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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The government's opposition does not dispute the central facts of this case: (1) Mr. Bright is legally entitled to a waiver of deportation under former § 212(c); (2) his son's approved application for a "relative visa" independently entitles him to remain in the country; (3) he never fled nor hid from authorities; and (4) he is now in government custody, where he twice petitioned the court of appeals to hear his arguments.

Nor does the government directly dispute the central points of Mr. Bright's petition: (1) the courts are divided as to when and how they may apply the "fugitive disentitlement" doctrine; (2) resolution of that question affects whether and when the government can unilaterally convict or deport individuals without any judicial review (and, in the case of deportation, when courts can override Congress's comprehensive design for jurisdictional preclusion); and (3) the court of appeals (twice) denied review while Mr. Bright was in custody, declined to weigh the equities of the case in its opinion, and relied on broad policy concerns in support of its decision.

The government nonetheless opposes *certiorari*.

First, it attempts to minimize the split among the circuits. In so doing, it misstates this Court's practice of reviewing unpublished opinions, misreads the circuits' published opinions, misremembers the chronology of the appeal (during whose pendency Mr. Bright was taken into custody), and misinterprets the court of appeals' straightforward conclu-

sion that it was "barred from … review[ing]" Mr. Bright's case.

Second, the government attempts to minimize the importance of the questions presented by alleging that the "fugitive disentitlement" doctrine is seldom applied. That ignores federal and state courts' regular use of the doctrine, which this Court has reviewed nine times in other contexts. Every regional circuit has reviewed the doctrine at least once. Indeed, the government's own legal publication notes a rising "trend" in disentitlement cases. That observation worries a number of the Court's *amici*, including a former Commissioner of the Immigration and Naturalization Service under George W. Bush.

The government also asserts that a ruling from this Court will not benefit Mr. Bright. That allegation is both irrelevant and incorrect. A favorable ruling would require the Board of Immigration Appeals to consider the merits of Mr. Bright's case. This Court's opinion in *Judulang v. Holder* and the approved application for a "relative visa" filed by Mr. Bright's son almost certainly entitle him to relief.

Finally, the government defends the lower court's application of the "fugitive disentitlement" doctrine against Mr. Bright based on broad policy concerns. But it ignores this Court's requirement in *Degen v. United States* that the doctrine be limited by necessity in each case.

ARGUMENT

Mr. Bright's petition presents an ideal vehicle to review three questions that have divided the circuits and whose resolution is of profound national importance.

I. THE CIRCUITS ARE SPLIT ON EACH OF THE QUESTIONS PRESENTED.

The government cannot dispute that "[t]here is a split among the circuit courts on whether an alien is a fugitive where, as here, he has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien." Petition Appendix ("Pet. App.") 5a. Instead, the government attempts to minimize the extent of the split, asserting that the circuits are in "near-consensus" from which "only the Ninth Circuit has deviated," Opp. 13. That is like saying the Cold War Era world was in near-consensus about democracy from which only the Soviet Union had deviated: The disagreement is far more widespread than the government lets on, but even the two-circuit split it acknowledges is a very big deal.

To take the latter point first, the split between the Ninth and Fifth Circuits is of enormous consequence. It, alone, affects more than 50% of the nation's immigration proceedings, Pet. 21-22, and thus warrants this Court's review.

In any event, the split is much deeper and potentially affects almost all immigration and criminal proceedings. The government finds "consensus" only

by dismissing some opinions as unpublished and misreading the rest. It overlooks this Court's practice when it argues that unpublished opinions "do not give rise to circuit conflicts warranting [Supreme Court] review." Opp. 13. In fact, this Court frequently counts unpublished opinions in considering how deeply the circuits are split. *See* Eugene Gressman *et al.*, *Supreme Court Practice* 263 (9th ed. 2007) ("[A]n unpublished or summary decision on a subject over which courts of appeals have split" signals "a persistent conflict.") (collecting citations); *see also Ortiz v. Jordan,* 131 S. Ct. 884, 889 n.1 (2011); *Hall Street Assocs. v. Mattel*, 552 U.S. 576, 583 n.5 (2008).

On the question whether a non-absconder is a "fugitive," the government reads selectively from the lower courts' opinions, dismissing some merely because they do not recite certain magic words about non-absconders never being fugitives. *See* Opp. 14-15. But these cases cannot be reconciled with the body of cases that have come out the other way.

For example, the Eighth Circuit's understanding of who is a "fugitive" clearly comports with common usage: "[W]e deny respondent's motion to dismiss the petition. Nothing in the record suggests that Nnebedum is hiding from authorities or cannot be located, *and thus* we do not consider her to be a fugitive." *Nnebedum v. Gonzales*, 205 Fed. App'x. 479, 480-81 (8th Cir. 2006) (emphasis added).

The Third Circuit's view is also unambiguous. In *Arana v. INS*, 673 F.2d 75 (3d Cir. 1982), it observed that "Arana has neither complied with the district court's order nor has he been located by fed-

eral authorities" and "*therefore*, the Government argues that Arana 'should be foreclosed from further pursuing this matter' *so long as he refuses to make known his whereabouts*." *Id.* at 76-77 (emphasis added). The court then concluded that, "*[i]nasmuch as Arana's counsel has not disputed the fact that Arana cannot now be located*, we agree." *Id.* at 77 (emphasis added). Both the government's argument and the court's agreement clearly depend on Mr. Arana's failure to announce his whereabouts.

Moreover, the Third Circuit's more recent analysis in *Yan Yun Ye v. Attorney General*, 383 Fed. App'x. 113 (3d Cir. 2010), cites *Arana*'s decades-old holding for its reluctance to, for the first time, disentitle "an alien whose whereabouts are known and who has not fled from custody." *Id.* at 116. Whether or not the court's discussion in *Yan Yun Ye* was theoretical, *see* Opp. 14, is immaterial to what it reveals about the court's holding in *Arana*—namely, that the Third Circuit does not consider a non-absconder to be a fugitive.

The Eleventh Circuit has also consistently held that "[a] person is still a fugitive even if his location is known, *when that location is beyond the jurisdictional reach of the court*." *Xiang Feng Zhou v. Attorney Gen.*, 290 Fed. App'x. 278, 280 (11th Cir. 2008) (emphasis added) (citing *United States v. Barnette*, 129 F.3d 1179, 1185 n.11 (11th Cir. 1997) ("That [an appellant's] whereabouts are known does not change her status as a fugitive *when her location is beyond the jurisdictional reach of the court*." (emphasis added)). It naturally follows that a person is

not a fugitive when her location is known and falls *within* the jurisdictional reach of the court.

The Tenth Circuit's view is admittedly slightly less clear. Pet. 15-16. In *Martin v. Mukasey*, 517 F.3d 1201 (10th Cir. 2008), it concluded that because Mr. Martin "*not only* failed to appear for his scheduled appointment, [but] *also failed to provide DHS with his current address*," "the two failures *together* render Mr. Martin a fugitive." *Id.* at 1203-04. It is unclear how this case supports the government's view. *See* Opp. 15. But because a 4-5 split warrants a grant of *certiorari* as much as a 5-4 split, Mr. Bright will stipulate that the Tenth Circuit's view is at least up for grabs. (The government does not quarrel with Mr. Bright's analysis of the four opinions on the other side of the split. *See* Opp. 13.)

Moving to the question whether a petitioner is a "fugitive" if he is taken into custody during the pendency of his appeal, the government cannot dispute that the Fifth Circuit stands alone. Instead, it argues that the court "had no occasion" to review that question. Opp. 16. But the lower court had *two* occasions to review the question. The first was when Mr. Bright petitioned for rehearing en banc *after he was taken into custody*. Pet. 10. The second was when Mr. Bright again petitioned the court below to reconsider and remand his case in light of *Judulang v. Holder*, 132 S. Ct. 476 (2011). Pet. 11. The court denied both motions. *See* Pet. App. 19-20a; Reply App. 1a.

The Fifth Circuit stayed its mandate (over the government's objection), Pet. App. 22a, to permit this

Court's review. Mr. Bright's appeal remains pending before the court of appeals, which could have considered either of Mr. Bright's "post-custody" motions. *See, e.g.*, *United States v. Cook,* 592 F.2d 877, 880 (5th Cir.), *cert. denied,* 442 U.S. 921 (1979); *see also In re Grand Jury Investigation*, 399 F.3d 527, 529 (2d Cir. 2005) (noting the government's own argument "that the mandate has yet to issue and the appeal is thus technically still pending before our panel").

Finally, the government cannot dispute that the "fugitive disentitlement" doctrine is discretionary and requires a court to weigh the equities presented by a particular case. *See* Opp. 18. Instead, it argues that the court *did* weigh the equities (without telling anyone) and that the petition misinterprets the court's conclusion that, as a result of Mr. Bright's failure to surrender for removal, "*we are barred* from further review of [his] petition." Pet. App. 6a (emphasis added).

That is not how other educated consumers of immigration opinions have read the court of appeals' conclusion. A senior presiding member of the Board of Immigration Appeals and its attorney-advisor have observed: "The Fifth Circuit concluded that applying the fugitive disentitlement doctrine barred its consideration of the alien's petition for review—*departing considerably, it appears, from the Second Circuit's reasoning that this is a discretionary rule to be used sparingly*." *See* Edward R. Grant & Patricia M. Allen, *When Cousins Are Two of a Kinds: Circuits Issue Not-Quite-Identical Paired Decisions*, 5 U.S. Dep't of Justice, Immigration Law Advisor, No. 7, at

7-8 (Aug. 2011) (emphasis added) (noting that as a result of the Fifth Circuit's opinion, "the split in the circuits on fugitive disentitlement … appears to have deepened").

The government nonetheless argues that the lower court meant not what it said at the end of its opinion, but at the beginning, Opp. 17, where it acknowledged the doctrine is discretionary. But a court's cursory acknowledgment of the appropriate legal standard cannot save it from review where it fails to actually apply that standard. *See, e.g.*, *Fox v. Vice*, 131 S. Ct. 2205, 2217 (2011) (overturning the lower court's opinion even where it initially "articulated a standard that, taken alone, might be read as consistent with our [precedent]").

II. THE QUESTIONS PRESENTED ARE RECURRING, THEIR RESOLUTION IS OF PROFOUND NATIONAL IMPORTANCE, AND THIS CASE PRESENTS A PERFECT VEHICLE FOR REVIEW.

The government does not deny that the questions presented involve matters of national importance, Pet. 22-24, but instead asserts that those questions are not sufficiently recurrent to warrant this Court's attention, Opp. 18. In support of that view, the government alleges a "paucity of circuit court decisions concerning fugitive disentitlement," which "strongly suggests that the issue does not arise with any frequency." *Id.* That is odd. Every regional circuit court has reviewed the doctrine's scope and application. Pet. 20-21. This Court has examined its meaning at least nine times in other

contexts. Pet. 27 n. 3. Federal and state courts apply it regularly and have done so several times just in the few months since Mr. Bright filed his petition.[1] (A Westlaw/Lexis search unrestricted by date produces far too many relevant cases to include here.)

In fact, the government's own legal publication specifically noted a rising "trend" in recent years among circuit courts' application of the doctrine to immigration cases. *See* Edward R. Grant, *The "Fugitive Disentitlement Doctrine," and other Limits on Circuit Court Review*, 1 U.S. Dep't of Justice, Immigration Law Advisor No. 3, at 4 (Mar. 2007). It observed that "the Federal circuit courts of appeals are responding to their higher caseloads in part by taking a stricter view of matters of jurisdiction—including denying review to ["fugitive"] aliens." *Id.*

That observation resonates with former government officials' concern that the lower court's "wooden application" of the doctrine provides government agents with "strong incentive to argue for application of this doctrine in as many cases as possible." Br. of Former Gov't Officials 10; *see* Pet. 29-30. As *amici* further explain, "[t]his deprivation of judicial review through application of the doctrine in cases of non-absconding aliens is exacerbated by recent

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[1] *See, e.g.*, *United States v. Grajales-Lemos*, No. 94-621-CR, 2012 WL 1405712 (S.D. Fla. Mar. 27, 2012); *Hardin v. State*, No. E2011-00567-CCA-R3-PC, 2012 WL 765206 (Tenn. Crim. App. Mar. 12, 2012); *Deering v. Dir. Mich. Dep't of Corr.*, No. 11-cv-10701, 2012 WL 666731 (E.D. Mich. Feb. 29, 2012); *Campbell v. Forniss*, No. 2:09-CV-392-MHT, 2012 WL 896259 (M.D. Ala. Jan. 24, 2012).

changes in the structure of the [BIA], including a reduction in the number of BIA judges and the expansion of BIA single-judge affirmances without opinions." *Id.* at 9 (citation omitted).[2]

The government does not respond to its former colleagues' concern. Nor does it respond to any of the multiple *amici curiae*, whose broad spectrum includes former U.S. Attorneys (appointed under both Republican and Democratic administrations), a former federal judge, former federal immigration officials (including the former Commissioner of INS under President George W. Bush), 45 professors of criminal, constitutional, and immigration law; The National Legal Aid & Defenders Association, Public Counsel, and the American Immigration Lawyers Association.

Finally, the government asserts that a ruling in Mr. Bright's favor would offer him little benefit. Opp. 19-21. But this Court is not a court of error. It does not ordinarily weigh the potential rewards to a particular party in granting *certiorari*. No matter. A ruling in Mr. Bright's favor would provide him enormous benefit. If he is not a fugitive, he is en-

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[2] The doctrine's rapid expansion beyond the criminal-law contours this Court initially established only magnifies the issue—courts now disentitle "fugitives" in family law cases, *see, e.g.*, *In re Prevo*, 59 F.3d 556 (6th Cir. 1995), in FOIA proceedings, *see* Dep't of Homeland Security, 2009 Annual FOIA Report (Feb. 2009) at 6, available at www.ice.gov/doclib/foia/annual-report/2009foia-annual-rpt.pdf, and in cases involving trusts and estates, *see* Matthew P. Matiasevich, *Hog-tying the Contumacious Beneficiary—The Disentitlement Doctrine in Estate and Trust Litigation*, 21 Prob. & Prop. 46 (2007).

titled to a decision from the BIA on his motion to reopen. That motion would almost certainly have been granted based on Mr. Bright's son's application for a "relative visa," as well as his own application for waiver under former § 212(c) (undisputedly meritorious now that this Court has overturned the Board's statutory interpretation in *Judulang*). The BIA has not offered any grounds—other than its own usurpation of a judicial doctrine outside its reach—to dismiss Mr. Bright's motion.

III. THE COURT OF APPEALS' DECISION IS WRONG AND CONFLICTS WITH THIS COURT'S OPINION IN *DEGEN V. UNITED STATES.*

The court of appeals' decision is wrong as to each of the questions presented.

As to the first question, Mr. Bright was never a fugitive because he never fled. Pet. 26-31. The government argues that his behavior "differed from flight only in degree," Opp. 12, which is rather like saying that kissing differs from pregnancy "only in degree." Either a petitioner is a fugitive or he is not. There are no degrees. But even if there were, this Court would have to grant *certiorari* to distinguish the precise types of "flight-like" behavior that warrant disentitlement from those that do not. Fortunately, as the pile of briefs in support of *certiorari* demonstrates, a "fugitive" is exactly what most people think of when they imagine Harrison Ford

running and hiding from Tommy Lee Jones in *The Fugitive*.[3]

In defense of the lower court's opinion, the government mistakenly invokes broad policy concerns. *See* Opp. 10-11. Such concerns are insufficient to justify dismissal absent evidence of the "*necessity* for the harsh sanction of absolute disentitlement" in a particular case. *Degen v. United States*, 517 U.S. 820, 827 (1996) (emphasis added). Disentitlement is "too blunt an instrument for advancing" either "the need to redress the indignity visited upon the [court] by [an appellant's] absence" or "the need to deter flight." *Id.* at 828; *cf.* Opp. 10 (citing the court's "dignified operation" and the "deter[rence] of unlawful conduct" as justifications for dismissal).[4] The court of appeals thus ignored the central holding in *Degen* that the doctrine is always "limited by the *necessity* giving rise to its exercise." *Degen*, 517 U.S. at 829 (emphasis added).

As to the second and third questions, the government is in complete agreement on what the law is. The "fugitive disentitlement" doctrine cannot apply to a petitioner in government custody, Pet. 31-33, and the disentitlement doctrine is discretionary, Pet. 33-35. That is reason enough to grant *certiorari*. There is no doubt that the lower court considered

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[3] Even the Dep't of Homeland Security would apparently not consider Mr. Bright a fugitive. *See* Br. of the Am. Immigration Lawyers Ass'n at 11 n.5.

[4] The government's reliance on *Estelle v. Durrough*, 420 U.S. 534 (1975), *see* Opp. 10 n.1, is improper. That case was governed by state statute. *See Degen*, 517 U.S. at 824; Pet. 31 n.4.

and rejected the former argument. *See supra* 6-7. And the most rational reading of the opinion below is that the court of appeals meant what it said and said what it meant when it concluded that it was "barred from further review." *See supra* 7.

CONCLUSION

This Court should grant *certiorari* to resolve an entrenched conflict among the circuit courts.

Respectfully submitted,

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May 7, 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-60300

IKE ROMANUS BRIGHT,

Petitioner

v.

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

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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Before JONES, Chief Judge, and HIGGINBOTHAM and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that petitioner's motion to remand the case to the Board of Immigration Appeals is DENIED