subsequently issued the current [FAQ](#). As discussed in more detailed below, the current guidance instructs individuals or their representatives to affirmatively contact the ICE’s Enforcement and Removal Operations (ERO) Outreach unit through its Detention Reporting and Information Line (1-888-351-4024) or a generic email address (ERO.INFO@ice.dhs.gov).

III. ICE’S Return Directive and Implementation Challenges

ICE’s policy [directive](#) falls far short of providing fairness to prevailing litigants who have overcome the difficulties of litigating from abroad. Most significantly, it covers only a subset of litigants.

- **Applies Only to Prevailing PFR Litigants.** The directive only covers noncitizens who prevail on Petitions for Review (PFR). It does not cover noncitizens who prevail on administrative motions to reopen or reconsider before an immigration judge (IJ) or the BIA. (Strategies for returning these individuals are discussed below).
- **Applies Only to Individuals Restored to LPR Status or Whose Presence ICE Deems Necessary.** The directive states that ICE will facilitate return only where:
 - i. *The court, by vacating or reversing the removal order, restores the noncitizen to LPR status.* Practitioners continue to report that, despite the fact that the policy is clear on this point, ICE nevertheless has refused to facilitate return in this situation. Some practitioners have had to file a federal court lawsuit seeking to compel return. (Note: In every lawsuit of which the authors are aware, ICE has returned the individual prior to substantive briefing and in lieu of litigating the case.)

OR
 - ii. *ICE deems, in its sole, unfettered discretion, that a non-LPR’s “presence is necessary for continued administrative removal proceedings.”* There is little guidance on when ICE will deem a person’s presence necessary. The FAQ states only that presence may be necessary if “the nature of the court’s decision requires [] return for further testimony” and that “ICE may explore other options in lieu of facilitating your return, such as arranging for video teleconference or telephonic testimony, if appropriate.” In accordance with the FAQ, ICE often takes the

¹⁰ See H.R. 5855, 113th Cong. (2013) (Floor Adopted Amendments), *available at* http://appropriations.house.gov/uploadedfiles/06.07.12_homeland_security_floor_adopted_amendments.pdf.

¹¹ [OSG Letter, Appendix D](#) (Previous FAQ), at 1.

position that return is unnecessary when an immigration court hearing may take place by video or by phone.¹²

- **Return After Succeeding on Remand to the Immigration Court or Board.** If an individual is not returned after succeeding on a PFR, but ultimately overcomes the obstacles and wins his or her case while abroad, ICE will return the person when “the Board or Immigration Court enters a final and unreviewable decision that permits [the noncitizen] to be physically present in the United States.”¹³
- **“Extraordinary Circumstances” Exception.** Even if a person satisfies one of the conditions described above and qualifies for return under the directive, ICE will only facilitate return “[a]bsent extraordinary circumstances.” The FAQ states that these circumstances “include, but are *not limited to*, situations where the return of an alien presents serious national security considerations or serious adverse foreign policy considerations.” (emphasis added). This nebulous definition delegates wide discretion to ICE and opens the door to manipulation.
- **No Pre-Return Detention Determination.** The directive notes only that it “may detain” a noncitizen upon return. The FAQ states that an individual “may be detained for further immigration proceedings” upon return depending on the case circumstances, whether the person is “subject to mandatory detention,” or whether the person poses “a danger to the community or risk of flight.” ICE’s refusal to make a custody determination prior to return, even for noncitizens who were not previously detained or who complied with a voluntary departure order, is unsettling. Knowing whether one will be detained is a key factor in weighing the risks and rewards of return and considering the timing of return.
- **Failure to Return to and Provide Proof of Pre-Removal Status.** The directive states that ICE regards a returned noncitizen as having the immigration status that she or he had, if any, prior to the entry of the removal order. Attorneys report that persons restored to LPR status by a court order are told by ICE and/or consular posts abroad that their client is required to apply for a returning resident visa, which can take several months. Moreover, the FAQ states that ICE will not treat a returning noncitizen as an “arriving alien” unless she or he was charged as an “arriving alien” prior to removal. Nonetheless, attorneys report that ICE fails to provide returning noncitizens with proof that they are returning with their pre-removal status.

¹² Noncitizens forced to proceed from abroad often face problems such as limited communication with their counsel, difficulty presenting and reviewing evidence, and technological malfunctions or failures. Worse still, practitioners have reported that, where clients were unable to appear in person, IJs have closed cases or considered issuing *in absentia* orders.

¹³ Although the FAQ claims that “[m]ost courts and many foreign embassies have the technology” to conduct video or teleconference hearings, there is no other indication of a system to facilitate videoconferencing from abroad. Secretary Clinton’s cable to consular offices, *see* OSG Letter, Appendix E, does not contain any instruction on facilitating videoconferencing.

- **Facilitation of Return through Parole.** The directive states that ICE will “if warranted, parole the alien into the United States.” The FAQ states that ICE will “work with the ICE Homeland Security Investigations Law Enforcement Parole Unit (LEPU)” to arrange proper transportation documents. To the extent that ICE is paroling in returning noncitizens who were *not* deemed “arriving aliens” prior to their removal order, this mechanism is at odds with the FAQ’s promise that ICE typically will not treat returning individuals as “arriving aliens.” Parolees are subject to grounds of inadmissibility under 8 U.S.C. § 1182(a) and detention without a bond hearing, *see* 8 C.F.R. § 1003.19(h)(2)(i)(B). Manner of entry issues are discussed in Part IV.C.
- **Cost-Prohibitive.** The directive states that “[f]acilitating an alien’s return does not necessarily include funding the alien’s travel via commercial carrier to the United States or making flight arrangements for the alien.” The FAQ states that a prevailing litigant who had an administratively final order but was not granted a stay of removal “will be responsible for incurring the costs for returning to the United States to resume his or her prior immigration status and/or to continue to pursue his or her immigration case.”¹⁴ Moreover, since the transportation document that ICE or DOS issues (*see* Part IV.C) may be valid for only a week or less, the cost of a flight on such short notice can be exorbitant. Additionally, in most cases, it is necessary to retain a lawyer to navigate the return process and, if necessary, file a federal court action to compel return. This additional expense also may prevent a noncitizen from returning to the United States.¹⁵

¹⁴ ICE has paid for travel, however, in instances where a court has ordered that the agency produce the person on a short timeframe, where the person was unlawfully deported during the pendency of the appeal period or filing of an appeal to the Board of Immigration Appeals, or where the person was unlawfully removed in violation of an administrative or judicial stay order. It is still advisable to make a written request for payment of travel costs when communicating with ICE. In addition, consider requesting that ICE cover travel as alternative relief when seeking a stay of removal and in merits briefing to the court of appeals in a petition for review.

¹⁵ The government recently reiterated its steadfast refusal to assist with payment for return, noting that petitioners “are free to raise” this issue in a stay motion to the court of appeals. Transcript of Oral Argument, *Nat’l Immigration Project of Nat. Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, ECF No. 87 at 19, No. 11-CV-3235 JSR, 2014 WL 6850977 (S.D.N.Y. Dec. 3, 2014) (“And the government has been consistent in saying, when a person is removed . . . as far as making the travel arrangements and paying for the ticket, that is not the government’s responsibility, and we did not make a representation about that. Now, if a person . . . believes that they will be unable to pay for their own return, they’re certainly free to raise that in their stay motion to the courts, and the courts could fully vet that.”).

At least two district court judges have recognized that the government’s policy of not paying for the return of indigent petitioners may deny them effective relief. *Nat’l Immigration Project of Nat. Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, No. 11-CV-3235 JSR, 2014 WL 6850977, at *5 (S.D.N.Y. Dec. 3, 2014) (“More troubling to the Court is the government’s refusal to fund the return of indigent aliens . . . For many such aliens, the financial burden of removal may, as a practical matter, preclude effective relief.”); *Kabenga v. Holder et al.*, No. 14-

- **Documentation.** The directive states that individuals returning by air or sea must have “a valid passport or equivalent documentation” and that persons returning by land must have “appropriate identity documentation, which could include a passport or other government-issued documents.” For lower income and indigent individuals and those who fear persecution in their countries of origin, this requirement may prohibit return altogether. The FAQ states that if the country of origin will not issue the person a passport or equivalent travel document, the individual will not be able to return “via a commercial air carrier or maritime vessel.” Even when petitioners gather the necessary documentation, practitioners report that their clients have been denied entry to a plane, or instructed by CBP that they needed additional documentation not required by the directive.¹⁶
- **Obligation to Initiate Return on Noncitizen.** The directive and the FAQ put the onus on the noncitizen to initiate return by affirmatively contacting ICE to request return. Pro se litigants who are abroad (either because the court denied their stay request or they did not seek a stay) have no means of knowing that they prevailed on the petition for review let alone that they are entitled to return.¹⁷ For these individuals, the return process is not accessible.
- **Non-Binding and Lacking Force of Law.** DHS has indicated that it does not intend this policy to bind agency employees or carry the force of law. The directive explicitly states that it “does not apply to bargaining unit employees” and “is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party.”¹⁸

CV-9084, 2015 U.S. Dist. LEXIS 434, 14 (S.D.N.Y. Jan. 2, 2015) (granting stay of removal to indigent petitioner and reiterating concern about “the Government’s policy of selectively financing post-removal travel”).

¹⁶ See, e.g., Tianyin Luo and Sean Lai McMahon, [Victory Denied: After Winning On Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad](#), New York University School of Law Immigrant Rights Clinic, at 22-25 (July 2014).

¹⁷ See, e.g., Geoffrey A. Hoffman, Nimra Chowdhry, & Martha Chace, [Immigration Appellate Litigation Post-Deportation: A Humanitarian Conundrum](#), 5 HLR*e* 143 (2015) (discussing case of a deported pro se litigant who won remand from the Fifth Circuit on a torture claim but whose victory is meaningless because he cannot be found).

¹⁸ Moreover, DHS should have satisfied notice-and-comment requirements under the Administrative Procedure Act (APA), 5 U.S.C. § 553, because the directive substantively affects the people it regulates. While policy statements are exempt from notice-and-comment requirements, § 553(b)(A), legislative rules carrying the force of law are not. See *General Electric Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002).

- **Subject to Change or Revocation at Any Time.** By issuing a mere statement of policy, DHS may change its position on returns at any time.¹⁹ DHS did not publish the directive in the Federal Register, as required by the Administrative Procedure Act (APA), 5 U.S.C. § 552(a)(1)(D), and the agency retains full discretion to revoke the policy directive at any time.

In sum, the lack of an adequate return policy in the PFR context, the lack of any policy in the motion to reopen or reconsider context, the problems associated with parole, and the myriad practical obstacles to return all present significant challenges to prevailing litigants. If the directive or ICE's implementation of it prevents or unnecessarily delays a person's return, attorneys should consider filing an action in federal court as discussed below.

IV. Navigating the Return Process

The return process needs an overhaul, both in terms of policy and practice. In the meantime, the advice in this section may help individuals navigate the vagaries of the current process based on some common occurrences and best practices.

The ICE directive only covers noncitizens who prevail on PFRs, but individuals who have prevailed on a motion to reopen or reconsider also can follow the steps outlined below. Some attorneys report success with arranging return for these individuals.

A. Initial Considerations: Client Communication and Document Collection

Attorneys should begin arranging return by communicating with the client about the court's decision and verifying that the person wishes to return to the United States. Timing and detention issues are important factors in making this decision.

Timing

An individual who prevails on a PFR need not wait for the mandate to issue for the court's order to take effect.²⁰ Unless and until the court of appeals reverses, amends, or vacates its decision, the government is bound by, and must follow, the court's existing decision.²¹

An individual who prevails on an administrative motion for reopening or reconsideration also can initiate return immediately. If an IJ granted the motion and DHS appealed the grant, DHS may refuse to return the person while the BIA appeal is pending. Such refusal may warrant a

¹⁹ See, e.g., *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“...[P]olicy statements are binding on neither the public, nor the agency.”) (internal citations omitted).

²⁰ Unless the government files a petition for rehearing or receives an extension of time for seeking rehearing, or the court stays the mandate (typically pending a petition for a writ of certiorari), the mandate will issue fifty-two days after the issuance of a decision entering judgment. Fed. R. App. P. 40(a)(1), 41(b).

²¹ See *Wedbush, Noble, Cooke, Inc. v. Securities and Exchange Commission*, 714 F.2d 923, 924 (9th Cir. 1983); *Vo Van Chau et al. v. Dep't of State*, 891 F. Supp. 650, 654 (D.D.C. 1995).

federal court lawsuit seeking to compel return.

Although one can initiate the process of return immediately, the possibility of detention upon return may affect when one decides to initiate the process.

Detention

The FAQ states that “[y]ou may be detained for further immigration proceedings upon your return depending on the circumstances of your case and ICE’s assessment of whether you are subject to mandatory detention under the immigration laws or should otherwise be detained because you pose a danger to the community or risk of flight.” ICE generally has detained returning noncitizens who were detained prior to their removal.²² They have refused, however, to promise that noncitizens who were *not* detained prior to their removal will be afforded the same custody status upon their return.

If feasible, a noncitizen facing a likelihood of detention upon return might consider pursuing her or his case from abroad to the extent possible, and only return once she or he is required to be present (e.g., for an individual hearing before an IJ). If ICE detains a noncitizen upon her or his return, 8 U.S.C. § 1226 should continue to govern the detention, unless another detention provision governed the person’s custody status prior to removal or departure. Importantly, DHS should not treat returning noncitizens as arriving aliens—whether for custody purposes or any other purpose—unless they were arriving aliens prior to their departure or deportation from the United States.

Collecting relevant information and documentation

The directive and FAQ require individuals to have a valid passport or equivalent travel document to return to the United States. These individuals also must provide ICE with certain information, which is specified in the sample letter at the end of this advisory, and includes the following: passport number and expiration date; the address and telephone number for the place where the person intends to live upon return; the closest U.S. consulate where the person can obtain necessary paperwork; and the anticipated port of entry (airport or border entry point).²³

B. Contact and Regular Follow Up with ICE

The FAQ instructs individuals or their representatives²⁴ to affirmatively contact ERO Outreach through its Detention Reporting and Information Line (1-888-351-4024) or a generic email address (ERO.INFO@ice.dhs.gov) and claims that ICE will assign a point of contact to facilitate return. Significantly, however, because a person may need to file a federal court action to compel return, it is advisable to document all return efforts by contacting ICE via email and

²² If the court of appeals ordered removal proceedings terminated, ICE should not detain the noncitizen at all.

²³ To determine the nearest land border, consult this [list of U.S. ports of entry](#): <http://www.cbp.gov/contact/ports>, last visited: April 27, 2015.

²⁴ According to the FAQ, attorneys and accredited representatives need to submit Form G-28. Other individuals seeking to assist with return need to submit an ICE Privacy Waiver Form.

cc:ing attorneys from the Office of Immigration Litigation (who litigated the PFR) and/or the ICE Chief Counsel's Office (who will represent ICE in remanded or reopened removal proceedings).

It is also advisable to complete the ICE, Enforcement and Removal Operations "ERO" Contact Form, which is available at <https://www.ice.gov/webform/ero-contact-form>. A designated use for the form includes "Facilitation of Return to the U.S. for Court Proceedings."

Practitioners report that ICE may respond with unhelpful information, may take a long time to respond, or may not respond at all. If ICE responds and agrees that a person can return, ICE is supposed to assign a point of contact to coordinate the return. However, practitioners should expect that ICE will not timely respond or will not respond at all to a request to facilitate return, and, therefore, should regularly send follow-up emails and make phone calls, all of which should be documented in anticipation of federal court action.

C. Mechanics of ICE-Facilitated Return

Even in situations where ICE agrees to facilitate return, practitioners report a significant lack of coordination within and among ICE, DOS, and Customs and Border Protection (CBP). As discussed above, ICE generally has refused to return LPRs their LPR cards so that they may use them to travel back to the United States. And once an LPR has returned, USCIS has denied the person's I-90 application to replace her or his LPR card. If USCIS refuses to issue the card, consider asking the ICE point of contact to communicate with her sister agency to ensure that USCIS issues the card. If this effort fails, consider evaluating federal court options.

According to the directive, ICE is supposed to engage in activities that would allow the person to travel to the United States. The directive specifically mentions issuance of a Boarding Letter (also known as a "transportation letter") to permit commercial air travel and parole upon arrival at a U.S. port of entry.

Transportation Letters

In nearly all cases it is advisable to request issuance of a transportation letter, which generally is obtained from the nearest U.S. embassy or consulate. This document allows a returning noncitizen to board a commercial airplane or boat to come to the United States. Airlines will not permit passengers to board international flights without proper travel documents. Transportation letters are addressed to passenger transportation companies and supervisory immigration inspectors at the intending port of entry. The letters generally state that the letter holder is considered properly documented to travel to the United States and assure the carrier that it will not be subject to liability for transporting the person.

An individual must present a valid passport or equivalent documentation to obtain the transportation letter. The person who issues the transportation letter may be a consular employee, an ICE attaché, or a USCIS officer stationed overseas. Practitioners have reported confusion and delay among consular officials and miscommunication between them and ICE.

Persistence with ICE and the local U.S. embassy or consulate is the best approach to overcome this problem, in the absence of a more systemic change to the current process.²⁵

Parole

The directive states returning noncitizens will have the immigration status that they had, if any, prior to the entry of the removal order, and the FAQ provides that “[b]ecause ICE regards you as returning to your prior status, ICE will not treat you as an arriving alien unless you had been charged as an arriving alien prior to removal.” Nonetheless, the ICE directive refers to parole as a mechanism for return, without specifying that parole would only be appropriate for those whom DHS deemed arriving aliens prior to their removal order. To the extent that both the FAQ and directive suggest that parole would be a proper mechanism for return for individuals who were not arriving aliens when they were deported, such a policy has serious, negative consequences.

First, there is no guarantee that CBP will allow the person back into the United States. CBP instructions on parole clearly provide that border officials can override a prior decision to grant parole.²⁶

Second, parole does not constitute an admission, *see* 8 U.S.C. § 1182(d)(5), and parolees remain subject to grounds of inadmissibility under § 1182(a) after passing into the United States.

Third, parolees are subject to detention without a bond hearing. 8 C.F.R. § 1003.19(h)(2)(i)(B).

Fourth, parole is temporary, lasting only as long ICE authorizes. In some cases, ICE has granted parole for less than a month, even though remanded removal proceedings may last much longer. Parolees in this situation must request that ICE renew their parole, and may have to make further renewal requests as parole expiration dates approach.

In addition, there may be unpredictable adverse consequences of entering on parole. For example, if the return policy is rescinded or substantially revised in the future, it may be difficult to convince an immigration officer 10 years from now that the person returned under the policy with her or his pre-removal status.²⁷ Given these consequences, we strongly encourage individuals to request a transportation letter or use a valid LPR card (if possible).

If ICE insists on facilitating return via parole, one can attempt to minimize the potential consequences by requesting that ICE or CBP annotate the parole document, I-94, and/or the person’s passport to reflect entry in pre-removal status. Keep in mind that when a person is being paroled in, ICE generally instructs CBP to parole the client in at a specific port of entry

²⁵ For example, one attorney reported that ICE sent the petitioner’s transportation letter to the embassy eleven days before his scheduled return date. The letter then sat in the embassy’s mailroom for days. Only as a result of the attorney’s follow up calls did the embassy finally locate the letter on the date the petitioner was scheduled to return.

²⁶ [CBP Directive No. 3340-043](#), at 5 (Exercise of Discretionary Authority) (Sept. 3, 2008).

²⁷ Note also that immigration forms often will ask for the applicant’s “manner of last entry” into the United States, *see, e.g.,* [Application for Employment Authorization](#), and thus the agency would likely assume that a person who entered on parole was an arriving alien.

during a specific window of time under 8 U.S.C. § 1182(d)(5). ICE may assign a parole reference number to an individual. Again, all returning noncitizens must also possess a valid passport or equivalent documentation.

V. Federal Court Options

A. Overview

1. Litigation to Address ICE’s Refusal to Respect a Federal or Administrative Court Order

Even in the wake of its policy directive, ICE still routinely fails to facilitate the return of individuals after they prevail in federal and administrative courts. Such failures underscore a fundamental lack of respect for administrative and court orders. If ICE expressly refuses to facilitate return or constructively refuses (e.g., is non-responsive), litigation options may be considered.

Any ICE refusal to return someone who has prevailed on a petition for review arguably constitutes a refusal to comply with the circuit court’s order granting the petition for review. In cases where the court’s order restores LPR status, ICE’s refusal to facilitate return also violates its own policy directive. Likewise, ICE’s refusal to return someone who prevails on an administrative motion constitutes a refusal to comply with an IJ or BIA order granting reopening or reconsideration.

There is no meaningful distinction between prevailing on a petition for review and prevailing on a motion to reopen or reconsider. The statutory right to judicial review, 8 U.S.C. § 1252(a), would be meaningless if a petitioner could not benefit from a favorable Article III Court decision. Similarly, the statutory rights to reconsideration and reopening, 8 U.S.C. §§ 1229a(c)(6)&(7),²⁸ and regulatory rights to reopening sua sponte, 8 C.F.R. §§ 1003.23 and 1003.2(a), would be meaningless if a noncitizen could not benefit from a favorable immigration court or BIA decision. Moreover, the effect on the removal order is the same regardless whether

²⁸ In *Dada v. Mukasey*, the Supreme Court held that “[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition.” 554 U.S. 1, 18 (2008). Further, the Court admonished any interpretation that would “nullify a procedure so intrinsic a part of the legislative scheme.” *Dada*, 554 U.S. at 18-19. See also *Kucana v. Holder*, 130 S. Ct. 827, 834, 838-39 (2010) (protecting judicial review of motions to reopen in light of the importance of such motions).

Of relevance here, despite the agency’s attempts to bar post-departure motions, see 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), ten circuits have rejected the validity of this regulatory bar with respect to motions filed pursuant to 8 U.S.C. §§ 1229a(c)(6), (7). See *Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

a circuit court grants a PFR or the immigration court or BIA grants reopening: the final removal order is vacated and the person is restored to pre-removal status.²⁹

Given the difficulties with facilitating return to the U.S., in petition for review cases, consider asking the court of appeals to order return as part of its order granting a petition for review. In *Orabi v. Holder*, 738 F.3d 535 (3d Cir. 2014), the Third Circuit reversed a BIA decision with instructions that the government “be directed to return Orabi to the United States in accordance with the ICE regulations cited.” Although the court’s reference to “regulations” was, in fact, a reference to ICE’s return directive, the court’s inclusion of return instructions in its merits decision can be cited in support of the argument that the court should order return.

2. Create a Paper Trail

As stated throughout this advisory, even if merely contemplating filing litigation to compel return, we strongly advise keeping detailed notes of all conversations and written correspondence related to return. If the only evidence of ICE’s refusal to return the client is oral, such notes may form the basis of a sworn declaration from a person with personal knowledge, attesting to the conversation.³⁰ While attorneys generally should avoid becoming witnesses for their clients, alternative evidence of ICE’s refusal to facilitate return may not be available.

B. Where and What to File

In most cases, a complaint in the district court having jurisdiction over the ICE office responsible for facilitating return is the most appropriate action. Motions and mandamus actions in the courts of appeals also may provide opportunities for redress in some cases.

1. Complaint for Declaratory and Injunctive Relief (District Court)

²⁹ When the BIA reopens a case, the removal order is vacated. *Nken*, 556 U.S. at 430 n.1. See also *Contreras-Bocanegra*, 678 F.3d at 818-19. Furthermore, the removal proceedings are reinstated. *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (holding that “the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings”). Thus, the person is restored to pre-removal status. See *Nken*, 556 U.S. at 435 (stating that persons who prevail on a petition for review “can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal”); Directive, at 1 (“ICE will regard the returned alien as having reverted to the immigration status she or he held, if any, prior to the entry of the removal order . . .”). See also *Matter of Lok*, 18 I&N Dec. 101, 105-06 (BIA 1981) *aff’d*, 681 F.2d 107 (2d Cir. 1982).

³⁰ Declarations attesting to return efforts or ICE’s position should be scrupulously accurate. The tone of such declarations should be detached and written to provide the court with information supporting the facts on which the motion is based. Declarations should not overstate the facts or give personal opinions about actions of government actors or opposing counsel. An unprofessional declaration could undermine the motion.

District courts regularly decide declaratory judgment and injunctive relief actions and, therefore, are arguably the most suitable forum for filing an action to compel return.³¹

A district court action can name several defendants, in their official capacities, including, but not limited to, the Secretary of DHS, the Director of ICE, the Field Office Director of the local ICE office, and the Chief Counsel of the local ICE office.

A district court complaint may allege jurisdiction to review ICE's refusal to facilitate return under 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 701 et seq. (Administrative Procedure Act);³² 28 U.S.C. §§ 2201 and 2202 (declaratory relief); 28 U.S.C. § 1361 (mandamus); and 28 U.S.C. § 1651 (All Writs Act).

The federal venue statute, 28 U.S.C. § 1391, governs where the complaint may be filed. Generally, venue will lie in the district where ICE "resides," *see* 28 U.S.C. § 1391(b)(1), and/or where a substantial part of the events giving rise to ICE's refusal to facilitate return occurred, *see* 28 U.S.C. § 1391(b)(2).

There are at least three types of claims one can raise in a district court action to compel return.

a. *Administrative Procedure Act Claims*

First, ICE's refusal to return the person arguably violates the APA. As an initial matter, it satisfies the APA's judicial review requirement that there be a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Under the APA, a person may ask the court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). A person may also challenge ICE's refusal to return her or him as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," and "in excess of statutory . . . authority, or limitations or short of statutory right," 5 U.S.C. § 706(2)(A)-(C). Further, to the extent ICE defies subpoenas or procedures required by the immigration court, a person may challenge ICE as acting "without observance of procedure required by law," 5 U.S.C. § 706(2)(D).

b. *Constitutional and Statutory Due Process Claims*

Second, ICE's refusal to facilitate return arguably violates the Fifth Amendment's Due Process Clause and a person's statutory rights in removal proceedings, including his right to be present at his own removal proceeding under 8 U.S.C. § 1229a(b)(2). *See also* 8 U.S.C. § 1229a(b)(4)(B) ("the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's behalf, and to cross-examine witnesses presented by the Government . . ."). An individual outside of the United States is substantially hindered in his

³¹ For sample district court complaints, please contact Trina Realmuto at trina@nipnl.org.

³² The APA does not independently grant subject matter jurisdiction, *see Califano v. Sanders*, 430 U.S. 99 (1977), but final agency action is available through federal question jurisdiction. The APA does waive sovereign immunity in actions against the government for injunctive relief, which is necessary for the court to exercise its jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Thus, the APA can be listed in the jurisdictional section of a complaint.

ability to testify, present witnesses and evidence, consult with his attorneys, and cross-examine the government's witnesses and examine its evidence.

Third, as discussed above, ICE's refusal to facilitate return also arguably violates the statutory right to judicial review, 8 U.S.C. § 1252(a), which is effectively rendered meaningless when a petitioner cannot benefit from a favorable court of appeals decision. Congress intended petitions for review of agency decisions to function as an "adequate and effective substitute for habeas corpus review."³³ Accordingly, like a district court judge sitting in habeas, a court of appeals panel must have authority to order effective relief, i.e., ensure that the petitioner is returned.³⁴ Any other conclusion would raise serious Suspension Clause problems, U.S. Const. Art. I, § 9, cl. 2. Similarly, ICE's refusal to return also may violate the individual's statutory rights to reconsideration or reopening, 8 U.S.C. §§ 1229a(c)(6)&(7), or regulatory right to reopening sua sponte, 8 C.F.R. §§ 1003.23 and 1003.2(a). It also may violate the individual's statutory and regulatory rights to seek the relief at issue in his or her removal proceedings. These statutory and regulatory rights also are effectively nullified if the individual cannot return to pursue either relief from removal or the benefits of reopening or reconsideration.

c. *Mandamus*

Finally, the complaint might include a claim that ICE's refusal to facilitate return warrants injunctive relief in the form of a writ of mandamus compelling ICE to perform its ministerial duty of returning the person. In order for a court to grant mandamus relief, the person must show that: (a) she or he has a clear right to the relief requested; (b) the defendant has a clear duty to perform the act in question; and (c) no other adequate remedy is available. *See, e.g., Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002).

At the end of the complaint, we suggest asking the district court to: (a) accept jurisdiction over the action; (b) declare that defendants' refusal to facilitate the plaintiff's return to the United States violates the Immigration and Nationality Act, the Fifth Amendment's Due Process Clause, and the Administrative Procedure Act; (c) order defendants to immediately facilitate plaintiff's prompt return to the United States – either pursuant to Federal Rule of Civil Procedure 65, pursuant to a writ of mandamus or pursuant to the court's inherent powers under 28 U.S.C. § 1651 and Article III; (d) grant attorneys' fees and costs under 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and any other relevant authority; and (e) grant such other and further relief as the court deems just and proper under the circumstances.

³³ *See Luna v. Holder*, 637 F.3d 85, 94 (2d Cir. 2011) ("In response to the Supreme Court's decision in *St. Cyr*, Congress passed the REAL ID Act, again channeling review of removal orders into the courts of appeals. With this Act, Congress intended to provide a scheme of judicial review which is an adequate and effective substitute for habeas corpus.") (internal quotation marks and citations omitted).

³⁴ *See Boumediene v. Bush*, 553 U.S. 723, 787 (2008) ("We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief.").

2. Motions Requesting Return (Circuit Court)

In cases where the court of appeals exercised its jurisdiction over the case, for example, in a petition for review or district court appeal, the circuit court should continue to have jurisdiction to entertain motions related to the main case, e.g., a motion asking the court to order the person's return. *See* Fed. R. App. Proc. 27(a)(1) ("An application for an order or other relief is made by motion unless otherwise provided by these rules"). There is no particular name for such a motion, but some ideas include: motion to enforce court's order, motion to order respondent to cause petitioner's return to the United States, and motion for ancillary relief to enforce court's order.³⁵ In extreme situations, some attorneys also have filed contempt motions for refusal to comply with the court's order.

3. Mandamus (Circuit Court)

Mandamus is appropriate to maintain the integrity of an earlier court decision.³⁶ If ICE flouts a circuit court decision by refusing to return a petitioner to the United States for execution of that decision, the circuit court arguably has the authority and the duty to preserve the effectiveness of its earlier decision by exercising mandamus jurisdiction.

The Ninth Circuit decision in *Ramon-Sepulveda v. Immigration & Naturalization Service*, 824 F.2d 749 (9th Cir. 1987), is an example of a successful circuit court mandamus action. In that case, the Ninth Circuit issued a writ of mandamus to preserve the effect of its prior decision to grant a petition for review. In its earlier decision, the court held that an IJ cannot reopen deportation proceedings where the evidence (in that case, a birth certificate) was not "newly discovered." *Id.* at 750. Following that decision, the former Immigration and Naturalization Service (INS) initiated new deportation proceedings based solely on the *same* birth certificate. *Id.* Petitioner then filed a mandamus action directly with the court of appeals, arguing that INS' initiation of new proceedings violated the court's earlier decision. The court agreed and issued a writ of mandamus, stating "[i]t is our mandate that the INS flouts. We have the authority and the duty to preserve the effectiveness of our earlier judgment." *Id.* at 751.

VI. Suggested Strategies for Avoiding In Absentia Orders in Removal Proceedings for Respondents Stranded Abroad

Practitioners may face an upcoming immigration court hearing for a client whom ICE has refused to return. In these situations, practitioners may consider the following strategies to avoid an *in absentia* removal order under 8 U.S.C. § 1229a(b)(5) while continuing to pursue administrative and federal court options to secure the client's return.

³⁵ In *Orabi v. Holder*, 738 F.3d 535 (3d Cir. 2014), the Third Circuit granted a petition for review and ordered the government to return petitioner. Thus, *Orabi* provides some authority for a court's ability to order return.

³⁶ *See, e.g., Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999); *Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980); *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977); *see also Miguel v. McCarl*, 291 U.S. 442, 451-52 (1934).

- Seek a continuance of the hearing pursuant to 8 C.F.R. § 1003.29. An IJ must assess whether a respondent demonstrates “good cause” for requesting a continuance. Where ICE has refused to return the client, arguably good cause is shown.
- Ask the IJ for a subpoena. *See* 8 U.S.C. § 1229a(b)(1), 8 C.F.R. § 1003.35. Immigration judges have the authority to issue subpoenas for the “attendance of witnesses and presentation of evidence.” 8 U.S.C. § 1229a(b)(1). Thus, the IJ may issue a subpoena for DHS to produce a respondent to be a witness and to present evidence at his or her hearing.
- Obtain the client’s consent to proceed in her or his absence pursuant to 8 U.S.C. § 1229a(b)(2)(A)(iii). In limited situations, the client’s presence may not be necessary for a master calendar hearing to take place if, for example, the judge is simply setting the date for an application to be filed and/or setting a hearing date.
- Move for administrative closure pursuant to *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). In *Matter of Avetisyan*, the BIA held that IJs may administratively close removal proceedings, even if one of the parties objects. Administrative closure may not be a suitable option as ICE may be even less inclined to return respondents whose cases have been administratively closed. Moreover, if simultaneously pursuing federal court litigation to compel return, having a forthcoming hearing date by which the person must return is strategically helpful.
- Build the record! If the IJ seems inclined to issue a ruling that is not in the respondent’s best interest (e.g., *in absentia* order or administrative closure) because ICE refuses to bring the client back, it is imperative that counsel object to the IJ’s ruling to preserve any and all appeal issues on the record. As noted above, ICE’s refusal to facilitate return arguably also violates the Fifth Amendment’s Due Process Clause and a person’s statutory rights in removal proceedings, including the right to be present at one’s own removal proceeding under 8 U.S.C. § 1229a(b)(2). *See also* 8 U.S.C. § 1229a(b)(4)(B) (“the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s behalf, and to cross-examine witnesses presented by the Government . . .”). An individual outside of the United States is substantially hindered in his ability to testify, present witnesses and evidence, consult with his attorneys, and cross-examine the government’s witnesses and examine its evidence.

VII. Conclusion

ICE’s current return “policy”—a product of the embarrassing revelation that, contrary to the OSG’s representations to the Supreme Court, the government lacked a “policy and practice” of providing “effective relief” to individuals who prevail in their cases—fails on several counts. The return policy is incomplete and vests unfettered discretion in the party responsible for removal in the first place. The directive does not cover noncitizens who prevail on motions to reopen or reconsider before an IJ or the BIA or petitioners who are non-LPRs (and whose presence ICE does not deem necessary). ICE also refuses to pay for the cost of return for any petitioner, even indigent ones. Finally, ICE refuses to return noncitizens who prevail on PFRs whenever it deems their presence unnecessary.

An incredible lack of coordination within and among the relevant agencies plagues the process. Some practitioners have had to file a complaint in district court seeking to compel return.

Practitioners whose clients are considering seeking return to the United States should contact the ICE Enforcement and Removal Office, to see if the agency will agree to facilitate return and to begin making arrangements. If that process fails to yield return, practitioners should consider litigation options.

Contact us

Practitioners are constantly confronting new and complicated obstacles in seeking the return of their clients. Please contact the National Immigration Project at trina@nipnlg.org or the American Immigration Council at clearinghouse@immcouncil.org if you would like help strategizing around these situations.

Sample Email to ICE ERO

To: ERO.INFO@ice.dhs.gov

To Whom It May Concern:

My firm represents an individual ([NAME], A# _____) who is currently in [CITY, COUNTRY]. [If applicable: [NAME] has a hearing before the [LOCATION] Immigration Court on [DATE]]. I write to seek your assistance in returning [NAME] to the United States [in advance of that hearing / in an expeditious manner].

On [DATE], [NAME] was removed based on [DESCRIBE BASIS FOR ORDER OF REMOVAL]. Subsequently, [DESCRIBE NATURE OF PROCEEDINGS SINCE THEN]. On [DATE], [COURT/BIA/IJ] granted [NAME]'s [motion for reopening/rehearing or Petition for Review]. A copy of the decision is attached to this email.

[For cases involving returning LPRs who prevail on PFRs, consider adding: As your agency acknowledged in its Feb. 24, 2012 directive, when a PFR is granted, the "alien will once again, in contemplation of law, be an LPR even though removal proceedings may still be pending before EOIR on remand." See also *Matter of Lok*, 18 I&N Dec. 101, 106 (BIA 1981).]

OR

[For cases involving returning LPRs who prevail on motions to reopen, consider adding: When a case is reopened, the removal order is vacated. *Nken v. Holder*, 556 U.S. 418 (2009). Reopening restores the person to her/his status prior to the removal order, i.e., lawful permanent resident. See *Matter of Lok*, 18 I&N Dec. 101, 106 (BIA 1981) (holding that LPR status terminates when there is a final order, but that "reversal on the merits of that deportability finding by an appellate court or administratively upon a motion for reopening or reconsideration" can restore lawful permanent resident status").]

Accordingly, [NAME] must be [if applicable: restored to her/his pre-removal status] and allowed to pursue [RELIEF]. I respectfully request your assistance in facilitating her/his return to the United States so that s/he may be restored to this status.

[If applicable: Furthermore, I note that the [Court/BIA/IJ] specifically ordered that [NAME] be permitted to enter the United States for her/his calendar hearing on [DATE]. Therefore, if [NAME] is not permitted to enter the United States for this purpose, your agency will have failed to comply with the [Judge's/IJ's] order. Although I hope this does not occur, such a failure will force my office to consider other actions, including whether to file an action in federal court seeking to compel compliance with the order.]

I am also supplying the follow information to assist with return arrangements: [If applicable: federal court case #]; passport # and expiration date; the address and telephone # at the place where [NAME] intends to live upon return; the closest U.S. consulate to obtain necessary paperwork; and anticipated port of entry.

I appreciate your prompt assistance with this matter.

Sincerely,

[Attorney Name]

Web Addresses for Documents Referenced in this Advisory

- ICE Policy Directive Number 11061.1 (Feb. 24, 2012), http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.
- U.S. ICE, Frequently Asked Questions about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (2012), available at <http://www.ice.gov/ero/faq-return-certain-lawfully-removed-aliens>.
- U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Contact Form, <https://www.ice.gov/webform/ero-contact-form>
- *Victory Denied: After Winning On Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad*, New York University School of Law Immigrant Rights Clinic (July 2014), http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/2014-7-3%20Victory%20Denied.pdf.
- National Immigration Project of the National Lawyers Guild, et al., *Seeking a Judicial Stay of Removal in the Court Of Appeals: Standard, Implications Of Ice's Return Policy and the OSG's Misrepresentation to the Supreme Court, and Sample Stay Motion* (Jan. 21, 2014), http://nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_Judicial_Stay_1-21-2014.pdf.
- Letter from Michael R. Dreeben, Deputy Solicitor General, to Hon. William K. Suter, Clerk of the Supreme Court (Apr. 24, 2012), http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG_Letter_to_Supreme_Court,_Including_Attachments_-_April_24_2012.pdf
- Letter from Paul R.Q. Wolfson and Adam Raviv to Hon. William K. Suter, Clerk of the Supreme Court (May 4, 2012), http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Amici_Letter_to_the_Supreme_Court_in_Nken_-_May_4_2012.pdf.
- CBP Directive No. 3340-043, at 5 (The Exercise of Discretionary Authority) (Sept. 3, 2008), http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20%28Partially%20Redacted%29%20-%20Sept%203%202008.pdf.

Case documents, case updates, and the documents the government disclosed through the FOIA litigation and to the Supreme Court in *Nken* are available on the NIPNLG website at <http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.