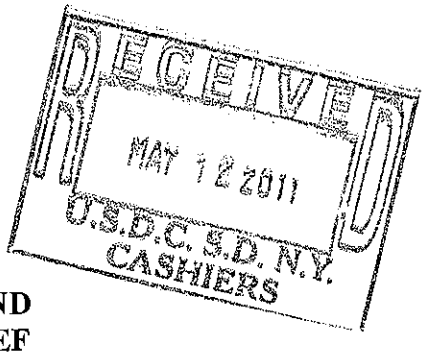
11 CV 3235

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT, AND RACHEL ROSENBLOOM, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES;UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF STATE, Defendants.	Civil Action No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., for injunctive and other appropriate relief to obtain the disclosure of agency records improperly withheld by defendants United States Department of Homeland Security ("DHS"), United States Citizenship and Immigration Services ("USCIS"), United States Immigration and Customs Enforcement ("ICE"), United States Customs and Border Protection ("CBP"), United States Department of Justice ("DOJ"), and United States Department of State ("DOS").

2. Plaintiffs seek records regarding the government's claims that it facilitates the return of individuals who prevail in their immigration cases from outside the United States. The records sought are a matter of great public concern. Individuals, lawyers, courts, and the larger public need to know whether and to what extent the government adheres to a policy and practice of returning individuals who prevail in their immigration appeals. Specifically, the requested information will enable individuals seeking return and their advocates to obtain long-sought relief and reunion with family and community in the United States. It will also inform courts adjudicating stay requests on whether irreparable harm results from removing individuals while their appeals are pending and allow litigants to make considered decisions as to whether to seek a stay of removal. Additionally, this information will allow the public to assess the government policy on removing individuals while their cases are on appeal and will ensure the fundamental fairness of immigration proceedings and meaningful judicial review.

3. Each year, the federal courts may vacate or reverse more than 1,000 removal orders. *See* Executive Office for Immigration Review Office of Planning, Analysis & Technology, FY 2010 Statistical Year Book T2 tbl.16 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. A significant number of these cases involve individuals who challenge their removability from outside the United States because the government maintains a policy of deporting individuals while their appeals are pending or before individuals have time to file an appeal, or because individuals acquiesce to removal based on the government's promise to facilitate their return if they should prevail in their immigration cases. In addition, the number of individuals who prevail in their immigration cases from abroad will likely increase because the circuit

courts have recognized that the BIA has jurisdiction to reopen and reconsider the removal orders of petitioners located abroad. *See infra* ¶ 39 (explaining that the Second, Fourth, Seventh, and Ninth circuits have held that the BIA has jurisdiction to review motions to reconsider and reopen the removal orders of individuals located abroad).

4. The government has made repeated public statements that it has a policy and practice of bringing back individuals who prevail in their immigration cases from abroad and continues to oppose motions to stay removal based on this promise to bring back individuals. *See e.g.* Brief for Respondent at 44, *Nken v. Holder*, 129 S.Ct. 1749 (2009) (08-681) ("by policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States"); *Spence v. Holder*, No. 09-60102, slip op. at 2 n. 4 (5th Cir. Feb. 8, 2011) (quoting the government's statement in its brief that "[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can been afforded [sic] effective relief by facilitation on their return, along with restoration of the immigration status…").

5. However, individuals who prevail in their immigration cases from abroad have faced substantial difficulty returning to the United States. Despite efforts to seek out the government agencies and components responsible for facilitating return, individuals, their lawyers, and community organizations remain in the dark regarding the actual government process for return. Instead, as the experiences of individuals below detail, our government agencies have constructed multiple barriers to return which has resulted in individuals and their advocates spending months and years trying to return to family and community in this country. Barriers include government agencies refusing to issue

the necessary travel documents for return, placing the burden on individuals to pay for application fees and travel costs, detaining or threatening to detain individuals upon arrival in the U.S., and failing to return individuals to the status they held prior to removal. Generally, there is a lack of clarity or consistency as to which government agencies are responsible for arranging return and an attitude of indifference as to how, if at all, individuals can return. *See infra* ¶¶ 25-35.

6. In light of the concern over the government's representations that it facilitates return and the difficulty individuals actually experience in returning to the United States, Plaintiffs submitted FOIA requests to Defendants on December 17, 2009, seeking records related to data and statistical information; informal communications, policies, procedures, and training materials; forms used to track cases; inter-agency communication; and documents relating to facilitating the return of individuals to the United States or claims thereof. *See* Exs. M, N, O. Defendants have failed to provide an adequate response to Plaintiffs' requests within the statutory timeframe.

JURISDICTION AND VENUE

7. This Court has both subject matter jurisdiction over this action and personal jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346.

8. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. §§ 1391(e) and 1402(a) as the American Civil Liberties Union Foundation and the Immigrant Defense Project reside in this district.

PARTIES

9. Plaintiff the National Immigration Project of the National Lawyers Guild is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws, including noncitizens in immigration proceedings and persons who have been removed. The National Immigration Project has been promoting justice, transparency and government accountability in all areas of immigration law and social policies related to immigration for over forty years. Appearing as amicus curiae, the National Immigration Project litigates before the circuit courts of appeals in cases challenging regulatory bars to review of motions to reopen or reconsider after deportation or departure from the United States. Through its membership network and litigation efforts, the National Immigration Project is acutely aware of the problems faced by noncitizens outside the United States who seek to return to the United States after prevailing before the Executive Office for Immigration Review (EOIR) or the federal courts. The National Immigration Project has consulted with attorneys, advocates and noncitizens seeking to enforce agency or court decisions, including Supreme Court decisions, which necessitate the noncitizen's return to the United States.

10. Plaintiff the American Civil Liberties Union Foundation, together with its affiliate, the American Civil Liberties Union ("ACLU"), a nationwide non-partisan organization of approximately 500,000 members, is dedicated to defending and preserving the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. Through the work of its Immigrants' Rights Project ("IRP"), the ACLU Foundation engages in litigation, advocacy, and public

education to defend and expand the rights of noncitizens. The issues raised by this case are central to the work of the IRP, and relatedly, to the ACLU Foundation. For example, the IRP has been in the forefront of litigation challenging prolonged immigration detention and the denial of judicial review to noncitizens facing removal. In both situations, the government's failure to put in place transparent policies that guarantee return of individuals who prevail in their removal cases has profound consequences for immigrants who are often forced to remain in jail while fighting their cases, rather than risk permanent deportation by returning to their countries of origin while their cases make their way through the courts. It is crucial to IRP's advocacy in this area to have full information as to the procedures in place to return deportees because in certain cases, the government's refusal to return deportees can thwart non-citizens' right to judicial review.

11. Plaintiff the Immigrant Defense Project ("IDP") promotes fundamental fairness for immigrants who are at risk of deportation due to criminal charges or convictions. IDP trains and consults with attorneys, community organizations and immigrants themselves on the impact that criminal charges and convictions can have on the ability to remain in or return to the United States. IDP also has appeared as amicus curiae before the U.S. Supreme Court, federal Courts of Appeals and the Board of Immigration Appeals in cases challenging the government's overbroad interpretation of immigration law and has issued numerous practice advisories following decisions that have rejected the government's position. Through this work, IDP has become acutely aware of the obstacles faced by immigrants who are deported or otherwise outside the country while their cases are pending or who are ordered deported based on an interpretation of immigration law that is later found to be inaccurate. The largest and most unnecessary obstacle is the lack of

transparency about the government's policies on facilitating the return of people who prevail in their removal cases from abroad. This also inhibits our ability to inform immigrants and their attorneys about the practical impact of litigating their cases from outside the country and on how to return to the United States after they prevail.

12. Plaintiff the Post-Deportation Human Rights Project (PDHRP) offers a novel and multi-tiered approach to the problem of harsh and unlawful deportations from the United States. It is the first and only legal advocacy project dedicated to the representation of individuals who have been deported from the United States. The PDHRP also aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Its ultimate goal is to introduce correct legal principles, predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country.

13. Rachel E. Rosenbloom is an Assistant Professor of Law at Northeastern University School of Law. Prior to beginning her teaching career, she was the Supervising Attorney at the Post-Deportation Human Rights Project, a project of the Center for Human Rights and International Justice at Boston College. In that capacity, she represented individuals who had been wrongly removed from the United States in their efforts to return to this country. Her current research concerns the phenomenon of wrongful removal and the scope of post-removal remedies. In particular, her scholarship focuses on the inadequacy of current administrative procedures for facilitating the return

of former lawful permanent residents who have been removed on the basis of erroneous interpretations of the law or on the basis of criminal convictions that have since been vacated. She is the author of two law review articles on this subject. She is also currently involved in the American Bar Association Administrative Law Section's study of the "departure bar" on motions to reopen removal proceedings.

14. Defendant United States Department of Homeland Security is the umbrella agency for CBP, ICE, and USCIS.

15. Defendant United States Customs and Border Protection is a department of the United States Department of Homeland Security which is primarily responsible for facilitating cross-border trade and travel.

16. Defendant United States Immigration and Customs Enforcement is a department of the United States Department of Homeland Security that enforces immigration and customs laws and is responsible for investigating a range of domestic and international activities arising from the movement of people and goods into, within and out of the United States. It has offices in all 50 states and in foreign countries.

17. Defendant United States Citizenship and Immigration Services is a department of the United States Department of Homeland Security that oversees immigration and citizenship benefits and information services including the adjudication of immigration benefits and petitions, provision of travel documents, and provision of information services. It has field offices located throughout the U.S and in foreign countries.

18. Defendant United States Department of Justice is a Department of the Executive Branch of the United States government. A number of its agency components are responsible for interpreting immigration law and defending government actions towards

immigrants before the courts including the Office of Immigration Litigation ("OIL"), Office of the Solicitor General ("OSG"), the Executive Office for Immigration Review ("EOIR"), and the Board of Immigration Appeals ("BIA").

19. Defendant United States Department of State is a Department of the Executive Branch of the United States government responsible for the international relations of the United States. Its responsibilities include consular visa processing, issuing travel documents for individuals who seek entry into the United States, and serving as the representative of the United States government for individuals residing in foreign countries.

STATEMENT OF THE FACTS

Background

20. Since 2005, the federal circuit courts alone have vacated or reversed more than 7,000 removal orders.[1] *See* Executive Office for Immigration Review Office of Planning, Analysis & Technology, FY 2010 Statistical Year Book T2 tbl.16 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. A significant number of these removal orders involve individuals challenging their removability from outside the United States. This is because the DHS and DOJ maintain a policy of removing individuals while their petitions for review or motions to reopen or reconsider are pending. *See Nken v. Holder*, 129 S. Ct. 1749 (2009) (explaining that after the law changed in 1996, immigrants no longer had automatic stays of removal when challenging their removal orders in federal court); *Coyt v. Holder*, 593 F.3d 902, 904 (9th Cir. 2010) (individual was removed while his motion to reopen was pending before the BIA).

Moreover, some individuals end up challenging their removability from abroad because they are deported before they have time to file a petition for review or a motion to reopen and reconsider, or acquiesce to removal because of the conditions of detention and the government promise that they can pursue their appeals from abroad. *See e.g. Reyes-Torres v. Holder*, No. 08-74452 and No. 09-70214 (9th Cir. Apr. 7, 2011) (individual was removed from the U.S. seven days after the Board affirmed the removal order and before he filed petition for review and a BIA motion to reopen and reconsider); Hohenstein Decl. Ex. G ¶¶ 23-24 (explaining that one of his clients filed a motion to rescind the stay order because he was concerned about his ability to survive immigration detention given his medical condition and the assumption that he could pursue his petition from abroad).

A. The Government Has Made Repeated Representations That It Has a System for Returning Individuals Who Prevail in Their Removal proceedings from Outside the United States

21. The government has represented to the courts, individuals, and the public that it has a policy and practice of returning individuals who prevail in their removal proceedings from outside of the United States. In its brief to the Supreme Court in *Nken v. Holder*, the government stated that "by policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States by parole under 8 U.S.C. § 1182(d)(5) if necessary." *See* Brief for Respondent at 44, *Nken v. Holder*, 129 S.Ct. 1749 (2009) (No. 08-681) (2009 WL 45980). Based on this representation, the Office of the Solicitor General in *Nken v. Holder* argued that the legal standard for stays in the removal context should be not be lowered since individuals

[1] This number underestimates the number of cases in which immigrants prevail in challenges to final orders of removal since it does not take into account the additional cases reopened by Immigration Judges

could pursue their immigration cases from abroad and would be returned to the United States if they prevailed. *Id.*

22. In April 2009, in its decision in *Nken v. Holder*, the Supreme Court stated that the "burden of removal alone cannot constitute the requisite irreparable injury," relying on the government's statement that "those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Nken*, 129 S.Ct. at 1761 (citing Brief for Respondent 44). And various lower federal courts have adopted the government's statements as fact. *See, e.g., Leiva-Perez v. Holder*, No. 09-71636, slip op. 9-10 (9th Cir. Apr. 1, 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 n.3 (5th Cir. 2010); *Desire v. Holder*, No. CV 08-1329-PHX-SRB, slip op. at 2 (D.Ariz. Dec. 14, 2009).

23. Since *Nken v. Holder*, OIL and OSG, components of the DOJ, have continued to represent that the government facilitates the return of individuals in opposing individuals' motions to stay removal pending judicial review. *See, e.g.*, Respondent's Opposition to Petitioner's Motion for a Stay of removal Proceedings at 6, n.1, *Adam v. Holder*, No. 10-13912-D (11th Cir. Sept. 13, 2010); *Spence v. Holder*, No. 09-60102, slip op. at 2 n. 4 (5th Cir. Feb. 8, 2011); Respondent's Opposition to Petitioner's Motion for a Stay of Removal at 4 n.2, *Sawboh v. Holder*, No. 09-70916 (9th Cir. Jun. 2, 2009).

24. Moreover, the government has acknowledged that the issuance of a court's mandate invalidating a removal order restores the immigrant to the status he had prior to the removal order. *See* Respondent's Opposition to Petitioner's Motion to Amend the Court's December 22, 2008 Decision at 11, *Sandoval-Macias v. Mukasey*, 304 Fed.Appx. 558 (9th Cir. 2008) ("once the Court's mandate issues in this case, there will no longer be

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and the BIA after a final order is issued.

a final order of removal against Sandoval and his status as a lawful permanent resident will be restored, along with his entitlement to evidence demonstrating of that status"); Brief for Respondent at 44, *Nken v. Holder*, 129 S.Ct. 1749 (2009) (08-681) (stating that "the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by providing effective relief by…according them the status they had at the time of removal"); Ex. Y, at 1 (Letter from Joseph D. Hardy, Trial Attorney, Office of Immigration Litigation at 1, *Hing Chuen Wu v. Holder*, No. 08-60073 (5th Cir. April 1, 2009)) ("A grant of the Petition…would vacate the entry of an order of removal against Mr. Wu and he would, for the time being, not lose his lawful permanent resident status.") This would seem to confirm that the government itself recognizes that individuals removed under invalid orders are entitled to return to the United States, though the experiences of individuals and advocates below show that the government does not do this in practice.

B. There Is Widespread Confusion About How Individuals Can Return to the United States after They Prevail in Their Immigration Appeals

25. Individuals who prevail in their immigration cases from outside the United States have experienced substantial difficulty returning to the United States. The experience of these individuals and their legal advocates evince a government bureaucracy with no consistent policy for facilitating return. For these reasons, there remains widespread confusion and concern about whether and how government agencies and components return individuals to U.S. family and community.

a. Government Agencies Have Made Contradictory Statements as to Whether and How the Government Facilitates Return and Have Yet to Reveal to the Public How Individuals Can Return

26. The agencies themselves have sent mixed messages to the public as to whether and how the government facilitates return, often diverting the responsibility for facilitating return on sister agencies and divisions. For example, the Office of Immigration Litigation (OIL) has told courts and attorneys that it takes no part in bringing individuals back. *See* Hohenstein Decl. Ex. G, at ¶ 11 (in response to petitioner's Motion for Contempt to the Third Circuit, the government argued that it had no legal obligation to facilitate his return and was not responsible for any expenses incurred in return because petitioner was removed pursuant to a lawful order); Drake Decl. Ex. B, at ¶ XII-XIII (OIL stated it "had not been delegated the authority to arrange Mr. Kueviakoe's return.") Yet, in practice, OIL has played a central role in facilitating return. *See e.g.* Hirota Decl. Ex. F, at ¶¶ 4-5 (stating that she was able to facilitate the return of her client by reaching out to opposing OIL counsel); Mattos Decl. Ex. L, at ¶ 7 (stating that OIL agreed to return her client and referred her to the local ICE office to coordinate return; when local ICE officials were unwilling to act, it was OIL that called ICE in Washington, D.C. and got the local ICE officials to agree to assist in her client's return). Moreover, one ICE Chief Counsel has publicly stated that OIL attorneys are the point persons to contact for facilitating return of an individual who prevailed at the circuit court. *See* Audio CD: Back in the USA: How to Return After Relief Has Been Granted, AILA 2009 Annual Conference, held by American Immigration Lawyers Association (Jun. 3-6, 2009) (on file with Plaintiffs' counsel) ("The OIL attorneys usually represent the government in the circuit court matters, the U.S. District Attorney's Office represents

us sometimes in tandem with OIL on district court matters, so I would urge you to contact, as a first point of contact, the attorney that's representing the government in the matter that you're dealing with…I would not contact [ICE] Chief Counsel's office at first instance.")

27. In turn, ICE and CBP have stated that their roles in facilitating return vary on a case by case basis and have not clearly identified the agencies otherwise responsible for returning individuals or the factors used in determining whether an individual should be returned. *See* Sandra Hernandez, *He Can't Come Home Again*, Miami New Times, Sept. 10, 2009, *available at*: http://www.miaminewtimes.com/2009-09-10/news/he-can-t-come-home-again-david-gerbier-deported-to-haiti/ (quoting DHS spokesman, "[O]ur role in these cases varies on a case-by-case basis."); Ex. R (Final Response of CBP (April 21, 2010)) ("The Office of Field Operations has no set procedure for admitting these individuals. Each situation is handled on a case by case basis…."). And despite representing in its own field guide manual that it facilitates return of individuals for participation in legal proceedings, USCIS has stated to individuals and legal advocates that it will not facilitate return. *See* Ex. X (USCIS Office of Communications, "USCIS American Immigration Lawyers Association (AILA) Meeting, September 27, 2007, *Answers to AILA Questions*") ("the CIS Humanitarian Parole Program does not include aliens in removal proceedings who must still apply to ICE"); *but see* USCIS Adjudicator's Field Manual § 51(b) (stating that a grant of parole is "authorized for an alien who is needed to participate in a law enforcement investigation, prosecution, or other legal proceedings"); Drake Decl. Ex B, at ¶ XIII (ICE counsel refused to grant entry to his client and recommended that his client apply for parole with USCIS).

28. DOS and embassy offices abroad have also made contradictory statements regarding their role in facilitating return. In some instances, the U.S. Embassy has refused to facilitate the return of individuals who prevail in their immigration cases. *See* Gerbier Decl. Ex. C, at ¶¶ 10-21 (Mr. Gerbier, a pro se individual, was repeatedly refused assistance from the U.S. Embassy in Port-au-Prince despite presenting his Third Circuit decision vacating his removal order to embassy officials and was only able to return after obtaining pro bono counsel); Lin Decl. Ex. H, at ¶¶ 7-21 (explaining that she made multiple calls to multiple embassy officials in Colombia requesting assistance in returning her client and eventually received an email from the Immigration Visa Unit stating that she should contact DHS and that the consulate could not issue the necessary paperwork). Other cases show the central role that DOS plays in deciding whether an individual can return to the United States. As lawyer Joe Hohenstein explains, in three cases in which he requested government assistance in facilitating return, the process suffered significant delays because State Department personnel refused to issue the necessary travel documents or explain the procedure for how to obtain the paperwork even after ICE and/or the DOJ agreed to facilitate return. *See* Hohenstein Decl. Ex. G, at ¶¶ 13, 31, 37.

b. The Lack of Information About How the Government Facilitates Return and Inconsistent Practices of the Government Have Created Serious Obstacles to Return

i. The Government Requires that Individuals Obtain Documentation to Return to the U.S. But Has Not Disclosed Which Documents Are Necessary or the Agency Responsible for Issuing the Paperwork

29. The government's inconsistent practices have created multiple barriers to return. For one, there is no available information regarding the necessary paperwork for return or

which agency is responsible for issuing such paperwork. In some cases, agencies have facilitated return by treating individuals as returning legal permanent residents. Chicco Decl. Ex. A, at ¶ 3. In other cases, the government requires that individuals present themselves at a border crossing or apply for parole. *See id.*; Maldonado Decl. Ex. I., at ¶¶ 4-7 (stating that ICE asked client to present himself at the U.S.-Mexican border crossing in Brownsville, Texas despite the fact that his client was from Peru and would not be able to travel through Mexico); Hirota Decl. Ex. F, at ¶ 6 (stating that ICE facilitated return by granting parole status to her client).

30. Some individuals are simply told that the government cannot facilitate return, or are only able to secure the necessary paperwork through the continued persistence of legal advocates. *See* Hohenstein Decl. Ex. G, at ¶¶ 4-16 (stating that he had to file a contempt motion with the Third Circuit in order to persuade ICE to issue a boarding letter to one of his clients because ICE, DOJ, and U.S. consulate had previously refused to facilitate return); Mattos Decl. Ex. L, at ¶¶ 4-11 (ICE and OIL initially claimed to be unaware of return procedures but became responsive after attorney filed motion to amend the judgment); *see also* Drake Decl. Ex. B, at ¶ XII-XIX (explaining that his client has been prevented from appearing in person for his asylum hearing on remand because both ICE and USCIS have refused to facilitate his reentry and OIL claims it has no authority to facilitate return); Markley Decl. Ex. K, at ¶¶ 14-16 (DHS was unresponsive to repeated attempts to confer regarding the process of return and provided contradictory and incorrect information about the process).

31. The stories of individuals seeking return illustrate just how difficult the process of return can be. For example, even though the Supreme Court of the United States

reversed his removal order and recognized that his deportation should not prevent him from pursuing his application for relief before the immigration judge, Jose Antonio Lopez experienced substantial difficulty returning to the United States. *See Lopez v. Gonzales*, 549 U.S. 47 (2006); Mattos Decl. Ex. L, at ¶¶ 2-10. As lawyer Patricia Mattos explained, "I contacted Mr. Lopez's deportation officer in the Immigration and Customs Enforcement ("ICE") office…as well as opposing counsel from the Department of Justice Office of Immigration Litigation ("OIL") but neither one knew of any procedures to arrange my client's return." *Id.*, at ¶ 4. Even after his lawyer filed a motion with the Circuit court requesting that it order return and negotiated a grant of parole, Mr. Lopez still had difficulty returning. *Id.*, at ¶¶ 8-9 (explaining that despite obtaining parole and making arrangements with ICE so that her client could enter at the Sonora border crossing on a certain date, Mr. Lopez was "turned away the first time he presented himself at the border. Border agents humiliated Mr. Lopez by yelling at him in front of a long line of people and telling him that as a deportee, he could never come back to the United States.")

32. In another example, David Gerbier, a long time legal permanent resident, spent eight years in Haiti after the Third Circuit overturned his removal order because government officials refused to facilitate his return to the United States. Following the Third Circuit's decision, the government assured the court that it would facilitate Mr. Gerbier's return. Responding to Mr. Gerbier's attorney requesting that the court order the government to allow Mr. Gerbier to return to the U.S., the government told the court that the process of arranging return was "already underway" and the Third Circuit denied Mr. Gerbier's motion. *See* Mark Decl Ex. J., at ¶ 2. However, assistance never arrived.

Between 2002 and 2009, Mr. Gerbier made various visits to the U.S. Embassy in Port-au-Prince seeking assistance. *Id*. ¶ 3. He was repeatedly turned away by embassy officials when he presented them with court documents showing that he prevailed in his Third Circuit appeal. *Id.* Even after Mr. Gerbier obtained representation and his counsel communicated with the embassy, the government continued to refuse to facilitate his return. Gerbier Decl. Ex. C, at ¶ 9-28, 32 ("Although I tried very hard, I was not able to get back to the U.S. until after I had the help of lawyers. Even after I had lawyers, it took many months before I was able to return."); Mark Decl. Ex. J, at ¶¶ 5-13 (explaining that neither the Consular section nor USCIS at the embassy in Port-au-Prince would provide Mr. Gerbier with the paperwork necessary to reenter the U.S.).

ii. The Government May Require Individuals to Pay Fees and Travel Expenses to Return and Has Provided No Information on How It Makes this Assessment

33. Additionally, there is confusion over whether and why certain individuals must pay fees or expenses to return to the United States. In some cases, individuals are required to pay fees for processing the necessary paperwork and/or the cost of transportation, significant monetary burdens for an individual living outside the United States. *See* Chicco Decl. Ex. A, at ¶ 4; *e.g.* Gutierrez-Castro Decl. Ex. D, at ¶ 16 ("I had to purchase the plane ticket using my own money. This put a lot of financial strain on me because even a one way ticket to New York is expensive, especially on my Colombian salary"); Mattos Decl. Ex. L, at ¶ 7 ("OIL informed me that the government would not pay for Mr. Lopez's transportation back to the U.S."); Markley Decl. Ex. K, at ¶ 15 (government initially agreed to pay reasonable travel expenses and then retracted). Yet, in other cases, the government has agreed to facilitate return without requiring the

individuals to pay for paperwork or transportation. *See* Maldonado Decl. Ex. I, at ¶¶ 8, 12; Hines Decl. Ex. E, at ¶ 10 ("The ICE personnel have also stated that they will arrange and pay for Mr. White's flight to ensure that he arrives in advance of his master calendar hearing.") The government's inconsistent practice and lack of information about whether and when the government pays the costs of return makes it difficult for individuals seeking stays to tell the court whether costs will present a barrier to return.

iii. The Government May Detain or Threaten to Detain Individuals Upon Their Return and Has Provided No Information on Why or How It Makes this Assessment

34. The inconsistency and confusion does not end when the individual arrives in the United States. Individuals are often detained or threatened with detention if they return. *See, e.g.*, Gerbier Decl. Ex. C, at ¶¶ 29-30 (explaining that he had "to be in detention for several months until I could have a hearing before an Immigration Judge to reinstate my permanent resident status"); Gutierrez-Castro Decl. Ex. D, at ¶ 10 ("When I heard that I had won at the Third Circuit, I was so happy because I thought it meant I could finally return home to my family. But then my counsel told me that ICE was going to detain me on my return to the United States. This news devastated me.") In many cases, the government has argued that individuals are subject to mandatory detention or required that individuals pay large bond amounts in order to be released from detention. *See* Hirota Decl. Ex. F, at ¶ 7 (stating that ICE determined that her client would be detained upon return and required a $10,000 bond); Hines Decl. Ex. E, at ¶ 5 (the government "maintains that Mr. White is subject to mandatory detention upon his return to the United States").

35. For example, in the case of lawyer Julia Markley's client, the government paroled her client into the United States to participate in his hearing before the immigration judge and maintained that the individual would be detained pending a background check. Markley Decl. Ex. K, at ¶ 16. Upon return however, the individual was transferred to an out of state detention center and missed his hearing before the immigration judge. *Id.* Another hearing was scheduled at which point the immigration judge granted him relief from removal. *Id.* ¶ 18. Yet, ICE continued to detain her client for nearly a month after he was granted relief and the government had waived appeal. *Id.* ¶¶ 19-23; *see also id.* ¶ 20 (explaining that during this time, ICE represented to her client that he would remain in detention pending additional background checks unless he agreed to be sent to a third country.)

iv. The Government May Refuse to Restore Individuals to their Pre-Removal Status and Provides No Information as to How and Why It Makes this Assessment.

36. While the government acknowledged in *Nken* and other cases that individuals who prevail in their immigration cases should be restored to their pre-removal status, the government frequently fails to do so in practice. For example, the government has charged returning individuals with inadmissibility in an attempt to render individuals ineligible for relief. *See* Ex. Z (Excerpt from Sept. 30, 2010 ICE OPLA production) (ICE memo explaining that an individual who was removed in violation of a stay will be charged with inadmissibility after being returned through public benefit parole); *cf.* Brief of Appellant at 6-8, *Napoles v. Bulger*, No. 03-11885-DD (11th Cir. June 25, 2003) (arguing that an immigrant's challenge to her removal order is moot because she had already been removed and even if her removal order was overturned she would still be

inadmissible and thus would not be permitted to return to the U.S.). Moreover, the government has sought to return individuals via parole rather than accord individuals their pre-removal status. *See e.g.* Mark Decl. Ex. 10, at ¶¶ 16-17 (noting that Mr. Gerbier, who was a legal permanent resident pre-removal, returned via parole); *Turnbull v. Ridge*, 1:04 CV 392 (N.D. Ohio 2004) (despite the court order to return and restore the individual's status *nunc pro tunc*, DHS sought to return the individual through parole). Parole only authorizes temporary permission for an individual to enter the U.S., leaving individuals vulnerable to inadmissibility charges once parole expires or DHS chooses to terminate parole. 8 U.S.C. § 1182(d)(5)(A) (stating that those granted parole have not been admitted into the United States and once parole is rescinded, an individual may be treated as an applicant for admission); Hirota Decl. Ex. F, at ¶ 9 ("My client was granted parole for a period of one year …I do not know what will happen to her parole status if her proceedings on remand are not completed by the time her parole is set to expire"); Hines Decl. Ex. E, at ¶ 9 (stating that ICE has refused to issue a temporary lawful permanent resident card to her client and stated that it will only issue parole documents which could render him an "arriving alien" and thus be ineligible for bond and subject to mandatory detention).

C. Public Interest Compels Agency Disclosure of this Information

37. The purpose of this FOIA request is to provide the general public, courts, immigrant advocates, and individuals with information regarding whether the government adheres to a policy and practice of facilitating return, and, if no formal policy is employed, how agencies treat individuals who prevail in their agency and federal court cases and are seeking to return and how the process works in practice.

38. Understanding the process through which individuals return to the United States is crucial for individuals seeking to reunite with their loved ones in the U.S. Despite representations that the government has a system for facilitating return, the government has provided no public information on how individuals can return to the United States. The lack of information compounded by the inconsistent practices of the government has left the public in a state of confusion and placed a financial and emotional strain on individuals seeking to return and their U.S. family and community seeking reunion. *See* Hines Decl. Ex. E, at ¶ 13 (stating that "Mr. White remains in Nicaragua and we are uncertain what further difficulties we may face in bringing him back to the United States to attend the court proceedings, of which he is a required party. The process of obtaining permission and documentation for him to return to the United States lacks uniform standards to guide government agencies."); Markley Decl. Ex. K, at ¶ 23 (stating that her client "invested his own meager finances and emotional energy into traveling back to the U.S. only to be detained with an uncertain future. It should not have taken this amount of time, money, and effort to bring him back after the Ninth Circuit determined that he never should have been subject to deportation.")

39. Moreover, the information from this FOIA will allow individuals who are seeking or considering a stay of removal and courts to assess the effect of deporting an individual pending the resolution of their appeal. The government has repeatedly stated that individuals with pending appeals will not face irreparable harm from deportation because it maintains a policy and practice of facilitating the return of individuals who prevail in their immigration appeals. *See supra* ¶¶ 21-24. The information requested will allow courts to evaluate the government's promises against its actual practices, i.e.

whether the government will issue the necessary paperwork for return to an individual, whether the government will assess travel and document fees against the individual, whether it will detain an individual upon return, and whether it will restore individual to his or her pre-removal status.

40. The need for this information has only grown in light of intervening Supreme Court and circuit precedent. First, since the Supreme Court decision in *Carachuri-Rosendo v. Holder*, circuit courts have recalled mandates and held removal orders unlawful based on the holding of *Carachuri-Rosendo* that two misdemeanor convictions for drug possession do not constitute an aggravated felony, allowing for immigrants to return to the United States. *See* 130 S.Ct. 2577 (2010); Executive Office of Immigration Litigation, "Immigration Law Advisor," January 2011, at 7 (discussing circuit court reversals due to *Carachuri-Rosendo*); *see e.g. Spence v. Holder*, 09-60102 (5th Cir. Feb. 8, 2011) (per curiam); Maldonado Decl. Ex. I, at ¶ 13; Hines Decl. Ex. E, at ¶ 3. Second, circuit courts have recognized that the BIA retains jurisdiction over motions to reopen or reconsider post-removal, meaning that individuals can now challenge their removability at the BIA from abroad. *See, e.g.*, *Reyes-Torres v. Holder*, No. 08-74452 and No. 09-70214, 4707 (9th Cir. Apr. 7, 2011); *Luna v. Holder*, Nos. 07-3796 and 08-4840, slip op. at 28 (2d Cir. Mar. 3, 2011); *Pruize v. Holder*, No. 09-3836, slip op. at 2 (6th Cir. Feb. 3, 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593-594 (7th Cir. July 14, 2010); *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007); *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 660 (BIA 2008) (in so far as a circuit court has invalidated the departure bar rule, the BIA will retain jurisdiction to review a motion to reopen and reconsider in that circuit); *cf. Matter of Bulnes-Nolasco*,

25 I&N Dec. 57 (BIA 2009) (the immigration judge has jurisdiction to consider a motion to reopen and reconsider from abroad where the motion challenges an absentia deportation order for lack of proper notice.)

41. In addition, understanding whether the government actually adheres to a policy and practice of return ensures the fundamental fairness of immigration proceedings and the right of immigrants to meaningful judicial review. Congress has created a statutory scheme that only allows the government to remove immigrants from the United States pursuant to a fair hearing on removability and a valid final order of removal. *See* 8 U.S.C. § 1229a(a)(1)("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); 8 U.S.C. §1229a(a)(3) ("Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.") The current confusion has effectively barred long-time residents—no longer subject to a valid final order of removal—from the United States and left pro se individuals, lawyers, family members, and community organizations not knowing where to turn. Bureaucratic intransigence cannot stand in the place of a statutory scheme set out by Congress for removing and providing relief to immigrants. *Cf. Samirah v. Holder*, No. 08-1889 (7th Cir. Dec. 3, 2010) (granting mandamus requiring the government to facilitate the return of a petitioner whose advanced parole was revoked by DHS while outside the United States).

42. Thus, this FOIA request falls within "[t]he basic purpose of FOIA," namely "to ensure an informed citizenry, vital to the functioning of a democratic society . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437

U.S. 214, 242 (1978). Plaintiffs' request warrants a fee waiver because the information "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

Request for Information

43. Out of concern for individuals who could be and are facing substantial difficulty returning to the U.S. and the public interest at hand, Plaintiffs filed a FOIA request on December 17, 2009, to the DHS, DOJ, and DOS seeking information relating to the government's efforts to facilitate the return of individuals[2] including information about the timeline of return for individuals who prevail in their agency and federal court cases from abroad; information on all cases in which an immigrant prevailed in their immigration case broken down by categories of information; and informal communications, policies, procedures, training materials, forms used to track cases, inter-agency communication, and transportation documents related to individuals trying to return to the United States. Exs. M, N, O.

A. The Department of Homeland Security

44. By letter dated December 31, 2009, Ms. Sabrina Burroughs, the Disclosure and FOIA Operations Manager, acknowledged receipt of our FOIA request.

[2] Specifically, Plaintiffs' FOIA request is seeking information on the category of individuals "who were removed from the United States by the Department of Homeland Security (DHS) or who left the country after accepting voluntary departure or self-deportation and (1) whose removal orders were subsequently vacated or reversed by any United States federal court; and/or (2) whose immigration cases have subsequently been reopened by an Immigration Judge or the BIA." *See* Ex. M at 1 (Original FOIA to DHS); Ex. N at 1 (Original FOIA to DOJ), Ex. O at 1 (Original FOIA to DOS).

45. During the months of January and February, 2010, Counsel's interns Ms. Marie Mark and Ms. Nancy Steffan confirmed with DHS via letter and email that the FOIA request would be referred to CBP and USCIS in addition to ICE.

B. The United States Citizenship and Immigration Services

46. By letter of January 19, 2010, Ms. T. Diane Cejka, FOIA Director, acknowledged receipt of our FOIA request.

47. By letter dated February 25, 2010, Ms. Cejka stated that Form I-212 and I-601 and related materials could be responsive to portions 5, 6, and 7 of our request

48. By email dated March 26, 2010, Counsel further clarified Plaintiffs' FOIA request and stated that documents did not appear responsive to our requests and in any case, asking the agency to provide a sufficient description of the information so that Plaintiffs may make an informed decision as to whether we wish to receive these documents.

49. By phone call dated April 1, 2010, Ms. Tracy Bellisime at USCIS stated that she had received our letter. She was unsure whether records existed at USCIS relating to our request but would continue to search for records responsive to our request.

50. On December 9, 2010, Counsel's intern Ms. Yihong Mao attempted to reach Ms. Bellisime by phone and left a voice message requesting an update on Plaintiffs' FOIA request.

51. To date, USCIS has not issued a final response to our FOIA request.

C. Immigration and Customs Enforcement

52. By letter dated September 30, 2010, Ms. Catrina Pavlik-Keenan, FOIA Officer, issued a final response, producing 587 pages of records from the Office of the Principal

Legal Advisor (OPLA), and acknowledged receipt of our FOIA on January 5, 2010. The 587 pages, consisting mostly of copies of the same documents, include communications between OPLA, other components of ICE, USCIS, DOS, OIL, and OSG regarding individuals trying to come back to the United States and stays of removal. These records offer a narrow glimpse into the government practices towards individuals seeking return after prevailing in their removal proceedings. *See e.g.* Ex. AA (Excerpt from Sept. 30, 2010 ICE OPLA Production) (correspondence between OIL and ICE regarding return procedures); Ex. Z (same) (ICE OPLA memo regarding return of individual who was removed in violation of a stay); Ex. BB (same) (internal ICE email correspondence regarding how to respond to a journalist's inquiry on DHS's policy and practice of return); Ex. CC. (same) (internal ICE email correspondence regarding procedures for return); Ex. DD (same); Ex. EE (same);

53. By letter dated November 24, 2010, Counsel appealed the final response of ICE challenging the reasonableness of the agency's search, the scope of the search as limited to certain individuals within OPLA, and the withholding of information.

54. By letter dated December 9, 2010, Ms. Susan Mathias, Chief of the Government Information Law Division of OPLA, acknowledged receipt of Plaintiffs' appeal letter.

55. By letter and email dated January 24, 2011, Ms. Mathias stated to Counsel that the FOIA request would be remanded to the FOIA division for additional searches that include but are not limited to searching the Office of Public Affairs, the Office of International Affairs, ICE Office of Congressional Relations, the ICE Office of Planning and Policy, and the ICE Office of Enforcement and Removal Operations. In addition, Ms. Mathias noted that the review of the search uncovered a document produced by the

Office of Planning and Policy that was not processed for release within the initial response and which would be processed on remand.

56. By letter dated March 31, 2011, Ms. Pavlik-Keenan stated that a partial search has been conducted and a total of 2,650 pages responsive records were found. However, these documents are being withheld from Plaintiffs pending payment of $2,265.45 processing fee despite Plaintiffs' original request for a fee waiver. *See* Ex. T (ICE Letter of March 31).

57. By phone conversation dated April 7, 2011, Counsel's intern Ms. Mao spoke to FOIA officer Mr. Mark Graff regarding the March 31 letter. He stated that the FOIA office has made an assessment on fees but has not made a determination as to our specific request for a fee waiver.

58. By letter dated April 11, 2011, Plaintiffs appealed the agency's withholding of 2,650 pages of responsive contingent on fee payment and challenged the adequacy of the agency's search and exemption determinations. As further explained in our letter, the FOIA Office is statutorily barred from assessing fees because it has failed to respond to our FOIA request within the 20 working day statutory time limit. *See* 5 U.S.C. § 552(a)(4)(A)(viii) ("An agency shall not assess search fees…if the agency fails to comply with any time limit under paragraph (6)"); *see also* Ex U, at 2 (Letter of Appeal to ICE). In any case, this information warrants a fee waiver given the great public interest at hand. Thus, ICE should release the 2,650 pages of documents and any improperly exempted records; and conduct a reasonable search of all locations likely to produce responsive records. This letter was sent to ICE via next day mail and delivered on April 12, 2011.

59. By letter dated April 18, 2011, Ms. Mathias acknowledged receipt of our appeal. This is the last correspondence Plaintiffs have had with ICE.

D. Customs and Border Protection

60. By letter of March 17, 2010, Ms. Elissa Kay, Acting Director of the FOIA office at CBP Office of International Trade, acknowledged receipt of our FOIA request.

61. By letter dated April 21, 2010, Ms. Kay stated that a search of records found no responsive records and the Office of Field Operations (OFO) has no set procedure for facilitating return but rather handles each situation on a case by case basis. *See* Ex. R, Final Response of CBP.

62. By letter dated May 19, 2010, Plaintiffs appealed the agency's final response and clarified that the request sought information not only about formal procedures but also what the agency did or did not do with an individual on a case by case basis. By letter dated May 27, 2010, CBP acknowledged receipt of appeal.

63. By letter dated August 23, 2010, CBP responded to Plaintiffs' appeal by partially producing 25 pages of border crossing data from the TECS database system for three individuals referenced in Plaintiffs' January 27, 2010 letter to DHS and a 6 page document on an individual whose expedited removal was vacated by CBP. In addition, CBP stated that the agency may communicate with DOS, embassy or consular offices, or with other entities involved regarding individuals requesting return. However, officials at OFO, the Office of Training and Development, and the Office of Chief Counsel advised that there were no records responsive to our request. No other offices or systems of record-keeping were searched. *See* Ex. S (CBP Response to Appeal (Aug. 23, 2010)).

E. The Department of State

64. On December 23, 2009, FOIA officer from DOS, John Parker, emailed Plaintiffs to acknowledge the receipt of our FOIA request and asked that we clarify our FOIA request. On January 29, 2010, Plaintiffs emailed John Parker with an amended FOIA request and provided further explanation regarding the purpose of the request.

65. On February 17, 2010, Plaintiffs received a letter from DOS acknowledging receipt of our requests and notifying Plaintiffs that it would begin processing our request

66. During the months of December of 2010 and January of 2011, Counsel's intern Ms. Mao repeatedly contacted DOS FOIA officers about processing of the FOIA request. FOIA officers initially stated that the request was sent to the Office of Legal Advisor and that no additional offices within DOS would be searched. Through further discussion, FOIA officer Chris Barns agreed that the request should be referred to additional offices.

67. By phone on January 24, 2011, Mr. Barns stated that after he consulted a senior reviewer regarding the search strategy for our FOIA, the FOIA request has been referred to additional agency components with the acronyms CA, VO, PRM, and SA2. Mr. Barns stated that he had no idea about the timeline for response.

F. The Department of Justice

68. By letter dated January 6, 2010, Ms. Paula Scholz, an Assistant Director in the Justice Management Division ("JMD") of the DOJ, acknowledged receipt of our FOIA request and referred the request to the Bureau of Prisons and the Office of Justice Programs.

69. During the months of January and February, 2010, both the Bureau of Prisons and Office of Justice Programs notified Counsel that the offices were not able to identify

any records responsive to our request. By letter dated May 19, 2010, Counsel asked Ms. Scholz to confirm whether the JMD would be redistributing the FOIA request to more DOJ components.

70. By letter dated June 2, 2010, Ms. Scholz notified Counsel that the agency has referred the FOIA request to the Civil Division and the OSG.

1. Civil Division

71. By phone conversation dated July 5, 2010, Mr. James Kovakas notified Counsel that he referred the request to the Office of Immigration Litigation, a component within the Civil Division, which has identified two documents that may be responsive to our request.

72. On July 9, 2010, Mr. Kovakas issued a final response via email, attaching the aforementioned two documents and a list of adverse cases against the government. *See e.g.* Ex. FF (Copy of July 9, 2010 OIL productions (Office of Immigration Litigation ("OIL") Adverse Decision Procedures (a.k.a. First Cuts) for Non-OIL Attorneys and Attorneys Detailed to OIL & for OIL Attorneys). The two documents set procedures for OIL and non-OIL attorneys when a court issues an adverse decision. These documents, however, make no mention of whether or how attorneys should facilitate the return of individuals who prevailed from abroad. Counsel replied to Mr. Kovakas via email asking whether there are any documents relating to what OIL does when a person has been previously been removed. Mr. Kovakas answered in the negative.

73. On February 2, 2011, Plaintiffs filed a second FOIA request that renewed and clarified our original FOIA request. *See* Ex. Q (Second FOIA Request to OIL). In light of knowledge subsequently obtained from individuals and agencies regarding OIL's

involvement in facilitating return, Plaintiffs believe that OIL is in possession of additional records responsive to our request. In renewing our original request, Plaintiffs clarified that (1) communications between OIL and other agencies or/and opposing counsel regarding individuals who prevail in their immigration proceedings from abroad; and (2) any records related to *Nken v. Holder* and/or any statements regarding government facilitation of return would be responsive to our request.

74. By phone conversation dated February 4, 2011, Counsel's intern Ms. Mao spoke to Mr. Kovakas regarding the second FOIA request. Mr. Kovakas explained that while OIL clearly interacts with DHS and there could be more records responsive to our request, the Civil Division would be unable to be able to identify records other than through a search of individual case files. When asked to describe the original search for documents, Mr. Kovakas stated that he had forwarded the request to Mr. Thomas Hussey and, though he did not know the specifics of the search, he believed that Mr. Hussey anecdotally asked individuals in the office about the request. In light of our second request, Mr. Kovakas stated that he would (1) determine what type of search was conducted for our first FOIA; and (2) conduct a search of the records of individuals referenced in our second FOIA request who prevailed in their immigration cases from abroad for records responsive to our request; as well as (3) decide whether to assess fees and adjudicate our fee waiver.

75. To date, the agency has not responded to our second FOIA request and material doubt remains as the adequacy of the agency's search.

2. Office of the Solicitor General

76. By letter on July 9, 2010, Executive Officer of OSG, Ms. Valerie Hall, issued a final decision stating that the only records responsive to the FOIA request were the briefs filed in the case of *Nken v. Holder*, No. 08-681.

77. By letter dated August 3, 2010, Counsel appealed the final decision of the agency, explaining that there remained serious doubts as to the adequacy of the agency's search for documents.

78. On December 10, 2010, Counsel's intern Ms. Mao spoke to FOIA officer Mr. James Davis regarding Plaintiffs' FOIA request. Mr. Davis stated that an additional search was conducted after our appeal which revealed one set of documents but that these documents need to be review by a Deputy Solicitor General Mr. Edwin Kneedler.

79. During the month of January, Counsel and Ms. Mao communicated with Mr. Davis via letter and phone requesting that OSG process our request according to FOIA's statutory timeline and spirit of disclosure.

80. On February 8, 2011, Mr. Davis informed Ms. Mao via phone, email, and letter that Mr. Kneedler had reviewed the set of documents totaling approximately 4 pages and that the documents would be withheld under Exemption 5's attorney client, attorney-work product, and deliberative-process privileges because the "documents were generated in connection with deliberations within the government concerning the *Nken* case." *See* Ex. V at 1 (OSG Letter).

81. By letter dated March 3, 2011, Counsel appealed the FOIA response to the Office of Information Policy (OIP) explaining that the records are being improperly withheld under Exemption 5 and that the agency has yet to conduct a reasonable search

for records. Requesters are asking for information related to the government's policy or practice of facilitating return. Attorney-client, work-product, and deliberative process privilege have no application to a policy and practice to which the agency has made repeated, public reference. Presumably, these documents existed before the litigation in *Nken* and were not generated for the *Nken* litigation. *See* Ex. W (Letter of Appeal to OSG).

82. By letter dated March 7, 2011, OIP acknowledged receipt of our appeal.

G. Plaintiffs Have a Statutory Right to the Information Withheld and to a Reasonable Search for Responsive Records

83. The government's response and lack thereof to this FOIA request has kept Plaintiffs, individuals, the courts, and the public in the dark regarding how individuals can return to the United States after prevailing in federal court and agency challenges to their removal orders from outside the country. To date, two agencies have yet to make a final response to our FOIA request. *See supra* ¶¶ 46-51 (USCIS); *supra* ¶¶ 64-67 (DOS). Of the agencies that have responded, two agencies are withholding information in its entirety, in addition to having failed to conduct an adequate search and provide a description of the search. *See supra* ¶¶ 52-59 (ICE); *supra* ¶¶ 76-82 (OSG). The remaining agencies claim that no other responsive documents exist despite clear involvement in the return process and a failure to adequately conduct and describe their search methods. *See supra* ¶¶ 60-63 (CBP); *supra* ¶¶ 71-75 (DOJ Civil Division).

84. The experience of individuals and lawyers detailed above and in the attached affidavits—along with the approximately 587 pages of ICE partial productions—is proof that the agencies are likely to have records responsive to our request. Records were likely created when individuals, legal advocates, and the public at large sought assistance from

each agency. Presumably there is a factual basis for the government's representations to the courts that there is a policy and practice of return.

85. Plaintiffs have a statutory right to the records they seek and there is no legal basis for Defendants' failure to disclose them in full. Plaintiffs have exhausted administrative remedies and the agencies' failure to respond to these appeals in a timely manner under 5 U.S.C. § 522(a)(6)(ii) results in constructive exhaustion of Plaintiffs' administrative remedies pursuant to 5 U.S.C. § 522(a)(6)(C).

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Defendants Failed to Disclose and Release Records Responsive to Plaintiffs' Request

1. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 85 as if repeated and incorporated herein.

2. By failing to disclose, conduct adequate search and otherwise respond adequately to our request for information relating to the government's claim that it facilitates the return of individuals who have prevailed before the courts, Defendants have violated Plaintiffs' rights to Defendants' records under 5 U.S.C. § 552.

SECOND CLAIM FOR RELIEF

Defendant ICE Improperly Assessed Fees Against Plaintiffs

3. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 85 as if repeated and incorporated herein.

4. Defendant ICE has improperly and untimely assessed a fee amount of $2,265.45 in violation of 5 U.S.C. § 552(a)(6)(A). Defendant has violated Plaintiffs'

rights to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and Defendant's own regulations at 6 C.F.R. § 5.11(k)(DHS).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1) Assume jurisdiction over this matter;

2) Declare that Defendants' refusal to disclose the records requested by Plaintiffs is unlawful;

3) Order Defendants to immediately make a full, adequate, and expedient search for the requested records;

4) Order Defendants to make the requested records available to Plaintiffs forthwith, and enjoin them from withholding the requested records;

5) Award Plaintiffs their costs and reasonable attorney's fees in this action as provided by 5 U.S.C. § 552(a)(4)(E);

6) Enjoin Defendants from assessing fees or costs for the processing of the FOIA Request; and

7) Grant such other and further relief as this Court may deem just and proper.

Dated: May 12, 2011
New York, New York

Respectfully submitted,

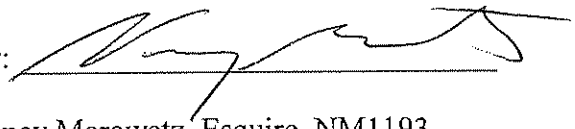
By: 

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Exhibit List

I. Declarations of Individuals and Lawyers

Exhibit A: Declaration of Jessica Chicco

Exhibit B: Declaration of David C. Drake

Exhibit C: Declaration of David Gerbier

Exhibit D: Declaration of Luis Gutierrez-Castro

Exhibit E: Declaration of Barbara Hines

Exhibit F: Declaration of Maile Hirota

Exhibit G: Declaration of Joseph Hohenstein

Exhibit H: Declaration of Sonia Lin

Exhibit I: Declaration of Javier Maldonado

Exhibit J: Declaration of Marie Mark

Exhibit K: Declaration of Julia Markley

Exhibit L: Declaration of Patricia Mattos

II. FOIA Correspondence

Exhibit M: Original FOIA to DHS

Exhibit N: Original FOIA to DOJ

Exhibit O: Original FOIA to DOS

Exhibit P: Sandra Hernandez Article

Exhibit Q: Second FOIA Request to OIL

Exhibit R: Final Response of CBP (April 21, 2010).

Exhibit S: CBP Response to Appeal (Aug. 23, 2010)

Exhibit T: ICE Letter of March 31

Exhibit U: Letter of Appeal to ICE

Exhibit V: OSG Letter

Exhibit W: Letter of Appeal to OSG

III. Other Documents

Exhibit X: USCIS Office of Communications, "USCIS American Immigration Lawyers Association (AILA) Meeting, September 27, 2007, *Answers to AILA Questions*"

Exhibit Y: Letter from Joseph D. Hardy, Trial Attorney, Office of Immigration Litigation at 1, *Hing Chuen Wu v. Holder*, No. 08-60073 (5th Cir. April 1, 2009)

Exhibit Z: Excerpt from Sept. 30, 2010 ICE OPLA production (OPLA memo regarding return of individual who was removed in violation of a stay).

Exhibit AA: Excerpt from Sept. 30, 2010 ICE OPLA production (email correspondence between OIL attorney and DHS regarding procedure for arranging the return of individual who prevailed in petition for review)

Exhibit BB: Excerpt from Sept. 30, 2010 ICE OPLA production (internal ICE email correspondence regarding journalist's inquiry on government procedures for return of individuals who prevail from outside the United States)

Exhibit CC: Excerpt from Sept. 30, 2010 ICE OPLA production (internal ICE email correspondence discussing procedure for returning individuals who have been improperly removed)

Exhibit DD: Excerpt from Sept. 30, 2010 ICE OPLA production (internal ICE email correspondence regarding return of individuals in proceedings)

Exhibit EE: Excerpt from Sept. 30, 2010 ICE OPLA production (internal ICE email correspondence regarding procedure for arranging parole).

Exhibit FF: Copy of July 9, 2010 OIL productions (Office of Immigration Litigation ("OIL") Adverse Decision Procedures (a.k.a. First Cuts) for Non-OIL Attorneys and Attorneys Detailed to OIL & for OIL Attorneys.