



STAND FOR JUSTICE

By Hand Delivery and Email

October 17, 2016

Scott S. Harris
Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: *Jennings v. Rodriguez*, No. 15-1204

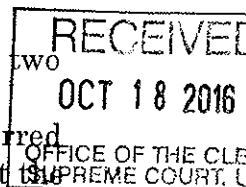
Dear Mr. Harris,

Respondents submit this response to the Government's August 26, 2016 letter in *Demore v. Kim*, 538 U.S. 510 (2002) (the "Letter"). Despite acknowledging "several significant errors" in figures relied upon by the Court in *Demore*, the Government suggests the Court merely amend *Demore* by deleting the phrase "and about five months in the minority of cases in which the alien chooses to appeal." Letter p. 3 (quoting *Demore*, 538 U.S. at 530). The "significant errors" in fact go to the heart of *Demore* and limit its relevance. The errors also have implications for how the Court should address the record in *Jennings*.

Demore rested on the Court's belief that the Government detains individuals under 8 U.S.C. 1226(c) only for a "limited" or "brief period necessary for their removal proceedings." 538 U.S. at 513, 523, 530. The Court believed that the six-month detention of the petitioner in *Demore* was an anomaly caused by his request for a continuance. *Id.* at 531. The Court formed these beliefs based on figures submitted for the first time by the Solicitor General during briefing in this Court. The Court understandably construed those figures as showing the average length of detention in cases involving appeals as "about five months." *Id.* at 530.

But as the Solicitor General now belatedly acknowledges, the average length of time to complete a case for those taking an appeal was actually 382 days, or nearly thirteen months.¹ The government's submission in *Demore* led the Court to

¹ The 382-day figure is itself an underestimate of detention length for at least two reasons. First, it is based on the "case completion" definition used by the immigration court at the time, which included cases that were merely transferred from one court to another. Letter p. 2. The Solicitor General's letter notes that the immigration court has since revised the "case completion" definition to remedy this

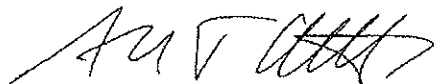


underestimate the average length of detention during appeals as less than one-half of its actual length. Thus, the Court's opinion did not address the constitutionality of prolonged mandatory detention.

The Solicitor General's admission that the extra-record data the government submitted in *Demore* misled this Court confirms that the Court should not rely on the extra-record data that Petitioners now cite in *Jennings*. For example, in its opening brief in *Jennings*, the government asserts that "flight is a serious risk" because, according to its reading of an "EOIR FY 2015 Statistics Yearbook," 41% of removal orders in 2015 were issued *in absentia* "after the alien absconded." Br. 22, 33. This figure is not reliable. As in *Demore*, the government has never disclosed the underlying queries, criteria, or data on which this estimate rests, despite extensive discovery in district court proceedings below. The district court record in *Jennings*, moreover, contains expert evidence regarding errors and limitations in the government's data. J.A. 104-110. The Ninth Circuit found the government's *absentia* figures unreliable in an order not challenged in the petition for certiorari. Req. for Judicial Notice Order 6-7, ECF No. 133.²

Respondents respectfully request that this letter be circulated to the Justices of the Court.

Respectfully submitted,



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Counsel of Record for Respondents

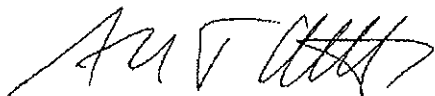
problem, but does not state how the 382-day figure would change if the new definition were applied to the same set of cases. Second, the total-time figure is calculated from "receipt" of the charging document by the immigration court to case completion, and therefore excludes the time people spend in detention after the charges issue but before the court receives their case. Government data provided in the attachment to the Letter suggests that this gap may be significant. See Letter p. 11 n.3 (observing that, "[i]n some instances, there is a significant period of time between issuance" and "receipt" of the charging document); *id.* (data reflecting that, in 2001, median gap between "issuance" and "receipt" was 28 days, while average gap was 103 days).

² A recent statistical analysis of the EOIR data set for the same period of time has concluded that the *absentia* rate for individuals released by Immigration Judges after bond hearings is far lower. See <http://trac.syr.edu/immigration/reports/438/>. This analysis raises further questions about the accuracy and relevance of Petitioners' extra-record evidence.

CERTIFICATE OF SERVICE

I, Ahilan T. Arulanantham, do hereby certify that, on this 17th day of October, I caused one copy of the foregoing letter to be served by first class mail, postage prepaid, and by email on the following party:

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