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RESPONSE**Does the Legal Standard Matter?
Empirical Answers to Justice Kennedy's Questions
in *Nken v. Holder***

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In response to Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014).

In Justice on the Fly: The Danger of Errant Deportations, Professors Fatma Marouf, Michael Kagan, and Rebecca Gill take on the ambitious task of answering the empirical questions posed by Justice Kennedy and others in *Nken v. Holder* with respect to the proper legal standard for judicial stays of removal in the immigration adjudication context. To answer these questions, the authors review, code, and analyze 1,646 cases in all circuits that hear immigration appeals and reveal stark differences in stay-of-removal practices and outcomes among the federal courts of appeals. This Response reflects on three of those findings: the disparity in stay grant rates among circuits, the variation by circuit in government opposition and immigration attorneys' stay request practices, and the differences in Type I and Type II errors among circuits that apply the distinct legal standards. In addition to agreeing with *Justice on the Fly* that courts should adopt a uniform legal standard, the Response proposes a judicial solution that enhances court–agency dialogue to help courts handle the Federal Government's misstatement in *Nken* about the ability of petitioners to return to the United States if they prevail on appeal.

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I. INTRODUCTION

In January 2009, the Supreme Court heard oral argument in *Nken v. Holder* to resolve a circuit split on the proper legal standard for judicial stays of removal in the immigration adjudication context.¹ The Federal Government argued that it should be the “clear and convincing evidence” standard set forth in the Immigration and Nationality Act (INA),² whereas the Petitioner asserted that the less-stringent traditional four-factor test for preliminary injunctive relief should apply. On its face, this was a routine case. Deciding the proper legal standard (especially when there is confusion among the lower courts) is the bread and butter of the Supreme Court’s docket. Every year the Court decides such questions in a wide range of legal contexts from immigration, tax, and ERISA to affirmative action, criminal sentencing, and federal habeas—just to name a few.³

Although the Court routinely articulates the proper legal standard based on existing law and policy considerations, the argument in *Nken* took a somewhat

¹ 556 U.S. 418 (2009). Indeed, Justice Kennedy recognized this circuit split a half-dozen years earlier. *See Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303–04 (2003) (Kennedy, J., in chambers) (denying application for stay of removal) (noting that “[t]he question raised by applicant indeed has divided the Courts of Appeals” where “the Second, Sixth, and Ninth Circuits have examined the matter, both before and after the Eleventh Circuit’s decision . . . , and have reached a contrary result”). By the time *Nken* reached the Court, the split had apparently widened to 8–2, with the Fourth Circuit joining the short end of the split. *See* Petition for Writ of Certiorari at 6, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681), 2008 WL 5369549, at *20 (2008).

² 8 U.S.C. § 1252(f)(2) (2012).

³ *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (holding that *Chevron* deference applies to judicial review of IRS statutory interpretations); *Conkright v. Frommert*, 559 U.S. 506, 509 (2010) (rejecting argument that “a single honest mistake in plan interpretation justifies stripping the [ERISA plan] administrator of that [judicial] deference for subsequent related interpretations of the plan”); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013) (applying “the demanding burden of strict scrutiny articulated in *Grutter*” to affirmative action plan); *Gall v. United States*, 552 U.S. 38, 41 (2007) (applying deferential abuse-of-discretion standard to “all [criminal] sentences—whether inside, just outside, or significantly outside the Guidelines range”); *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (applying “doubly deferential standard” in federal habeas for “state court’s reasonable factual finding”).

unusual turn. The Justices were particularly interested in knowing whether the standard actually matters. In fact, the first question, from Chief Justice Roberts, queried whether the Petitioner's counsel "happen[ed] to know empirically if most people who are facing removal get a stay"—to which counsel responded no.⁴ Justice Kennedy shortly followed up by asking whether it is "true that there are more petitions filed in the courts with the more generous standards": "I would be curious to know, A, the percentage of the cases in which it's granted; and B, the percentage of those cases that are ultimately decided in favor of the government . . ."⁵ During the Government's argument, the Chief renewed his empirical question, to which the Deputy Solicitor General replied: "[W]e do not have empirical data, and I wish we did, on the percentage, but [stays of removal] are—in the Ninth Circuit in our experience—again we don't have percentages, but they are granted quite frequently."⁶

By a 7–2 vote, the Court ultimately agreed with the Petitioner that the proper standard is the traditional criteria for granting preliminary injunctions, though the Court emphasized that the standard is quite exacting.⁷ In particular, based on the Government's (mis)representation that noncitizens "who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal," the Court held that the harm of removal, without more, "is not categorically irreparable."⁸ But the empirical questions remained. In a concurring opinion joined by Justice Scalia, Justice Kennedy repeated his call for more empirical data:

No party has provided the Court with empirical data on the number of stays granted, the correlation between stays granted and ultimate success on the merits, or similar matters. The statistics would be helpful so that experience can demonstrate whether this decision yields a fair and effective result. Then, too, Congress can evaluate whether its policy objectives are being realized by the legislation it has enacted.⁹

In *Justice on the Fly: The Danger of Errant Deportations*, Professors Fatma Marouf, Michael Kagan, and Rebecca Gill take on the ambitious project of collecting, coding, and analyzing such empirical data in the post-*Nken* world.¹⁰

⁴ Oral Argument Transcript at 4, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681).

⁵ *Id.* at 5.

⁶ *Id.* at 35.

⁷ *Nken*, 556 U.S. at 422, 435.

⁸ *Id.* at 435.

⁹ *Id.* at 437 (Kennedy, J., concurring).

¹⁰ Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 338 (2014) [hereinafter Marouf, Kagan & Gill, *Justice on the Fly*]. Whereas the authors focus on error rates and related questions in *Justice on the Fly*, they explore issues related to the length of delay in a companion piece. See Michael Kagan, Fatma Marouf & Rebecca Gill, *Buying Time? False Assumptions About*

It turns out that Justice Kennedy's request is no simple task. Stay decisions seldom make their way onto Westlaw or Lexis, so the authors had to mine the PACER dockets of 1,646 cases in all circuits that hear immigration appeals. From this data, the authors have unearthed valuable findings as to whether—to borrow from Justice Kennedy—a particular legal standard “yields a fair and effective result” and “whether [Congress's] policy objectives are being realized by the legislation it has enacted.”¹¹

This Response is far less ambitious than the underlying empirical study, but endeavors to make two main points: Part II addresses the study's key findings and their implications for immigration law, policy, and practice. This reaction does not do justice to the nuanced and detailed approach taken in *Justice on the Fly*, but hopefully will help enrich the dialogue among and within courts, the Executive, and Congress to evaluate the fairness and effectiveness of the current approach in the courts of appeals with respect to stays of removal.

Part III returns to the problems with the standard articulated in *Nken* (which also may affect the policy implications of *Justice on the Fly*) and, in particular, how courts should handle the Government's misstatement about the ability of petitioners to return to the United States if they prevail on appeal. This Response proposes a judicial solution that enhances court–agency dialogue and builds on the Author's work in a related immigration context.¹² Namely, courts of appeals should require that the Government certify in opposing stay-of-removal motions that it will facilitate the petitioner's readmission into the United States if the petitioner is ultimately successful on the merits of her petition; absent such certification, irreparable harm should be presumed. Such solution is justified by the study's empirical findings on the prevalence of Type II errors (or false negatives, where the stay is denied but the petition is ultimately granted) and the importance of avoiding such errors when assessing irreparable harm.

II. THE STUDY'S KEY FINDINGS AND THEIR IMPLICATIONS FOR IMMIGRATION LAW, POLICY, AND PRACTICE

At the outset, it is important to note what *Justice on the Fly* does not do. The study does not look back at pre-*Nken* practices in the courts of appeals to determine whether application of the traditional four-factor standard or the INA's “clear and convincing evidence” standard affected the grant rate for stays of removal. Instead, the study is forward-looking and analyzes a remaining circuit split on how the traditional four-factor test should apply in the stay-of-removal context.

Abusive Appeals, 63 CATH. U. L. REV. (forthcoming 2014) [hereinafter Kagan, Marouf & Gill, *Buying Time?*], available at <http://ssrn.com/abstract=2399672>.

¹¹ *Nken*, 556 U.S. at 437 (Kennedy, J., concurring).

¹² See Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. (forthcoming 2014) [hereinafter Walker, *Judicial Toolbox for Agency Dialogue*], available at <http://ssrn.com/abstract=2242869>.

As noted in *Justice on the Fly*, “[t]he disagreement centers on whether the four parts of the test can be applied according to a sliding scale, so that a particularly compelling showing on the irreparable harm factor can justify relaxing the standard for likelihood of success on the merits, or vice versa.”¹³ The *Nken* Court did not resolve this conflict about whether a court can relax or “slide” a petitioner’s burden of proof for one of the four factors—i.e., likelihood of success on the merits, irreparable harm absent a stay, substantial injury to others, or the public interest¹⁴—based on a very strong showing on another.

In the same Term as *Nken*, however, the Court cast doubt on the legitimacy of the sliding-scale approach in the preliminary injunction context—rejecting the Ninth Circuit’s rule that, “when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a ‘possibility’ of irreparable harm.”¹⁵ Despite this ruling, within the time period analyzed for this study (2009–2012), four circuits continued to apply the sliding scale, three had expressly rejected it, and the rest were somewhere in between.¹⁶ The data set thus appears to provide a suitable vehicle for analyzing whether the legal standard matters in addition to whether either standard yields a fair and effective result. This Response highlights three main findings.

1. Circuit Disparity in Stay Grant Rate. The study found that about one in four (26%) stay motions were granted. That overall rate, however, masks great disparity among the circuits. The stay grant rate ranged from 63% in the Ninth Circuit to only 4% in the Fifth Circuit, with the First (29%), Third (21%), Fourth (14%), Sixth (48%), Seventh (31%), Eighth (10%), Tenth (6%), and Eleventh (6%) Circuits in between.¹⁷ This disparate treatment among circuits is not unique to the stay-of-removal context, but may reflect broader systemic issues in judicial review of immigration adjudications. For instance, a smaller-scale empirical study on the application of administrative law’s ordinary remand rule in the immigration adjudication context reveals similar disparity among courts of appeals—with an overall compliance rate with the remand rule of 81% yet a range from 100% to 67%.¹⁸ And the most expansive empirical study on immigration adjudication to date similarly finds “amazing disparities in grant rates,” such that the process was compared to “refugee roulette.”¹⁹ The

¹³ Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 349–50.

¹⁴ *See Nken*, 556 U.S. at 426.

¹⁵ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008).

¹⁶ *See* Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 353–56.

¹⁷ *See id.* at 364–65, 365 fig.1. The Second Circuit is excluded from this analysis because it has an agreement with the Federal Government to issue an automatic temporary stay that remains in effect until the petition is resolved. *See id.* at 364 & n.126.

¹⁸ Walker, *Judicial Toolbox for Agency Dialogue*, *supra* note 12, Part II.A & tbl.1.

¹⁹ Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007). It should be noted, however, that *Justice on the Fly* found less circuit-by-circuit disparity in the grant rate of underlying petitions, which ranged from 3% to 20%, than in the grant rate for stays of removal. *See* Table 1 *infra*.

raw numbers thus suggest that the likelihood of receiving a stay may well depend in large part on which circuit reviews the agency's removal order—something that neither the Supreme Court nor Congress (nor the Executive, for that matter) would find to be fair or effective.

2. Other Disparities. The disparities are not limited to the judicial branch. Only about half (55%) of petitioners sought stays of removal with great disparity among circuits, ranging from 25% in the Eleventh Circuit to 94% in the Ninth Circuit.²⁰ The overall Federal Government opposition rate is 71%, but it ranges from 18% in the Tenth Circuit to 99% in the Eleventh.²¹ Table 1 provides the circuit-by-circuit comparison of rates for stay grants, requests, and oppositions along with the petition grant rate for the cases reviewed.²²

Table 1: *Circuit-by-Circuit Summary*

Court of Appeals	Sliding-Scale Approach	Stay Grant Rate	Stay Request Rate	Gov't Opposition Rate	Petition Grant Rate
First Circuit	Unclear	29%	44%	42%	4%
Second Circuit	Yes	*	99%	44%	6%
Third Circuit	No	21%	48%	90%	7%
Fourth Circuit	No	14%	30%	88%	7%
Fifth Circuit	Unclear	4%	49%	90%	3%
Sixth Circuit	Yes	48%	70%	69%	7%
Seventh Circuit	Yes	31%	38%	46%	20%
Eighth Circuit	Unclear	10%	58%	80%	6%
Ninth Circuit	Yes	63%	94%	71%	10%
Tenth Circuit	Unclear	6%	50%	18%	8%
Eleventh Circuit	No	6%	25%	99%	9%
Total:		26%	55%	71%	8%

* The Second Circuit has automatic temporary stay practice.

²⁰ Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 368–69 & fig.2.

²¹ *Id.* at 374–75 & fig.3. One might think that the Government's rate of opposition would be less in cases involving asylum, withholding, or Convention Against Torture (CAT) claims as the chance of irreparable harm from removal may be heightened in those contexts, but the study found no statistically significant difference between those claims and non-persecution-based claims. *See id.* at 375–76 & fig.4.

²² Table 1 draws on Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 365–76 & figs.1, 2 & 3, as well as additional data graciously provided by the authors of the study. The circuit-by-circuit statistics included in both tables report percentages from the overlapping data sets that include a random sample of 100 cases from each circuit plus an over-sample of cases where stays were requested such that there are 100 cases per circuit with stay requests. *See id.* at 364–65 (describing the two data sets).

The disparities among these rates should send a strong message to the Executive Branch, Congress, courts, and immigration attorneys. For instance, as *Justice on the Fly* recommends, the Justice Department's Office of Immigration Litigation (OIL) should collect its own data on stay-of-removal motions, oppositions, and grant rates. Because the study finds that the Government's opposition has a "dramatic impact on the likelihood of [the petitioner] being granted a stay," OIL should reexamine its procedures and practices to ensure consistent application of the law among similarly situated noncitizens in the various circuits.²³ Not only would such systemic review and implementation enhance the critical policy objective of uniform administration of the law, but it would also help better leverage Executive Branch expertise, encourage efficient allocation of government resources, and promote equity in the administration of federal immigration law.

Similarly, immigration attorneys should recalibrate their cost-benefit analysis on whether to seek a stay of removal in light of the actual request and grant rates in the relevant circuit. This is particularly necessary when one considers the study's finding that nearly half (48%) of those petitioners who prevailed in their appeals never moved for a stay of removal.²⁴ Likewise, as *Justice on the Fly* documents, failure to adequately brief the stay factors increases the likelihood of an opposition from the Government²⁵—thus further decreasing the likelihood of success in court. Accordingly, attorneys should thoroughly brief the stay request in accordance with *Nken*'s guidance and the applicable circuit precedent.

3. Impact of Sliding-Scale Approach. With these disparities in mind, what can or should Congress or courts do to ensure a more consistent, efficient, and equitable administration of federal immigration law? *Justice on the Fly* suggests an immediate and critical step: courts should adopt the sliding-scale approach to the traditional four-factor test for stays of removal.²⁶ The study finds that there is a strong correlation between the adoption of the sliding-scale approach and higher stay grant rates.²⁷ The more important inquiry, however, is whether that increased grant rate is accompanied by increased Type I (false positives) and/or Type II (false negatives) errors.²⁸ Here, false positives occur when the court grants the stay motion yet ultimately denies the petition—thus prohibiting the Government from removing a petitioner during the pendency of an unsuccessful appeal. By contrast, false negatives take place when the court denies the stay

²³ *Id.* at 399–400.

²⁴ *Id.* at 380.

²⁵ *See id.* at 402.

²⁶ Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 395.

²⁷ *See id.* at 390–91. The authors are careful to note that other factors—and in particular, the procedural differences in how circuits handle stay-of-removal motions—also influence grant rates, *see id.* at 391, and they explore those procedures in Kagan, Marouf & Gill, *Buying Time?*, *supra* note 10.

²⁸ *See generally* R.S. Radford, *Statistical Error and Legal Error: Type One and Type Two Errors and the Law*, 21 LOY. L.A. L. REV. 843 (1988).

motion yet ultimately grants the petition—thus allowing the Government to remove during the appeal a petitioner who is ultimately adjudicated to be entitled to remain in the United States.²⁹

Not unsurprisingly, the study finds that the more petitioner-friendly sliding-scale approach reduces the number of false negatives but increases the number of false positives. As for the false negatives, the study reveals that sliding-scale circuits committed Type II errors 27% of the time when they denied a stay motion, whereas non-sliding-scale circuits committed such errors at a 57% rate. The disparity is even greater in the context of persecution-based claims (asylum, withholding, and CAT claims) where non-sliding-scale circuits make nearly three times as many Type II errors as sliding-scale circuits (55% to 19%). This increased disparity should raise concerns as the likelihood of irreparable harm is more acute in the context of a petitioner who is removed (likely to the land of such persecution) yet ultimately prevails on a persecution-based claim. As for false positives, the study reveals that sliding-scale circuits committed Type I errors 46% of the time when they granted a stay motion, while non-sliding-scale circuits committed such errors at a 10% rate. The difference in persecution-based cases changed to 50% and 9%, respectively.³⁰ Table 2 provides the circuit-by-circuit comparison on stay and petition grant rates along with rate of Type I and Type II errors.³¹

²⁹ To call these “errors” is a bit misleading as courts balance four factors when determining whether to grant a stay:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). In other words, even if the stay motion is denied but the petition is ultimately granted (or vice versa), that does not necessarily mean the court committed legal error in denying (or granting) the stay as the other three factors may cut the other way. That said, as a matter of equity and efficiency, these are errors because false negatives result in unnecessary deportations and false positives result in petitioners remaining in the country longer than the Government may prefer.

³⁰ Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 390–91 tbls.3 & 4. Both the Type I and Type II error rates reported here are based on the subset of cases where the petition was ultimately granted. Although the overall size of the sample is robust, it should be noted that the numbers for Type I and Type II errors are quite small for some circuits.

³¹ Table 2 draws on Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 364–65 & fig.1, as well as additional data provided by the study’s authors.

Table 2: Type I and II Errors by Circuit

Court of Appeals	Sliding-Scale Approach	Stay Grant Rate	Petition Grant Rate	Type I Error Rate	Type II Error Rate
First Circuit	Unclear	29%	4%	27%	50%
Second Circuit	Yes	*	6%	*	*
Third Circuit	No	21%	7%	14%	0%
Fourth Circuit	No	14%	7%	12%	71%
Fifth Circuit	Unclear	4%	3%	4%	100%
Sixth Circuit	Yes	48%	7%	41%	0%
Seventh Circuit	Yes	31%	20%	16%	21%
Eighth Circuit	Unclear	10%	6%	10%	100%
Ninth Circuit	Yes	63%	10%	58%	47%
Tenth Circuit	Unclear	6%	8%	3%	67%
Eleventh Circuit	No	6%	9%	5%	89%
	Total:	26%	8%	22%	47%
* The Second Circuit has automatic temporary stay practice.					

Administrative law cares about both types of errors as a matter of consistency, efficiency, and equity.³² And Congress may well want to intervene to exercise its policy judgment. In this context, however, *Justice on the Fly* seems to have the better argument that courts and Congress should care more about Type II errors/false negatives—where the court denies a stay motion but ultimately grants the relief sought in the petition—than Type I errors/false positives. The consistency and equity arguments are straightforward in that applying one standard nationwide should lead to more uniform application of the law, and choosing the more petitioner-friendly standard reduces the Type II errors that could lead to irreparable harm. This is particularly true in the context of persecution-based claims where the chance of irreparable harm is more acute and the difference in Type II errors is even greater among the approaches. Even as a matter of efficiency, there is a credible argument that it is more efficient to minimize Type II errors (that involve erroneously removing and then returning noncitizens) at the expense of some additional Type I errors (that involve merely allowing ultimately removable noncitizens to remain in the United States pending appeal).

Accordingly, *Justice on the Fly* makes a persuasive argument that courts should adopt a sliding-scale standard when evaluating stay-of-removal motions.

³² See generally Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. Part III.A (forthcoming 2014) (exploring policy considerations of consistency, efficiency, equity, and expertise for deference to federal agency action), available at <http://ssrn.com/abstract=2393412>.

And, as discussed in Part III, adoption of the sliding-scale approach is even more important in light of the Government's post-*Nken* confession of error that petitioners who prevail on their claims may not be able to reenter the United States after a removal.

III. THE GOVERNMENT'S CONFESSION OF ERROR AND A POTENTIAL PATH FORWARD

The study's key findings may be affected by the *Nken* Court's reliance on a factual misstatement made by the Federal Government. In holding that "the burden of removal alone cannot constitute irreparable injury,"³³ the Court relied on the Government's representation that noncitizens "who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal."³⁴ Three years after the opinion in *Nken* was issued, the Solicitor General informed the Court that the Government did not actually have a policy or practice to allow noncitizens to return to the United States if they prevailed in their appeals and that the Government would not rely on that *Nken* conclusion about no irreparable harm.³⁵ It is not clear when the Government ceased to rely on this representation in the courts of appeals, much less if or when the courts of appeals abandoned such take on irreparable harm or how this misrepresentation affects the circuit-by-circuit findings in this study.

More importantly, scholars, commentators, and litigators have struggled with how to respond to the Court's reliance on this misstatement. Professor Nancy Morawetz, for instance, makes a compelling case that government self-regulation of misstatements is problematic and that courts should take remedial action to ensure proper administration of justice:

Unless the Court or lower courts take remedial action, the court system is left relying on what is little more than an advisory opinion—a statement of the rule if a hypothetical state of affairs were to exist. This undermines the foundation of our legal system, which requires that courts decide cases and controversies and not hypothetical questions.³⁶

The question then becomes what type of judicial remedy would be fair and effective in the stay-of-removal context.

This Response suggests that the courts of appeals have already developed a number of novel judicial tools in the immigration adjudication context to enhance their dialogue with federal agencies and that courts should craft a

³³ *Nken*, 556 U.S. at 435.

³⁴ *Id.*

³⁵ See Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 348–49 & nn.51–55.

³⁶ Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1663 (2013).

similar dialogue-enhancing tool here. As chronicled elsewhere in the context of administrative law's ordinary remand rule, these tools include: requesting notice of the agency's decision on remand, retaining jurisdiction of the petition, setting a timeline for remand, providing hypothetical solutions, certifying issues for remand, and suggesting the transfer of the matter to another immigration judge. Of particular relevance here, courts of appeals at times also seek concessions from the Government at argument or otherwise during judicial review.³⁷

Here, federal courts of appeals should seek a similar concession in the stay-of-removal context. Namely, at the stay application briefing stage, courts should require that the Federal Government concede that it will facilitate the petitioner's return to the United States in the event that she is successful on appeal and perhaps work out those details in advance with the petitioner.³⁸ If the Government fails to make such concession, the harm alleged by the petitioner should be presumed irreparable, which admittedly is the opposite approach than that counseled by the *Nken* Court.³⁹

Such an approach would not be unprecedented, as the Second Circuit and the Government have a somewhat similar agreement that the Government will not remove a petitioner while a stay motion is pending (and the Second Circuit thus does not typically rule on the stay motion until it rules on the underlying petition).⁴⁰ Furthermore, this dialogue-enhancing tool is justified by the study's empirical findings on the prevalence of Type II errors (or false negatives) and the importance of avoiding such errors in a determination of irreparable harm. After all, non-sliding-scale circuits commit Type II errors 57% of the time when they denied a stay motion, and even sliding-scale circuits commit such errors at a 27% rate. The data presented in *Justice on the Fly* reinforce the conclusion that it would be more fair and effective to shift the burden on the Government to disprove irreparable harm if the Government is unwilling to guarantee that it will facilitate the petitioner's return to the United States.

³⁷ Walker, *Judicial Toolbox for Agency Dialogue*, *supra* note 12, Part II.C, Part III & tbl.2; *see, e.g.*, *Sandoval v. Holder*, 641 F.3d 982, 987 (8th Cir. 2011).

³⁸ As noted in *Justice on the Fly*, the Government's current attempts to remedy the situation may not go far enough to facilitate a petitioner's return, especially considering that many petitioners lack financial means to pay the court filing fees yet would be required to pay for their international travel back to the United States. *See* Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 348, 349 n.55.

³⁹ *See* *Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that "the burden of removal alone cannot constitute the requisite irreparable injury").

⁴⁰ *See* Marouf, Kagan & Gill, *Justice on the Fly*, *supra* note 10, at 364 n.126; *see also* Kagan, Marouf & Gill, *Buying Time?*, *supra* note 10, at *31-*32 (exploring Second Circuit situation in more detail).

IV. CONCLUSION

Justice on the Fly presents yet another bleak picture about the current state of immigration adjudication. The disparate treatment of stay-of-removal motions among the courts of appeals—as well as among the Government’s opposition practices and immigration attorneys’ stay request patterns—calls into question the consistent, efficient, and equitable administration of federal immigration law. Much work needs to be done to ensure, as Chief Justice Roberts remarked in writing for the Court in *Nken*, that “[t]he choice for a reviewing court should not be between justice on the fly or participation in what may be an idle ceremony.”⁴¹

Moreover, the study’s findings confirm Justice Kennedy’s intuition about the importance of empirical data in this area of immigration law—and in the context of competing legal standards more generally—“so that experience can demonstrate whether [*Nken*] yields a fair and effective result” and that “Congress can evaluate whether its policy objectives are being realized by the legislation it has enacted.”⁴² *Justice on the Fly* provides an excellent model for how such empirical study can be conducted. Hopefully other scholars will follow suit, and the various actors here (courts, Congress, the Executive Branch, and immigration attorneys) will apply the insights uncovered to improve federal immigration law, policy, and practice.

⁴¹ *Nken*, 556 U.S. at 427 (internal quotation omitted).

⁴² *Id.* at 437 (Kennedy, J., concurring).