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Justice on the Fly: The Danger of Errant Deportations

FATMA MAROUF, MICHAEL KAGAN & REBECCA GILL*

*The government may deport an immigrant appealing a deportation order in federal court even before the court rules on the case, unless the court issues a stay of removal. In its 2009 decision in *Nken v. Holder*, the Supreme Court clarified that the legal standard for stays of removal is the same test courts use for preliminary injunctions. Yet Justice Kennedy expressed frustration that the Court had little data to inform its decision. The Court will likely need to revisit this issue, as doubts cloud the meaning of *Nken*'s main holdings, in part because the government misled the Court. This Article responds to Justice Kennedy's request for data and sheds light on the doctrinal controversies surrounding stays by presenting groundbreaking empirical analysis of 1646 cases in all the circuits that hear immigration appeals. It offers a singular window into an arena of adjudication where decisions are rarely articulated in writing. Among our most important findings, the circuit courts denied stays of removal in about half of the appeals that were ultimately granted, an alarming type of error that could result in people being errantly deported to countries where they risk persecution or torture. Our results also suggest that legal doctrine makes an important difference in how accurately courts identify which cases merit a stay, but that no magic bullet exists to avoid errors. In order to adopt an effective approach to stays of removal, courts must confront an important value judgment about whether to err on the side of preventing wrongful removal or on the side of avoiding delayed deportation.*

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TABLE OF CONTENTS

I. INTRODUCTION	339
II. THE DECISION IN <i>NKEN V. HOLDER</i>	343
A. <i>The Importance of a Stay of Removal</i>	343
B. <i>Jean Marc Nken's Application for a Stay</i>	344
C. <i>The Legal Dispute in Nken</i>	345
D. <i>Government Misstatements</i>	348
E. <i>The Circuit Split on the Sliding Scale</i>	349
F. <i>The Empirical Doubt at the Heart of Nken</i>	356
III. THE EMPIRICAL PROJECT ON STAYS OF REMOVAL	357
A. <i>Data and Methodology</i>	362
B. <i>Discussion of Key Findings</i>	364
1. <i>How Often Do Courts Grant Stays of Removal?</i>	364
2. <i>How Often Do Petitioners Seek Stays of Removal?</i>	367
a. <i>Legal Representation, Detention, and Other Theories</i>	370
b. <i>Does a High Stay Grant Rate Lead to More Stay Requests?</i>	371
3. <i>How Often Does the Government Oppose Stays of Removal?</i>	374
a. <i>Government Opposition Rates</i>	374
b. <i>Cases Where the Government Changes Position</i>	378
4. <i>What Are the Correlations Between Stays and Petitions Granted?</i>	379
a. <i>Relationship Between Stays Requested and Petitions Granted</i>	380
b. <i>Relationship Between Stays and Petitions Granted</i>	381
c. <i>Contextualizing "Error" in Analyzing Correlations</i>	384
d. <i>Ratios of Stays to Petitions Granted</i>	385
5. <i>What Is the Impact of Doctrine?</i>	387
a. <i>Impact of Doctrine on Stay Grant Rates</i>	387
b. <i>Impact of Doctrine on "Error" Rates</i>	388
IV. RECOMMENDATIONS	391
A. <i>Recommendations to the Judiciary</i>	391
1. <i>Providing Temporary Automatic Stays</i>	391
2. <i>Refining the Doctrine</i>	393
3. <i>Monitoring Ratios</i>	396
4. <i>Countering Overconfidence Bias</i>	397

B. <i>Recommendations for the Executive Branch</i>	399
1. <i>Reexamining OIL's Approach to Stays of Removal</i>	399
2. <i>Exercise of Prosecutorial Discretion by ICE</i>	401
C. <i>Recommendations for Immigration Attorneys</i>	402
V. CONCLUSION	402

I. INTRODUCTION

The choice for a reviewing court should not be between justice on the fly or participation in what may be an "idle ceremony."

— Chief Justice Roberts, *Nken v. Holder*, 556 U.S. 418, 427 (2009).

Every year, over 6000 people ask the federal courts of appeals to review the government's decisions to remove them from the United States.¹ These immigration appeals account for approximately 11% of cases on the federal appellate docket.² A substantial percentage of the cases concern asylum and torture claims, raising the specter of persecution or bodily harm if a person is deported in error. Much of immigration law scholarship is devoted to describing, analyzing, and debating how the circuit courts decide these cases. Yet relatively little attention has been paid to an urgent concern for any noncitizen contemplating this process. Under current law, the government can deport someone even while a petition to the court of appeals is pending. The only concrete way to prevent this is to persuade the appellate court to grant a stay of removal.

In its 2009 decision in *Nken v. Holder*, the Supreme Court addressed a circuit split about what legal standard applies to stays of removal. The Court made clear that it wanted to ensure that immigrants have access to an effective appeal process without frustrating the government's interest in enforcing immigration laws efficiently. It reached two main conclusions. First, the Court found that the well-established four-part test for issuing preliminary injunctions should govern stays of removal, with the focus on assessing the likelihood of success on the merits and the risk of irreparable harm.³ Second, the Court found

¹ See U.S. COURTS FOR THE NINTH CIRCUIT, 2011 ANNUAL REPORT 58 (2011) ("BIA appeals number 2,963 The court had almost 47% of the total BIA appeals filed nationally in FY 2011").

² There were more than 6000 immigration appeals filed, *see id.*, while there were approximately 55,000 total appeals lodged with the courts of appeals in 2011. ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 9 (2012), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>. In some recent years immigration cases constituted one out of every six cases on the federal appellate docket, and a third of the cases in the Second and Ninth Circuits. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1646 (2010).

³ *Nken v. Holder*, 556 U.S. 418, 426 (2009).

that deportation on its own is not sufficient to show a risk of irreparable harm, absent some other factor.

There is good reason to believe that the Court will need to revisit the issue of stays of removal. In 2012, the Office of the Solicitor General conceded that it had misled the Court in *Nken* to believe that the government had a policy of bringing deported individuals back to the United States if they won their appeals, and the Court relied on this information in holding that deportation itself does not constitute irreparable harm. In addition, the Court left unresolved a circuit split about how the four-factor test for stays and injunctions should be applied. Thus, confusion clouds the legitimacy or meaning of both of *Nken*'s holdings.

We conducted this study so that courts wrestling with these issues will have better information about what is actually happening in immigration appeals where a stay is requested. In *Nken*, some of the Justices expressed frustration that they had little data to inform their decision regarding the appropriate legal test for stays. In a concurring opinion, Justice Kennedy, joined by Justice Scalia, complained, "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."⁴

This Article helps answer those questions by presenting groundbreaking empirical research on how the federal courts of appeals adjudicate stays of removal. We analyzed 1646 cases filed after *Nken* in the eleven circuits that adjudicate immigration appeals. By reviewing the individual dockets of these cases, we collected unique data on the rates at which courts grant stays, the rates at which noncitizens request them, the rates of government opposition, and correlations between stays granted and ultimate success on the merits. This study provides new insight into the way circuit courts process immigration appeals, offering a singular window into an arena of judicial decision-making where judgments are rarely articulated in writing.

One of our most striking findings is that the circuit courts as a whole denied stays of removal in about half of the appeals that were ultimately granted, a pattern that we call false negatives. This was true even in cases involving asylum, withholding of removal, or protection under the Convention Against Torture (CAT). In other words, noncitizens with meritorious appeals remain vulnerable to being deported to countries where they face a risk of persecution or torture. Since demonstrating a likelihood of success is inextricably linked to demonstrating a risk of irreparable harm in these types of cases, and the other two factors have little practical impact on the decision of whether or not to grant a stay, our results suggest that courts in general are not particularly good at predicting the likelihood of success.

⁴*Id.* at 437 (Kennedy, J., concurring).

To be clear, most immigrants who file petitions with the courts of appeals lose, so most denials of a stay are eventually validated by a denial of the petition. But imagine, as an analogy, a screening test for a certain form of cancer that fails to detect the disease 50% of the time. Most people never get the disease, so the negative results are usually accurate. Yet, the point of a screening test is to identify early on the small fraction of the population who *will* get sick so that those individuals can receive necessary care. Who would be content with a test that fails to identify half of the people at risk? Yet that is effectively what is happening in the circuit courts when noncitizens request stays of removal. The courts fail to identify half of the petitioners who eventually prevail in their appeals, leaving them at imminent risk of deportation, which, in the words of Justice Brandeis, may result “in loss of both property and life; or of all that makes life worth living.”⁵

Our results also suggest that legal doctrine makes an important difference in how accurately the courts identify which cases merit a stay. These doctrinal differences remain important because *Nken* failed to resolve a circuit split about how to apply the four-part test for stays and injunctions. Specifically, the circuit courts disagree about whether or not to use a “sliding scale” approach, where a greater showing on one factor would allow a lesser showing on another factor. While the Second, Sixth, Seventh, and Ninth Circuits have clearly adopted the sliding scale approach, the Third, Fourth, and Eleventh Circuits have rejected it, using a sequential approach instead.⁶ The doctrinal approach in the remaining circuits is not quite clear, but they appear to be moving towards rejecting the sliding scale.⁷

We found that the circuits using a sliding scale approach not only have a much higher overall grant rate for stays (53%, compared to just 11% in the circuits that refuse to slide), but also have a significantly lower number of false negatives. At the same time, however, the sliding scale circuits have a much higher number of false positives, which we define as cases where the stay was granted but the petition was denied. Thus, the sliding scale circuits are doing a much better job than sequential circuits in preventing errant deportations, but they are also giving stays to many more noncitizens who ultimately lose, which could potentially frustrate immigration enforcement.

These findings indicate that to adopt an effective approach to stays of removal, courts must confront an important value judgment about whether to err on the side of preventing wrongful removal or on the side of avoiding delayed deportation. Making a sound judgment requires information not only about the relative rates of error, but also about the length of the delay. In a companion

⁵ *No Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also* *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized deportation is a particularly severe ‘penalty’”); *id.* at 1486 (quoting *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947)) (describing deportation as “the equivalent of banishment or exile”).

⁶ *See infra* Part II.E.

⁷ *See infra* Part II.E.

article, entitled *Buying Time? False Assumptions About Abusive Appeals*, we examine the issue of delay in much greater detail.⁸

Doctrine is only part of the equation, however. We not only found huge variations in stay grant rates among the circuits, ranging from 4% to 71%, but we also found large variations among circuits that appeared to use *similar* doctrinal standards. Likewise, there were sizeable variations among circuits in the rates of false negatives and false positives. A few circuits stood out for granting stays to most or all of those who prevailed in our sample, while other circuits denied stays in every single case that succeeded. These differences did not map neatly onto doctrine. For example, the Third Circuit, which has rejected the sliding scale, had no false negatives in our sample and a low number of false positives. Other factors therefore appear to play a significant role.

Equally intriguing as our answer to Justice Kennedy's question about correlations between stays and petitions granted was our finding that about half of the individuals who ended up winning their appeals had *never even requested* a stay of removal. Lack of representation does not explain this finding, since pro se petitioners actually requested stays at rates comparable to represented petitioners. We were also surprised to find that petitioners seeking asylum, withholding of removal, or protection under the CAT—applications based on a risk of persecution or torture in the country of origin—did not request stays at significantly higher rates than individuals with other types of applications. While there are many possible explanations for these results, immigration attorneys should take note that a large number of petitioners are exposing themselves to deportation during the pendency of their appeals.

Our results are of relevance not only to immigrants, their attorneys, and the courts, but also the Department of Justice's Office of Immigration Litigation (DOJ), which represents the government in these appeals. We found extremely high rates of opposition to stay motions in several circuits, but inexplicably low opposition rates in others. We further found that the government had opposed stays in over 70% of the cases where it ultimately filed its own motion to remand to the Board of Immigration Appeals (BIA), thereby recognizing that at least some aspect of the appeal had merit. This indicates that the DOJ, like the courts, has difficulty determining which appeals raise meritorious issues at the beginning of the litigation. Our findings suggest that the DOJ may want to take a closer look at its practices regarding stays of removal in order to help ensure more equitable outcomes and a more efficient process.

Part II of this Article provides relevant background about the importance of stays of removal and the Supreme Court's decision in *Nken*, including the empirical doubt at the heart of that decision. Part III describes our study of stays of removal, situating it in the broader field of empirical legal research, explaining the methodology, and presenting our key findings on grant rates for

⁸Michael Kagan, Fatma Marouf & Rebecca Gill, *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399672.

stays, application rates, opposition rates, correlations between stays and petitions granted, and the impact of doctrine. We present recommendations for the judiciary and executive, as well as for immigration attorneys, in Part IV, and we conclude in Part V.

II. THE DECISION IN *NKEN V. HOLDER*

A. *The Importance of a Stay of Removal*

The usual adjudication process for removing a noncitizen from the United States begins with a Notice to Appear before an Immigration Judge (IJ) in Immigration Court, which is part of the Executive Office of Immigration Review (EOIR) within the Department of Justice.⁹ The IJ can issue an order of removal or can rule in favor of the noncitizen, but the IJ's decision will not become final for thirty days, during which either the noncitizen or the Department of Homeland Security may appeal to the BIA, which is also part of the EOIR.¹⁰ Once the BIA resolves an appeal, any order of removal becomes final.¹¹ A final order of removal may be appealed by filing a petition for review with the U.S. court of appeals that has jurisdiction over the state where the immigration court was located.¹² But, by statute, the filing of a petition for review "does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."¹³

The requirement that a petitioner must move for a stay against an administrative order is the default rule in the federal courts of appeals.¹⁴ However, in some areas of law Congress has taken a different approach to the question of whether appeals should always stay orders by specialist tribunals and administrative bodies. For example, the mere filing of a bankruptcy petition with the U.S. district court "operates as a stay" that temporarily prevents most actions against a debtor's property.¹⁵ Similarly, until Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), removal orders were automatically stayed until an appeal was resolved.¹⁶ Since April 1, 1997, when IIRIRA became effective, noncitizens

⁹ 8 C.F.R. § 239.1 (2013).

¹⁰ *Id.* §§ 1003.1(b), 1003.2(b)(2).

¹¹ *Id.* § 1241.1.

¹² 8 U.S.C. § 1252(a)–(b) (2012).

¹³ *Id.* § 1252(b)(3)(B).

¹⁴ *See* FED. R. APP. P. 18(a).

¹⁵ 11 U.S.C. § 362(a)–(b) (2012).

¹⁶ *See* 8 U.S.C. § 1105a(a)(3) (1995) (repealed 1997) ("The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs.").

risk being deported from the United States while their appeals are pending unless they specifically request and receive stays of removal.¹⁷

B. Jean Marc Nken's Application for a Stay

The facts underlying *Nken* illustrate both the convoluted nature of immigration adjudication, as well as the practical importance of stays of removal. Jean Marc Nken was a Cameroonian man who applied for asylum and protection under the CAT in 2001.¹⁸ He testified that he had been arrested and detained twice for participating in anti-government protests, and that he was frequently beaten during both detentions.¹⁹ The IJ found his claim to be insufficiently documented, whereas Nken argued that the IJ had cut him off when he had tried to address the alleged weaknesses in his case.²⁰ Nken appealed to the BIA, but his lawyer at the time missed a deadline to file a brief and, in 2006, the BIA issued a final order of removal.²¹

In May 2008, Nken submitted new evidence to support his original asylum claim, and asked the BIA to reopen the case.²² While that motion was pending, Nken was arrested and detained for failing to report on a daily basis to an Immigration and Customs Enforcement (ICE) office.²³ In detention, an ICE agent told him that he would be deported in June 2008.²⁴ On June 23, the BIA denied Nken's motion to reopen his asylum case, and, on the same day, he filed a petition for review with the Fourth Circuit Court of Appeals. On August 6, he asked the court of appeals for a stay of removal. During the three months before the court ruled on his motion, he remained vulnerable to deportation. When the

¹⁷Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 100 (2010) (describing government advantage in immigration adjudication through the automatic stay of an Immigration Judge's decision to release a detainee on bond when appealed by the Department of Homeland Security to the BIA).

¹⁸*Nken v. Holder*, 556 U.S. 418, 422 (2009).

¹⁹Brief for Petitioner at 8, *Nken*, 556 U.S. 418 (2009) (No. 08-681), 2008 WL 5369549, at *8.

²⁰*Id.* at 9.

²¹*Id.* at 10. While the case was pending, Nken married a U.S. citizen and petitioned to adjust his status to a lawful permanent resident based on the marriage. The Citizenship and Immigration Service (USCIS) eventually found the marriage to be valid, but failed to rule on this petition before the BIA ordered his removal, *id.* at 10–11, and the BIA and the Fourth Circuit also refused to reopen the case, *id.* at 11. Had the government exercised its discretion differently, for instance by deferring removal until USCIS ruled on the marriage, or by later consenting to reopen the case after the marriage was found to be valid, Nken might never have reached the federal courts.

²²*Id.* at 12.

²³*Id.* at 13–14.

²⁴*Id.* at 14.

court denied a stay on November 5, it did so in a one-sentence order.²⁵ Nken then asked the Supreme Court for a stay.

C. *The Legal Dispute in Nken*

When Congress enacted IIRIRA in 1996, it made two changes that became the central questions that the Supreme Court sought to resolve in *Nken*. First, before IIRIRA, the courts of appeals had no jurisdiction to consider petitions from noncitizens who had left the country.²⁶ Congress eliminated this restriction, so that at least in theory a noncitizen could pursue an immigration appeal from abroad.²⁷ The degree to which this change was effective in practice has become a significant controversy, as we will discuss in greater detail below.

Second, IIRIRA included a peculiar provision, § 1252(f)(2), that purports to limit “injunctive relief” in immigration cases by providing that “no court shall enjoin the removal of any alien . . . unless the alien shows by *clear and convincing evidence* that the entry or execution of such order is prohibited as a matter of law.”²⁸ The Fourth and Eleventh Circuits had concluded that the clear and convincing standard should govern stays of removal.²⁹ But seven other circuits had concluded that a stay of removal pending resolution of an appeal is not an injunction subject to § 1252(f)(2).³⁰ These circuits instead applied the traditional test for granting a preliminary injunction.

Writing for a seven-justice majority, Chief Justice Roberts resolved this circuit split by concluding that the traditional four-part standard for injunctions should apply despite § 1252(f)(2),³¹ and that the Fourth and Eleventh Circuits had erred by adopting the clear and convincing test.³² The Supreme Court held that the appropriate test for stays of removal involves examining (1) the likelihood of success on the merits, (2) the risk of irreparable injury to the petitioner, (3) the risk of substantial injury to the opposing party, and (4) the

²⁵ Brief for Petitioner, *supra* note 19, at 15.

²⁶ 8 U.S.C. § 1105a(c) (1995) (repealed 1996).

²⁷ Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-612 (1996) (repealing 8 U.S.C. § 1105a).

²⁸ 8 U.S.C. § 1252(f)(2) (2012) (emphasis added).

²⁹ *See* Teshome-Gebreegziabher v. Mukasey, 528 F.3d 330, 335 (4th Cir. 2008); *Weng v. U.S. Attorney Gen.*, 287 F.3d 1335, 1337 (11th Cir. 2002).

³⁰ *See* *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172, 176 (5th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230, 233-34 (3d Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 7, 9 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95, 97 (2d Cir. 2002); *Andreu v. Ashcroft*, 253 F.3d 477, 483-84 (9th Cir. 2001) (en banc); *Bejjani v. INS*, 271 F.3d 670, 688 (6th Cir. 2001).

³¹ The Court concluded that stays are distinguishable from injunctions because they temporarily suspend executive authority, while an injunction directly orders an action. The Court acknowledged that this left unclear when, if ever, § 1252(f)(2) would actually apply. *Nken v. Holder*, 556 U.S. 418, 428-29, 431, 433 (2009).

³² *Id.* at 423.

public interest, which are the same factors that courts examine in deciding whether to grant a preliminary injunction.³³

The decision in *Nken* relies heavily on the “inherent” power of a court to issue stays so that an appeal may proceed.³⁴ Much of *Nken* reaffirms the value of permitting stays in order to facilitate the administration of justice and the effectiveness of courts.³⁵ The Chief Justice opened the decision by declaring: “It takes time to decide a case on appeal. . . . A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.”³⁶ Interim relief is essential because “[t]he choice for a reviewing court should not be between justice on the fly or participation in what may be an idle ceremony.”³⁷

While the decision was a victory for *Nken* personally and rejected the more stringent stay standard, it also offered the government an important concession. The government had argued that “there are many ways in which aliens with non-meritorious claims may seek to manipulate the judicial system to delay their removal”³⁸ and complained that the Seventh and Ninth Circuits, in particular, were too lenient in granting stays.³⁹ The Washington Legal Foundation, in an amicus brief, put it more bluntly: “[A] court-imposed delay in removal is a victory for the alien.”⁴⁰ The government asked the Court to clarify that even under the traditional four-part preliminary injunction test, a stay should be considered an “extraordinary remedy.”⁴¹ The Court went some distance to acknowledge these concerns by stating that stays are a matter of judicial discretion and not a matter of right.⁴² The Court found that it is not enough for a petitioner to show a mere possibility of success on the merits, or the mere possibility of irreparable injury.⁴³

³³ *Id.* at 434.

³⁴ *Id.* at 426.

³⁵ See Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 53, 89 (2011) (*Nken* is part of a broader trend of Supreme Court decisions reaffirming equitable standards that date to “the earliest federal rulings from the Marshall Court era.”). *But see* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205–06, 215, 218–19 (2012) (arguing that the Court has recently taken a new approach, at least for permanent injunctions, by more strictly defining the equitable factors that can be considered).

³⁶ *Nken*, 556 U.S. at 421.

³⁷ *Id.* at 427 (internal quotation marks omitted).

³⁸ Brief for the Respondent at 10, *Nken*, 556 U.S. 418 (No. 08-681), 2009 WL 45980, at *10.

³⁹ *Id.* at 47–48.

⁴⁰ Brief of Washington Legal Foundation & Allied Educational Foundation as *Amici Curiae* in Support of Respondent at 20, *Nken*, 556 U.S. 418 (No. 08-681), 2009 WL 75556, at *20.

⁴¹ Brief for the Respondent, *supra* note 38, at 46 (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008)).

⁴² *Nken*, 556 U.S. at 433.

⁴³ *Id.* at 434.

Perhaps the greatest benefit to the government from the *Nken* decision, and the main source of controversy afterwards, was the Court's analysis of the potential for noncitizens to pursue immigration appeals from abroad and to reenter the United States if they prevail. The majority found that "[a]lthough removal is a serious burden for many aliens, it is not categorically irreparable, as some courts have said."⁴⁴ The Court also reasoned that "[t]here is always a public interest in prompt execution of removal orders," which implicitly endorses the government's concern that the appeals process might be used to thwart immigration enforcement.⁴⁵ The decision in *Nken* therefore seemed to weaken the arguments that noncitizens could offer under the second prong of the four-part test, and strengthened the government's argument under the fourth prong.

The Court left many questions unanswered. It barely discussed *Nken's* argument that, as an asylum-seeker, he faced more acutely irreparable harm than other people subject to removal, since he was claiming that he would be persecuted if returned to Cameroon.⁴⁶ While the Court stated that a petitioner requesting a stay must show more than a "mere possibility" of irreparable harm, it left unclear how much evidence of risk would be enough.⁴⁷ And although the Court conceded a public interest in prompt removals of unauthorized immigrants, it also acknowledged that "[o]f course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm."⁴⁸ Thus, on several parts of the four-prong test, *Nken* offers support to both immigrants and the government, and does not entirely clarify how courts should decide whether to grant stays of removal.

On remand to the Fourth Circuit, the government stipulated that it would not deport *Nken* while his case was still pending, rendering the issue of a stay moot.⁴⁹ When the Fourth Circuit ultimately ruled on the substantive question of the BIA's refusal to reopen *Nken's* asylum application, it ruled in his favor, remanding the case because the BIA had failed to consider adequately the new evidence that he would risk persecution if removed to Cameroon.⁵⁰ Thus, after initially finding that *Nken* could be deported to Cameroon (by denying his request for a stay), the Fourth Circuit ultimately concluded that his appeal had

⁴⁴ *Id.* at 435.

⁴⁵ *Id.* at 436.

⁴⁶ Brief for Petitioner, *supra* note 19, at 17 ("[P]etitioner . . . may be exposed to dangerous, potentially deadly, conditions if he is removed. Although a stay is hardly automatic under the traditional standard, courts applying the traditional stay standard would not be forced to imperil the lives of petitioners with strong cases and a high risk of irreparable harm because they could consider the equities before sending petitioners in harm's way.").

⁴⁷ *Nken*, 556 U.S. at 434.

⁴⁸ *Id.* at 436.

⁴⁹ *Nken v. Holder*, 585 F.3d 818, 821 (4th Cir. 2009).

⁵⁰ *Id.* at 822–23.

merit and remanded to the BIA for further consideration of his claims. Our research found that such apparent errors were not uncommon in immigration appeals. Given that *Nken* was arguing that he would be persecuted in Cameroon, his deportation might have had catastrophic human consequences. However, the *Nken* decision has become controversial for other reasons.

D. Government Misstatements

In reaching the finding that “the burden of removal alone cannot constitute irreparable injury,”⁵¹ the Court relied on the statutory amendment that allowed noncitizens to continue their appeals from outside the country and on the government’s assertion that there was a procedure by which a successful petitioner who had been deported could actually re-enter the United States.⁵² However, subsequent litigation under the Freedom of Information Act revealed that at the time of the *Nken* decision, the government did not actually have such a policy or practice allowing noncitizens to return to the United States if their appeals were successful.⁵³ On April 24, 2012, the Deputy Solicitor General Michael R. Dreeben wrote to the clerk of the Supreme Court to “clarify and correct” the government’s statement to the Court.⁵⁴ Dreeben informed the Court that the government would no longer rely on the doubtful statement in *Nken*.⁵⁵

⁵¹ *Nken*, 556 U.S. at 438.

⁵² In its brief to the Court, the government asserted:

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, and according them the status they had at the time of removal.

Brief for the Respondent, *supra* note 38, at 44. The Supreme Court, in turn, relied on the existence of this policy, stating in *Nken*: “Aliens 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.” *Nken*, 556 U.S. at 435 (citing Brief for the Respondent, *supra* note 38, at 44).

⁵³ See Lyle Denniston, *Significant Feud over an SG Brief (UPDATED)*, SCOTUSBLOG (Feb. 13, 2012, 2:40 PM), <http://www.scotusblog.com/2012/02/significant-feud-over-an-sg-brief/>. In February 2012, Judge Jed Rakoff of the Southern District of New York found that internal executive branch correspondence “evidences an attempt to cobble together a factual basis for making the representation the [Office of Solicitor General] made to the Court in *Nken*.” *Nat’l Immigration Project v. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720, 727 (S.D.N.Y. 2012).

⁵⁴ Letter from Michael R. Dreeben, Deputy Solicitor Gen., U.S. Dep’t of Justice, to the Honorable William K. Suter, Clerk, Supreme Court of the U.S. (Apr. 24, 2012), *available at* <http://www.justice.gov/osg/briefs/2008/3mer/2mer/2008-0681.mer.sup.pdf.pdf>. Dreeben conceded that at the time of the *Nken* decision “the government had not established a procedure as such” for effectuating the return of a noncitizen appealing a removal order, and that “the government is not confident that the process . . . was as consistently effective as the statement in its brief in *Nken* implied.” *Id.* Dreeben acknowledged that since *Nken* was decided, lower courts had relied on the Supreme Court’s finding that successful appellants

The revelation that the Supreme Court relied on an errant representation by the government does not directly question the holding that the standard for granting a stay of removal is the four-part test normally used for preliminary injunctions. But it does raise significant questions about the validity of the Court's understanding of how the irreparable harm prong of that test should apply in immigration cases.⁵⁶ The Court's conclusion that removal is not *per se* irreparable was based on a falsehood, and the DOJ now says it will not rely on it. Although the Supreme Court does not need to reconsider *Nken* wholesale, it has good reason to revisit how the four factors should apply to immigration cases.

E. *The Circuit Split on the Sliding Scale*

Even without considering the Solicitor General's misstatement to the court, the Supreme Court should revisit the standard for stays because the circuit courts remain divided about *how to apply* the four-part test that the Court adopted in *Nken*. The disagreement centers on whether the four parts of the test can be applied according to a sliding scale, so that a particularly compelling

could return to the United States, and that some appellants had "encountered significant impediments in returning." *Id.*

⁵⁵ *Id.* The government stated that it did not believe that any action by the Court would be required. However, the American Immigration Lawyers Association asked the Court to amend the *Nken* decision by deleting the suspect portions. Letter from Paul R.Q. Wolfson & Adam Raviv, Counsel for the Am. Immigration Lawyers Ass'n et al., to the Honorable William K. Suter, Clerk, Supreme Court of the U.S. (May 4, 2012), available at <http://www.aila.org/content/default.aspx?docid=39508>. In early 2012, the Department of Homeland Security sought to develop a procedure that would more reliably allow noncitizens who prevail in immigration appeals to re-enter the country. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, POLICY DIRECTIVE 11061.1, FACILITATING THE RETURN TO THE UNITED STATES OF CERTAIN LAWFULLY REMOVED ALIENS para. 2 (2012). Many questions remain about the practicality of the new system. For example, return will be facilitated only if the person's presence in the United States is "necessary" to the appeal. *Id.* Even if reentry is allowed in principle, the modalities of how it would actually be effectuated are also problematic. ICE will issue papers to allow a returning noncitizen to board a commercial airplane, and can parole her into the country, but the noncitizen will likely need to pay for her own travel costs. *Id.* para. 3.1. Our research found that a significant percentage of immigrant petitioners to the federal courts ask for and are often granted leave to appeal *in forma pauperis*. This means that they lack the means to pay the \$450 filing fee at the court of appeals. But under the ICE policy, if they prevail in their appeals they might nevertheless be expected to pay for international travel to return to the United States.

⁵⁶ For a brief comment on the jurisprudential implications of the government's factual misstatement, see Christopher J. Walker, *Does the Legal Standard Matter? Empirical Answers to Justice Kennedy's Questions in Nken v. Holder*, 75 OHIO ST. L.J. FURTHERMORE 29 (2014); see also Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1663 (2013) (arguing that the false factual basis for this aspect of *Nken* may render the decision advisory and thus offend the case or controversy requirement in the Constitution).

showing on the irreparable harm factor can justify relaxing the standard for likelihood of success on the merits, or vice versa.⁵⁷

This disagreement existed long before *Nken*.⁵⁸ But the division deepened after the Court's decisions in *Nken* and *Winter v. Natural Resources Defense Council*, which were issued around the same time and both written by Chief Justice Roberts.⁵⁹ In *Winter*, the Court reaffirmed that even if a plaintiff shows a high likelihood of success on the merits, there still must be a showing that irreparable injury is likely, not merely possible, in order for a preliminary injunction to issue.⁶⁰ This led at least one circuit that previously accepted the sliding scale approach to question its validity, while also leading commentators to suggest that *Winter* has unsettled the doctrine.⁶¹

Although some courts have concluded that *Winter* undermines the sliding scale, *Winter* did not directly address this question.⁶² In vacating the Ninth Circuit's injunction that prevented the Navy from using a type of sonar in training exercises off the southern California coast, the Court said: "[E]ven if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."⁶³ The Chief Justice's opinion in *Winter* states that the case did not turn on the correct formulation of the irreparable harm prong at all, since the lower courts had found a "near certainty" of harm.⁶⁴ It may be that other than restating the four-part requirement for an injunction, *Winter* stands mainly for the narrow proposition that courts should be reluctant to interfere in military matters.⁶⁵ The opinion opens with a quote from George Washington about the importance of a nation

⁵⁷ See generally Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011) (explaining the origins of the circuit split before and after *Winter*).

⁵⁸ *Id.* at 1530–35.

⁵⁹ See generally *Nken v. Holder*, 556 U.S. 418 (2009); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

⁶⁰ *Winter*, 555 U.S. at 22.

⁶¹ Bates, *supra* note 57, at 1537; see also *Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355, 356 (4th Cir. 2010) (per curiam).

⁶² *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting); see also *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("The majority opinion in *Winter* did not, however, explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions employed by this circuit and others.").

⁶³ *Winter*, 555 U.S. at 23.

⁶⁴ *Id.* at 22 ("It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm. Although the court referred to the 'possibility' standard, and cited Circuit precedent along the same lines, it affirmed the District Court's conclusion that plaintiffs had established a 'near certainty' of irreparable harm.").

⁶⁵ The Supreme Court cited *Winter* for this proposition in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010); cf. *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (finding that in a preliminary injunction case a court need not defer to the Forest Service in the same manner as *Winter* defers to the military).

preparing effectively for war.⁶⁶ The clearest holding of *Winter* is that in some cases the public interest prong can outweigh the other parts of the test, at least where military preparedness is at issue.

The Supreme Court's decision in *Hollingsworth v. Perry*, which postdates both *Winter* and *Nken*, provides support for a continued flexible interpretation of the likelihood of success factor.⁶⁷ In *Hollingsworth*, which addresses the standard for obtaining a stay pending the disposition of a petition for writ of certiorari, the Supreme Court required a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari and a "fair prospect" that the majority of the Court will vote to reverse the judgment below, contrasting this lower standard to a "likelihood that irreparable harm will result from the denial of stay."⁶⁸ This suggests that the Court does not insist on a rigid application of the likelihood threshold in all situations.

There are also other reasons for questioning the application of *Winter* to stays of removal. While *Winter* relies heavily on the fourth prong of the test (the public interest), *Nken* minimized the importance of the third and fourth factors. In *Nken*, the Court said, "The first two factors of the traditional standard are the most critical."⁶⁹ A practical way to read *Nken* may be that the Court rendered three of the four factors inconclusive.⁷⁰ Removal alone cannot constitute irreparable harm, though risk of persecution might still tip the scales. But the government can always articulate a counter-balancing interest in prompt execution of removal orders. The public interest can go either way, encompassing efficient immigration enforcement as well as the prevention of human rights violations. In practical terms, this means that the decisive part of the four-part test is the first factor. The critical question then is how likely success for the petitioner must appear in order to justify a stay. The Court gave only minimal guidance on this issue. Merely "better than negligible" is not enough.⁷¹ Nor is a "mere possibility" of success sufficient.⁷² But beyond this,

⁶⁶ *Winter*, 555 U.S. at 12.

⁶⁷ *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010) (per curiam); see also *O'Brien v. O'Laughlin*, 557 U.S. 1301, 1302 (2009) (Breyer, J., in chambers) (explaining that "whether the stay applicant has made a strong showing that he is likely to succeed on the merits . . . means that it is *reasonably likely* that four Justices of this Court will vote to grant the petition for writ of certiorari, and that, if they do so vote, there is a *fair prospect* that a majority of the Court will conclude that the decision below was erroneous" (emphasis added)); *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987) (requiring only a "substantial case on the merits," where the other factors support a stay).

⁶⁸ *Hollingsworth*, 558 U.S. at 190–91 (emphasis added).

⁶⁹ *Nken v. Holder*, 556 U.S. 418, 434 (2009).

⁷⁰ Considering the Court's attention to the danger of interfering with immigration enforcement, emphasizing the first two factors is peculiar. These two factors—likelihood of success on the merits and risk of irreparable injury to the petitioner—do not weigh the government's interest in prompt deportations. The danger of frustrating enforcement of immigration law is relevant to injury to the opposing party (prong three) and to the public interest (prong four).

⁷¹ *Nken*, 556 U.S. at 434.

the precise application of the four-part test to stays of removal remains unresolved.

In the aftermath of *Nken* and *Winter*, the Second,⁷³ Sixth,⁷⁴ Seventh,⁷⁵ and Ninth⁷⁶ Circuits have all continued to apply a sliding scale approach. These circuits have expressed skepticism about predicting the likelihood of success at the beginning of a case, before the legal arguments are developed and presented in briefs.⁷⁷ By allowing a “plausible claim on the merits” (Seventh Circuit),

⁷² *Id.* (internal quotation marks omitted).

⁷³ See *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (explaining that *Winter* and *Nken* “did not suggest that [the likelihood of success] factor requires a showing that the movant is ‘more likely than not’ to succeed on the merits”). The Second Circuit confirmed its view that a plaintiff who demonstrates “*sufficiently serious questions* going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly [in its favor]” satisfies an “overall burden [that] is no lighter than the one it bears under the ‘likelihood of success’ standard.” *Id.* at 35 (emphasis added); see also *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010).

⁷⁴ See *Nwakanma v. Ashcroft*, 352 F.3d 325, 327–28 (6th Cir. 2003) (“[W]hen a greater showing of irreparable harm in the absence of a stay is made, a lesser showing of the likelihood of success on the merits is necessary to support a stay.”). While the Sixth Circuit has yet to address whether this standard still applies post-*Nken*, our review of unpublished orders on motions for stays reveals that the court continues to routinely cite both *Nwakanma* and *Nken*, indicating that it does not perceive any conflict between them.

⁷⁵ See *Hoosier Energy Rural Elec. Co-op v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (holding that equitable relief requires showing irreparable injury along with “a *plausible claim* on the [merits], and the injunction must do more good than harm (which is to say that the ‘balance of equities’ favors the plaintiff)” (emphasis added)). The court explained that “[h]ow strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.” *Id.*; see also *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 782–83 (7th Cir. 2011) (stating that “the threshold for establishing likelihood of success is *low*” and that the plaintiffs “needed only to present a claim *plausible enough* that (if the other preliminary injunction factors cut in their favor) the entry of a preliminary injunction would be an appropriate step” (emphasis added)).

⁷⁶ See *Leiva-Perez v. Holder*, 640 F.3d 962, 966–68 (9th Cir. 2011) (finding that “serious questions going to the merits’ . . . can support issuance of a[] [preliminary] injunction,” so long as the other requirements are met and explaining that the basic idea is that “a petitioner must show, at a minimum, that she has a *substantial case for relief on the merits*” (citation omitted) (emphasis added)). The court ultimately held that the impact of *Nken* is that a petitioner seeking a stay of removal must now “show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner’s favor.” *Id.* at 970; see also *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

⁷⁷ See *Salinger v. Colting*, 607 F.3d 68, 80–81 (2d Cir. 2010) (emphasizing “that courts should be particularly cognizant of the difficulty of predicting the merits of a [] claim” at an early stage in the litigation, pointing out that parties have limited time for briefing, preparation for the merits often takes many months, and the relevant arguments “are often sophisticated and fact-intensive, and must be crafted with a good deal of thought and

“sufficiently serious questions” (Second Circuit), or a “substantial case on the merits” (Ninth Circuit) to satisfy the “likelihood of success” factor when the balance of hardships tips sharply in the movant’s favor, these courts have avoided placing too much emphasis on prediction.⁷⁸ These standards are flexible enough to permit the court to grant injunctive relief when faced with an issue of first impression or when precedents appear inconsistent, which a stricter interpretation of the “likelihood of success” factor might prevent, while still barring stays in frivolous cases.

A second group of circuits has squarely rejected the sliding scale approach. In an election law case, the Fourth Circuit concluded that *Winter* is incompatible with a sliding scale analysis.⁷⁹ The Eleventh and Third Circuits had rejected the sliding scale even before *Winter*.⁸⁰ The key feature of this

effort”); *U.S. Army Corps of Eng’rs*, 667 F.3d at 783 (warning that “[b]y moving too quickly to the underlying merits, the district court required too much of the plaintiffs and, correspondingly, gave too little weight to the strength of their claim at this stage of the case”); *Leiva-Perez*, 640 F.3d at 967 (cautioning that “pre-adjudication adjudication would defeat the purpose of a stay, which is to give the reviewing court the time to ‘act responsibly,’ rather than doling out ‘justice on the fly’”); see also *Cottrell*, 632 F.3d at 1140 (Mosman, J., concurring) (“[I]t can seem almost inimical to good judging to hazard a prediction about which side is likely to succeed.”).

⁷⁸ See *supra* notes 73–76.

⁷⁹ See *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010) (reasoning that *Winter*’s requirement that a plaintiff show likely success on the merits is “far stricter” than *Blackwelder*’s requirement that a plaintiff “demonstrate only a grave or serious question for litigation”). The Fourth Circuit subsequently reissued the portions of its original decision articulating the standard for the issuance of preliminary injunctions and remanded to the district court for reconsideration in light of *Citizens United*. *Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355, 356 (4th Cir. 2010) (per curiam); cf. *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (allowing the court to balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant).

⁸⁰ Prior to *Nken*, the Eleventh Circuit, like the Fourth, analyzed stays of removal under the rigorous standard set forth in 8 U.S.C. § 1252(f), rather than the traditional stay factors. See *Weng v. U.S. Attorney Gen.*, 287 F.3d 1335, 1336–38 (11th Cir. 2002). Since *Nken*, the Eleventh Circuit has not addressed how to apply the traditional four-part test in the context of stays of removal, but it has applied this test in other contexts with no mention of a sliding scale. For example, in evaluating death row inmates’ requests for stays of execution, the Eleventh Circuit requires a showing of “substantial likelihood of success on the merits.” *Arthur v. Thomas*, 674 F.3d 1257, 1261 n.4 (11th Cir. 2012) (emphasis added) (internal quotation marks omitted); see also *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011) (same). In the context of preliminary injunctions, the court has likewise rejected a sliding scale approach. See *Pittman v. Cole*, 267 F.3d 1269, 1292 (11th Cir. 2001) (stressing that the court’s precedents have “uniformly required a finding of substantial likelihood of success on the merits before injunctive relief may be provided,” noting that “when a plaintiff fails to establish a substantial likelihood of success on the merits, a court does not need to even consider the remaining three prerequisites of a preliminary injunction”); *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 483 n.3 (11th Cir. 1990) (noting that the Eleventh Circuit does not recognize the “serious questions” standard); see also *Douglas v. Ashcroft*, 374 F.3d 230, 233 (3d Cir. 2004) (criticizing the Ninth Circuit’s two-pronged

group is the more rigid, sequential application of the four-part preliminary injunction standard, and a tendency to demand a fairly high likelihood of success. If a petitioner fails to show a high likelihood of success, a stay will be denied, even if there is a showing of a grave risk of serious harm.

In the remaining circuits, the doctrine appears to be unclear or in flux, but may be trending away from the sliding scale and toward the sequential approach. Prior to *Winter* and *Nken*, the Eighth⁸¹ and Tenth⁸² Circuits applied an overall balancing approach, at least in the context of preliminary injunctions, but they seem to be moving towards a sequential approach in the aftermath of these decisions. The First Circuit long purported to apply a sliding scale but

approach for “collaps[ing] the traditional four-prong test”); *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 90–91 (3d Cir. 1992) (requiring the movant to show “both a likelihood of success on the merits and a probability of irreparable harm”); *In re Arthur Treacher’s Franchise Litig.*, 689 F.2d 1137, 1147 n.14 (3d Cir. 1982) (rejecting the serious questions standard).

⁸¹ See *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc) (“[W]here the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.”). The court’s recent decision in *Sierra Club*, however, suggests that it may be moving in the opposite direction. See *Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978, 993 (8th Cir. 2011) (stating that the district court “did not use the preferred wording” in finding that the plaintiff had raised “serious issues” but reasoning that the district court was familiar with *Winter*’s requirement that “a plaintiff must also show it was likely to succeed on the merits,” and concluding that the plaintiff had made that showing based on the record (emphasis added)). The court has not yet addressed how to apply the traditional four-part test to stays of removal. In fact, the court had not even addressed whether or not this standard applies prior to *Nken*. See *Rife v. Ashcroft*, 374 F.3d 606, 615 n.3 (8th Cir. 2004) (noting the circuit split on what standard applies for stays of removal but finding no need to reach that issue).

⁸² In the context of preliminary injunctions, the Tenth Circuit has historically recognized a “modified” likelihood of success standard when a strong showing is made on the other three factors, as long as the injunction does not fall into certain disfavored categories. See *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc). However, in a post-*Winter* decision involving preliminary injunctions, the court framed the traditional four-part test by stating that “the moving party must demonstrate four factors” and characterized the standard for disfavored injunctions as requiring the movant “to make a heightened showing of the four factors.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208–09 (10th Cir. 2009) (emphasis added). As another commentator has noted, this language suggests that the Tenth Circuit “may be leaning toward adopting a sequential test.” Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1047 (2012). In the context of stays, the Tenth Circuit has set forth the traditional four-part test without any mention of a sliding scale, leaving it ambiguous as to whether it would apply that approach. See *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) (setting forth the traditional stay standard without mentioning a sliding scale); *O Centro Espirita Beneficente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 465–66 (10th Cir. 2002) (granting a stay of a preliminary injunction pending appeal and describing the standard without mentioning a sliding scale). Our review of a sample of the Tenth Circuit’s orders on stays confirms this interpretation, as we came across orders denying stays based on the failure to demonstrate a likelihood of success, without any mention of the other factors.

never showed flexibility regarding the likelihood of success factor, balancing only the other factors.⁸³ Citing both *Winter* and *Nken*, the First Circuit has used language indicating that a party seeking an injunction must independently establish both the likelihood of success and irreparable harm factors, although it is not clear whether there can be any flexibility about the degree of showing required.⁸⁴ The Fifth Circuit had an inconsistent approach prior to the Supreme Court's decisions, articulating a sliding scale for stays but sometimes denying injunctions based solely on failure to show "a substantial likelihood of success."⁸⁵ Its recent decisions on both stays (in contexts other than removal) and injunctions, however, seem to clearly support a sequential approach, denying relief whenever the movant fails to establish a "substantial likelihood

⁸³ See, e.g., *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) ("The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity."); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996) ("Likelihood of success is the main bearing wall of the four-factor framework."); *Pye ex rel. NLRB v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 67 (1st Cir. 1994) ("Without a clear likelihood of success, injunctive relief would not have been just and proper."); cf. *Braintree Labs., Inc. v. Citigroup Global Mkts., Inc.*, 622 F.3d 36, 42–43 (1st Cir. 2010) ("It is true that we measure *irreparable harm* on 'a sliding scale, working in conjunction with a moving party's likelihood of success on the merits,' such that '[t]he strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown.'" (emphasis added) (internal citations omitted)); *Vaqueria Tres Manjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) ("[T]he measure of irreparable harm is not a rigid one; it has been referred to as a sliding scale . . .").

⁸⁴ See *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) ("Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be likely absent an injunction."). The First Circuit adopted the traditional four-part test for stays of removal in *Arevalo v. Ashcroft*, 344 F.3d 1, 7–9 (1st Cir. 2003) and treats "likelihood of success" as the sine qua non in that context as well. See, e.g., *Ratnasingam v. Holder*, 556 F.3d 10, 13 n.1 (1st Cir. 2009) (noting that the petitioner's stay was denied for failure to show a likelihood of success on the merits, without mentioning the other factors).

⁸⁵ See *Chambers v. Mukasey*, 520 F.3d 445, 451 (5th Cir. 2008) (addressing all four factors even after finding that the petitioner's case had fatal legal flaws); *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005) ("[T]emporary stays of removal are considered in the light of *the degree to which* four factors can be shown . . ." (emphasis added)); *Ignacio v. INS*, 955 F.2d 295, 299 (5th Cir. 1992) (recognizing, in the context of a motion for a stay of removal, that "if a serious legal question is involved, the first prong requires a showing only of 'a substantial case on the merits'"); *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (holding that "on motions for stay pending appeal the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay"), *cert. denied*, 460 U.S. 1042 (1982). *But cf.* *Lake Charles Diesel, Inc., v. Gen. Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003) ("[An] absence of likelihood of success on the merits is sufficient to make the district court's grant of a preliminary injunction improvident as a matter of law . . ."); *Walgreen Co. v. Hood*, 275 F.3d 475, 477 (5th Cir. 2001) (affirming the district court's denial of the injunction based solely on its determination that there was "no substantial likelihood that [the plaintiff] w[ould] prevail on the merits").

of success.”⁸⁶ Because none of these courts has overruled its prior decisions, preferring to articulate new standards without recognizing any inconsistency with the past, we group these circuits separately from the ones that have outright rejected the sliding scale approach. Our analysis in Part III below analyzes the impact of this circuit split on how courts actually rule on stays of removal.

F. *The Empirical Doubt at the Heart of Nken*

Behind the conflicted understandings of each prong of the four-part test discussed above, there is a canonical concern about weighing competing interests. The basic tension at the heart of *Nken* is between the need to preserve a functional and meaningful appellate process for immigrants while still addressing the government’s concern that some immigrants will use the process simply to delay deportation.⁸⁷ To set a more clearly defined standard about when to grant a stay, the Court would need to decide how to balance these interests. But addressing this question involves a basic set of empirical questions. As mentioned above, in a concurring opinion in *Nken*, Justice Kennedy, joined by Justice Scalia, expressed a desire for empirical data about the correlation between stay grants and the resolution of petitions, and for information about the general rate at which stays of removal are granted.⁸⁸

These empirical queries are sensible because, in theory, petition grants should be associated with stay grants. The key missing datum is a comparison of the granting of stays against the ultimate granting of petitions. There is also a significant temporal dimension to the analysis, since the fundamental government concern is about abuse of the judicial process. A stay of removal

⁸⁶ See, e.g., *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) (vacating the district court’s grant of a stay of execution based solely on the finding that Adams had not made a showing of a likelihood of success); *La Union Del Pueblo Entero v. FEMA*, 608 F.3d 217, 225 (5th Cir. 2010); *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009); see also *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012) (“[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has *clearly carried the burden of persuasion on all four requirements.*” (emphasis added) (internal quotation marks omitted)); *Janvey v. Alguire*, 647 F.3d 585, 595–601 (5th Cir. 2011) (addressing separately each of the four factors in reviewing the district court’s decision to grant a preliminary injunction, without mentioning or applying a sliding scale analysis). Two other commentators have grouped the Fifth Circuit among courts that apply a sequential approach. See *Bates*, *supra* note 57, at 1534, 1544; *Weisshaar*, *supra* note 82, at 1015 n.20, 1032 n.133.

⁸⁷ Similarly, in *Winter*, the Supreme Court emphasized that an injunction analysis requires a balance: “In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008) (internal quotation marks omitted).

⁸⁸ *Nken v. Holder*, 556 U.S. 418, 437–38 (2009) (Kennedy, J., concurring). Justice Kennedy expressed concern about the government’s assertion that the Ninth Circuit grants stays frequently, and wrote that stays of removal should not be “routine.” *Id.*

most frustrates immigration enforcement if it remains in place for a long time. But if appeals are resolved fairly quickly in most cases, then even a liberal approach to granting stays would have a much less detrimental effect on the government. We address the issue of correlations here and address the temporal dimension in a companion study.⁸⁹

In arguing the *Nken* case, the government did attempt to submit some empirical data, but in a highly limited and self-serving form. The government's main argument was that a more liberal standard for granting stays encouraged the filing of appeals, evidenced by a 42% rate of filing petitions for review in the Ninth Circuit compared to 9% in the Eleventh Circuit.⁹⁰ Of course, just because there are different rates of appeal in these two circuits does not mean that the standards for granting stays of removal are responsible for this disparity, as opposed to some other factor. For instance, a higher appeal rate might result from a court's greater likelihood of granting petitions, not stays, from greater access to immigration attorneys and pro bono legal aid in a particular region, or simply from a different mix of nationalities and types of cases. At oral argument, the government stated, "We do not have empirical data . . . but [stays of removal] are—in the Ninth Circuit in our experience . . . granted quite frequently."⁹¹ Thus, other than frustration with the Ninth Circuit, it does not appear that the government was able to refine the actual danger of the stay process allowing immigrants to abuse the legal process. This Article helps fill the gap in empirical research on stays of removal and addresses the questions posed by Justice Kennedy.

III. THE EMPIRICAL PROJECT ON STAYS OF REMOVAL

Empirical research about the behavior of courts has become a contested subject between some judges and scholars. The basic origins of the disagreement are longstanding. Since the earliest days of American law, a debate has simmered about whether judicial decisions are determined by objective rules or by the subjective perspectives of individual judges.⁹² At the time of the Framing and in the nineteenth century, leading jurists came to see judicial precedent—the principle of *stare decisis*—as a means of disciplining judicial discretion and promoting predictable outcomes.⁹³ But the idea that law can ever be rendered entirely objective has always had skeptics, especially in

⁸⁹ Kagan, Marouf & Gill, *supra* note 8, at 17–19.

⁹⁰ Brief for the Respondent, *supra* note 38, at 36.

⁹¹ *Nken*, 556 U.S. at 437 (quoting from oral argument).

⁹² See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 38–40 (2001) (describing early critiques of the common law for being indeterminate).

⁹³ *Id.* at 41–42 (describing the views of Joseph Story and others about the value of judicial precedent); see also Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 635–37 (2009) (describing commentary on judicial precedent in the *Federalist Papers*).

the legal realist movement.⁹⁴ Beyond the high-minded debates about positivism and realism, there is the streetwise maxim: “A good lawyer knows the law. A great lawyer knows the judge.”

Empirical research has added an explosive new dimension to this debate because it offers apparently concrete evidence that knowing the judge may indeed explain more than knowing the law.⁹⁵ Political scientists interested in judicial behavior have done much of this research.⁹⁶ While a full discussion of that body of work is beyond the scope of this Article, we briefly mention two contrasting extremes among theories of judging. On the one hand, the attitudinal model posits that judges decide cases based on their ideology or policy preferences.⁹⁷ Although the attitudinal model is supported by many empirical studies,⁹⁸ it has been critiqued for minimizing the role of other factors that add

⁹⁴ See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1155–56 (2004) (describing how Holmes and his realist followers “undermined the classical notion of law as a set of static, natural, and apolitical rules that could be mechanically discerned and applied by judges,” but “never offered much beyond judges’ idiosyncratic ‘hunches’ in terms of positive predictive theory”); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (setting forth a “prediction” theory of law and explaining that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law”).

⁹⁵ In other contexts, the focus of the debate has been the degree to which judicial opinions are predicted by the political background of the judge (i.e. Democratic appointees v. Republican appointees). This question was highlighted by the debate between Judge Harry Edwards and Professor Richard Revesz, among others. See generally Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Richard L. Revesz, *Ideology, Collegiality and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999).

⁹⁶ See Ruger et al., *supra* note 94, at 1157 (discussing how “[w]ith the waning of Realism in the law schools, much of the academic interest in prediction of cases shifted across campus to the fledgling field of quantitative political science as applied to courts”); see also Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625, 625–26 (2000) (discussing various theories of judicial behavior within the field of political science); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 833–43.

⁹⁷ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

⁹⁸ Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 479 (2007) (discussing the relevance of the attitudinal model to *Refugee Roulette*’s conclusion that the outcome of an asylum case appears strongly influenced by the identity of the judge to whom it is assigned).

nuance to adjudication.⁹⁹ Because the attitudinal model assumes a high level of judicial discretion and independence,¹⁰⁰ its explanatory power is generally strongest in analyzing decisions by the Supreme Court.¹⁰¹ Studies finding support for attitudinal variables in analyzing the federal courts of appeals have generally focused only on published decisions where courts are consciously setting a precedent for the future, not the types of interim, unpublished decisions that we examine here.¹⁰²

By contrast, the “legalist” theory of judging stresses the role of legal doctrine, arguing that judges are socialized in law school and by the legal community to focus on legal norms and principles.¹⁰³ In reality, of course, it is often difficult for scholars to untangle the legal and policy principles that influence a judge’s decision.¹⁰⁴ Compounding this problem, many scholars who focus on the role of law avoid quantitative research, preferring to examine only jurisprudence, while those focused on attitudes have often focused on quantitative data and political science literature, minimizing or omitting the role of judicial reasoning and legal doctrine.¹⁰⁵ Some scholars, drawing on both models of judging, have shown that legal factors are easily hidden or hard to identify in statistical terms, but actually turn out to be influential, contradicting the purest forms of the attitudinal model.¹⁰⁶ This has been especially true in research on lower federal courts, where the judges have less discretion.¹⁰⁷

⁹⁹ See Ruger et al., *supra* note 94, at 1158–59.

¹⁰⁰ See DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 70–90 (1976).

¹⁰¹ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 324–25 (2002) (discussing the superior predictive performance of attitudinal variables as compared to legal variables in analyses of Supreme Court voting behavior); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1479 (2003) (discussing the strength of the empirical evidence and the general consensus supporting the primacy of attitudinal factors in analyses of Supreme Court decision-making).

¹⁰² See Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 309 (2004) (discussing the importance of identifying controversial cases in order to find support for attitudinal variables); see also Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574, 579 (2010).

¹⁰³ LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 58–60 (1997); Ronald Kahn, *Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 175, 175–76 (Cornell W. Clayton & Howard Gillman eds., 1999).

¹⁰⁴ Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 370 (2008).

¹⁰⁵ Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 261–62 (2006).

¹⁰⁶ Bailey & Maltzman, *supra* note 104, at 381; see also Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV.

Our study provides quantitative support for the position that, at least in some contexts, legal doctrine matters more than political affiliation in predicting judicial outcomes. Our results suggest that different doctrinal approaches to applying the four-factor test for stays of removal produce different results, whereas the political composition of the panels had much less impact.¹⁰⁸ Of course, policy preferences may influence a court's doctrinal choices, so attitudes may still play an important role. In addition, other types of values and considerations may influence decision-making. The strategic model of judging stresses how judges are "subject to compromises imposed by collegial decision making and a number of political constraints."¹⁰⁹ A version of the strategic model called the rational choice model emphasizes that judges are motivated to promote their own interests.¹¹⁰ Our results appear consistent with these theories. For example, the extremely low number of dissents in our sample¹¹¹ is consistent with concern for collegiality and the rational decision not to waste time writing a dissent to an unpublished decision that lacks the weight of precedent.¹¹²

Our study builds on prior work showing glaring inconsistencies in immigration adjudication, which have been documented for over a decade.¹¹³

305, 305 (2002) (describing a new approach to incorporating law into statistical models of Supreme Court decision-making).

¹⁰⁷ See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 153 (2013).

¹⁰⁸ Similarly, research has shown that "jurisprudential regimes structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny the justices are to employ in assessing case factors." Richards & Kritzer, *supra* note 106, at 315.

¹⁰⁹ Taylor, *supra* note 98, at 479 (discussing the relevance of the strategic model to *Refugee Roulette's* finding that certain interventions by the Attorney General corresponded to a steep drop in BIA decisions favorable to asylum applicants and describing the strategic model as "an especially apt theory to employ in a study of agency adjudicators who decide cases subject to political and policy controls").

¹¹⁰ See generally EPSTEIN, LANDES & POSNER, *supra* note 107.

¹¹¹ In a sample of 100 immigration petitions from each of the eleven circuits (1100 total cases), we found only two dissenting opinions.

¹¹² Lee Epstein and her colleagues have found strong dissent aversion in the federal courts of appeals. See EPSTEIN, LANDES & POSNER, *supra* note 107, at 255–303; see also Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 130 (2011) (calculating, using Lexis, that dissent rates in the federal courts of appeals averaged about 2.8% between 1990 and 2006, ranging from a 4.8% in the Sixth Circuit to 1.1% in the Eleventh, but noting that these rates understate the percentage of opinions with dissents because some appeals are terminated without an opinion).

¹¹³ See Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367–68 (2003) (describing various accounts of disparities in asylum adjudication, including statistical disparities between immigration judges). Syracuse University maintains an online database of asylum grant rates for nearly every immigration judge in the United States, revealing

The most expansive empirical study to explore immigration adjudication is *Refugee Roulette: Disparities in Asylum Adjudication*, which analyzed hundreds of thousands of decisions in asylum cases by asylum officers, immigration judges, the Board of Immigration Appeals, and the federal courts of appeals, and found “amazing disparities in grant rates,” even when comparing applicants of the same nationalities.¹¹⁴ The authors concluded that these variations

reflect not the relative merits of the cases or the differential grant rates of the immigration judges, but rather the differing attitudes that the judges in these circuits have, in the aggregate, with respect to asylum seekers’ claims, or at least the differing degrees of their skepticism about the adequacy of Board and immigration judge decision making.¹¹⁵

Noting that the circuits with the lowest remand rates were the three southern circuits (the Fifth, Fourth, and Eleventh), the authors surmised that the variation may also be “linked to regional culture.”¹¹⁶ Our study similarly found huge variations among circuits in adjudication of stays, but suggests that legal doctrine plays a more important role than these earlier studies appreciated.

While *Refugee Roulette* focused on the final resolution of cases in the courts of appeals, our research examines empirically a type of judicial action that is not susceptible to more traditional forms of legal analysis, and where judges have good reason to want to know empirically how the legal doctrines are working in practice. Stays of removal are an extreme version of the challenge posed to federal jurisprudence by unpublished opinions.¹¹⁷ In the case of final decisions, “[t]he term ‘unpublished opinions’ is somewhat of a misnomer,”¹¹⁸ because most of the decisions are, in fact, publicly available. Orders granting or denying stays of removal, on the other hand, are genuinely unpublished decisions. When courts of appeals decide whether to grant a stay of removal, they rarely issue any written explanation of their decisions. Traditional legal analysis of judicial reasoning offers few tools useful to understanding such judicial actions, since one cannot analyze judicial reasoning when no reasoning is given. Empirical analysis is thus the most direct way by which one can understand what courts are doing in this field. Below we explain our

grant rates that range from 1% to over 90%. See *TRAC Immigration Judge Reports—Asylum*, TRAC, <http://trac.syr.edu/immigration/reports/judgereports/> (last visited Jan. 16, 2014).

¹¹⁴ Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007).

¹¹⁵ *Id.* at 364.

¹¹⁶ *Id.*

¹¹⁷ See Weisgerber, *supra* note 93, at 622, 634–38 (explaining that the precedential value of unpublished opinions in federal courts remains ambiguous, especially since the Supreme Court in 2006 changed Federal Rule of Appellate Procedure 32.1 to permit litigants to cite them, and that important jurisprudential and constitutional concerns prompt questions about whether federal appellate courts should be permitted to designate some of their decisions as having precedential weight, while designating others as having none).

¹¹⁸ *Id.* at 624.

methodology for analyzing the adjudication of stays and discuss our key findings.

A. *Data and Methodology*

Our study analyzed 1646 immigration cases, spread across the eleven circuits that handle immigration appeals.¹¹⁹ We found these cases through the Public Access to Court Electronic Records (PACER) service, which provides online access to federal court records. Since orders on stays are interim decisions, we could only access them by looking into individual case dockets in PACER; such interim decisions are generally not available on Westlaw or Lexis. Using PACER also provided for superior sampling because it includes *all* immigration cases, whereas Westlaw and Lexis select which cases to include in their databases.

We used two overlapping datasets for the analyses in this Article. We began with a random sample of 100 immigration cases from each circuit.¹²⁰ This sample of cases allows us to make comparisons among the circuits in terms of stay request rates, petition grant rates, and other important statistical patterns. We also collected a supplemental dataset of cases where the petitioner requested a stay of removal.¹²¹ We used the first random sample of 100 cases when we analyzed stay request rates, or other empirical questions that require us to distinguish between cases with and without stay requests. We used the supplemental sample of 100 cases with stay requests when we analyzed whether stays are granted. All of the cases in our sample were filed after April 22, 2009, when the Supreme Court issued its decision in *Nken*, and had been resolved by the courts.

Our datasets included not only cases decided on the merits, but also those that were dismissed prior to reaching the merits. For example, the datasets include cases dismissed for lack of jurisdiction or for procedural reasons like failure to file a brief or pay the fees, as well as cases voluntarily dismissed by the petitioner. We chose to include data on such dismissals because we believe this data is relevant to concerns about noncitizens potentially abusing the legal process and filing frivolous appeals simply to gain more time in the United States. Our data thus provide a more complete picture of the circuit courts'

¹¹⁹The D.C. Circuit Court of Appeals does not decide immigration appeals because there is no immigration court located in Washington, D.C.

¹²⁰The first dataset is a random sample of approximately 100 immigration appeals in each circuit that were filed after *Nken*. We identified these cases and retrieved the docket sheets from PACER, so our data include cases with both published and unpublished opinions.

¹²¹In some circuits with relatively small numbers of immigration appeals, we could not find 100 cases where stays had been requested and where a final decision had been made on the petition for review between the date that *Nken* was issued and the present.

immigration dockets than studies that examine only cases decided on the merits.¹²²

One of the challenges in collecting data on immigration appeals is that it is exceedingly rare for a petitioner to prevail. Some circuits grant fewer than five out of 100 immigration appeals, making it extremely difficult to amass large numbers of successful appeals, especially since we were limited to appeals filed after *Nken* where there was a final disposition.¹²³ This means that our data include relatively few cases where the petitions were granted. Our statistical models accommodate the rarity of this event. In the few instances where we looked at only those cases where petitions had been granted, our models only detect significant relationships if those relationships are of high magnitude. In the rest of the statistical analyses in this Article, the small number of petition grants in the sample has no mathematical effect on our ability to model the phenomena of interest.

The results discussed below focus on five main phenomena. First, we explore differences in the rates at which courts grant stays of removal. We tested several hypotheses that may affect grant rates and developed a linear regression model to examine the impact of each characteristic on the likelihood of obtaining a stay. Second, we explored how often petitioners actually request stays of removal. Again, we hypothesized about the characteristics that could influence stay requests and developed a linear regression model to examine the impact of each characteristic on the likelihood of requesting a stay. Third, we analyzed government opposition rates to stay motions, as well as how often the government opposes stays in cases where it eventually files motions to remand. Fourth, we analyzed the correlations between stays and petitions granted. We counted any remand to the BIA as a “grant” or “win” for the petitioner. Lastly, we analyzed the impact of doctrine (i.e., sliding scale versus sequential approaches to applying the four-part test for stays) on correlations between stays and petitions granted. The types of characteristics that we examined and controlled for in the linear regressions included the type of case, nationality, attorney representation (or pro se status), circuit detention rates, the genders of the petitioner and the judges, and the political party of the President who appointed each judge. We considered the characteristics of the judges who ruled on the stay as well as the judges who ruled on the petition for review, since these decisions are made by separate panels.

¹²² The *Refugee Roulette* study, for example, chose to include only cases decided on the merits. See Nogales, Schoenholtz & Schrag, *supra* note 114, at 405.

¹²³ The First and Fifth Circuits granted only four petitions each out of our samples of 100 such cases.

B. Discussion of Key Findings

1. How Often Do Courts Grant Stays of Removal?¹²⁴

Aggregating the data from all of the circuits, except for the Second, we found that 26% of stay motions were granted, but with large variations across the country.¹²⁵ We excluded the Second Circuit because it follows a unique procedure that often renders formal adjudication of stay requests moot.¹²⁶ The existence of variation itself did not surprise us. Previous research has found wide disparities in how the circuits resolve immigration cases on the merits,¹²⁷ and the likelihood of succeeding in the petition plays a critical role in deciding whether or not to grant a stay. Yet the *scale* of the disparities in adjudicating stay requests was surprising.¹²⁸ The range of the variations among circuits in their rates of granting stays far exceeded the range of variations in rates of granting petitions for review. For example, while grant rates for petitions ranged from 4% to 18% among the circuits in our sample of cases, the grant rates for stays ranged from 4% in the Fifth Circuit to 63% in the Ninth.¹²⁹ Thus, the process of adjudicating stays appears to magnify the differences among the circuits.

Overall, five of the circuits granted fewer than 15% of stay requests: the Fifth (4%), Tenth (6%), Eleventh (6%), Eighth (10%), and Fourth (14%).¹³⁰ The Third Circuit was somewhat more generous, granting 21% of stay motions. The First and Seventh Circuits both granted about 30%. The Sixth and Ninth Circuits stood out in granting a much higher number of stays; the Sixth Circuit

¹²⁴ For this Section of the analysis, we report findings gleaned from our supplemental data, which include an oversampling of cases where stays have been requested. All of the analyses in this Section have been replicated without these supplemental data, and the results are similar.

¹²⁵ If we were to include the Second Circuit “de facto” stays as grants, the aggregated grant rate would increase to 27%.

¹²⁶ As explained more fully below, the Second Circuit informally provides a temporary automatic stay due to an agreement that the Department of Homeland Security (DHS) will not deport petitioners while their stay motions are pending. Rather than ruling on stay motions promptly, the Second Circuit usually keeps them until the petition is resolved, at which time it denies the stay as moot. Thus, the petitioner usually benefits from a de facto stay during the pendency of the appeal, but the stay is not formally granted.

¹²⁷ See Nogales, Schoenholtz & Schrag, *supra* note 114, at 405.

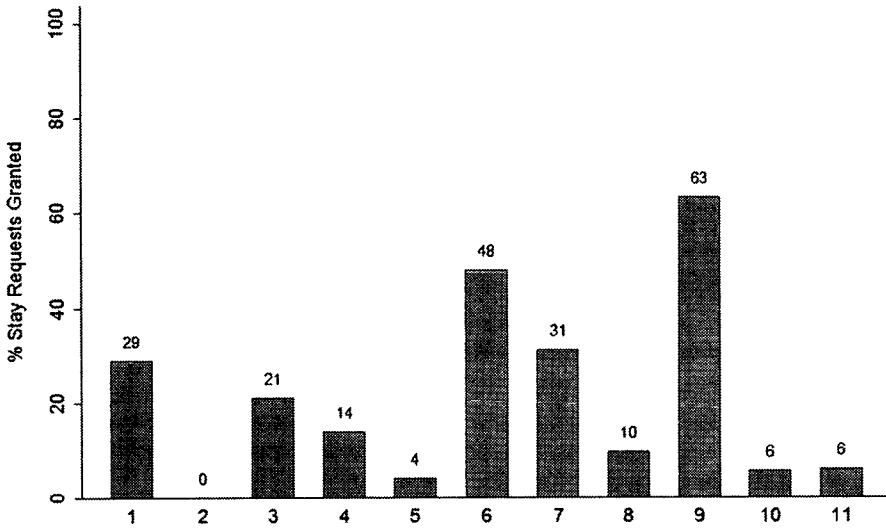
¹²⁸ The mean grant rate for the ten courts of appeals was 24%, and the standard deviation was 22, indicating a large spread. The coefficient of variation for stay grant rates was .86, compared to .48 for stay request rates, showing greater dispersion in the rates at which courts grant stays than in the rates at which petitioners request them.

¹²⁹ Range=59.23%.

¹³⁰ Formally, the Second Circuit would have been at the bottom of this list, because it granted no stays in our sample. However, this is because the Second Circuit often (sixty-four times in our sample) denies a stay as moot at the same time it dismisses the petition, but it does this after having left an informal stay in place for the duration of the appeal. If such de facto stay grants were counted, the Second Circuit would have a stay grant rate of 48%.

granted 48% of stay motions, and the Ninth Circuit granted about 63%. The Ninth Circuit's rule provides for a stay whenever the motion is unopposed, which contributes to the especially high rate of grants in the Ninth Circuit. Even if we look only at *opposed* stay motions in the Ninth Circuit, however, the grant rate is still high at 57%.

Figure 1: *Grant Rates for Stays of Removal*



We developed several hypotheses about why some stays are granted, while others are not. Specifically, we hypothesized that:

- Represented petitioners would be more likely than pro se petitioners to have their stays granted because the motions would be properly briefed;
- Petitioners with more meritorious cases would be more likely to get a stay;
- Government opposition would decrease the chance of getting a stay;
- Petitioners seeking asylum, withholding, or protection under CAT would be more likely to obtain stays because they fear serious harm if deported;
- Mexican citizens would be less likely to get stays than citizens of other countries because they are often perceived as having weaker cases, especially asylum cases;
- Petitioners in circuits that apply a sliding scale approach to the four-factor test for stays would have better chances of being granted stays; and

- The composition of the panel that ruled on the stay would play a role, with Democratic appointed judges being more likely to grant stays than Republican appointed judges and female judges being more likely to grant stays than male judges.

We developed a logistic regression model of stay grants that includes the factors mentioned above as independent variables. The impact of several characteristics matched what we expected, but there were also many surprises.

Table 1: *Logistic Regression Predicting Stay Grants*¹³¹

	Coefficient	Odds Ratio	Robust SE	z-score	p > z
Pro Se Litigant	-0.811**	0.445	0.144	-2.50	.012
Meritorious Petition	1.113	3.044	1.867	1.81	.070
Gov't Opposition	-1.177*	0.308	0.160	-2.27	.023
Asylum Case	0.138	1.148	0.240	0.66	.508
Mexican Citizenship	0.599	1.821	0.596	1.83	.067
Sliding Scale	1.992***	7.328	4.212	3.47	.001
Party Balance of Panel	1.197***	3.311	0.988	4.01	.000
Sex Balance of Panel	0.490	1.633	1.133	0.71	.480
Constant	-1.797	---	0.076	-3.92	.000

Robust standard errors are calculated by clustering around the ten circuits, thus correcting for unmeasured circuit-level idiosyncrasies that cause non-independence in the data. Second Circuit omitted. n=1022;
Wald $\chi^2(8)=1245.86^{***}$; Pearson $\chi^2(280)=387.46^{***}$; Sensitivity=42%;
Specificity=92%; Correctly Classified=79 %

We will discuss our findings regarding government opposition, correlations between petitions and stays, and the impact of doctrine in more detail below. But several key findings are worth highlighting from the outset.

¹³¹ We used a logistic regression to predict the likelihood that a petitioner will be granted a stay given the particular characteristics. A logistic regression measures the relationship between a categorical dependent variable (here, whether or not a stay was requested) and several independent variables (the characteristics mentioned in our hypotheses) by converting the dependent variable to probability scores. This technique is similar to ordinary least squares regression, except that it is appropriate for estimating the probability that a "yes or no" variable will be "yes." See DAVID W. HOSMER, JR. & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* 1 (1989).

As hypothesized, represented petitioners have a higher probability of getting a stay granted than pro se petitioners. Specifically, they have an 11% higher chance of obtaining a stay than pro se petitioners, which is significant but not as big of an increase as one might expect given the value placed on having an attorney.

Surprisingly, having an application for asylum, withholding of removal, or protection under the CAT, as opposed to some other type of application, does *not* increase the likelihood of obtaining a stay. Being a citizen of Mexico likewise had no significant effect on the chance of being granted a stay. This could mean that Mexican cases are no weaker, or it could mean that judges recognize that deportation is especially imminent for Mexicans and are therefore more willing to grant them stays.

In this model, we also include some controls for the party and gender make-up of the panels.¹³² There is substantial literature in the field of political science suggesting that female and liberal judges may be more inclined to support disadvantaged parties (like petitioners in immigration cases), but other literature finds “little evidence that judges differ in their decisions with respect to the mass of case outcomes.”¹³³ Our data indicated a moderate impact of political affiliation.¹³⁴ However, our data showed no significant impact from the gender of the judge (i.e., male and female judges did not grant stays at different rates).

2. How Often Do Petitioners Seek Stays of Removal?

Previous research from 2004 found disparities in the rates at which noncitizens file petitions for review ranging from a low extreme of only 9% in

¹³² There is a significant amount of variation among the circuits when it comes to the political party and gender makeup of the panels in our sample. In order to capture the relative importance of shifts in the party and gender balance of panels, we have measured these variables as the party or gender balance of the stay panel relative to the circuit’s mean. We have measured political party as the party of the President who appointed the judge.

¹³³ Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257, 259 (1995) (explaining that studies finding significant party effects are often suffering from selection bias, and that selecting only from the published appellate decisions is likely to produce party differences that are not manifested in the day-to-day workings of lower courts).

¹³⁴ The moderately strong effect of the party composition of the panel is highly significant in this model. Holding the other variables in the model constant, panels with a higher percentage of Democratic appointees than the circuit average are more likely to grant stay requests than those with a lower percentage of Democratic appointees. It is important to remember, of course, that the effect of this measure is circuit specific. It measures the difference between the average party balance of panels from that circuit and the party balance of the panel in a particular case. The intention here is to control for the effect of party composition on the panels without inadvertently capturing more general, circuit-level variations that happen to co-vary with the percentage of judges in each circuit that are appointed by Democrats or Republicans. In other words, the party balance of the panel matters inasmuch as it deviates from the average party balance within the circuit.

the Eleventh Circuit to 60% in the Eighth,¹³⁵ with a national appeal rate of 34%.¹³⁶ We were not able to calculate a more recent rate of appeal. Because we looked only at federal appellate court dockets, we could not calculate what percentage of BIA orders of removal were appealed to the federal courts.¹³⁷ Instead, our data allowed us to determine what proportion of those who appeal to the federal courts request a stay of removal.¹³⁸

Aggregating the data from all circuits, we found that *only about half* of petitioners (55%) applied for stays of removal. But beyond that, looking circuit by circuit, we observed wide variation. At the lowest end, in the Eleventh Circuit, only one quarter of the petitioners filed motions for stays. The rate is also relatively low in the Fourth (30%) and Seventh Circuits (38%). The First, Third, Fifth, Eighth, and Tenth Circuits fell in the middle, with about half of the petitioners requesting stays.¹³⁹ In the Sixth Circuit, about 70% of petitioners requested stays. At the highest end of the spectrum are the Ninth and Second Circuits, where respectively 94% and 99% of petitioners requested stays.

¹³⁵ John R. B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 54 (2005).

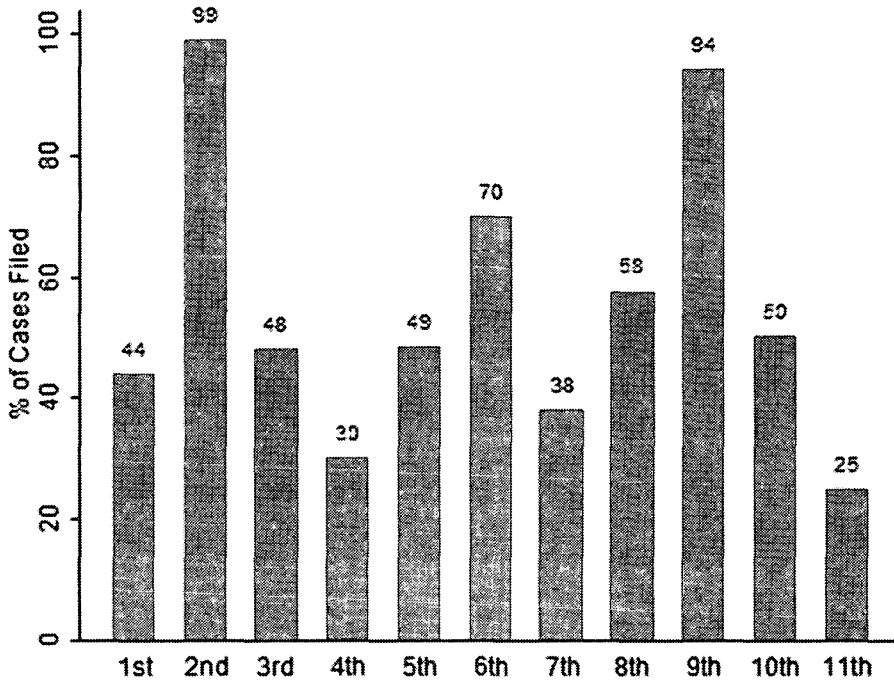
¹³⁶ *Id.*

¹³⁷ The Executive Office of Immigration Review reports the number of appeals received by the BIA, but does not report the number of removal orders issued. See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEAR BOOK, at S1 (2012). Since a noncitizen would only appeal an order of removal, without this data it is difficult to determine if current figures are similar to those in 2004.

¹³⁸ Assuming that the rates of appeal have remained fairly consistent over time, what may be surprising is that the rates of requesting stays do not appear closely aligned with the rates of appeal. While the Eleventh Circuit occupies a low extreme for both variables, the Eighth Circuit had a high rate of appeal but not a high rate of stay requests or stay grants. The Seventh Circuit grants stays at a high rate, and yet has a low rate of appeal and a relatively low rate of stay requests.

¹³⁹ The exact rates of filing motions for stays were as follows: 44% in the First Circuit; 48% in the Third Circuit; 49% in the Fifth Circuit; 58% in the Eighth Circuit; and 50% in the Tenth Circuit.

Figure 2: Stay Requests as a Percentage of Cases



Several hypotheses might be suggested about why some petitioners request stays while others do not. First, we hypothesized that pro se petitioners are less likely to request stays than represented petitioners, either because they do not know that they have to request one or because they have difficulty drafting the necessary motion. Second, we hypothesized that detained petitioners are more likely to request stays than non-detained petitioners, due to the imminence of deportation. Third, we hypothesized that Mexican citizens are more likely to request stays than non-Mexicans, again because they are more easily deported. Fourth, we hypothesized that petitioners seeking asylum, withholding, or protection under CAT are more likely to seek stays than petitioners with other types of cases because they fear persecution or torture if deported. Finally, we assessed the hypothesis implied by the government and Justice Kennedy in *Nken*, that petitioners in circuits with higher rates of stay grants are more likely to request stays simply because of the higher chance of success.

To test these hypotheses, we calculated the degree to which different characteristics predicted the likelihood that the petitioner would seek a stay. The results of this analysis are presented below. First we discuss representation, detention, and other theories. Then we discuss the relation between a circuit's stay grant rate and the request rate.

Table 2: *Logistic Regression Model of Stay Requests*¹⁴⁰

	Odds Ratio	Robust SE	z-score	p > z
Pro Se Litigant	1.369	0.443	0.97	.332
Stay Grant Rate	1.032	0.013	2.48	.013
Lawyer Effect	1.003	0.009	0.37	.713
Asylum Case	1.368	0.256	1.67	.094
Mexican Citizenship	1.093	0.295	0.33	.740
High Detention Rate	1.000	0.000	1.34	.102
Female Petitioner	0.697	0.145	-1.73	.083
Constant	0.331	0.170	-2.15	.031

Robust standard errors are calculated by clustering around the ten circuits, thus correcting for unmeasured circuit-level idiosyncrasies that cause non-independence in the data. Second Circuit omitted. n=998;
Wald $\chi^2(7)=100.71***$; Pearson $\chi^2(90)=162.22***$; Sensitivity=54%;
Specificity=68%; Correctly Classified=61%

a. *Legal Representation, Detention, and Other Theories*

Our data and analysis appear to rule out several hypotheses regarding stay request rates. Most surprisingly, several factors that we thought would correlate strongly with higher rates of requesting stays actually had little or even the opposite effect. Having a lawyer did *not* make a petitioner more likely to request a stay. Being Mexican had no effect. Petitioners seeking asylum or related relief were not more likely to seek a stay.

Contrary to our hypothesis about the impact of representation, we found that pro se petitioners requested stays at rates comparable to represented petitioners.¹⁴¹ We actually found that pro se petitioners had a higher rate of stay requests than represented petitioners, but the difference was also not statistically significant. Our findings further suggest that all petitioners, be they represented or not, were 41% more likely to request stays in circuits with high stay grant rates. However, even in a circuit with a stay grant rate of zero, the predicted probability that a litigant will request a stay is 37%.

Our data could not confirm or disprove the hypothesis that detained immigrants request stays more often since they are at more imminent risk of deportation. Unfortunately, we were not able to directly test the impact of detention on the filing of stay requests as directly as other factors. The publicly

¹⁴⁰ For an explanation of logistic regression, see *supra* note 131.

¹⁴¹ To test the alternative hypothesis that represented litigants will request more stays in circuits with high stay grant rates and fewer in circuits with low stay grant rates, we included an interaction term measuring the sensitivity of represented litigants to information about circuit stay grant rates. This measure, labeled “the lawyer effect,” is also insignificant.

accessible portions of the case records on PACER did not indicate whether or not a given petitioner was detained. In other words, we could not tell how many of the cases in our sample involved detained petitioners. As a proxy, we calculated the total number of detainees in each circuit by adding up the average daily population of all of the detention centers within that circuit.¹⁴² We then correlated the overall rate of stay requests in each circuit with the overall size of the detained population in each circuit. Two circuits with high detained populations, the Fifth and the Ninth, did have a higher rate of stay requests. But since the Ninth Circuit has an exceptionally high stay request rate for other reasons, we do not believe that we can make any assertions about the impact of detention on stay request rates.

b. Does a High Stay Grant Rate Lead to More Stay Requests?

In *Nken*, the government argued that “there are many ways in which aliens with non-meritorious claims may seek to manipulate the judicial system to delay their removal”¹⁴³ and complained that the Seventh and Ninth circuits in particular were too lenient in granting stays.¹⁴⁴ This implies that a high stay grant rate will invite a higher rate of stay requests, as more petitioners see an attractive opportunity to delay their deportations. This is an easily testable theory, since it effectively predicts that grant and request rates will be closely correlated. Our data suggest partial support for this theory. Overall, there was a correlation among the circuits with higher stay grant rates and those with a higher rate of stay requests. Yet, this is overly simplistic because the government’s theory appears to be true for some circuits, but not others.

At the surface level, circuits with a higher grant rate have a higher request rate. Our overall data suggest that a grant rate of 50% would increase the predicted probability that a petitioner would request a stay to 63%.¹⁴⁵ But on closer examination, there does not appear to be any simple relationship between

¹⁴² This is weak proxy for actual detention, since venue may remain in a court that is distant from where the petitioner is detained. Moreover, the number of detained individuals in a circuit may not reflect the number of detained cases on the circuit court’s docket. For example, it is possible for most of the cases on a circuit court’s docket to be non-detained, even if that court happens to have a high number of detainees in its geographical boundary. Rounding to the nearest hundred, the numbers of detainees in each circuit are 700–900 in the First, Second, and Sixth Circuits, 900–1100 in the Seventh and Eighth Circuits, 1400 in the Fourth Circuit, 1700 in the Tenth Circuit, 2800 in the Third Circuit, 5100 in the Eleventh Circuit, 7800 in the Ninth Circuit, and 10,100 in the Fifth Circuit.

¹⁴³ Brief for the Respondent, *supra* note 38, at 10.

¹⁴⁴ *Id.* at 47–48.

¹⁴⁵ We also examined whether represented litigants would be more sensitive to the circuit’s grant rate than pro se petitioners when deciding whether to request a stay. We expected that represented litigants would be less likely to request stays in circuits with low stay grant rates, but more likely to request stays in circuits with high stay grant rates. This is the concept measured by the “lawyer effect” variable. Our model showed no support for such a proposition.

a higher grant rate and a higher request rate. The Seventh Circuit, for example, has a relatively high stay grant rate, but—contrary to the government’s assertions to the Supreme Court—a relatively low stay request rate. Meanwhile, the Fifth Circuit has a very low stay grant rate, but still receives an average number of requests. We found that even in the face of near certain rejection, as is the case in some circuits, 37% of immigrant petitioners sought a stay of removal, all other factors being equal. The relationship between request rates and grant rates therefore appears to be complicated, and the factors that we analyzed are simply not very good at predicting whether an individual will request a stay of removal.

What is most clear in our data is that petitioners in the Second and Ninth circuits request stays of removal nearly every time—94% in the Ninth and 99% in the Second. No other circuit showed this pattern. These are the circuits with the largest immigration dockets.¹⁴⁶ They also both offer an immediate, automatic stay of removal for at least a short time, though they do so in different ways.¹⁴⁷

At oral argument in *Nken*, the government stated, “[w]e do not have empirical data . . . but [stays of removal] are—in the Ninth Circuit in our experience . . . granted quite frequently.”¹⁴⁸ That is correct, but the means by which the Circuit grants stays is somewhat more complicated. The Ninth Circuit’s most unique feature is the availability of an immediate, temporary stay before the court is able to consider a stay motion on its merits.¹⁴⁹ If the government fails to respond to the motion or files a notice of non-opposition, then the temporary stay continues during the pendency of the appeal.¹⁵⁰ If the government opposes the stay, then the court will rule on the motion. The court does not set a briefing schedule in the case until the motion for stay is resolved.¹⁵¹

The Second Circuit, on the other hand, has an informal, unwritten agreement with DHS, known as the Forbearance Policy, whereby the court has agreed to notify DHS when a motion for stay has been filed, and DHS has

¹⁴⁶ Legomsky, *supra* note 2, at 1646.

¹⁴⁷ See *infra* notes 148–151 and accompanying text.

¹⁴⁸ *Nken v. Holder*, 556 U.S. 418, 437 (2009) (Kennedy, J., concurring) (quoting from oral argument).

¹⁴⁹ The Ninth Circuit provides a formal temporary automatic stay once a motion for stay has been filed. See U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, GENERAL ORDERS § 6.4(c)(1). We observed that several other courts occasionally grant temporary stays as a matter of discretion. These decisions are sometimes issued by a single judge and may be a way to preserve the status quo in an emergency when the judge needs more time to review the case. We found that most of the circuits rarely, if ever, used this power. While we did not track the numbers of these discretionary temporary stays, we noted their being granted most often in the Seventh Circuit, although they were still issued in only a small fraction of cases.

¹⁵⁰ *Id.* §§ 6.4(c)(3), (c)(6).

¹⁵¹ *Id.* § 6.4(c)(1).

agreed not to remove those noncitizens unless the court denies the motion.¹⁵² In more than 48% of the Second Circuit cases in our sample, the Second Circuit avoided ruling on the motion for stay until it ruled on the petition. This creates an informal system of providing a stay for the duration of the appeal and effectively frees the court from applying the four-part test.¹⁵³ By contrast, in the Ninth Circuit, a petitioner can get an immediate, automatic stay but it will last only until the government files an opposition and the court rules on the motion.

In sum, we found a somewhat surprising result. The availability of an immediate and automatic stay, formal or informal, does appear strongly correlated with nearly all petitioners requesting a stay, at least for the two circuits in this category.¹⁵⁴ Without the automaticity, a relatively high grant rate does not translate into a high rate of stay requests.¹⁵⁵ This is intriguing because if one assumes that noncitizens are simply seeking to delay their deportation as long as possible, one would expect them to file many more stay requests in circuits with high grant rates. Our results suggest that the grant rate may be an important factor in predicting stay requests and that automaticity appears even more powerful than simply a high grant rate, but there is considerable complexity, with other factors also playing an important role.

These findings offer a partial explanation of the variation in stay request rates, but still leave a significant question mark about why only half of petitioners are requesting stays. There are some other possible explanations that we could not evaluate through our research. One possibility pertains to the quality of the petitioners' attorneys or the way in which they handle fees. It could be that many petitioners are not requesting stays simply because their lawyers are ineffective. Attorneys working on a flat fee or pro bono basis may also have a financial incentive not to take on the additional work of preparing a stay motion. The quality of the immigration bar and typical fee arrangements could vary from circuit to circuit, which might help explain some of the variation in stay request rates. Another possibility is that some petitioners obtained a stay from ICE, or otherwise received assurance that they would not be deported, and therefore did not need a stay from the court. Moreover, some petitioners may have already been deported and may have been seeking to reopen their case from abroad. These explanations are likely insufficient,

¹⁵² See Matthew L. Guadagno, *Nuts and Bolts in Presenting Petitions for Review to the U.S. Court of Appeals for the Second Circuit*, in N.Y. CNTY. LAWYERS' ASS'N, LITIGATING IMMIGRATION CASES IN THE SECOND CIRCUIT 12 (Feb. 9, 2011); NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD ET AL., PRACTICE ADVISORY, SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSG'S MISREPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION, at 2 n.2 (2012), available at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_a_Judicial_Stay_of_Removal_May2012.pdf.

¹⁵³ In particular, the likelihood of success on the merits test is meaningless if the court issues its decision on the same day when it issues a final decision on the merits.

¹⁵⁴ See *supra* Tbl. 2.

¹⁵⁵ See *supra* note 145 and accompanying text.

however, to explain why nearly half of the petitioners failed to request stays. We believe that further research on this question is warranted.

3. *How Often Does the Government Oppose Stays of Removal?*

The government attorneys who represent the Department of Homeland Security in immigration litigation before the U.S. Courts of Appeals belong to the Appellate Section of the Office of Immigration Litigation (OIL) in the Department of Justice's Civil Division. OIL's Appellate Section employs approximately 250 attorneys who are divided into fifteen teams.¹⁵⁶ Each team reports to an Assistant Director.¹⁵⁷ Due to the extremely high number of cases in the Second and Ninth Circuits, which account for about 70% to 75% of immigration appeals nationwide, all OIL attorneys work on cases in those circuits.¹⁵⁸ The immigration appeals in the remaining circuits are divided among the teams in a way that balances the workload, with at least two teams handling cases from any given circuit.¹⁵⁹ OIL attorneys have discretion about whether or not to oppose a motion for stay of removal in a particular case and generally consult with the assistant directors of their teams in making that decision.¹⁶⁰

We found that government opposition to the stay motion reduces the probability of getting a stay by 18%, all other factors being equal. Thus, the negative effect of government opposition on the noncitizen's likelihood of getting a stay is much stronger than the positive effect of attorney representation. In this Section, we first examine the government's opposition rates in each of the circuits. We then examine how often the government filed a motion to remand the case to the BIA, thereby acknowledging that the appeal had merit, after having *opposed* the stay.

a. *Government Opposition Rates*

Our data indicate that the government opposed the vast majority of stay requests in most circuits but was not consistent across the country. Aggregating data from all eleven circuits, the government opposition rate was 71%. In five of the circuits (the Third, Fourth, Fifth, Eighth, and Eleventh), the government opposed 80% to 90% of stay motions. In the Sixth and Ninth Circuits, the government opposed approximately 70% of stay motions. In the Seventh Circuit, the government opposed only 46% of stay motions, in the First Circuit, the government opposed 42% of stay motions, and in the Second Circuit, the

¹⁵⁶ Telephone Interview with David McConnell, Dir., Office of Immigration Litig., Appellate Section (Sept. 5, 2012).

¹⁵⁷ *Id.*

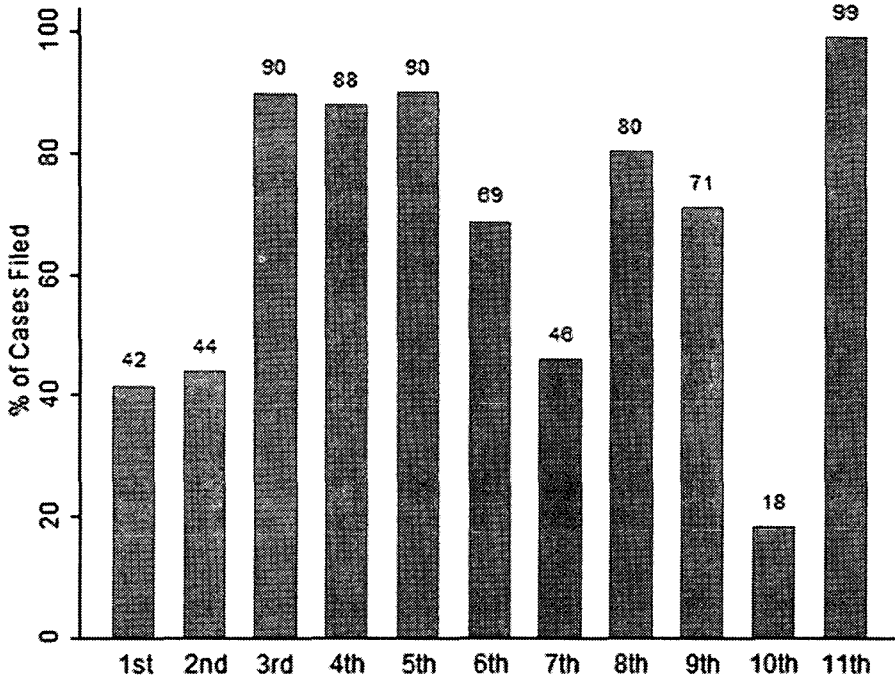
¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

government opposed 44% of stay motions.¹⁶¹ In the Tenth Circuit, the government filed oppositions to stay requests at a particularly low rate of 18%.

Figure 3: Rates of Government Opposition to Motions for Stays of Removal



In order to try to understand the variation in opposition rates, we interviewed the Director of OIL who stated that the office routinely opposes stays where the motion is perfunctory, i.e., where the petitioner does not discuss the *Nken* factors or make an effort to show how they are satisfied.¹⁶² We were further informed that OIL routinely opposes stays in cases where it appears that the court lacks jurisdiction.¹⁶³ OIL's Director also indicated that the office is less likely to oppose a stay in an asylum case where the petitioner puts forth an argument about how the *Nken* factors justify the stay.¹⁶⁴ However, our data indicate that in cases involving asylum, withholding, and CAT, the government

¹⁶¹ Unfortunately, there were forty-two cases in our Second Circuit sample where the government filed a response to the stay request but we were not able to determine the nature of that response. The government's responses were usually "locked" in PACER and accessible only to the parties, so we could not open them. In some cases, we were able to open the courts' orders on the motions for stays, but these orders did not always specify whether or not the government had opposed the motion.

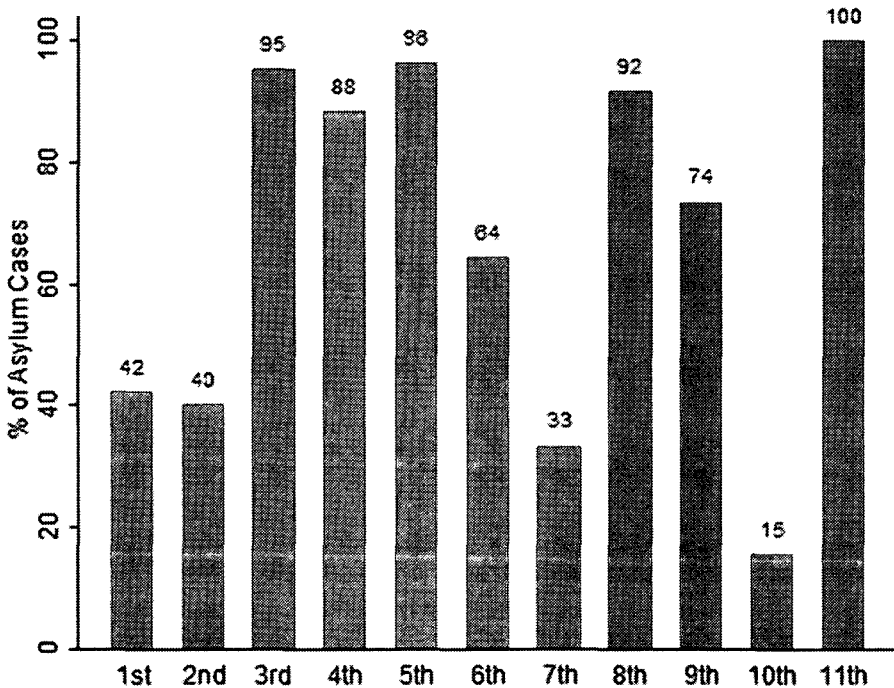
¹⁶² Telephone Interview with David McConnell, *supra* note 156.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

still opposes 70% of stay requests.¹⁶⁵ In fact, there was no statistically significant difference in government opposition rates between asylum, withholding, CAT cases, and other types of cases.¹⁶⁶ In non-asylum cases, the government opposed 69% of stay requests. This may suggest that individual attorneys in OIL are opposing stays more aggressively than the Office policy intends. It is also possible that OIL attorneys consider many stay requests in asylum cases to be perfunctory, and thus may oppose them regardless of the underlying nature of the claim.

Figure 4: *Government Opposition Rates to Stays in Asylum and Related Cases*



Whatever the explanation for the Department of Justice's response to stay requests, the government's decision to oppose a request is a strong predictor that the court will deny it. When we aggregate the data for the circuits, we find that the courts grant stays in only 18% of the cases where the government opposed the motion, compared to 49% of the cases where the stay motion was unopposed.¹⁶⁷ This does not necessarily mean that courts are simply following

¹⁶⁵ See *infra* Fig. 4.

¹⁶⁶ We calculated Pearson's Chi 2(1)=0.0601, p=0.806 using a two-tailed test.

¹⁶⁷ This calculation excludes the Second Circuit because of its unique way of handling stay requests. If we were to include as grants the Second Circuit's cases denied as moot at

the government's lead, because it is likely that the government will be more likely to oppose stays in weaker cases. But the data is at least consistent with the hypothesis that the government plays a critical role in influencing the outcome of the stay motion and thus should take special responsibility to make careful decisions about whether or not to file an opposition.

It is still difficult, however, to explain why the opposition rates are so much lower in the First, Second, Seventh, and Tenth Circuits than in the other circuits. We found it especially interesting that despite the extremely low opposition rate in the Tenth Circuit, the court granted only 6% of stay motions. It may be that OIL attorneys see no need to oppose stay motions in the Tenth Circuit, because that court routinely denies them even if they are unopposed. The very low opposition rate in the First Circuit, on the other hand, may help explain its relatively high grant rate of 29%, despite having a rigorous interpretation of the "likelihood of success" factor.¹⁶⁸

The data about the government's opposition rates on stay motions raise many questions for both courts and the Department of Justice. For courts, a critical question is whether they should deny stay requests when the government does not file an opposition. The Tenth Circuit denied the majority of stay requests (56%) even though the government remained silent. If a represented petitioner asks for a stay without providing any basis at all, a court would be correct to deny the motion. But if even thin reasons are given, or if a pro se petitioner pleads to not be deported without knowing that she should say more, the calculus may be different. If the government believes that delaying deportation would be damaging to its interests or to the public—the third and fourth prongs of the *Nken* test—then it might be reasonably expected to say so or to forfeit the issue.¹⁶⁹ Moreover, it is entirely possible that the government actually has no plans or interest in deporting the petitioner in the immediate future, in which case a stay would give the petitioner peace of mind at no cost to the government. The Second Circuit recently complained that the government often vigorously litigates immigration appeals in court, but then fails to execute a final removal order after prevailing.¹⁷⁰

Our data suggest that there may be good reason for OIL to review its approach to stay requests. It seems that the government's central interest is in preventing the appellate process from being abused through delayed deportation. In this light, OIL should clarify when it will oppose stay requests in asylum cases, where the risk of irreparable harm appears highest. It would also seem logical not to oppose stay requests unless the government actually intends

the end of the appeal, then we would find an 18% stay grant rate for opposed motions and a 44% grant rate for unopposed motions.

¹⁶⁸ See, e.g., *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996).

¹⁶⁹ See *Nken v. Holder*, 556 U.S. 418, 436 (2009).

¹⁷⁰ *In re Immigration Petitions for Review Pending in the U.S. Court of Appeals for the Second Circuit*, No. 12-4096 at 3 (2d Cir. Oct. 16, 2012), available at http://www.ca2.uscourts.gov/Docs/News/12-4096_opn.pdf.

to execute the removal order promptly. Agreeing to a stay whenever the government has no urgent interest in deportation would conserve resources for both the parties and the courts.¹⁷¹

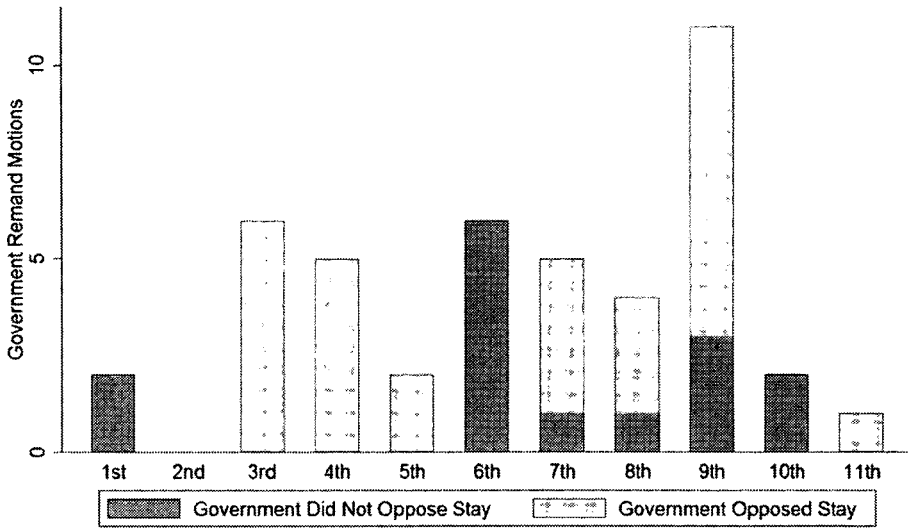
b. Cases Where the Government Changes Position

The government sometimes changes its mind about the merits of an immigration appeal. We found that in one out of every twenty-four cases where OIL opposed a stay, it later filed a motion to remand. This suggests that the government is occasionally opposing stays of removals in valid appeals. In fact, in thirty-three of the forty-four cases in our sample where the government filed motions to remand, it had previously opposed stays of removal. In other words, in *three-quarters* of the cases where the government eventually recognized that some aspect of the appeal had merit, it had opposed staying deportation until the appeal was resolved. While this is a small minority of immigration appeals overall, it does suggest that OIL may sometimes be overly aggressive in fighting stays and runs against the government's insistence that its only interest is in preventing abuse of the appellate process.

This pattern was not consistent among the circuits, however. The Sixth Circuit stands out as the only circuit where the government did not oppose stays in *any* of the cases where it later filed a motion for remand. In all other circuits, the government opposed stay requests in most or all of the cases where it eventually asked for a remand. These data underscore our point that OIL should take a closer look at its practices in opposing stays. In fact, OIL may wish to collect its own data on this subject to inform its decision-making about when to oppose a stay.

¹⁷¹ DHS has discretion to agree to a stay of removal. *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton, Apprehension, Detention, and Removal of Aliens], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

Figure 5: Cases Where Government Filed Motion To Remand



The frequency with which OIL opposes stays in cases where it later supports remand underscores the inherent difficulties involved in assessing the merits of an appeal at the beginning of the litigation. While it is especially difficult to assess the merits of an appeal at the beginning of the case if the motion for stay is merely perfunctory, this difficulty exists even in cases where an attorney briefs the *Nken* factors, because the legal arguments often require substantial research and time to develop fully. The data suggest that OIL is able to assess the merits of the case and determine whether remand is appropriate only after the petitioner's opening brief has been submitted, not at the start of litigation when the motion for stay is normally filed. For the same reasons, one would expect judges to have great difficulty in determining which cases are "likely to succeed" at the time that the motion for stay is filed. Opposing a stay only later to discover that the petitioner really should prevail risks transforming the appellate process into the "idle ceremony" that Chief Justice Roberts sought to avoid in *Nken*.¹⁷² The high rate of pro se appeals in some circuits also weighs against opposing perfunctory stay motions without first trying to determine if the appeal has any merit.

4. What Are the Correlations Between Stays and Petitions Granted?

In *Nken*, Justice Kennedy was particularly interested in empirical data on the correlation between stays and the outcome of the petitions for review.¹⁷³

¹⁷² *Nken*, 556 U.S. at 427 (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942)).

¹⁷³ *Id.* at 437 (Kennedy, J., concurring).

One would expect an association between being granted a stay and prevailing in the appeal because of the importance of the “likelihood of success” factor in the traditional four-part test.¹⁷⁴ Examining whether courts granted stays in appeals where the petitioner ultimately succeeded on the merits helps shed light on how well courts can predict the likelihood of success. It also addresses the government’s concern that stays of removal might allow immigrants with weak cases to delay their removal.

Because many circuits grant only a very small number of petitions for review, and because we focused only on cases decided after the decision in *Nken* was issued on April 22, 2009, we had a limited amount of data involving petitions that were granted, especially in the circuits with relatively low numbers of immigration appeals.¹⁷⁵ But even with the small sample size of granted petitions, we were able to find statistically significant relationships.¹⁷⁶

Those with meritorious appeals, defined as ultimately having the petition granted, are more successful at getting stays. Holding all of the other variables at their means, the probability of getting a stay increases by 21% if the petition is granted.¹⁷⁷ While this is a significant increase, it also means that even if we have prescient knowledge that the petitioner will prevail, the likelihood of getting a stay is still only 48%, which is no better than the flip of a coin.

a. *Relationship Between Stays Requested and Petitions Granted*

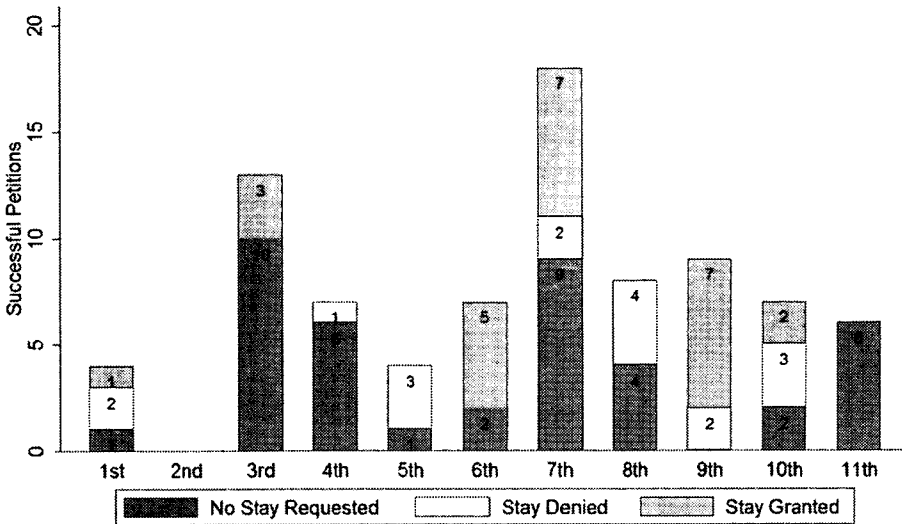
Our first major finding in examining correlations is that about half (48%) of the petitioners who ended up prevailing in their appeals had *never even requested a stay of removal*. Specifically, in our random samples of 100 cases from each circuit (1100 cases total), petitions were granted in eighty-nine cases. In forty-three out of these eighty-nine cases, no stay had been requested. The figure below shows a circuit-by-circuit breakdown of the correlation between stay requests and petitions granted.

¹⁷⁴ See *infra* note 188 (citing cases that stress the importance of the “likelihood of success” factor).

¹⁷⁵ We are currently gathering more data to expand our sample of cases where petitions were granted.

¹⁷⁶ By analogy, if one flips a coin only ten times but it comes up heads each time, then the likelihood of that result being due to chance is extremely low. Similarly, even if we have only ten cases out of a hundred where the noncitizen prevailed, if a stay was denied in each of those ten cases, then that result should not be attributed to chance.

¹⁷⁷ In this model, we have used the future success of the petition as a proxy indicator for meritorious claims.

Figure 6: *Stay Request and Grant Patterns Among Successful Petitioners*

Notably, in the Third Circuit, ten out of thirteen petitioners who prevailed had never requested a stay; in the Fourth Circuit, six out of seven who prevailed had never requested a stay; in the Seventh Circuit, nine out of eighteen petitioners who prevailed had never requested a stay; in the Eighth Circuit, four out of eight who prevailed had never requested a stay; and in the Eleventh Circuit, *none* of the six petitioners who prevailed had requested a stay.¹⁷⁸

If we look only at cases involving applications for asylum, withholding, and CAT, twenty-nine petitions were granted and no stays were requested in eight of those cases. This means that even individuals who may be genuinely at risk of serious harm in their home countries are failing to request stays of removal. These results indicate that, contrary to what one might expect, having a meritorious case (as demonstrated by winning the appeal) is not significantly correlated with having requested a stay. The results also underscore the importance of doing further research to better understand why more petitioners with meritorious cases are not requesting stays of removal.

b. *Relationship Between Stays and Petitions Granted*

The *Nken* case itself points to a particularly worrying type of error that occurs in stay adjudications. When the Supreme Court remanded the case to the Fourth Circuit, the Government stipulated that it would not deport Nken while his case was still pending, rendering the issue of a stay moot.¹⁷⁹ When the

¹⁷⁸ See *supra* Fig. 6.

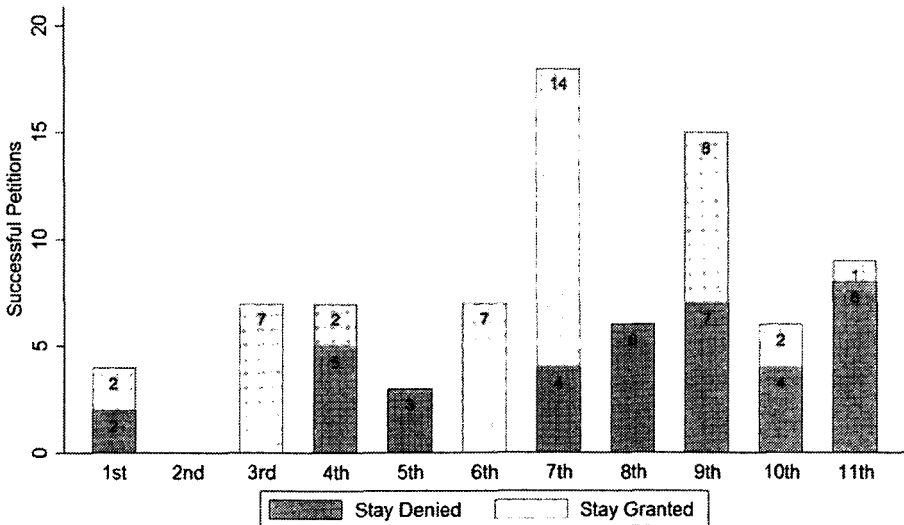
¹⁷⁹ *Nken v. Holder*, 585 F.3d 818, 821 (4th Cir. 2009).

Fourth Circuit ultimately ruled on the substantive question of the BIA’s refusal to re-open Nken’s asylum application, *it ruled in his favor*.¹⁸⁰ This chain of events suggests that at the stage when the Fourth Circuit first considered the stay, both the court and the government appeared to underestimate the strength of Nken’s case.

Out of the 937 cases in our study where stays were requested, eighty-two petitions for review were granted, and stays were denied in thirty-nine of these cases (48%). This finding indicates that, when we view the circuit courts as a whole, those who win their appeal are almost as likely to have had their stay request denied as granted. As we explain below, in some circuits the prospects for a noncitizen with a meritorious appeal winning a stay are far worse.¹⁸¹ Accurately identifying strong appeals early in the process is a challenge, because, in all circuits, the majority of petitions are ultimately denied. But this identification process is central to the stay of removal system, since if courts fail to pick out those likely to succeed, they will leave people in danger of irreparable harm.

While many courts denied stays to the *majority* of those who ended up succeeding in their appeals, a few did very well in granting stays to those who ultimately prevail. The following figure provides a circuit-by-circuit analysis of the correlation between stays and petitions granted.

Figure 7: *Patterns of Stay Decisions in Cases with Successful Petitions*



¹⁸⁰ *Id.* at 822–23 (remanding the case because the BIA had failed to adequately consider the new evidence that Nken would be persecuted if removed to Cameroon).

¹⁸¹ See *infra* Fig. 7.

This figure shows that the group of circuits with the highest rates of false negatives were the Fifth Circuit (denied stays to all three petitioners who prevailed), Eighth Circuit (denied stays to all six petitioners who prevailed), Fourth Circuit (denied stays to five of the seven who prevailed), Tenth Circuit (denied stays to four of the six who prevailed), and Eleventh Circuit (denied stays to eight of the nine who prevailed). The First and the Ninth Circuits did somewhat better, granting stays to about half of those who succeeded; the First Circuit granted stays to two of the four petitioners who prevailed, and the Ninth Circuit granted stays to seven of the fifteen who prevailed. The circuits that did the best at granting stays to those who ultimately prevailed were the Third, Sixth, and Seventh Circuits. The Third Circuit granted stays to all seven of the petitioners who succeeded in their appeals. The Sixth Circuit also granted stays to all seven of the petitioners who prevailed. The Seventh Circuit granted stays to fourteen of the eighteen petitioners who prevailed.¹⁸²

We determined that in the Third, Sixth, and Seventh Circuits, there was a statistically significant positive association between prevailing in the petition for review and being granted a stay.¹⁸³ While both the Third and Sixth Circuits appear to have “perfect scores” (i.e. they granted stays to all who prevailed in our small sample), the association in the Third was stronger than in the Sixth because the Third Circuit granted fewer stays to unsuccessful petitioners than the Sixth Circuit. Specifically, the Third Circuit granted stays to unsuccessful petitioners only 15% of the time, while the Sixth granted stays to unsuccessful petitioners 44% of the time.

The Seventh Circuit also displayed a substantial relationship between stays and petitions granted, because, despite failing to give stays to nearly a third of the petitioners who prevailed, it gave stays to only 20% of unsuccessful petitioners. Comparing the Seventh Circuit with the Sixth, we see two different approaches. The Sixth Circuit grants stays relatively leniently, which helps it capture those who eventually succeed, although it also ends up granting stays to nearly half of those who lose their appeals. The Seventh Circuit, on the other hand, is more tight-fisted with stays and therefore ends up missing a sizeable fraction of those who prevail, but at the same time it minimizes the number of stays granted to petitioners who lose. The Third Circuit represents the best of both worlds, capturing successful petitioners while somehow maintaining an even lower rate of “false positives” than the Seventh Circuit.

While one might expect the Ninth Circuit to do a good job of providing stays to successful petitioners given its overall high grant rate for stays, we found that the association fell far short of the level of statistical significance. Despite granting 63% of stay motions, the Ninth Circuit still denied stays in

¹⁸² We could not obtain data from the Second Circuit on this correlation because, as noted above, we could not obtain access information from PACER regarding whether or not the Second Circuit granted the motions for stays.

¹⁸³ We calculated the levels of significance to be as follows: Third Circuit (Pearson’s $\chi^2(1)=28.32$, $p=.000$); Sixth Circuit (Pearson’s $\chi^2(1)=8.15$, $p=.004$); Seventh Circuit (Pearson’s $\chi^2(1)=22.58$, $p=.000$).

47% of the cases where the petitioner ultimately prevailed. In other words, the court granted nearly two-thirds of stay requests but still denied stays to almost half (47%) of the petitioners who ended up winning their appeals. This indicates that simply granting more stays does not necessarily ensure that those who prevail will be protected from deportation, while a modest grant rate does not necessarily signal a high risk of error. We note that the Third and Seventh Circuits both have modest grant rates for stays (21% and 31% respectively), but still managed to grant stays to most of those who ultimately prevailed.

Although the Ninth Circuit denied stays to about half of the petitioners who prevailed in their appeals, it still performed far better than any of the remaining circuits (the First, Fourth, Fifth, Eighth, Tenth, and Eleventh) in displaying a positive association between prevailing in the petition and being granted a stay.¹⁸⁴ In fact, we found a statistically significant relationship in the *opposite* direction in the Tenth Circuit, indicating that prevailing in the petition was actually associated with *not* having been granted a stay.¹⁸⁵ These results flag serious concerns about how these circuits handle motions for stays.

c. Contextualizing “Error” in Analyzing Correlations

Just because a court denies a stay to a petitioner who ultimately prevails does not mean that court made an error in adjudicating the motion for stay. Because the legal standard for stays involves four different factors, a court may deny the stay for failure to demonstrate one of the factors other than “likelihood of success on the merits.” But this scenario is unlikely to explain the high rates of cases where the stay was denied but the petition was granted. First, as discussed above, in immigration cases, decisions on stays almost always turn on the first two factors—likelihood of success and the risk of irreparable harm. *Nken* itself suggests that it would be unlikely for a court to deny a stay based on either of the other two factors (risk of harm to the government and where the public interest lies), because arguments can usually be made by both the petitioner and the government about why these factors weigh in their favor, and these arguments tend to be generic in most removal cases.¹⁸⁶ Consequently, as a practical matter, these factors carry little weight in the final determination about whether or not to grant a stay.

Second, and most persuasively, we can limit the possibility that a court may deny a stay based on failure to show irreparable harm, despite finding a likelihood of success on the merits, by examining only cases involving asylum, withholding of removal, and protection under the CAT. In such cases, the likelihood of success on the merits goes hand-in-hand with the risk of irreparable harm, since one must show a reasonable chance of future persecution to win an asylum case and a greater than 50% chance of persecution

¹⁸⁴ We calculated Pearson’s $\chi^2(1)=.69, p=.403$ in the Ninth Circuit.

¹⁸⁵ We calculated Pearson’s $\chi^2(1)=9.46, p=.002$ in the Tenth Circuit.

¹⁸⁶ See *Nken v. Holder*, 556 U.S. 418, 434–35 (2009).

or torture to win withholding or CAT relief respectively. Looking only at these types of cases, we still find that courts deny stays to a high percentage of petitioners who ultimately prevail. Out of 374 cases involving asylum, withholding or protection under the CAT, thirty-four petitions were granted, of which fifteen had been denied stays of removal.¹⁸⁷ Thus, 44% of applicants for asylum and related forms of relief who eventually prevailed in their appeals were first denied stays. Despite their meritorious claims, they remained at risk of deportation—or were actually deported—to countries where they faced a risk of serious harm.

In short, while denying a stay of removal to a petitioner who ultimately prevails is not necessarily an “error” in light of the four-part test, we believe that a pattern of consistently denying stays to a large number of petitioners who ultimately prevail flags a problem with the process and raises serious questions about judges’ abilities to predict, with a reasonable level of accuracy, which cases are likely to succeed. We are especially concerned that this pattern appears even in asylum cases, where the failure to grant a stay puts the petitioner at risk of serious bodily injury or even death.

d. *Ratios of Stays to Petitions Granted*

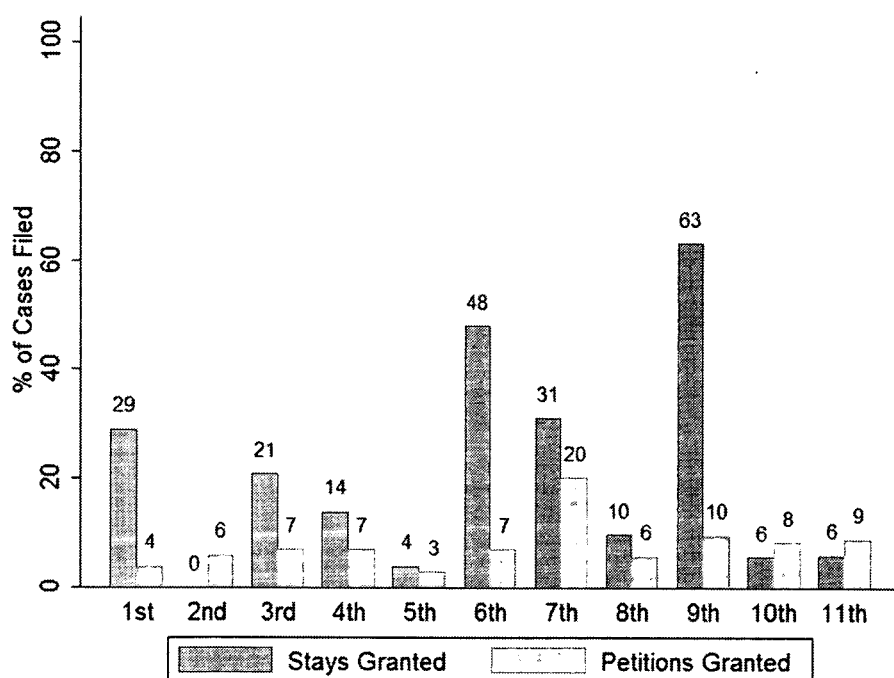
Another way to view this data is to consider the ratios between stays granted and petitions granted. As discussed above, likelihood of success is one of the two most important factors (if not *the* most important factor in granting stays).¹⁸⁸ However, ambiguity about the likelihood of success standard leads to ambiguity about precisely what kind of correlation courts should seek. If likelihood of success means a 50% probability of winning, then one should expect a court to grant twice as many stays as it does petitions. Yet not all circuits did so. The Eleventh Circuit actually granted *more petitions* than it did stays. The Fifth and Tenth Circuits granted about the same number of petitions as stays. These ratios alone suggest that the Eleventh, Fifth, and Tenth circuits are granting too few stays. The Fourth and Eighth Circuits both granted about twice as many stays as petitions for review.

¹⁸⁷ These figures exclude the Second Circuit.

¹⁸⁸ See *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005) (“Although four factors are relevant to determining entitlement to a stay, the first (likelihood of success on the merits) is arguably the most important.”); *Shrink Mo. Gov’t PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998) (“The most important of the . . . factors is the appellants’ likelihood of success on the merits.”); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996) (“Likelihood of success is the main bearing wall of the four-factor framework.”). *But see* *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (“A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction . . .” (internal quotation marks omitted)); *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1190 (10th Cir. 2008) (“[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction . . .” (internal quotation marks omitted)).

Some courts have explicitly rejected this approach as too strict an interpretation of “likelihood of success,” finding that “likelihood” may represent a probability of less than 50%, thereby suggesting that the ratio of stays to petitions granted should be greater than 2:1.¹⁸⁹ In our sample, the Third Circuit granted about three times as many stays as petitions; the First Circuit granted about five times as many stays as petitions; the Sixth Circuit granted about six times as many stays as petitions; and the Ninth Circuit granted about eight times as many stays as petitions.¹⁹⁰

Figure 8: Comparison of Numbers of Stays and Petitions Granted



It would seem that under any interpretation of the likelihood of success test, a court should grant at least *somewhat* more stays than it does petitions. Failing to do so opens the door to many false negatives (cases where the stay is denied but the petition is granted). At the same time, a few circuits are granting many

¹⁸⁹ See, e.g., *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (holding that “to justify a stay, petitioners need *not* demonstrate that it is more likely than not that they will win on the merits” (emphasis added)); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (holding that the Supreme Court “did not suggest that this factor requires a showing that the movant is ‘more likely than not’ to succeed on the merits”).

¹⁹⁰ See *infra* Fig. 8.

times more stays than petitions, opening the door to a high rate of false positives (cases where the stay is granted but the petition is denied). It turns out that doctrine also has a significant impact on the rates of false negatives and false positives, as discussed below.

5. *What Is the Impact of Doctrine?*

Why do the circuit courts vary in their likelihood of granting stays of removal and in their rates of false negatives and false positives? One answer is that legal doctrine matters, and that doctrine remains unsettled. Of all the variables in our model, we found that the use or non-use of the sliding scale has the biggest impact on the likelihood that a petitioner's stay will be granted.¹⁹¹ All other things being equal, the probability that a petitioner's stay request will be granted in a sliding scale circuit is 48%, which is a full 34% higher than a litigant in a non-sliding scale circuit.

As mentioned above, the decision in *Nken* firmly established the four-part test and ruled out certain understandings as too lenient. It made clear that "more than a mere possibility of relief" and more than "some possibility of irreparable injury" is required to satisfy the first two factors of the test for stays.¹⁹² But the Court did not resolve the uncertainty regarding the *degree* of likely success that petitioners must show to satisfy the "likelihood of success" factor. It also did not clarify whether or not courts should use a "sliding scale" approach in applying the four-factor test. We performed various statistical analyses to examine how doctrine affects overall stay grant rates, as well as the correlation between stays and petitions granted. First, we compared the stay grant rates for circuits that use the sliding scale approach and those that do not. Then we compared how often each group "errs" by failing to grant stays to petitioners who ultimately succeed (resulting in "false negatives"), as well as how frequently they grant stays to petitioners who are unsuccessful (resulting in "false positives").

a. Impact of Doctrine on Stay Grant Rates

A circuit's adoption of the sliding scale appears to be strongly correlated with a higher stay grant rate. Excluding the Second Circuit, for which the grant rate is difficult to determine,¹⁹³ we found that the three other circuit courts that

¹⁹¹ In this model, we have included the Sixth, Seventh, and Ninth Circuits as sliding scale circuits, and the remaining seven circuits in the model as non-sliding. We replicated these analyses with alternative specifications, including the omission of circuits which were more difficult to classify. Our findings were robust to these alternative specifications.

¹⁹² *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citations omitted) (internal quotation marks omitted).

¹⁹³ We note that including the Second Circuit in our analysis would not change our conclusion that there is a significant difference in grant rates between sliding scale circuits and other circuits. If we count as grants the "de facto" stays that result from the Second

clearly continue to apply a sliding scale approach (the Sixth, Seventh, and Ninth Circuits) have a mean grant rate of about 50%. By comparison, the mean grant rate for the circuit courts that have clearly rejected the sliding scale approach (the Fourth, Eleventh, and Third Circuits) was about 14%. As for the group of circuits where the doctrine appears to be leaning towards rejection of the sliding scale (the First, Fifth, Eighth, and Tenth Circuits), we calculated a mean grant rate of about 13%. Similarly, we find a statistically significant difference in stay grant rates when we compare sliding scale circuits to the other circuits combined.¹⁹⁴ In fact, there is no significant difference in grant rates among circuits that have rejected the sliding scale approach and those that seem to be moving in that direction.¹⁹⁵ In short, while the sliding scale circuits as a whole grant *about half* of stay motions, courts that have rejected that approach or are leaning in that direction grant stays in *less than one out of seven cases*.

Of course, these results do not indicate that all the courts within any given grouping are acting in the same way. For example, the Third Circuit, which has rejected a sliding scale, still grants stays at a rate of 21%, which is not far behind the Seventh Circuit's grant rate of 31%, although the Seventh Circuit applies a sliding scale. Even more striking, the First Circuit, which does not entertain a lower showing of the likelihood of success factor, grants stays at a rate of 29%, which is effectively the same as the Seventh Circuit. Moreover, among the courts that clearly apply a sliding scale approach, there is a wide spread, with grant rates ranging from 31% in the Seventh, to nearly 50% in the Sixth to 63% in the Ninth. These numbers suggest that factors other than the legal standard also influence grant rates in important ways. In particular, we believe that procedural differences among the circuits in handling motions for stays may play an important role. We discuss those procedures in greater detail in our companion study of the relation between time and the danger of abusive immigration appeals.¹⁹⁶

b. *Impact of Doctrine on "Error" Rates*

Knowing that the sliding scale approach is associated with a higher stay grant rate provides valuable information, but it does not necessarily help courts

Circuit's not ruling on the stay motions until the end of the appeal, then the grant rate for sliding scale circuits goes up to 49%, further widening the gap between sliding scale and other circuits. If we count these "de facto" stays as denials because the court eventually dismisses the motions as moot, then the grant rate for sliding scale circuits drops to 43%. As stated above, excluding the Second Circuit results in a grant rate of 50% for sliding scale circuits. Thus, the grant rate ranges from around 42%–50% depending on how we treat the Second Circuit. This demonstrates that the association between doctrine and stay grant rates gets weaker or stronger depending on how we characterize the Second Circuit, but that the Second Circuit itself is not driving the trend, especially since a significant association exists even when we exclude it.

¹⁹⁴ Pearson's $\chi^2(1)=166.46$, $p=.000$.

¹⁹⁵ Pearson's $\chi^2(2)=0.177$, $p=.674$.

¹⁹⁶ Kagan, Marouf & Gill, *supra* note 8, at 25–32.

decide which doctrinal approach to adopt. Courts would also benefit from knowing whether one doctrinal approach is more “accurate” than another. Here, we use the term “accuracy” loosely to describe how closely stays granted are correlated with petitions granted. A court might err in two ways. It might produce false negatives, where a stay is denied to someone who ultimately prevails in her petition. Or it might produce false positives, where the court grants a stay only to later deny the petition. False negatives expose immigrants to potential errant deportation, and in an asylum or torture case subject them to the risk of serious harm. Yet a high number of false positives might frustrate the government’s efforts to enforce removal orders promptly. We found that the sliding scale significantly reduces the number of false negatives, but at the cost of increasing the number of false positives.

We compared sliding scale circuits (the Sixth, Seventh, and Ninth) to circuits that have clearly rejected the sliding scale (the Third, Fourth, and Eleventh). We found that the sliding scale circuits failed to grant stays in 28% of all cases where the petition was ultimately granted, whereas the non-sliding scale circuits failed to grant stays in 57% of all cases where the petition was granted.¹⁹⁷ Looking only at cases involving applications for asylum, withholding, or CAT, the sliding scale circuits failed to grant stays in 20% of the cases where the petition was ultimately granted, whereas the non-sliding scale circuits failed to grant stays in 51% of the cases where the petition was granted. Thus, in high stakes cases where deportation is associated with a risk of persecution or torture, circuits that have rejected the sliding scale denied stays half of the time, making more than twice as many “errors” as the sliding scale circuits. Courts that are wary of denying stays in meritorious asylum cases may therefore want to adopt the sliding scale approach.

Table 3: *Percent of Granted Petitions Where a Stay Was Denied*

	Sliding Scale (6, 7, 9)	All Non- sliding	Definitely Non- sliding (3, 4, 11)
ALL IMMIGRATION CASES			
False Negatives	27% n=41	67% n=42	57% n=23
ASYLUM CASES ONLY			
False Negatives	19% n=16	67% n=18	55% n=11

¹⁹⁷ The Cramer’s V for the correlation between the circuit categorization and the “false negatives” (cases where the stay was denied but the petition was granted) was -.21.

But courts should also be aware that the sliding scale approach is associated with a much higher rate of false positives—cases where stays are granted but the petitions are unsuccessful. We found that sliding scale circuits granted stays in 47% of cases where the petition failed, whereas non-sliding scale circuits granted stays in merely 11% of the cases where the petition failed. For asylum, withholding, and CAT cases, the gap became slightly wider: sliding scale circuits granted stays in 50% of the cases where the petition failed, whereas non-sliding scale circuits granted stays in just 9% of the cases where the petition failed.

If we compare sliding scale circuits (Sixth, Seventh, and Ninth) to the group of circuits that have either explicitly rejected the sliding scale or that are moving in that direction (First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh), the difference between the two groups becomes even starker. The latter group failed to grant stays in 67% of the cases where the petition was ultimately granted, which is twice as often as sliding scale circuits' "error" rate of 27%. In other words, while sliding scale circuits "missed" about one-quarter of meritorious cases, the other circuits "missed" about two-thirds of meritorious cases. For asylum, withholding, and CAT cases, the sliding scale circuits failed to grant stays in 19% of cases where the petition was granted, as noted above, whereas the other circuits failed to grant stays in 67% of cases. The rates of false positives for this grouping of circuits were similar to what we found for the grouping described above. While sliding scale circuits granted stays in 47% of cases where the petition failed, the other circuits combined granted stays in only 12% of cases where the petition failed. In asylum, withholding, and CAT cases, the sliding scale circuits granted stays in 50% of cases where the petition was denied, while the other circuits granted stays in just 13% of the cases where the petition was denied.

Table 4: *Percent of Stays Granted Where Petition Was Denied*

	Sliding Scale (6, 7, 9)	All Non- sliding	Definitely Non- sliding (3, 4, 11)
ALL IMMIGRATION CASES			
False Positives	46% n=308	12% n=632	10% n=11
ASYLUM CASES ONLY			
False Positives	50% n=123	13% n=217	9% n=112

These results indicate that courts must make a value decision: are they willing to adopt a doctrine that offers much greater protection to petitioners who ultimately succeed but also yields a large number of stays for unsuccessful

petitioners, or do they want to minimize granting stays to unmeritorious petitioners at all costs? Courts must also grapple with whether or not they are comfortable denying stays to over half the asylum seekers with meritorious claims. One of the factors they should consider in analyzing this issue is how much granting a stay will actually delay deportation for petitioners who turn out to be unsuccessful. If the appeal doesn't delay deportation for very long, then giving stays to a large number of petitioners who ultimately lose may not be such a big deal compared to the risk of wrongful deportation. We analyze this issue of delay in much greater detail in our companion article, *Buying Time*, but the short answer is that cases with stays are not the cause of delay in the system.¹⁹⁸ Moreover, some courts are quite adept at closing quickly the petitions that are most likely to be baseless, so that immigration appeals are often resolved faster than has been previously recognized.¹⁹⁹

IV. RECOMMENDATIONS

Based on the results discussed above, we make recommendations for the judiciary (the Supreme Court and the U.S. Courts of Appeals), the executive (OIL within DOJ and ICE within DHS), and immigration attorneys. These recommendations are aimed at protecting the right to a meaningful appeal and preventing wrongful deportation, while still preventing abuse of the appellate process.

A. *Recommendations to the Judiciary*

Our recommendations to the judiciary include providing a temporary automatic stay, refining the doctrine surrounding the four-part test for stays, paying attention to ratios of stays to petitions granted, and countering overconfidence bias. Each of these recommendations is discussed below.

1. *Providing Temporary Automatic Stays*

We believe that the high rates of false negatives and false positives underscore the inherent difficulty in determining which cases are likely to succeed at the outset of an appeal. The more rushed a court is in ruling on the stay, the more likely it is to misjudge the merits of the case. A temporary automatic stay should help reduce the risk of wrongful deportation by giving the court more time to make a reasoned decision. It would function much the same as a temporary restraining order, where immediate protection is given until the court can decide whether a permanent restraining order should go into effect. We suggest a two-step stay process, with the first stay issuing automatically as soon as a petitioner asks for one but lasting only until the court rules on the

¹⁹⁸ Kagan, Marouf & Gill, *supra* note 8, at 50.

¹⁹⁹ *Id.* at 49–50.

merits of the stay motion. The second stay would issue after the government has an opportunity to respond and judges review the motion on the merits.

As previously discussed, the Ninth Circuit is currently the only court with a formal temporary automatic stay procedure, and the Second Circuit provides an informal temporary stay based on an agreement with DHS.²⁰⁰ In all other circuits, the petitioner risks being deported before the court even has an opportunity to decide whether or not a stay should be granted.²⁰¹ Setting strict deadlines for responding to the stay motion and construing the government's failure to respond as non-opposition to the stay, as in the Ninth Circuit, would help facilitate prompt rulings on motions.

Our data from the Ninth and Second circuits indicate that providing a temporary automatic stay is likely to lead nearly all petitioners to ask for a stay. However, in order to address the government's concern that the court process will be abused, our recommendation is to combine this temporary stay system with a mechanism to dismiss weak appeals quickly. One means of doing this is to dismiss cases with obvious jurisdictional or procedural flaws early on, perhaps at the same time when the court would otherwise rule on the merits of the stay.

Courts may be proceeding on false assumptions about how much delay a stay or removal is actually likely to produce. Previous research has suggested that it can take "on average" one year to resolve an immigration appeal, based on 2004 data from three circuits.²⁰² This led previous scholars to conclude that "it is possible to achieve a considerable amount of delay," at least in some circuits, though it was less than clear that this delay was actually inducing more people to appeal.²⁰³ Our more recent data from a wider range of circuits found that the likely delay is actually much less in most circuits. In our study, only the Second and Sixth Circuits took a year or longer, on average, to issue judgment mandates in immigration petitions for review.²⁰⁴

As we elaborate elsewhere, several circuits, including the Ninth, screen immigration appeals to identify cases with obvious flaws and as a result dismiss a significant portion of their immigration cases in less than six months, and in some cases less than three months.²⁰⁵ By readily issuing stays but preventing them from lasting long in weak cases, the courts can address the legitimate concerns of the government and immigrants with strong cases.

²⁰⁰ See *supra* notes 125, 149 and accompanying text.

²⁰¹ See *supra* Part I.

²⁰² Palmer, Yale-Loehr & Cronin, *supra* note 135, at 82–85 (reporting data for the Second, Ninth, and Eleventh Circuits).

²⁰³ *Id.* at 82.

²⁰⁴ Kagan, Marouf & Gill, *supra* note 8, at 19–20.

²⁰⁵ *Id.* at 23–24.

2. Refining the Doctrine

The Supreme Court will eventually need to resolve the circuit split on whether a sliding scale approach is appropriate in immigration cases. The Court will also likely be asked to clarify what chance of winning is sufficient to show a “likelihood of success.” We believe that there are compelling reasons to use the sliding scale. As we have observed already, the drastic nature of deportation, especially in cases where there may be a risk of persecution, should tilt the scales in stay adjudications, and should cause courts to guard against errors that may result in wrongful deportations. Moreover, as reported elsewhere, the fear that a stay of removal will significantly delay enforcement may be exaggerated in many cases.²⁰⁶

In a commentary on this research, Professor Christopher Walker correctly notes that courts must be concerned both about impeding agencies from enforcing the law and about leaving petitioners unprotected from serious injury when the agency is in error.²⁰⁷ Professor Walker suggests tools that the federal courts have at their disposal to manage this balance of interests short of directly ruling on a stay request.²⁰⁸ He suggests that courts make greater use of their ability to, among other things, request notice of agency action on a case and to suggest concessions from parties before adjudicating an issue.²⁰⁹ The importance of this insight is that it can free the courts from being limited to binary decisions such as to grant or deny a stay. Instead, a petitioner’s request for a stay would first be an occasion for dialogue and negotiation between the parties and the court, with more flexibility to find case-specific solutions and to limit the situations in which the courts must decide whether to directly block enforcement action.

We argue that *Winter* was based on the exceptional public interest in military readiness, and thus does not apply directly in immigration cases.²¹⁰ However, even if *Nken* and *Winter* do not prohibit the sliding scale approach, they suggest that some minimum threshold must be met for each factor, so that no factor simply drops out of the analysis.²¹¹ What that minimum threshold is for the “likelihood of success” factor remains uncertain. We believe that our results support a low threshold for this factor and also favor the sliding scale

²⁰⁶ See *id.* at 51.

²⁰⁷ Walker, *supra* note 56.

²⁰⁸ *Id.*

²⁰⁹ *Id.* See generally Christopher J. Walker, *Administrative Common Law Toolbox for Enhancing Court–Agency Dialogue*, 82 GEO. WASH. L. REV. (forthcoming 2014).

²¹⁰ See *supra* note 66.

²¹¹ See *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring) (“When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other.”); see also *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (“[C]ourts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief.”).

approach. First we discuss the minimum threshold, then we turn to the issue of a sliding scale.

In determining the minimum threshold to show a likelihood of success on the merits, courts should consider how difficult it is for judges to identify meritorious cases in the haystack of immigration appeals, especially before the briefs are submitted. The high number of false negatives in our sample of cases, even in asylum and torture cases, suggests that it would be wise to keep the minimum threshold low for the likelihood of success factor. While the Supreme Court appeared to state in *Winter* that a greater than 50% chance of irreparable harm is required to satisfy the second factor, this does not mean that the same probability must be applied to the first factor, especially since the risk of irreparable harm is usually easier to assess at the beginning of an appeal than the merits of the case.²¹²

Beyond recommending a “low” threshold, we do not believe that a rigid mathematical formula should be applied to the likelihood of success factor.²¹³ Assigning a specific probability as the minimum threshold would impose an unreasonable expectation that judges can assess the likelihood of success or irreparable harm with a high degree of accuracy. It also makes little sense to assign a precise mathematical formula to an assessment that is inherently flexible in practice. As Frederic Kirgis has argued, “[i]t is not helpful to think of an element as either being met or not met,” as, in most cases, “[i]t will be met (or not met) to a degree.”²¹⁴ Fuzzy descriptions, such as the Seventh Circuit’s articulation of a “low” threshold, with which we agree, seem more useful than trying to set forth strict percentages.²¹⁵

²¹² See *Leiva-Perez v. Holder*, 640 F.3d 962, 966, 968 (9th Cir. 2011).

²¹³ This recommendation is consistent with the Supreme Court’s decision in *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (stating that the formula for evaluating stays “cannot be reduced to a set of rigid rules,” because “the traditional stay factors contemplate individualized judgments in each case”); see also *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 624 (8th Cir. 1987) (“[A] preliminary injunction motion is too early a stage of the proceedings to woodenly assess a movant’s probability of success on the merits with mathematical precision.”); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc) (noting that “an effort to apply the probability language to all cases with mathematical precision is misplaced”); *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (“The court is not required to find that ultimate success by the movant is a mathematical probability The necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other factors.”).

²¹⁴ Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 461 (2002). Kirgis uses the test for preliminary injunctions as an example of a sliding scale that evokes fuzzy logic. *Id.* at 435–39.

²¹⁵ Several commentators have applied the mathematical discipline of “fuzzy logic” to legal decision making. See, e.g., Edward S. Adams & Daniel A. Farber, *Beyond the Formalist Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1312–14 (1999) (discussing the relationship between fuzzy logic and judicial decision making); Beverly Blair Cook, *Fuzzy Logic and Judicial Decision Making*, 85 JUDICATURE 70, 99 (2001); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 750 (1995)

We believe our results also provide support for the sliding scale approach over a strict sequential approach. Although sliding scale circuits miss roughly a quarter of meritorious cases, this is far better than missing two-thirds of meritorious cases, as in the other circuits. We are especially concerned about non-sliding scale circuits' failure to identify meritorious asylum and torture cases. Leaving *nearly two-thirds* of the petitioners with meritorious asylum, withholding, and CAT cases vulnerable to deportation substantially weakens the United States' commitment to the Refugee Convention and to the *jus cogens* norm of *non-refoulement*.²¹⁶ It also needlessly places numerous lives in jeopardy. In the sliding scale circuits, this number goes down to 19%, which is still worrisome but a considerable improvement.²¹⁷ The flexibility afforded by the sliding scale approach helps protect against erroneous decisions by allowing a stay to be granted when serious questions or substantial issues are presented to the court and the other factors favor the movant. It is easier for courts simply to identify an important legal issue than to try to resolve it at the outset of the case, without the benefit of thorough briefing. In short, the "serious questions" or "substantial case" standards are high enough to weed out obviously weak cases, but not so high as to increase the risk of erroneous assessments about the merits of the case.

It is clear that in *Nken* the Supreme Court was seeking to strike a balance, and the sliding scale embraces that approach by avoiding a rigid standard that might yield undesirable results in certain cases.²¹⁸ It also accommodates a basic reality that the tolerable likelihood of a negative event depends on the gravity of the event. The chances of a home burning down or premature death are statistically quite unlikely, but because of their grave consequences it is worthwhile to spend significant money to purchase insurance against them. A stay of removal in an asylum case is similarly important.

(stressing that the mathematical field of fuzzy logic "reminds us that 'fuzzy' is not the opposite of 'logical'" and that "[c]ombining fuzzy rules yields reasoned decisions and well-defined results"); Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guarantees: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1409 (1994) ("Fuzzy logic provides a judge the ability to account for partial truths; it allows a judge a better chance at arriving at a result that is mostly right."); Michael T. Nguyen, Note, *The Myth of "Lucky" Patent Verdicts: Improving the Quality of Appellate Review by Incorporating Fuzzy Logic in Jury Verdicts*, 59 HASTINGS L.J. 1257, 1265–66 (2008) (discussing applications of fuzzy logic in the legal context and giving "good faith" as an example of a legal term with a fuzzy meaning).

²¹⁶ See generally Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 162–63 (Erika Feller et al. eds., 2003); Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533, 538–42 (2001).

²¹⁷ See *supra* Tbl. 3.

²¹⁸ See *Nken v. Holder*, 556 U.S. 418, 433–36 (2009); cf. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) ("Flexibility is a hallmark of equity jurisdiction.").

Finally, we recommend that the courts clarify that cases where deportation may lead to serious human rights violations deserve special concern and involve a risk of irreparable harm that cannot be remedied by letting the person re-enter the United States. *Nken* did not distinguish among different types of immigration cases, and this may produce confusion about how the four-part test should be applied.²¹⁹ In order to provide as much clarity as possible about the interplay between the likelihood of success and irreparable harm factors, we would suggest that the Supreme Court take a pair of cases, one of which would involve an asylum or CAT claim where the risk of irreparable harm is grave, and the other an issue with lower stakes, such as cancellation of removal for a lawful permanent resident, which does not require showing a risk of imminent harm. This would then give the Court the opportunity to examine how different circumstances affect the balance of interests at stake with stays of removal.

3. *Monitoring Ratios*

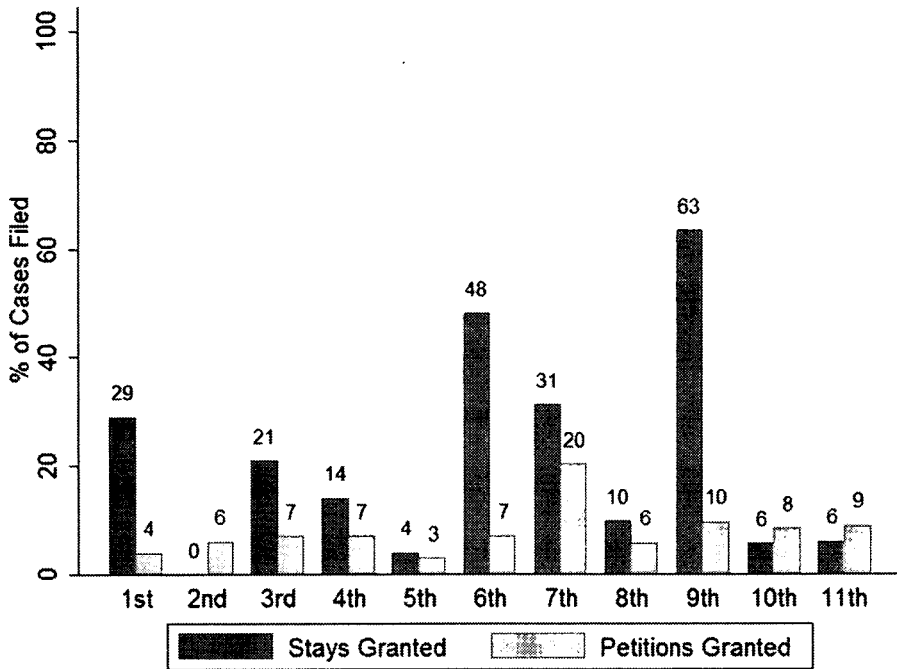
Related to our recommendation about doctrine is our caveat that courts should pay closer attention to the ratio of stays to petitions granted. Even if a court decides that the minimum threshold for showing a “likelihood of success” requires the petitioner to show she is more likely than not to win, that court should reasonably expect to grant twice as many stays as petitions. We suggest that courts continually monitor their decision-making on stays and petitions, and report the results back to judges and the public as a means to help the court properly calibrate its standard.

Our results show that several circuits are granting stays in fewer cases than the doctrine would seem to anticipate, with the Tenth and Eleventh Circuits actually granting fewer stays than petitions.²²⁰ This finding suggests that some courts may be setting the bar far too high for showing a “likelihood of success,” and may instead be expecting a showing of certain success before briefs have even been written. Judges on these courts may have good reason to relax their standard for issuing a stay.

²¹⁹ See generally *Nken*, 556 U.S. 418.

²²⁰ See *infra* Fig. 9.

Figure 9: Percentages of Petitions Granted v. Stays Granted



4. Countering Overconfidence Bias

The high rates of false negatives and false positives in our sample suggest that a heuristic bias known as overconfidence may be affecting decisions on motions for stays.²²¹ This bias, which involves “overestimating one’s ability to predict outcomes,” provides yet another reason to adopt a more flexible doctrinal approach to stays.²²² Studies have shown that judges overestimate their abilities to assess the credibility of a witness, avoid bias, and facilitate settlements.²²³ Judges also underestimate their rates of reversal, disproportionately believing that they have lower rates of reversal than their peers.²²⁴ As Jeffrey Rachlinski explains, “[o]verconfidence in judgment can

²²¹ See *supra* Tbl. 4.

²²² Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1172 (2003).

²²³ Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 428 (2011).

²²⁴ Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 814 (2001) (finding, in an experiment involving 155 magistrate judges, that 87.7% of the judges believed that at least half of their peers had higher reversal rates and concluding that at least 43.9% of the judges exhibited a significant egocentric bias regarding the likelihood of their being overturned on appeal); see also Theodore Eisenberg,

lead judges to believe that they have more ability to predict the course of a lawsuit than is actually the case.”²²⁵ Since “[o]verconfidence is most extreme with tasks of great difficulty,” judges may be particularly susceptible to this bias in complex immigration cases.²²⁶

In order to reduce overconfidence bias, courts could employ cognitive feedback debiasing techniques. Giving judges feedback on their rulings on stay motions could improve their accuracy in predicting the likelihood of success in future cases.²²⁷ The first step in applying this technique would be for judges to provide a confidence estimate for each decision they make on a motion for stay of removal.²²⁸ They would specifically indicate their confidence level about the first factor of the test—the likelihood of success on the merits. Once the appeal is resolved, the judges who ruled on the stay would receive feedback about any discrepancies between their determination regarding the likelihood of success, as well as their confidence level in that determination, and the actual outcome of the case.²²⁹

This process would make judges aware of cases where they felt confident about denying a stay based on a finding that the petitioner was unlikely to succeed, but where the petitioner actually succeeded. Through repetition of this

Differing Perceptions of Attorney Fees in Bankruptcy Cases, 72 WASH. U. L.Q. 979, 982–87 (1994) (finding that bankruptcy judges rated their own performance more favorably than how attorneys rated them, showing “substantial egocentric biases”).

²²⁵ Rachlinski, *supra* note 223, at 428–29 (arguing that “[t]he move to heightened pleading and plausibility assessments . . . feeds the overconfidence and vulnerabilities that judges have when making intuitive misjudgments”); *see also* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1987–88 (2007) (arguing that overconfidence bias “can inflate a judge’s confidence in her ability to predict settlement effects, which in turn can cause her to take bolder steps than she should given the actual likelihood of success and the potential costs of failure”); *cf.* Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers Ability To Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133, 149 (2010) (finding that lawyers estimate the likelihood of winning their cases).

²²⁶ Sarah Lichtenstein, Baruch Fischhoff & Lawrence Phillips, *Calibration of Probabilities: The State of the Art to 1980*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 306, 315 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); *see also* Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 239 (1986) (“[P]eople are much less likely to be overconfident about easy probability judgments[;] . . . [it is the] difficult judgments [that] produce the most overconfidence.”).

²²⁷ Elizabeth J. Reese, Comment, *Techniques for Mitigating Cognitive Biases in Fingerprint Identification*, 59 UCLA L. REV. 1252, 1278 (2012).

²²⁸ *Id.*; *see also* Catherine Hackett Renner & Michael J. Renner, *But I Thought I Knew That: Using Confidence Estimation as a Debiasing Technique To Improve Classroom Performance*, 15 APPLIED COGNITIVE PSYCHOL. 23, 24–25 (2001).

²²⁹ Studies have shown that using cognitive feedback to point out the discrepancy between confidence and accuracy is more effective than giving feedback on accuracy alone. *See* Gregory Schraw, Maria T. Potenza & Lori Nebelsick-Gullet, *Constraints on the Calibration of Performance*, 18 CONTEMP. EDUC. PSYCHOL. 455, 461–62 (1993); *see also* Reese, *supra* note 227, at 1278.

process over time, judges should develop a more realistic sense of their abilities to predict the likelihood of success. Such debiasing techniques have been used successfully to mitigate overconfidence bias in many other contexts.²³⁰

B. Recommendations for the Executive Branch

Many of the challenges involved with stays of removal can be addressed through the discretion of executive branch officials. We first suggest some recommendations for OIL within the DOJ regarding its policies around opposing stays of removal. Then we discuss the role that ICE can play in exercising prosecutorial discretion not to deport someone with a pending appeal, which is what happened in *Nken*'s case after the Supreme Court remanded it to the Fourth Circuit.²³¹

1. Reexamining OIL's Approach to Stays of Removal

Our results suggest that OIL should reexamine the principles and procedures it applies in deciding whether or not to oppose a motion for stay. We suspect that the striking variations in OIL's opposition rates in different circuit courts are largely unintentional. Yet whether or not an opposition is filed may have a dramatic impact on the likelihood of being granted a stay.²³² If OIL is simply more active in some circuits than others, or some OIL attorneys assigned to particular circuits zealously oppose motions while other attorneys assigned to different circuits are more willing to acquiesce to a stay, then an element of randomness clouds the entire process. In order to minimize such unintentional discrepancies in opposition rates, OIL should collect its own data on stays of removal and publish them periodically. Because it handles every petition for review filed with the circuit courts, it is in a unique position to collect these data.

Reviewing the actual numbers would also help OIL evaluate whether its principles match its practices. For example, OIL may endorse a principle of not opposing stays in asylum cases where some effort is made to satisfy the *Nken* factors. In practice, however, it may be opposing stays in asylum cases as fervently as in other types of cases. Indeed, that is what our results indicate.²³³

²³⁰ See, e.g., Reese, *supra* note 227, at 1278.

²³¹ *Nken v. Holder*, 585 F.3d 818, 820–22 (4th Cir. 2009). Discretion might also be exercised by the government not actively opposing a stay in court, though the impact of this might be less certain outside of the Ninth Circuit, which imposes an automatic stay unless the government files an opposition. Our research found that other courts sometimes deny a request for a stay even without a government opposition. See *supra* Part III.B.3.a. Rather than simply remain silent on a motion for a stay, it may have more impact for the government to file a statement of non-opposition, which would seem more likely to ensure that a court will grant the stay.

²³² See *supra* note 82.

²³³ See *supra* Fig. 4.

Knowing this discrepancy, OIL may wish to investigate why its opposition rates in asylum cases are so high. Tracking the asylum cases where the stay motions are perfunctory, for instance, would help OIL determine if that explains its decisions to oppose the stays. If it turns out not to be the case that most of these motions are perfunctory, then OIL may wish to reassess whether its attorneys are aware of its principles and are following them.

In light of the data presented here, we also suggest that OIL develop a more systematic approach to responding to stay motions. We do not expect OIL to consent to all stay requests. But we do believe that OIL could tailor its response to its core concern that judicial procedures not be abused simply to delay deportation. This does not require OIL to concede points of law; OIL can argue its view of the case and still agree to a stay in the meantime. Opposing a stay of removal should be limited to those cases where a petitioner has no viable ground of appeal, where the court clearly lacks jurisdiction, or where there is a concrete reason for believing that the petitioner is abusing the process. At a minimum, OIL should not oppose stays in cases that raise close questions or where reasonable minds could disagree about how the court will rule, as such cases present compelling reasons to wait to remove the person until after the appeal takes its course. In asylum and torture cases, where the petitioner fears serious human rights violations if returned to her country, OIL should not oppose a stay unless it is especially clear that the appellate process is being abused through a baseless asylum claim. This approach of opposing stays only in cases that clearly lack merit would help avoid the situation where OIL opposes the stay and then later realizes that the appeal actually has merit and files a motion to remand. As discussed above, we found that this unfortunate situation characterized the majority of remand motions filed by OIL.²³⁴

We encountered this situation firsthand in a case that we handled in 2012 through our own law school's immigration clinic.²³⁵ In that case, OIL opposed a stay in a case that raised an issue of first impression in the Eleventh Circuit.²³⁶ Another circuit had published a decision that favored the petitioner's position, yet OIL argued that simply because the issue of law was new to the Eleventh Circuit, the petitioner could not show he was likely to succeed on the merits and therefore should not receive a stay. Since we were attorneys on the case, we do not pretend to have an objective view of the matter. But we would like to suggest that when there is case law from another circuit favorable to the petitioner, and no adverse binding precedent, we do not believe that there is any reasonable basis for thinking that the appellate process is being abused. In this case, the Eleventh Circuit denied the stay and our client was scheduled for deportation, yet OIL later filed a motion to remand the case to the BIA. In a case like this, discretion by OIL to not oppose the stay would have been easily justified and would avoid unnecessary danger to petitioners.

²³⁴ See *supra* Part III.B.3.b.

²³⁵ The information about this case is being withheld to protect confidentiality.

²³⁶ The issue involved whether a particular BIA decision could be applied retroactively.

2. Exercise of Prosecutorial Discretion by ICE

ICE is under no obligation to deport a noncitizen who lacks a stay of removal. As the Supreme Court recently recognized, “[a] principal feature of the removal system is the broad discretion exercised by immigration officials.”²³⁷ Exercise of that discretion is essential to allow immigration officials to address “immediate human concerns” that would be ignored by rigid enforcement of the law in all cases.²³⁸ Prosecutorial discretion has attracted considerable attention since the “Morton memos” were issued in June 2011 outlining the categories of noncitizens who are high and low priorities for removal.²³⁹

We recommend that, as a general matter, ICE exercise its discretion not to deport noncitizens with pending appeals in the federal courts. Although a pending appeal itself is not listed as a factor in the memos, the list is not exhaustive.²⁴⁰ Moreover, the memo addressing “Certain Victims, Witnesses, and Plaintiffs” emphasizes that ICE should avoid deterring people from pursuing actions to protect their civil rights and states that particular attention should be paid to “plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations.”²⁴¹ ICE may not construe immigration appeals to be civil rights cases, but the right to appeal is one of the most basic rights guaranteed by due process. Deportation, especially if the noncitizen is pro se, effectively terminates that right. ICE should be particularly cautious in deporting asylum seekers, as it must consider “conditions in the [person’s home] country” and “whether the person is likely to be granted temporary or permanent status or other relief from removal, including an asylum seeker.”²⁴² Rather than trying to analyze each petitioner’s case on its own to determine the likelihood the person will get status, an area in which it lacks expertise, ICE should simply abstain from deporting noncitizens who are pursuing good faith appeals, especially if they are a low priority anyway.

²³⁷ *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); see also Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

²³⁸ *Arizona*, 132 S. Ct. at 2499.

²³⁹ Morton, Apprehension, Detention, and Removal of Aliens, *supra* note 171, at 4–5; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 2 (June 17, 2011) [hereinafter Morton, Certain Victims, Witnesses, and Plaintiffs], available at <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

²⁴⁰ Morton, Apprehension, Detention, and Removal of Aliens, *supra* note 171, at 4.

²⁴¹ Morton, Certain Victims, Witnesses, and Plaintiffs, *supra* note 239.

²⁴² Morton, Apprehension, Detention, and Removal of Aliens, *supra* note 171, at 4.

C. Recommendations for Immigration Attorneys

Lastly, we recommend that attorneys who represent noncitizens in petitions for review examine their practices around motions for stays of removal. Our finding that just 55% of the petitioners even requested stays of removal raises many questions, including whether the attorneys representing them are doing an effective job advocating their clients' interests.²⁴³ Compounding this concern is our finding that 46% of the petitioners who *prevailed* in their petitions for review had never requested a stay.²⁴⁴ This means that even noncitizens with meritorious appeals are leaving themselves vulnerable to deportation, including in cases where there is a risk of persecution or torture in their home country. Perhaps attorneys are engaging in a cost-benefit analysis and weighing the time and effort involved in writing a stay motion against the chance that the individual client will actually be apprehended by ICE and deported. While that may be a tempting course of action for a busy lawyer, it also places the client's appeal—and possibly her life—in jeopardy and may undermine the fear of future harm on which the appeal is based in an asylum or torture case.

We also encourage immigration attorneys to provide thorough briefing on their motions for stays, addressing each of the *Nken* factors and the relevant circuit's case law. Failure to brief the issues would likely trigger an opposition from OIL, which says that it opposes perfunctory stay requests, and our results showed that an opposition by OIL makes it much less likely that the stay will be granted.²⁴⁵ Immigration attorneys who submit perfunctory stay requests are therefore doing their clients a great disservice. While we found that, all other things being equal, stay motions filed by attorneys are granted at higher rates than stay motions filed by pro se petitioners, the difference is not as big as one might expect, suggesting that poor lawyering is part of the problem.

V. CONCLUSION

The Supreme Court's decision in *Nken* sought to preserve noncitizens' access to a meaningful appeal, and to ensure that courts have sufficient time to consider their petitions. Yet the Court was also eager to prevent those with weak cases from using the appellate process simply to delay their deportations. At the time of the decision, the Court lacked clear enough information about how the process works in practice to fully realize the goal of balancing these interests. As a result, *Nken* only takes an initial step toward resolving the challenges involved in adjudicating stays of removal.

Our study offers valuable empirical data that should inform any future decisions by the Court on stays of removal. The results indicate that there is good reason to worry that noncitizens with strong grounds of appeal are

²⁴³ See *supra* Part III.B.2.a.

²⁴⁴ See *supra* Part III.B.4.

²⁴⁵ See *supra* Part III.B.2.a.

vulnerable to the danger of premature removal. This study also provides important support for the proposition that legal doctrine matters. This might be a mundane point, except that empirical legal scholarship is often perceived as an effort to prove that the identity of judges matters more than legal norms. Our data does not rebut this suggestion, but it shows that even if the background or ideology of the judge is important, the law matters, too, and getting the legal doctrine right is therefore critical.

While sliding scale circuits do a better job of granting stays to the petitioners who ultimately prevail, resulting in fewer false negatives, non-sliding scale circuits do better at denying stays to the petitioners who ultimately lose, resulting in fewer false positives.²⁴⁶ These results not only suggest that the different legal standards have a real impact on how courts rule, but also that the task of defining the right doctrinal standard poses an important value judgment for courts.²⁴⁷ Should they err on the side of protecting access to justice or preventing delayed deportation? This decision will be informed, in part, by how much delay is actually likely. If these appeals are resolved relatively quickly, then the brief delay that would result from a false positive may not justify the greater number of false negatives associated with the sequential approach. If, on the other hand, appeals drag out for a much longer period of time, then concerns about granting too many stays become more pressing.

One of the reasons we favor the sliding scale and somewhat relaxed standards for granting stays of removal is that our companion study found that immigration petitions do not take nearly as long as many may assume.²⁴⁸ Our study explores this data as well as the impact of different case management strategies on the duration of appeals.²⁴⁹ The results support the argument made here that courts would be wise to err on the side of more false positives rather than more false negatives in order to prevent wrongful removals and protect a meaningful right to appeal.

Finally, this research raises broad questions about the practicality of a legal standard that requires judges to predict under time pressure how a case will ultimately be decided. This issue arises not only in immigration cases involving stays of removal, but also in any type of case where the litigant seeks a preliminary injunction or temporary restraining order. Such injunctive relief is essential to the concept of equity. Yet the standard we employ for obtaining that relief proves impossible to apply with any accuracy, undermining the very objective of an equitable outcome. We encourage further research on judges' abilities to predict the outcome of cases, including research on the various

²⁴⁶ See *supra* Part III.B.5.a.

²⁴⁷ We agree with Bethany Bates's argument that a sliding scale approach "allow[s] a more fair and complete review of the plaintiff's case and minimiz[es] the harm caused by hasty decisions." Bates, *supra* note 57, at 1554. Like us, Bates urges judges to focus on whether the case raises serious questions going to the merits, rather than trying to predict the outcome of the case. See *id.* at 1555.

²⁴⁸ Kagan, Marouf & Gill, *supra* note 8, at 19.

²⁴⁹ *Id.* at 25–32.

cognitive biases that may color this prediction. The need for injunctive relief arises in many important kinds of litigation, from environmental cases to domestic violence cases to discrimination cases to copyright infringement cases. If we take this special form of relief seriously, then we should critically examine and empirically test the standard that courts use to decide when to grant it.