No. 11-890

IN THE
Supreme Court of the United States

IKE ROMANUS BRIGHT,
Petitioner,
v.
ERIC J. HOLDER, U.S. ATTORNEY GENERAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Criminal Law Professors are eleven professors of criminal law at law schools throughout the country. *Amici* have written and taught on matters concerning criminal punishment and are familiar with the circumstances and justifications under which this Court has applied the fugitive disentitlement doctrine. The names and affiliations of *Amici* are listed in the Appendix.

Amici agree with the Petitioner that certiorari should be granted to resolve the deep and prolonged circuit split concerning the application of the fugitive disentitlement doctrine to immigration proceedings. *Amici* submit this brief in order to explain more fully the origins and purposes of the fugitive disentitlement doctrine and thereby to demonstrate why the rule adopted by the Court of Appeals for the Fifth Circuit, and three other circuits, takes the doctrine far away from its roots and its purposes in this Court's precedents.

SUMMARY OF ARGUMENT

While the "fugitive disentitlement doctrine" reflects well-entrenched criminal law policies, none of them is served by the Fifth Circuit's decision to apply it to the immigration petitioner here. This Court has never applied the fugitive disentitlement

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties received appropriate notice and consented to the filing of this brief.

doctrine outside of a criminal case. It has never done so where the claimed "fugitive" status is not based on a judicial custody order; and it has never done so when, in fact, the petitioner has taken no affirmative act to abscond. The Fifth Circuit's decision adopts all of those propositions, and in so doing, it takes the doctrine well beyond where it has gone before, and where this Court ever intended that it go.

There is no dispute that a federal appellate court may dismiss an appeal pending from a fugitive from justice. *Smith v. United States*, 94 U.S. 97 (1876). As the Court recognized well over a century ago, 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." *Id.* at 97. Thus, a reviewing court need not hear an appeal when the appellant's fugitive status provides little assurance that an underlying decision would be enforced.

While enforceability concerns continue to lie at the core of the doctrine, the Court has recognized several other purposes as well. The defendant's flight may be deemed an act waiving the appeal, *see Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970), the doctrine serves to deter the felony of escape, and the doctrine is important to preserve the efficiency and dignity of the appellate courts, *see Degen v. United States*, 517 U.S. 820, 824 (1996).

Absent concerns about the actual enforceability of an appellate decision, however, the Court has been slow to apply the doctrine where there is no evidence that the fugitive's status will have any impact on the appeal. In recent years, this

Court has recognized that the doctrine is too "blunt an instrument" to wield as a means of punishing the defendant for perceived infractions that do not threaten the enforcement power of the appellate court. *Degen*, 517 U.S. at 828. The Court thus has declined to apply the doctrine where the fugitive had been recaptured prior to an appeal, *Ortega-Rodriguez v. United States*, 507 U.S. 234, 249-52 (1993), and has refused to extend the doctrine to the civil forfeiture context, *Degen*, 517 U.S. at 829.

These decisions demonstrate that the Fifth Circuit stands on the wrong side of the circuit split concerning applying the fugitive disentitlement doctrine to the immigration context, particularly where the petitioner is not a "fugitive" under any plain language understanding of the term. Petitioner has not been ordered into custody by any court, and he has never taken any affirmative step to evade the jurisdiction of the court. The parties litigated this matter before the Fifth Circuit based on the understanding that Petitioner's whereabouts were well-known to the Government, counsel, and the courts for the duration of this litigation. If any more evidence was needed, the Government was readily able to detain Petitioner following the Fifth Circuit's dismissal of his petition. Petition for Writ of Certiorari at 10, Bright v. Holder, No. 11-890 (filed Jan. 17, 2012).

Under such circumstances, there can be no compelling reason why the fugitive disentitlement doctrine should operate to debar Petitioner from pursuing an apparently meritorious petition in the Fifth Circuit. Absent a specific concern for the enforceability of a decision, or evidence that the

petitioner in fact has taken affirmative steps that would frustrate appellate proceedings, there is no warrant for application of the doctrine.

The Fifth Circuit's holding ignores this Court's recent jurisprudence and takes the fugitive disentitlement doctrine far away from its original moorings. In view of the fact that the Fifth Circuit is on the wrong side of a clear circuit split, the petition for certiorari should be granted and the decision reversed.

ARGUMENT

I. THE FUGITIVE DISENTITLEMENT DOCTRINE DOES NOT APPLY ABSENT A SERIOUS THREAT TO THE ENFORCEABILITY OF A CRIMINAL JUDGMENT AND THE INTEGRITY OF APPELLATE PROCEEDINGS.

This Court has long recognized that the federal appellate courts may dismiss a criminal appeal where the party seeking relief is a fugitive from justice while the matter is pending. *Degen*, 517 U.S. at 824. The fugitive disentitlement doctrine arises from the common law, and its central concern has always been the need to protect the enforceability of judicial decisions.

The prototypical case concerns a criminal defendant who is convicted and sentenced, but flees during the pendency of his appeal, creating a genuine concern over the enforceability of the court's decision in the defendant's absence. *E.g., Estelle v. Dorrough*, 420 U.S. 534, 537 (1975) ("Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American

law. This Court itself has long followed the practice of declining to review the convictions of escaped criminal defendants.") (citations omitted). Under such circumstances, the convicted defendant has committed the crime of escape, and the court acts well within its discretion in refusing to hear an appeal of a judgment that could prove unenforceable.

In *Degen*, the Court explained the several justifications that have been given for the rule. The Court first and foremost emphasized this concern for the enforceability of the ultimate judgment against the fugitive. 517 U.S. at 824. In addition, the Court recognized that the act of escape had been viewed as an affirmative act of waiver that "disentitles" the fugitive "to call upon the resources of the Court for determination of his claims." *Id.*

While regularly applying the doctrine based on these two rationales, this Court also has recognized two additional ones in the context of upholding more restrictive state laws for conformity with the Due Process Clause of the Fourteenth Amendment. *See id.*; *see also Estelle*, 420 U.S. at 537; *Allen v. Georgia*, 166 U.S. 138, 140 (1897). Specifically, the Court has observed that the rule serves the purpose of deterrence by "discourag[ing] the felony of escape," and that it "'promotes the efficient, dignified operation' of the courts." *Degen,* 517 U.S. at 824.

What ties these four justifications together is that they "all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response." *Ortega-Rodriguez*, 507 U.S. at 244. "Absent some connection between a defendant's fugitive status and his appeal," however, the Court

has held that the justifications for the rule "generally will not apply." *Id.* at 249.

Accordingly, on its two most recent occasions to revisit this doctrine, the Court has declined to extend the rule where the defendant's fugitive status did not threaten the enforceability of an appellate judgment. Thus, in *Ortega-Rodriguez*, the Court held that a former fugitive who was recaptured prior to his appeal was not barred from taking an appeal because there was "no question but that dismissal . . . cannot be justified by reference to the enforceability concerns" that animated the doctrine, and the Court concluded that there was no evidence before the lower court that the defendant's former fugitive status had sufficiently impacted the appellate process "that would justify an appellate sanction of dismissal." *Id.* at 244, 251.

In *Degen*, the Court likewise refused to extend the doctrine to bar a fugitive from contesting a civil forfeiture action—refusing to extend the doctrine outside the context of a criminal appeal—because the court's jurisdiction over the property subject to forfeiture remained secure, and thus "there is no danger the court in the forfeiture suit will waste its time rendering a judgment unenforceable in practice." 517 U.S. at 825.

Thus, the fugitive disentitlement doctrine will apply only when the fugitive's flight impairs the enforceability of the judgment or the act of flight otherwise interferes with the appeal. The Court has pointedly declined to take the additional step of using the threat of disentitlement as an all-purpose punishment for "any conduct that exhibited disrespect for any aspect of the judicial system, even

where such conduct has no connection to the course of appellate proceedings." *Ortega-Rodriguez*, 507 U.S. at 246. The fugitive disentitlement doctrine is simply "too blunt an instrument" for such a purpose. *Degen*, 517 U.S. at 828.

A. The Enforceability Concern Has Always Been of Paramount Importance to the Doctrine.

The fugitive disentitlement doctrine was born in this Court's jurisprudence out of the need to preserve the enforceability of appellate court decisions against criminal fugitives. As the Court recently described it, "the rationale of the first case to acknowledge the doctrine" was that "so long as the party cannot be found, the judgment on review may be impossible to enforce." *Degen*, 517 U.S. at 824.

In that case, *Smith*, 94 U.S. at 97, this Court refused to hear a writ of error to review a criminal conviction because the convict had escaped from custody in the Washington Territory and was undisputedly a fugitive from justice. The Court justified its decision to dismiss the writ by reasoning that there was no way to ensure the enforceability of its decision, should it render one.

> 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 this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in

> custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

Id.

Since *Smith*, the Court has repeatedly invoked the doctrine where a criminal defendant in some form challenged his conviction, only to later flee from custody and become a fugitive, triggering enforceability concerns. *See, e.g., Eisler v. United States*, 338 U.S. 189, 190 (1949) (dismissing petitioner-convict's case because, after petitioning for a writ of certiorari and submitting his cause on the merits, petitioner-convict fled the country); *Allen*, 166 U.S. at 140 (refusing to hear plaintiff-prisoner's writ of error after he had escaped from prison); *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1887) (finding that Bonahan had escaped custody and ordering his case to be struck from the docket "unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below on or before the last day of this term.").

Indeed, the concern for enforceability has underpinned virtually every Supreme Court case to apply the fugitive disentitlement doctrine to date. *See Coley v. Lappin*, 549 U.S. 997, 997 (2006) (denying petition for writ of certiorari where petitioner-convict challenged his conviction and sentence by filing a habeas corpus petition, only to

later flee, causing his petition to be dismissed, although he was eventually recaptured); *Estelle*, 420 U.S. at 534, 542 (dismissing petitioner-convict's appeal filed before he escaped from jail by stealing a federal mail truck, regardless of his later recapture); *Molinaro,* 396 U.S. at 365-66 (dismissing Molinaro's appeal where he had fled from state authorities upon being released on bail and remained at large); *Eisler*, 338 U.S. at 190 (removing Eisler's case from the docket where the Court granted his petition for writ of certiorari and Eisler argued his case on the merits, but fled from the country pending the Court's decision and remained at large); *Allen*, 166 U.S. at 140 (refusing to reverse dismissal of Allen's writ of error by the Georgia Supreme Court where Allen escaped from jail after suing out the writ, despite his eventual recapture); *Bonahan*, 125 U.S. at 692 (dismissing the case where it was admitted that petitioner-convict had escaped and was no longer in the control of the court); *Smith*, 94 U.S. at 97 (same). The enforceability rationale thus remains the fugitive disentitlement doctrine's principal justification and "classic case" for its application.

B. The Doctrine's Other Purposes Have Played a Supporting Role in Its Application.

1. Waiver Rationale

The Court also has recognized that the fugitive disentitlement doctrine may be an appropriate sanction for the act of escape. The Court recognized this justification back in *Allen*, where the Court acknowledged: "By escaping from legal custody, [Allen] has . . . committed a distinct

criminal offense; and it seems but a light punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error." 166 U.S. at 141. Under this rationale, the Court has recognized that a fugitive, through the act of escape, should be deemed to have abandoned or waived his right to appeal as retribution for his flight from justice. Disentitlement, then, is a penalty for the convict's escape and flouting the judicial process.

The Court described this justification in *Molinaro*, 396 U.S. at 366. As with this Court's other federal precedents, the convict in *Molinaro* remained at large. Nonetheless, the Court did not expressly cite the enforceability rationale in dismissing the appeal. Instead, the Court explained:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. . . . [W]e believe [the escape] disentitles the defendant to call upon the resources of the Court for determination of his claims.

Id. The Court acknowledged *Molinaro*'s waiver rationale in several subsequent decisions. *See, e.g.*, *Degen*, 517 U.S. at 824; *Ortega-Rodriguez*, 507 U.S. at 240; *Estelle*, 420 U.S. at 537.

While recognizing the waiver rationale, the Court has acknowledged that the rule is ground not in punishment, but in the abandonment of the appellate process. Thus, the Court has upheld state

laws that apply the disentitlement doctrine to fugitives who fled during their appeal, but then were recaptured. *See Estelle*, 420 U.S. at 534-35; *Allen*, 166 U.S. at 138. Yet the Court has found that a fugitive cannot waive an appeal that is not ripe. So in *Ortega-Rodriguez*, 507 U.S. at 246-47, the Court refused to extend the waiver rationale where the convict fled post-conviction, but was recaptured, prior to the commencement of the appellate process. The Court pointedly refused to "accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings." *Id*. at 246.

2. Deterrence Rationale

The Court also has recognized that the fugitive disentitlement doctrine may serve to deter attempts to escape from justice. As explained in *Estelle v. Dorrough*, the doctrine "discourages the felony of escape and encourages voluntary surrenders." 420 U.S. at 537. The Court has continued to acknowledge this third justification in its more recent fugitive disentitlement cases. *See Degen*, 517 U.S. at 824; *Ortega-Rodriguez*, 507 U.S. at 241, 247.

The Court, however, has declined to allow the general interest in deterring escapes to justify punishment not connected to the appellate process. As with the waiver rationale, *Ortega-Rodriguez* refused to allow the deterrence rationale to extend the doctrine to a pre-appeal escape, reasoning that the sanction of an appellate dismissal should apply only to escapes tied to the appellate process. *See*

507 U.S. at 247 ("*Estelle*'s deterrence rationale offers little support . . . . Once jurisdiction has vested in the appellate court, as in *Estelle*, then any deterrent to escape must flow from appellate consequences, and dismissal may be an appropriate sanction by which to deter. Until that time, however, the district court is quite capable of defending its own jurisdiction.") (citation omitted).

Similarly in *Degen*, the Court found that deterrence alone was not sufficient to justify applying the fugitive disentitlement doctrine to a civil forfeiture proceeding. 517 U.S. at 828 ("Both interests are substantial, but disentitlement is too blunt an instrument for advancing them. . . . A court-made rule striking Degen's claims and entering summary judgment against him as a sanction . . . would be an arbitrary response to the conduct it is supposed to redress or discourage.").

3. Efficiency and Dignity Rationale

The Court also has recognized that the fugitive disentitlement doctrine "promotes the efficient, dignified operation" of the courts. *Degen*, 517 U.S. at 824. For example, in *Allen*, the Court articulated that dismissal was appropriate because the plaintiff-prisoner's escape from jail threatened the dignity of the appellate court. 166 U.S. at 139-41. Although Allen was later recaptured, the Court reasoned that the Georgia Supreme Court was justified in dismissing the writ of error while Allen was a fugitive because:

> [Allen is] in a position of saying to the court: 'Sustain my writ, and I will surrender myself, and take my chances upon a second trial; deny me a new trial, and I will leave the state, or forever remain in hiding.' We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its *dignity* that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.

Id. at 141 (emphasis added).

More recently, the Court has looked not simply at the dignity of the court, but also at the concrete ways in which the act of escape has impaired the Government's ability to prove its case. Thus, in *Ortega-Rodriguez*, the Court rejected the Eleventh Circuit's categorical holding that the doctrine should apply where the former fugitive was returned to custody before the appeal, but the Court left open the possibility that if the period of escape had prejudiced the Government's case, a different result might follow. 507 U.S. at 250.

Similarly, in *Degen*, the Court observed that the convict's flight worked an "indignity" upon the district court, but also looked concretely at whether the fugitive would win a strategic advantage by

forcing the civil forfeiture case to go before the criminal one. 517 U.S. at 825**.** While recognizing those interests, the Court found that the district court had other tools at its disposal to protect the Government's interest, and it thus did not warrant the "excessive response" of dismissal. *Id.* at 825-27, 829.

II. THE FUGITIVE DISENTITLEMENT DOCTRINE DOES NOT APPLY TO IMMIGRATION APPEALS WHERE THE ALIEN DOES NOTHING OTHER THAN FAIL TO COMPLY WITH AN ADMINISTRATIVE REPORT ORDER.

The policies described above simply do not apply to a case such as the present one, where an alien challenging his deportation has done nothing other than fail to report in the face of an administrative order. Where the Petitioner has not taken any act to escape the authorities, he can hardly be deemed a "fugitive," a word whose etymology clearly contemplates an act of flight. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 918 (1986) (Latin, *fugitivus*, from stem of *fugere*, "to run away; flee"). Where, as here, there is no evidence at all of any attempt to flee or hide, and the Petitioner is now in custody, the Government cannot show any enforceability concern.

Nor is there any indication that Petitioner's failure to report would impair the dignity of the federal courts or impede the Court of Appeals' review of the immigration petition.

The Fifth Circuit's rule here, and the similar rule adopted by some of its sister courts, is justified

solely as a sanction for a pre-appeal violation of an administrative order. Congress has never expressly specified such a sanction in the immigration laws, and there is no basis for the courts to imply one here. As in *Ortega-Rodriguez* and *Degen*, that violation has an insufficient connection with the appellate process to justify the extreme sanction under the fugitive disentitlement doctrine.

A. There Were Never Any Serious Enforceability Concerns Here.

On the record before the Court of Appeals, Petitioner was not a fugitive, and there was no serious risk that his failure to report into administrative custody would threaten the enforceability of the Court's order. Petitioner had not affirmatively "fled" anywhere—until he was taken into custody, he had been living at the same address since before the inception of this dispute. As the Fifth Circuit expressly acknowledged, Petitioner's location had been known to the parties, the Government, the courts, and counsel from the start. *Bright v. Holder*, 649 F.3d 397, 400 (5th Cir. 2011).

This Court has recognized the enforceability concern when the convicted appellant has affirmatively fled from the court's control—most commonly either by escaping from prison or jumping bail. *E.g.*, *Estelle* 420 U.S. at 534 (convict filed appeal and then escaped from jail by stealing a federal mail truck); *Molinaro*, 396 U.S. at 365 (convict filed appeal and then, while free on bail, fled from the State's authorities); *Eisler*, 338 U.S. at 190 (convict filed a petition for writ of certiorari and then

fled the country, becoming a fugitive from justice); *Allen*, 166 U.S. at 139 (refusing to hear murder convict's writ of error filed before he had escaped from jail); *Bonahan*, 125 U.S. at 692 ("during the pendency of this writ the plaintiff in error has escaped, and is not now within the control of the court below, either actually, by being in custody, or constructively, by being out on bail"); *Smith*, 94 U.S. at 97 ("[I]t is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail."). These cases all contain the same trigger—a criminal convict's appeal and then subsequent flight, presenting a challenge to the enforceability of the very judicial decision that the convict himself demanded.

Petitioner's situation bears no relation to those circumstances. Petitioner never took any affirmative act to flee or avoid capture. Rather, the Court of Appeals deemed Petitioner akin to a "fugitive" solely because he failed to report to an administrative custody order, arising out of a civil proceeding. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country"); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("[D]eportation is not technically a criminal proceeding"). While the administrative directive may have been procedurally proper (even if premised upon an erroneous removal decision), Petitioner has neither defied a court order nor taken any act to remove himself from the jurisdiction and control of the courts.

The fact that Petitioner was not in custody at the time the Court of Appeals issued its decision does not distinguish him from the lion's share of petitioners and appellants whose cases are regularly heard by the appellate courts, or from the many immigration petitioners whose petitions to stay enforcement are granted prior to the Court of Appeals hearing their appeal.

Of relevance, neither the Court of Appeals nor any other court had made a determination that Petitioner presented a flight risk or that remand into custody was required. And indeed, when the Government decided to take Petitioner into custody, he was readily located at the address he had identified. Petitioner remains in custody to this day, and there is simply no concern that a decision against him cannot be enforced.

B. None of the Other Rationales Favors Extension of the Doctrine.

None of the three remaining justifications—waiver, deterrence, and the preservation of the efficient, dignified operation of the courts—can support the rule articulated by the Court of Appeals and applied here.

Petitioner plainly has not taken any kind of affirmative act so as to forfeit his right to petition the federal courts. Petitioner has failed to respond to an administrative order issued prior to the appeal. Such a failure to report is hardly akin to an affirmative act of escape intended to make one's whereabouts unknown. There is no indication that Petitioner's location changed at any time during this litigation, and thus little basis to read his failure to

report as an act waiving the right to petition the federal courts.

The same deficiencies likewise appear when considering the deterrence rationale. This rationale is aimed squarely at deterring the specific crime of escape, s*ee Estelle* 420 U.S. at 537, yet Petitioner engaged in no escape whatsoever. No doubt, a rule requiring the dismissal of any petition for review of a decision of the Board of Immigration Appeals will create an incentive for petitioners to comply with an administrative order to report to custody. Yet the underlying act is hardly as severe as actions that constitute the federal crime of escape.

As previously mentioned, the Court in *Degen*, the only case where the Court has considered the fugitive disentitlement doctrine in the civil context, found the doctrine to be "too blunt an instrument" for deterrence purposes as well as retributive interests. 517 U.S. at 828. And just as *Ortega-Rodriguez* specified that punishment must originate in the same authority that had been flouted, so too must the deterrence come from the affected power. *See* 507 U.S at 247 ("Once jurisdiction has vested in the appellate court…then any deterrent to escape must flow from appellate consequences, and dismissal may be an appropriate sanction by which to deter. Until that time, however, the district court is quite capable of defending its own jurisdiction."). Petitioner failed to comply with an order of the Executive Branch, not the judiciary. Employing a judicially-crafted appellate sanction would be an improper deterrent mechanism in this case.

Finally, the Court of Appeals' decision is not supported by the need to ensure the dignified and

efficient operation of the courts. The fugitive disentitlement doctrine requires that the convict disrespect the appellate court itself, rather than the judicial system generally. *Degen*, 517 U.S. at 828. Thus, in *Ortega-Rodriguez*, where the fugitive was recaptured prior to the appeal, the Court emphasized that because the convict had "flouted the authority of the District Court, not the Court of Appeals," an *appellate* sanction was not warranted. 507 U.S. at 246.

If an appellate court should not dismiss an appeal to punish conduct that disrespected the district court, then a fortiori the appellate court should not dismiss a petition based on a failure to comply with an order issued by the Department of Homeland Security ("DHS"). The connection between the purported act of disrespect and appellate proceedings is even more attenuated than in *Ortega-Rodriguez*. To the extent that Petitioner's failure to comply impugns the dignity of the Executive Branch, DHS plainly has the authority to "defend its own dignity" if by no other means than affirmatively taking Petitioner into custody.

Similarly, the Court's concern for the efficient operation of appellate proceedings has little application here. As in *Ortega-Rodriguez*, there is no indication that Petitioner's failure to report had any impact at all on the court's ability to hear his petition or the Government's ability to defend the administrative decision. 507 U.S. at 251. There is no indication that physical custody of Petitioner would have any impact at all on the petition for review.

Accordingly, applying the doctrine to dismiss the petition does not comport with any of the traditional justifications for the doctrine, neither its primary enforceability rationale, nor any of the secondary justifications. This Court has recognized that the judiciary's inherent power to dismiss an appeal should be "delimited with care, for there is a danger of overreaching," absent standards set by Congress. *Degen*, 517 U.S. at 823. Indeed, as the Court cautioned in *Degen*:

> [T]he sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

517 U.S. at 828.

In the decision below, the Court of Appeals failed to heed this admonition. No enforceability concern exists here, nor does any other of the traditional justifications for the doctrine strongly compel dismissal. Accordingly, the Court of Appeals' attempt to extend the fugitive disentitlement doctrine to encompass Petitioner's civil petition for review of an immigration decision offends the traditional bases for invoking the doctrine, and with its overbreadth gnaws at the dignitary concerns that the doctrine was ultimately crafted to preserve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

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