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

BRIEF FOR FORMER FEDERAL PROSECUTORS AND FORMER DEPARTMENT OF HOMELAND SECURITY OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONER

Elliott Schulder
Counsel of Record
Chad Albert*
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. N.W.
Washington, DC 20004
202.662.6000
eschulder@cov.com

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Counsel for Amici Curiae

* Admitted in New York and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of principals of the Firm pursuant to D.C. Bar Rule 49(c)(8).

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INTEREST OF AMICI CURIAE[1]

Amici are former federal prosecutors, including thirteen former United States Attorneys from nine federal circuits, and former Department of Homeland Security officials, including a former Commissioner of the Immigration and Naturalization Service.[2] While serving in their positions in the government, amici had responsibility for enforcing the Nation's criminal and immigration laws. Having experienced the challenges of pursing cases against absconders, both in the criminal and immigration contexts, amici understand the governmental interests that the "fugitive disentitlement" doctrine is meant to serve.

Amici strongly support the uniform and fair enforcement of the Nation's immigration laws, and are concerned with the recent circuit split regarding the application of the "fugitive disentitlement" doctrine to aliens who have not absconded but have merely failed to report for removal. Amici submit this brief to provide the Court with their insights on the origin and application of this doctrine in the criminal-law context, and to explain why this

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[1] Counsel of record for all parties received notice of the amici's intention to file this brief at least 10 days prior to its due date. Each party has consented to the filing of this brief. No party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *amici* and their counsel made a monetary contribution intended to fund this brief's preparation or submission.

[2] The full list of amici appears in the Appendix.

doctrine is not properly applied to non-absconding aliens in immigration cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a convicted criminal defendant flees from custody while his appeal is pending, he places the prosecution and the court in an untenable position. Should the prosecution prevail on appeal, it likely will be unable to enforce the court's judgment against the defendant. But, should the defendant prevail, he in all likelihood will come out of hiding to obtain the benefit of the court's favorable ruling.

The "fugitive disentitlement" doctrine serves an important role in leveling the playing field when a defendant flees during the pendency of his appeal. As traditionally applied, the doctrine "disentitles" a fugitive defendant from pursing an appeal of his conviction. *See Smith v. United States*, 94 U.S. 97 (1876). This ensures that the court need not issue a judgment that may be unenforceable, and it prevents absconders from benefitting from the appellate process while at the same time avoiding its consequences. *See Degen v. United States*, 517 U.S. 820, 823-24 (1996).

Although this Court has never applied the "fugitive disentitlement" doctrine in immigration cases, many lower courts have expanded the use of this doctrine by employing it in the immigration context. Amici understand that, in cases of absconding aliens, this doctrine may serve some of the same interests that justify its application in the criminal prosecution context: it prevents the alien

from engaging the court in an unwinnable game of "heads I win, tails you'll never find me." *See, e.g., Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003).

But the government's interest in applying this doctrine fades in immigration cases, like petitioner's, where an alien does not flee but merely fails to respond to a notice to report. In the case of an alien whose location is known, the failure to report implicates neither the enforceability nor the fairness concerns that justify this doctrine's application.

Nevertheless, the Fifth Circuit joined three other circuits in applying the "fugitive disentitlement" doctrine against a non-absconding alien who failed to report, finding that the government had other legitimate interests, such as "encourag[ing] voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law," that would be served by the doctrine's application. Pet. App. 6a. But even if these interests might be relevant in cases of absconding aliens—which is far from clear, *see* Pet. 25-33—they do not suffice to justify a wooden application of the doctrine in other situations. As this Court has observed, although the government's interests in "deter[ring] flight" and "redress[ing] . . . indignit[ies] visited upon the [court] . . . are substantial, . . . disentitlement is too blunt an instrument for addressing them." *Degen*, 517 U.S. at 828.

In expanding the "fugitive disentitlement" doctrine to reach non-absconding aliens, the Fifth Circuit shifted this doctrine away from its proper

role of ensuring the enforceability of judgments and fair play, and instead applied it broadly to promote policies that this Court rejected as justifications for the doctrine in *Degen*. Amici request that this Court grant review to correct the recent misapplication of this doctrine, and to provide uniform guidance to the courts of appeals on this important issue.

REASONS FOR GRANTING THE PETITION

I. In Criminal Cases, the "Fugitive Disentitlement" Doctrine Ensures that the Courts' Judgments Will Be Enforceable and that Defendants Will Not Gain an Unfair Advantage in the Appellate Process

The "fugitive disentitlement" doctrine arose as a solution to a specific problem. In 1870, this Court agreed to hear a writ of error to review a criminal conviction on behalf of a defendant named Smith. Smith then escaped from custody. His case was continued on the Court's docket each term for six years, and, in 1876, while Smith continued to evade the authorities, his counsel moved to schedule the case for oral argument. Declining to let Smith decide whether or not he would submit to the Court's decision based on what was "most for his interest," this Court held that, in the exercise of its discretion, it would refuse to entertain an appeal from a criminal defendant unless "he can be made to respond to any judgment [the Court] may render." *Smith*, 94 U.S. at 97.

Since its origin in *Smith*, this Court has continued to apply the "fugitive disentitlement" doctrine in similar circumstances, and it has

articulated two justifications for its use. First, consistent with a court's "inherent authority to "protect . . . [its] judgments," the doctrine ensures that courts do not issue opinions against absconders that "may be impossible to enforce." *Degen*, 517 U.S. at 823-24; *see also Eisler v. United States*, 338 U.S. 189, 190 (1949) (dismissing fleeing petitioner's case because he "may have rendered moot any judgment on the merits"). Second, consistent with a court's "inherent authority to "protect [its] proceedings," this doctrine prevents a defendant from unfairly seeking the benefits of appellate review while shielding himself from its consequences. *Degen*, 517 U.S. at 823-24; *see also Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) ("[Abscondment] disentitles the defendant to call upon the resources of the Court for determination of his claims."); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 (1993) ("[A] defendant's flight during the pendency of his appeal [i]s tantamount to waiver or abandonment.").

Although this Court has acknowledged that the "fugitive disentitlement" doctrine also may serve a number of other governmental interests, it has limited application of this doctrine to cases that implicate concerns of enforceability and fair play, as a court's "inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. Accordingly, the Court has declined to apply the doctrine in cases where it would serve only broad policy goals, such as "discourag[ing] the felony of escape" and "promot[ing] the efficient, dignified operation of the courts," *id.* at 824, 828-29 (internal quotation marks and citation omitted), and has rejected it as a sanction against an absconding

defendant who was recaptured before his appeal was filed, *see Ortega-Rodriguez*, 507 U.S. at 244-47, 251.

II. The Justifications for Applying the "Fugitive Disentitlement" Doctrine in Criminal Cases Are Absent in Immigration Cases Involving Non-absconding Aliens

Although this Court has never applied the "fugitive disentitlement" doctrine outside the criminal law context, many lower courts, including the Fifth Circuit below, have expanded the doctrine to reach immigration cases. *See, e.g., Shigui Dong v. Holder*, 426 F. App'x 418 (6th Cir. 2011).

Amici recognize that, in some cases, the government's interest in applying the doctrine against aliens closely parallels its interest in applying the doctrine against criminals. In *Shigui Dong*, for instance, the Sixth Circuit was confronted with an appeal by an alien who vanished after an Immigration Judge issued an order directing his removal. *See id.* at 420. While the alien sent word that he had left the country, he failed to document his departure with the authorities and he refused to verify his whereabouts with either his counsel or the government. *Id.* In dismissing the alien's appeal, the Sixth Circuit pointed to the familiar criminal-law justification for applying the "fugitive disentitlement" doctrine to this absconding alien: the court explained that "an outcome adverse to Petitioner would likely prove impossible to enforce," but that, were it "to overturn the removal order, it is plausible to imagine Petitioner would shortly 'reappear' to reap the benefit of the ruling." *Id.* The court thus declined to "waste . . . judicial time and

resources" on an alien playing a game of "heads I win, tails you'll never find me." *Id.* at 419-20 (internal quotation marks and citation omitted).

This case, however, involves circumstances very different from those in the traditional case of the fleeing criminal or the absconding alien. Unlike the criminal defendants in the *Smith* line of cases, and unlike the alien in *Shigui Dong*, petitioner never attempted to flee, but rather he kept the authorities apprised of his whereabouts at all times. *See* Pet. App. 5a. Although amici appreciate that the government's efforts to apprehend an absconder may be costly, and may often be unsuccessful, here the costs to the government were minimal: the authorities merely went to petitioner's home and took him into custody. *See* Pet. 10. This occurred while petitioner's case was before the Fifth Circuit, and amici understand that petitioner remains in custody to this day.

Use of the "fugitive disentitlement" doctrine to bar the appeal of a non-absconding alien represents a radical departure from the doctrine's limited application in the criminal-law context: in such a case, any concerns involving the enforceability of judgments and fair play are absent. *See, e.g.*, *Degen*, 517 U.S. at 823-24. Here, for example, before petitioner was taken into custody, he was known to be living at home, and there was no reason to believe that the authorities would have trouble finding him and enforcing an adverse judgment against him. *See* Pet. App. 5a. And, after petitioner was placed in custody, there could be no serious question concerning enforceability of the court's judgment and

no concern that petitioner would attempt to take unfair advantage of the appellate process.

Looking beyond these traditional concerns, the Fifth Circuit based its application of the "fugitive disentitlement" doctrine on the very same justifications that this Court has deemed impermissible in situations akin to this one. Acknowledging that petitioner did not flee, and that his failure to report presented no practical hurdles for the government, the Fifth Circuit nonetheless applied the doctrine, explaining that doing so would "encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law." *Id.* at 6a. But these goals, while noble, do not justify application of this doctrine: although the government has interests in deterring unsavory conduct and encouraging respect for the courts and the law, "disentitlement is too blunt an instrument for advancing them." *Degen*, 517 U.S. at 823-24.

Amici believe that, in applying the "fugitive disentitlement" doctrine to petitioner for only broad policy reasons, the Fifth Circuit has detached this doctrine from "the necessity giving rise to its exercise." *Id.* at 829. Amici understand firsthand the court of appeals' concern that petitioner violated Department of Homeland Security regulations, but the fact remains that he never fled and he made his whereabouts known to the authorities at all times. Although the Fifth Circuit may have concluded that "[t]here would be a measure of rough justice" in disentitling petitioner from pursuing his appeal, amici submit that, as in *Degen*, "the justice would be

too rough" against the petitioner because "[t]here was no necessity to justify the rule of disentitlement in this case." *Id.*

III. This Court Should Intervene to Resolve a Circuit Split on an Important Issue that Affects Aliens and Law Enforcement Officials Across the Nation

Amici agree with petitioner that the Court's resolution of this recent circuit split—which affects thousands of aliens and implicates an alien's appellate rights—is important for all the reasons set forth in the petition. *See* Pet. 21-25. Moreover, amici agree that the need for resolution of this issue is particularly compelling because aliens subject to the "fugitive disentitlement" doctrine will be deprived of any opportunity for judicial review of decisions made by officers of the Executive branch. *See* Pet. 29.

This deprivation of judicial review through application of the doctrine in cases of non-absconding aliens is exacerbated by recent changes in the structure of the Board of Immigration Appeals (BIA), including a reduction in the number of BIA judges and the expansion of BIA single-judge affirmances without opinions, that have greatly increased the number of appeals filed by aliens in the courts of appeals. *See* The Constitution Project, *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings* 30 (2009), *available at* http://www.constitutionproject.org/pdf/359.pdf.

Amici understand the pressures that both immigration officials and the courts face when confronted with ever-growing caseloads, and amici are also aware that that applying the "fugitive disentitlement" doctrine against an appellant dramatically reduces the work involved in a given case. Amici are concerned that government officials will have a strong incentive to argue for application of this doctrine in as many cases as possible, and the Fifth Circuit's expansive reading of the doctrine, if accepted, would give them broad license to do so. As amici have shown, however, such an expansive and arbitrary application of the doctrine would not serve the important interests that led to its adoption—*viz.*, to promote the enforceability of judgments and the fairness of the appellate process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Elliott Schulder
Counsel of Record
Chad Albert*
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. N.W.
Washington, DC 20004
202.662.6000
eschulder@cov.com

February 21, 2012

Counsel for Amici Curiae

* Admitted in New York and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of principals of the Firm pursuant to D.C. Bar Rule 49(c)(8).

APPENDIX: LIST OF AMICI CURIAE

Kyle D. Brown
Former Attorney, U.S. Department of Justice, Immigration and Naturalization Service, New York, NY

A. Bates Butler III
U.S. Attorney, District of Arizona, 1980-81

W. Thomas Dillard
U.S. Attorney, Northern District of Florida, 1983-86
U.S. Attorney, Eastern District of Tennessee, 1981

John M. Hogan
Acting U.S. Attorney, Northern District of Georgia, 1993-94
Chief of Staff, Attorney General of the United States, 1994-98

Robert M. Morgenthau
U.S. Attorney, Southern District of New York, 1961-70

Thomas Ragland
Attorney, U.S. Department of Justice, Office of Immigration Litigation, Civil Division, 2003-04
Senior Attorney Advisor, Board of Immigration Appeals, Executive Office for Immigration Review, 1995-2003

John W. Raley
U.S. Attorney, Eastern District of Oklahoma, 1990-97

John L. Ratcliffe
U.S. Attorney, Eastern District of Texas, 2007-08

Richard A. Rossman
U.S. Attorney, Eastern District of Michigan, 1980-81
Chief of Staff, Criminal Division, Department of Justice, 1998-99

William S. Sessions
Judge, U.S. District Court, Western District of Texas, 1974-87
U.S. Attorney, Western District of Texas, 1971-74

J. Ronald Sim
U.S. Attorney, Western District of Washington, 1976-77

F.L. Peter Stone
U.S. Attorney, District of Delaware, 1969-72

Thomas P. Sullivan
U.S. Attorney, Northern District of Illinois, 1977-81

James B. Tucker
U.S. Attorney, Southern District of Mississippi, 2001
Assistant U.S. Attorney, Chief, Criminal Division, Southern District of Mississippi, 1986-2000
Assistant U.S. Attorney, Criminal Division, Southern District of Mississippi, 1972-86

James J. West
U.S. Attorney, Middle District of Pennsylvania, 1985-93

James W. Ziglar
Commissioner, Immigration and Naturalization Service, U.S. Department of Justice, 2001-02