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The Honorable William K. Suter
Clerk
Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *Nken v. Holder*, No. 08-681

Dear General Suter:

We write in response to the letter that the Office of the Solicitor General filed with the Court on April 24, 2012, regarding the Court's decision in *Nken v. Holder*, 556 U.S. 418 (2009). We write on behalf of organizations that filed a brief as amici curiae in support of the petitioner in *Nken*. *See* Amicus Brief of American Immigration Lawyers Association, *et al.* Amici and their members continue to represent clients in removal proceedings, and the Court's *Nken* opinion is relevant to many of these cases.

We appreciate the sentiment in the government's letter, which retracts its prior submission that it had a policy and practice of facilitating the return of aliens who are removed from the United States while their cases are pending but who eventually successfully challenge their removal. However, we disagree with the government's contention that it "does not believe that any action by this Court is required." Letter at 6. We respectfully urge the Court to consider withdrawing the parts of its *Nken* opinion that relied on representations that the government now acknowledges were inaccurate.

Our amicus brief in the *Nken* case explained that "in practice it is extremely difficult for an alien to return once he has been deported, even if his petition for review has been successful. There is no class of visa or other formal reentry mechanism available to aliens who have been previously removed but have successfully challenged their removal orders." Amicus Brief of American Immigration Lawyers Association, *et al.*, at 28-29. By contrast, in its responsive briefing, the government stated that "[b]y 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, and according them the status they had at the time of removal." Brief for Respondent at 44.

The Court's opinion in *Nken* cited the government's representation that it had a meaningful policy and practice of facilitating the return of previously removed noncitizens. *Nken*, 556 U.S. at 435. Significantly, the Court concluded that the removal of a noncitizen from the country "is not categorically irreparable," because "those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Id.* Various lower courts have since relied on this language as a basis

for—among other things—denying petitioners' requests for a stay of removal pending resolution of their cases. *See, e.g.*, *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-538 (9th Cir. 2011); *Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 & n.3 (5th Cir. 2010); *Dhillon v. Mayorkas*, No. C-10-0723, 2010 WL 1338132, at *11 (N.D.Cal., Apr. 5, 2010); *Villajin v. Mukasey*, No. CV 08-0839, 2009 WL 1459210, at *4 (D. Ariz., May 26, 2009).

The government now acknowledges that, contrary to its prior representation, it did *not* in fact have a consistent policy or practice of facilitating the return of aliens who were removed but who eventually prevailed in their removal proceedings. Letter at 4. Unfortunately, this belated admission—coming more than three years after the Court's opinion in *Nken*—does not by itself solve the problems created by the government's erroneous earlier claim.

The government suggests that no action by the Court is necessary because, in future litigation, the government will refrain from relying on the section of the *Nken* opinion that cited its claim about facilitating the return of previously removed individuals. In particular, the letter claims that since February 2012 the government (with one apparently accidental exception) has not relied on the relevant passage in *Nken*. Letter at 5. The government also suggests that, going forward, it will take measures to facilitate aliens' return in certain cases. *Id.* at 4-5.

We respectfully submit that the government's proposal is insufficient to remedy its prior erroneous representation. The Court's opinion in *Nken*, including its discussion of irreparable harm that relies on the government's representation about its supposed practice, remains unchanged in reporters and electronic databases. *See* 556 U.S. at 435. Unless this Court modifies its opinion, other courts may well rely on the relevant passage in *Nken*. Courts, lawyers, and litigants who review the Court's reported decision in the case may well not know the government subsequently retreated from its position in a separate filing three years after the decision was issued.

Nor is there any assurance that, at some future point, the government will not—inadvertently or otherwise—revert to its practice of citing this language in *Nken* to oppose stays of removal. Certainly the government's letter does not purport to commit to a permanent, legally binding policy. Indeed, the government's letter acknowledges that, mere weeks after announcing its putative policy not to rely on this passage in *Nken*, a government filing in the Seventh Circuit nonetheless did just that. Letter at 5 & n.10.

Correction of the relevant passage in *Nken* is particularly important because the government's letter, as well as interagency emails referenced therein (Letter at 2 n.2), confirm that the government does *not* facilitate the return of many aliens who are successful in their removal proceedings. Current policy as described in the government's letter indicates that there is still substantial agency discretion in determining whether and how to facilitate the return of

noncitizens who prevail in their proceedings. Letter at 4-5. And even this practice, according to the government, only has been in effect since February 2012.

Moreover, the government's letter states that its new directive facilitates the return only of noncitizens who were previously lawful permanent residents of the United States or whose "presence is necessary for continued administrative removal proceedings." Letter at 4. This leaves out large categories of individuals who challenge removal proceedings, including potentially Mr. Nken himself, an asylum applicant who was not a lawful permanent resident at the time of his removal proceeding. 556 U.S. at 422. Indeed, the emails referenced in the government's letter[1] confirmed that Mr. Nken might not be paroled back to the United States even if his petition for review of his removal order were successful.[2]

In addition, the government's letter confirms that "[t]he alien [is] responsible for providing his or her own transportation to the United States." Letter at 2. This amounts to a de facto bar to return for individuals of limited financial means.

This Court has a paramount interest in having lower courts and practitioners rely on its opinions. Where an opinion is premised in part on an incorrect factual understanding, the opinion should be modified accordingly. On several occasions, the Court has amended its opinions to correct earlier factual misunderstandings. *See, e.g.*, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008) (mem.); *Mahan v. Howell*, 411 U.S. 922 (1973) (mem.); *Slochower v. Board of Higher Education of the City of New York*, 351 U.S. 944 (1956) (per curiam); *see also Boumediene v. Bush*, 553 U.S. 723, 816-817 (2008) (Roberts, C.J., dissenting) (correcting earlier version).

We therefore respectfully request that the Court consider amending its *Nken* opinion to delete the sections that relied on the government's now-withdrawn representations regarding its support for the return of previously removed noncitizens.

We respectfully request that copies of this letter be distributed to the Conference.

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[1] The e-mails are available at http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20-Email%20Communications%20in%20Nken%20-%20Released%20April%2024%202012.pdf.

[2] After this Court's decision in Mr. Nken's case, the government abandoned its opposition to his request for a stay of removal. Mr. Nken's Petition for Review was granted. *Nken v. Holder*, 585 F.3d 818 (4th Cir. 2009). On remand, the Board of Immigration Appeals granted Mr. Nken's motion to reopen and remanded his case to the Immigration Court, where Mr. Nken's application for asylum was ultimately granted, and appeal waived by the parties.

Respectfully,

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Adam Raviv

Counsel for the American Immigration Lawyers Association, Catholic Legal Services, Americans for Immigrant Justice (formerly the Florida Immigrant Advocacy Center), the Hebrew Immigrant Aid Society, the National Immigrant Justice Center, the National Immigration Law Center, Public Counsel, and World Relief.

cc: Counsel of Record
Christine L. Fallon, Reporter of Decisions