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 IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Michael Churgin, Niels W. Frenzen, Suzanne B. Goldberg, Geoffrey A. Hoffman, Elizabeth McCormick, Susham M. Modi, Michael A. Olivas, Maritza Reyes, Victor C. Romero, Theodore Ruthizer, Irene Scharf, Juliet Stumpf, David Thronson, Michael S. Vastine, Jonathan Weinberg, Stephen Wizner, and Stephen W. Yale-Loehr are immigration law scholars who teach, research, and practice immigration law. An appendix with each *amici*'s name, title, and affiliation (for identification purposes only) is included at the end of this brief.

Amici have a professional interest in assuring that this Court is fully informed that courts of appeals have not applied the fugitive disentitlement doctrine consistently in the immigration context, and that applying the fugitive disentitlement doctrine to immigration cases is inconsistent with general principles of immigration law.

Amici have no personal, financial, or other professional interest, and take no position respecting any other issue raised by the Fifth Circuit's decision in this case.

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days before the due date of *amici curiae*'s intention to file this brief. No person other than *amici* and their counsel made a monetary contribution to its preparation or submission. No counsel for a party authored the brief in whole or in part.

ARGUMENT

The fugitive disentitlement doctrine arose in the context of criminal law. This Court first adopted the doctrine in a criminal case in 1876 in *Smith v. United States*, 94 U.S. 97 (1876). More than 100 years later, a circuit court first applied the fugitive disentitlement doctrine in the immigration context. *Arana v. U.S. Immigration & Naturalization Serv.*, 673 F.2d 75 (3d Cir. 1982) (per curiam). Since *Arana*, other courts of appeals have applied the doctrine in the immigration context in a confusing and inconsistent manner, with the result that under identical facts, immigration petitioners in some circuits are precluded from appellate review under the doctrine, while others obtain review, as discussed in the petition and in further detail below.

I. THE FIFTH CIRCUIT'S DECISION ADDS TO THE DEEP CIRCUIT SPLIT REGARDING HOW THE DOCTRINE IS APPLIED IN VARYING IMMIGRATION CIRCUMSTANCES.

Some courts of appeals, including the Fifth Circuit in this case and the Seventh Circuit, have stretched the fugitive disentitlement doctrine beyond recognition in the immigration context, applying it not only to petitioners who have literally fled the jurisdiction, but also to petitioners whose location is *known* to immigration officials and the courts. *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir. 2004) (applying doctrine to bar appeal by petitioners who failed to respond to a notice to appear, even though a temporary stay of deportation was in place and petitioners' address was on file).

Similarly, the Second and Sixth Circuits have held that failure to report for deportation alone warrants dismissal. *See Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) ("[F]or an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with that letter."); *Garcia-Flores v. Gonzales*, 477 F.3d 439, 442 (6th Cir. 2007) (dismissing petition for review when petitioner "failed to report despite a lawful order requiring him to do so while he was subject to the jurisdiction of this Court"); *but see Nen Di Wu v. Holder*, 646 F.3d 133, 136-37 (2d Cir. 2011) (holding that the doctrine did not apply where petitioner obtained a stay of the deportation order and his whereabouts were known to immigration officials).

The Second, Fifth, Sixth, and Seventh Circuits' approach is at odds with that of the Ninth Circuit, which has held that notwithstanding a failure to report for deportation in response to a bag-and-baggage letter, the fugitive disentitlement doctrine did not apply where the petitioner's whereabouts were known to immigration officials and to the court, *see Wenqin Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009), the Eleventh Circuit, which declined to dismiss a petition where the petitioner's whereabouts were known throughout the proceeding, *see Xiang Feng Zhou v. U.S. Attorney Gen.*, 290 F. App'x 278, 281 (11th Cir. Aug. 18, 2008) (unpublished), and the Eighth Circuit, which does not apply the doctrine unless the petitioner is "hiding from authorities" and "cannot be located." *Nnebedum v. Gonzales*, 205 F. App'x 479, 480-81 (8th Cir. Nov. 14, 2006) (unpublished).

Even a Department of Justice publication has recognized the split between the circuits on the contours of the fugitive disentitlement doctrine in the immigration context. Edward R. Grant & Patricia M. Allen, *When Cousins Are Two of a Kind: Circuits Issue Not-Quite-Identical Paired Decisions*, 5 IMMIGRATION LAW ADVISOR, No. 7, at 8 (Aug. 2011) ("The split in the circuits on fugitive disentitlement, therefore, appears to have deepened.") (discussing *Gao*, *Bright*, and *Wu*).

As illustrated by the various cases in which the courts of appeals have applied (and declined to apply) the doctrine, there is a wide spectrum of fact patterns in which the government may raise the fugitive disentitlement doctrine. At one extreme, immigration officials may have attempted without success to locate the petitioner, and there may be affirmative indications that petitioner has literally fled the jurisdiction or gone into hiding. At the other, a petitioner may have failed to voluntarily depart the country in response to a final order of removal, but his whereabouts are known and immigration officials have not given him a specific time and date to report, such as via a so-called "bag and baggage" letter. In the middle are cases like Bright's in which a bag-and-baggage letter has issued, the petitioner has not reported, and yet the petitioner's location is at all times known to immigration officials and the Court.

Assuming that the Court agrees with the courts of appeals that the fugitive disentitlement doctrine sometimes may be applied in the immigration context, this Court should resolve the split between the courts of appeals as to when the doctrine should be applied.

A failure to report voluntarily, in the absence of a bag-and-baggage letter, should not trigger the doctrine. The Immigration and Nationality Act ("INA") contains no express "duty to surrender." Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, J. GENDER, RACE & JUST., (Forthcoming Jan. 18, 2012) ("Hoffman"), (manuscript at 43), *available at* SSRN: http://ssrn.com/abstract=1974520. In September of 1998, the Department of Justice issued a proposed rule, at 63 Fed. Reg. 47,205 (Sept. 4, 1998), to establish procedures requiring aliens who received final orders of removal to surrender to immigration authorities for their removal from the United States. But the proposed rule was never finalized. Hoffman, *supra*, (manuscript at 43). The proposed rule was then reissued and supplemented by then-Attorney General John Ashcroft at 67 Fed. Reg. 31,157 (May 9, 2002). The proposed rule again would have required all non-U.S. citizens to turn themselves in to the legacy Immigration and Naturalization Service, now the Department of Homeland Security, within 30 days of the date that their removal order became administratively final. Again, no proposed surrender rule was actually implemented. Hoffman, *supra*, (manuscript at 43). Thus, as litigants who have sought to defend themselves against operation of the doctrine have noted, failure to report for removal does not automatically make a person a "fugitive." *Id.*

Even where a petitioner has failed to report in response to a bag-and-baggage letter, the doctrine still should not be applied. Disregarding an administrative order like a bag-and-baggage letter

does not compare to fleeing federal custody. Especially where the petitioner has kept his address current with immigration officials, even a petitioner who fails to report should not be considered a fugitive for the purposes of the fugitive disentitlement doctrine. The petitioner is still subject to the Court's jurisdiction, and any judgment is enforceable against the petitioner. While the government may have an interest in encouraging voluntary surrender, as in *Degen v. United States*, "disentitlement is too blunt an instrument" to achieve that goal. 517 U.S. 820, 828 (1996). Disregarding an administrative order is not comparable to fleeing the Court's jurisdiction, perhaps even through an escape from custody, by a criminal defendant.

Even the petitioner who has left the jurisdiction is not comparable to a convicted criminal who has fled custody, but the Court need not reach that issue to determine the petition in this case.

II. THE FUGITIVE DISENTITLEMENT DOCTRINE IS A CREATURE OF CRIMINAL LAW THAT IS ILL-SUITED TO THE IMMIGRATION CONTEXT.

Not only is review necessary to resolve the split among the circuits as to the application of the fugitive disentitlement doctrine, it is the view of *amici* that the fugitive disentitlement doctrine should not apply in the immigration context.

The fugitive disentitlement doctrine arose to keep criminal defendants from pursuing claims where they could not be found or were outside the reach of the criminal court. But a person in immigration proceedings is by definition not a

fugitive. A fugitive is one who flees from the jurisdiction or hides within the jurisdiction so as not to be brought to justice in criminal proceedings. *See, e.g.*, *United States v. Barnette*, 129 F.3d 1179, 1183 (11th Cir. 1997). Failing to report for deportation in response to an administrative bag-and-baggage letter is simply not comparable to fleeing from the jurisdiction of a court system in which one has been convicted of a crime to evade the sentence. Even when, as in Bright's case, the grounds for removability are based in part on a criminal conviction, the appellate remedy at issue is not review of a criminal conviction itself, but rather review of a final order of removal.

This Court has never decided that the fugitive disentitlement doctrine should be applied in the immigration context. In *Degen*, however, the Court declined to apply the doctrine to civil forfeiture proceedings where the claimant was outside the United States and could not be extradited to face drug charges. 517 U.S. at 823-25. The issue before the Court was "whether the doctrine should be extended to allow a court in a civil forfeiture suit to enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution." *Id.* at 823.

The Court concluded that the doctrine should not be extended because the civil proceeding did not implicate the concerns that animated the judge-created doctrine. *Id.* at 825. As an initial matter, the Court explained that the fact that a party to the forfeiture proceeding was absent would not affect the court's ability to enforce any judgment because the matter was *in rem*. *Id.* The Court also concluded that although two other purposes of the doctrine

would be served by applying the doctrine—"[t]he need to redress the indignity visited upon the District Court by Degen's absence from the criminal proceeding, and the need to deter flight from criminal prosecution . . . ," *id.* at 828—it was nevertheless not appropriate to apply the doctrine. While acknowledging that both interests are "substantial," the Court concluded that the doctrine was "too blunt an instrument" to further those interests. *Id.* The Court held that the sanction of disentitlement is "most severe" and "so could disserve the dignitary purposes for which it is invoked." *Id*. The Court continued, "[t]he 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." *Id.*

As in *Degen*, applying the doctrine in cases like Bright's does not further the purposes of the doctrine. Bright's whereabouts were at all times known to the immigration authorities and to the courts. Moreover, he is now in custody and indeed was in custody at the time he filed a post-opinion motion to remand with the Fifth Circuit.

Failing to abide by an administrative notice to report or notice to surrender[2] is not tantamount to being a fugitive against whom an adverse appellate ruling could not be enforced. A petitioner who does not report for deportation, but whose location is known, remains within the court's jurisdiction. Thus, one of the principal rationales for the fugitive

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[2] These notices are issued on Form I-166, an example of which can be found in appendix B of *United States v. Wong Kim Bo*, 466 F.2d 1298 (5th Cir. 1972).

disentitlement doctrine—that the court's judgment could not be enforced—does not apply in this circumstance.

Nor does a failure to report for deportation implicate any of the same concerns regarding the dignity of the courts. Until a petition for review is filed, an immigration matter is exclusively an administrative proceeding within the powers of the Executive, not the Judicial, branch.

It is particularly harsh to apply the fugitive disentitlement doctrine to immigration cases. Immigration petitioners often face even more severe consequences than plaintiffs in civil forfeiture proceedings and sometimes even criminal defendants. This Court often has recognized the harsh consequences of deportation, acknowledging that deportation can amount to "banishment" or "exile" from the United States with drastic consequences, including loss of property, loss of family, and even loss of life. *See, e.g.*, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (equating deportation to banishment); *Jordan v. De George*, 341 U.S. 223, 243 (1951) (deportation may impose "a life sentence of exile . . . a savage penalty"); *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may result in "loss of both property and life, or all that makes life worth living"); *Lehmann v. United States*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ("To banish [an

immigrant] from home, family, and adopted country is punishment of the most drastic kind . . . .").

It would be ironic, moreover, to apply the fugitive disentitlement doctrine in immigration cases because the Court in past cases has often declined to extend constitutional protections to aliens facing deportation on the ground that immigration cases are not criminal or penal. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1032 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."); *Woodby v. INS*, 385 U.S. 276, 285 (1966); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Carlson v. Landon*, 342 U.S. 524, 533 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment"); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime."). Persons in immigration proceedings should not get the worst of both worlds—denied constitutional protections on the grounds that their proceeding is civil in nature, while simultaneously being subjected to the criminal law fugitive disentitlement doctrine.

Applying the doctrine in the immigration context, finally, runs counter to a long line of cases holding that there is a strong presumption in favor of judicial review of administrative decisions, including immigration decisions. *Kucana v. Holder*, 130 S. Ct. 827, 839 (2010) (concluding that there is judicial review over regulations that vest the attorney general with discretionary authority

notwithstanding 8 U.S.C. § 1252(a)(2)(B)(ii) and holding that "[a]ny lingering doubt . . . would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action"); *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (noting the "strong presumption in favor of judicial review of administrative actions" in concluding that habeas corpus was available as a means to review final removal order).

III. APPLYING THE FUGITIVE DISENTITLEMENT DOCTRINE TO ASYLUM PETITIONERS WOULD BE INCONSISTENT WITH JURISDICTIONAL PROVISIONS AND THE UNITED STATES' TREATY OBLIGATIONS.

Applying the fugitive disentitlement doctrine in the asylum context is particularly problematic.

The INA specifically provides for jurisdiction under 8 U.S.C. § 1252 for the federal courts of appeals to hear petitions for review relating to petitioners' asylum and asylum-related denials. In the words of the statute, there is no jurisdiction to review denials of discretionary relief "other than the granting of relief under section 1158(a) [relating to asylum] of this title [Title 8 of the U.S. Code]." *Id.* In light of this specific statutory provision, the courts should be reluctant to invoke a judge-made doctrine to avoid review of asylum decisions. *See* Hoffman, *supra*, (manuscript at 42).

Moreover, among the United States' international legal obligations is the principle of *non-refoulement*, guaranteed, for example, in Article 33 of the 1967 United Nations Protocol relating to the Status of Refugees ("UN Protocol"), of which the

United States is a signatory.[3] The principle is violated if the United States does not permit persons seeking refuge in the country to exhaust their appellate rights fully before being physically deported to a country where they have alleged a fear of persecution or torture.

Because courts have applied the doctrine to dismiss appeals by asylum applicants, the Court should take this opportunity to clarify if and when the doctrine may be applied in the immigration context.

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[3] The principle of *nonrefoulement* under international law is expressed through the 1951 United Nations Convention Relating to the Status of Refugees ("UN Convention") and, more specifically, in the 1967 United Nations Protocol Relating to the Status of Refugees ("UN Protocol"), of which the United States is a signatory. Hoffman, *supra*, (manuscript at 42, n.148). Our government codified these articles and principles into the U.S. asylum laws by enacting the Refugee Act of 1980. *See, e.g.*, 8 U.S.C. § 1101(a)(42) (definition of refugee); 8 U.S.C. § 1231(b)(3)(B) (relating to withholding of removal). Fundamental principles established by the UN Convention and Protocol are found in Article 33:1 (*nonrefoulement* principle) and Article 31 (prohibiting imposing penalties on unlawful presenting refugees). *See* Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. As stated in the treaty: "[Article 33:1 requires that all contracting parties shall not] expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . membership of a particular social group or political opinion." *Id*.

CONCLUSION

For the foregoing reasons, *amici curiae* Immigration Law Professors respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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February 21, 2012

APPENDIX

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