No. 11-890

In the Supreme Court of the United States

IKE ROMANUS BRIGHT,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF ON BEHALF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Courts of Appeals disagree about the proper definition of a "fugitive" and when courts may apply the fugitive disentitlement doctrine to bar review of appeals by noncitizens who fail to surrender upon orders of the United States Immigration and Customs Enforcement.

Embedded in the Question Presented is whether the Courts of Appeals may extend this criminal law doctrine to disentitle noncitizens from seeking statutory review of removal orders.

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INTEREST OF THE AMICUS

The American Immigration Lawyers Association respectfully supports the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.[1]

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus's* intention to file this brief. The parties have consented to the filing of

The American Immigration Lawyers Association (AILA) is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court.

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this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amicus* or their counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

The Petition raises the question: "Whether a noncitizen who fails to respond to an agency order to report for removal is a 'fugitive' for purposes of applying the fugitive disentitlement doctrine, where the petitioner has not absconded and his address is known to the court and the government." Thus, the Courts of Appeals' application of this doctrine necessarily implicates a threshold question: Whether the Courts of Appeals may even invoke the fugitive disentitlement doctrine to bar noncitizens from seeking statutory review of removal orders.

This is an important question for hundreds of thousands of noncitizens in removal proceedings, over half of whom appear *pro se*. Judicial review is essential to protect these noncitizens' rights and to safeguard against the numerous errors endemic to the immigration system. These problems are exacerbated by the Department of Homeland Security's haphazard policy toward bag-and-baggage letters.

Moreover, the statutory design precludes the courts from applying the fugitive disentitlement doctrine to removal proceedings. Judicial review of a removal order is governed by a comprehensive statutory design. Through enacting this design, Congress has precluded courts from adding additional grounds for denying judicial review.

Finally, the doctrine is also inapplicable in non-criminal cases such as removal proceedings. Removal proceedings are strictly civil, not criminal,

actions. Therefore, noncitizens who fail to appear before immigration officials are not "fugitives" as historically understood by the doctrine. Moreover, the application of the doctrine in the immigration context does not further the purposes of the doctrine.

Consequently, this Court should grant *certiorari* to correct the decision of the court below.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS A THRESHOLD QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

The threshold question is exceptionally important for the more than 300,000 noncitizens in removal proceedings.[2] First, judicial review is an essential check on agency decision making. Immigration cases involve high stakes: there is no easy remedy for an unlawful deportation. *See*, *e.g.*, *Nat'l Immigration Project of the Nat'l Lawyers Guild, et al. v. U.S. Dep't of Homeland Security, et al.*, Opinion and Order, slip op. at 11-12, No. 11-Civ-3235 (S.D.N.Y. Feb. 7, 2012). Despite the high stakes, the potential for agency decision making error is great. *See Kucana v. Holder*, 130 S. Ct. 827, 839 (2010) (interpreting immigration statutes to presume judicial review). Immigration courts hear thousands of cases

[2] *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2010 Statistical Yearbook* (Jan. 2011) at B2 (noncitizen removal cases completed). Almost 75% of immigration judge decisions in 2010 were disposed of with a removal order. *Id.* at D2.

a year – approximately 230 immigration judges decided approximately 350,000 cases in 2010. Fifty-seven percent of noncitizens appear *pro se*.[3] Judicial review is therefore essential to ensure that the government is properly interpreting and applying the immigration laws and that noncitizens' interests are protected.

Second, the government's practice and policy on providing notice to noncitizens for reporting is haphazard. The government has no discernable policy that governs the provision of notice to noncitizens. *See* U.S. Immigration & Customs Enforcement, Office of Detention and Removal Operations, *Detention and Removal Operations Policy and Procedure Manual*, (March 2006) (DRO Policy Manual) at §§ 12.6, 15.4, AILA InfoNet Doc. 09100571 (posted 10/05/2009).[4] To the extent that it has guidance for its front line officers, the facts in this case demonstrate that the government routinely violates its own guidance in a manner that denies fair notice and impedes the fair administration of justice.[5]

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[3] *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2010 Statistical Yearbook* (Jan. 2011) at B2, G1; Transactional Records Access Clearinghouse, *Backlog in Immigration Cases Continues to Climb* (March 11, 2011) (describing immigration judge dispositions) *available at* http://trac.syr.edu/immigration/reports/225/ (last visited Feb. 19, 2012).

[4] *Available at* http://search.aila.org by entering the document number.

[5] *Compare* DRO Policy Manual, AILA InfoNet Doc. 09100571 at § 13.7 (explaining that service of I-166 and failure to appear are a necessary predicate for determining a noncitizen's fugitive status) *with* Petition for Writ Certiorari, No. 11-980, App. at 10a-11a (2011) (determin-

II. THE COURTS OF APPEALS HAVE ERRED IN APPLYING THE FUGITIVE DISENTITLEMENT DOCTRINE TO NONCITIZENS CHALLENGING THEIR REMOVAL

A. Federal courts cannot invoke a common law doctrine to supplant Congress's comprehensive design for jurisdictional preclusion

By creating a comprehensive statute that governs judicial review of removal orders, Congress has preempted the federal courts from creating additional restrictions on a noncitizen's statutory right to seek review of removal orders.[6] Section 1252 of Title 8 governs jurisdiction of petitions for review of removal orders. Congress exhaustively specified the instances in which a noncitizen may not seek judicial review. *See Kucana*, 130 S. Ct. at 837-838. The fugitive disentitlement doctrine is not specified in § 1252, and, accordingly, federal courts may not

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ing Mr. Bright is a fugitive based on notice addressed to third-party bond surety).

[6] For different reasons, the Board of Immigration Appeals ("BIA") may not invoke the common law fugitive disentitlement doctrine either. The BIA is a creation of regulation, 8 C.F.R. § 1003, *et seq.*, and its jurisdiction is specified by regulation, 8 C.F.R. § 1003.1(c). The regulations prescribe that the BIA "*shall* resolve the questions before it in a manner that is … consistent with the Act and regulations." 8 C.F.R. § 1003.1(d) (emphasis added). Accordingly, the BIA may *not* invoke the common law doctrine to abstain from deciding appeals. The BIA's unpublished opinion in Mr. Bright's case doing so is incorrect as a matter of law. *See* Petition for Writ Certiorari, No. 11-980, App. at 10a-11a (2011).

invoke it so as to interfere with Congress's statutory design.

This Court has repeatedly held that a statute displaces the common law when the statute "speak[s] directly to [the] question at issue." *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2530 (2011) (*quoting Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). This Court has further found that such displacement occurs when a comprehensive statutory design occupies the field. In *American Electric Power*, this Court determined that the Clean Air Act displaced principles of federal common law on public nuisance. *Id.* at 2538. In so holding, this Court found that the Clean Air Act (a) directed the Environmental Protection Agency to establish standards and regulations for air pollutants and (b) provided for "multiple avenues for enforcement," including the agency's power to inspect and monitor regulated sources, impose administrative penalties, and commence civil actions in federal court. *Id.*; *accord Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 325-27 (1981) (reasoning that the Water Pollution Control Act displaced the common law action for the abatement of a nuisance because Congress established an elaborate system for addressing interstate water pollution and its provision for enforcement by agency action and citizens suits); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 789 (1952) (holding that where Congress set forth a scheme of deductions and set-offs in maritime legislation, it was a "fair inference that those not listed may not be made," even if they were "once known to the general maritime law.").

So too here. Section 1252 displaces the common law fugitive disentitlement doctrine. Congress expressly granted aliens the right to challenge final orders of removal. *See* 8 U.S.C. § 1252(a)(1). Through the creation of a comprehensive statute, Congress has carefully delineated the issues that courts can review, *see* 8 U.S.C. § 1252(a)(2)(A)(1) (granting courts the power to review stays and deportation orders), and likewise, exhaustively listed the types of cases that a noncitizen may not appeal. *Kucana*, 130 S. Ct. at 838. For example, Congress precluded judicial review over relief claims made by noncitizens convicted of certain types of crimes, 8 U.S.C. § 1252(a)(2)(C), numerous claims of relief made by any noncitizen from removal, 8 U.S.C. § 1252(a)(2)(B)(i), many types of discretionary decisions by the Attorney General, § 1252(a)(2)(B)(ii), and certain types of admissions decisions, § 1252(a)(2)(A)(1). Congress has statutorily provided for a punitive regime for noncitizens that fail to report, *see*, *e.g.*, §§ 1253(a)(1)(D), (b), and has made noncitizens who fail to comply with removal orders ineligible for various forms of relief, § 1229c(d).

Congress intended the Immigration and Nationality Act to supplant all other "statutory and nonstatutory" provisions of law. *See* 8 U.S.C. §§ 1252(a)(2)(A), (B), (C). Because this design "implements Congress's policy via a strict, unqualified statutory stricture," courts "are bound to take Congress at its word." *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). This comprehensive design neither authorizes nor invites the Courts of Appeals to fashion additional restrictions on a noncitizen's right to seek review of removal orders.

Indeed, in a similar context, the Court overruled a series of lower court decisions that divested noncitizens of the right to judicial review of removal orders because of the comprehensive nature of § 1252. In *Kucana*, this Court explained that § 1252 "acted to bar judicial review of a number of executive decisions regarding removal," but it did not include on its list the discretion to grant or deny motions to reopen. *Id.* at 838. The Court explained that "[i]f Congress wanted [this] jurisdictional bar," it "could easily have said so." *Id.* at 837.

The fact that § 1252 does not authorize courts to refrain from deciding appeals by operation of the common law doctrine disentitling fugitives to appellate review is dispositive that the Courts of Appeals may not do so at all. Section 1252 displaces the common law doctrine entirely and courts may not invoke it to disrupt the statute Congress created for judicial review of removal orders.[7]

B. The common law doctrine serves no purpose in the immigration context

The common law fugitive disentitlement doctrine does not apply to statutory petitions for review of removal orders because its purposes cannot be furthered in the immigration context. The Courts of Ap-

[7] Notably, the process Mr. Bright invoked–filing a motion to reopen in lieu of reporting–has been countenanced by the BIA since at least 1981 without any hint in any published opinion or rulemaking procedure that it would adopt a different tact and utilize the common law doctrine. *Matter of Martinez-Romero*, I&N Dec. 75, 76 n.2 (BIA 1981).

peals have acknowledged that noncitizens who fail to appear are not, "strictly speaking, fugitives[.]" *Bar-Levy v. U.S. Dep't. of Justice, I.N.S.*, 990 F.2d 33, 35 (2d Cir. 1993). Nevertheless, they have extended the doctrine by analogy to noncitizens seeking review of a removal order. Such analogizing is plagued with errors.

First, the fugitive disentitlement doctrine is a common law doctrine grounded in criminal law. *Degen v. United States*, 517 U.S. 820, 823 (1996) ("We have sustained, to be sure, the authority of an appellate court to dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive."); *Smith v. United States*, 94 U.S. 97, 97 (1876) ("It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."). In contrast, immigration law is a purely statutory creation with no common law antecedents. The doctrine provides courts the discretion to dismiss appeals of "fugitives," that is, persons "who ha[ve] escaped the restraints placed upon [them] pursuant to [their] conviction." *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); *see also* Black's Law Dictionary 993 (9th ed. 2009) (second definition) (A fugitive is a "person who flees or escapes"; a "refugee"; or a "*criminal* suspect or a witness in a criminal case who flees, evades, or escapes arrest.") (emphasis added).

On its face, this doctrine applies only to common law fugitives. Noncitizens who fail to surrender themselves to ICE officials after being ordered to do so, however, are not "fugitives" within the common

law. "A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish unlawful entry . . . ." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Therefore, noncitizens that fail to surrender to ICE officials are not "criminals" that have been "convicted" of a crime. Indeed, there is no statutory, regulatory, or commonly accepted definition of a "fugitive" within the immigration context.[8]

Second, this Court made clear in *Degen* that this "harsh" doctrine metes out "rough justice." *Degen*, 517 U.S. at 823, 829. The *Degen* Court held

[8] The facts in this case bear this out. Here, Mr. Bright was deemed a "fugitive" not by ICE – the agency tasked to enforce immigration law – rather by the BIA, a completely separate agency. *See* Petition for Writ Certiorari, No. 11-980, App. at 10a-11a (2011). The ICE Office and Detention and Removal would apparently *not* consider Mr. Bright a fugitive because he was never served with an order to surrender. *See* DRO Policy Manual at 13.7. At the departmental level, the Department of Homeland Security has proffered a definition of fugitive that excludes individuals like Mr. Bright who have never been served with formal process from being classified as a "fugitive" for policy purposes. *See* U.S. Dep't of Homeland Security, *Operation Endgame: Detention and Removal Strategic Plan 2003-2012* (June 2003) at G3. Thus, it is passing strange that the Courts of Appeals could use the common law doctrine to disentitle a noncitizen from redress for one whose status as a fugitive is anything but clear. *See also* John Morton, Assistant Secretary of Homeland Security, Memorandum, National Fugitive Operations Program: Priorities, Goals, and Expectations, at 1, n.1 (Dec. 28, 2009, *available at* http://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf (last visited Feb. 20, 2012).

that the doctrine could not be extended to civil forfeiture cases brought by fugitives without explicit Congressional authorization. If the doctrine cannot be extended to fugitives engaged in civil litigation, then certainly it is improper to extend the doctrine to non-fugitives engaged in civil immigration litigation wherein the application of such "rough justice" could cause the deprivation "of all that makes life worth living[.]" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).[9]

Third, judicial courts rely on the fugitive disentitlement doctrine when their own dignity is threatened by a non-compliant defendant in a criminal case. It is settled law that the doctrine cannot be invoked to protect the dignity of another forum, even a lower court within the same judicial circuit. *See Ortega-Rodriguez v. United States*, 507 U.S. 234, 246 (1993). The United States Immigration and Customs Enforcement ("ICE") has numerous tools to obtain compliance with its own orders without the Courts of Appeals invoking common law doctrines to divest the noncitizen of his right to judicial review. For example, ICE could order Mr. Bright to surrender (which it did not do). They can call on the noncitizen's surety to assist in presenting the noncitizen for removal under threat of forfeiture of a bond. Under Congressional direction, ICE has established designated teams to apprehend noncitizens who actively avoid

[9] There is an international dimension to the doctrine that should give federal courts pause before invoking the common law doctrine. A federal court's invocation of the doctrine would cause tension with the United States's international obligations protecting refugees and certainly would undermine Congress's specification that refugee claimants are exempt from the judicial review preclusion rules. 8 U.S.C. § 1252(a)(2)(B)(ii).

compliance with removal orders.[10] Thus, ICE has a large set of tools at its disposal to protect the integrity of the removal process. It is clearly inappropriate for the Courts of Appeals to invoke the doctrine to protect the dignity of ICE officials.

Accordingly, the Board of Immigration Appeals and Courts of Appeal have no warrant to apply the doctrine in statutory immigration cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

[10] *See* Migration Policy Institute, *Collateral Damage: An Examination of ICE's Fugitive Operations Program*, at 9-10 (Feb. 2009) (summarizing Congressional and agency directed funding for the fugitive operations), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf (last visited Feb. 20, 2012).

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