No. 11-890

In the Supreme Court of the United States

IKE ROMANUS BRIGHT, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner filed a petition for review of the decision of the Board of Immigration Appeals denying reconsideration of its denial of petitioner's motion to reopen removal proceedings. The question presented is whether the court of appeals appropriately declined to consider the petition for review based on the fugitive disentitlement doctrine, where petitioner failed to comply with an agency order to surrender for his scheduled removal and remained at large throughout the appellate process, but did not abscond.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 649 F.3d 397. The opinion of the Board of Immigration Appeals denying petitioner's motions to reconsider and reopen (Pet. App. 7a-9a) is unreported. Prior decisions of the Board denying reopening and denying petitioner's administrative appeal, as well as the immigration judge's written decision (Pet. App. 10a-11a, 12a-15a, 16a-18a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2011. A petition for rehearing was denied on October 17, 2011 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on January 17, 2012 (a Tues-

day following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner, a native and citizen of Nigeria, was admitted to the United States as a lawful permanent resident in November 1985. Pet. App. 17a. In November 1986, petitioner was charged with attempted murder in Texas state court for stabbing another individual with the intent to commit murder. *Ibid.*; Administrative Record (A.R.) 169. Petitioner pleaded guilty. A.R. 163. Pursuant to Texas's deferred-adjudication framework, the adjudication of petitioner's guilt was deferred and he was sentenced to five years' probation. Pet. App. 17a.

b. On March 22, 2007, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner because his attempted-murder conviction is an aggravated felony under Section 101(a)(43) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 18a; A.R. 203-204; see 8 U.S.C. 1101(a)(43)(A) and (U), 1227(a)(2)(A)(iii). Petitioner was permitted to remain free during the proceedings after he posted bond. A.R. 202.

During the removal proceedings before an immigration judge (IJ), petitioner, represented by counsel, admitted the factual allegations against him and conceded removability, but sought relief from removal under former Section 212(c) of the INA. A.R. 148-150; Pet. App. 18a; see 8 U.S.C. 1182(c) (1994). That provision on its face authorizes the Attorney General to admit certain excludable aliens, but Section 212(c) relief also historically has been available to certain removable aliens. See *Judulang* v. *Holder*, 132 S. Ct. 476, 479-481 (2011). The IJ concluded that petitioner was ineligible for Section

212(c) relief on the basis of the "comparable-grounds" approach then used by the Board of Immigration Appeals (Board) to determine whether an alien facing removal should be granted a waiver under Section 212(c). *Id.* at 18a. Under that approach, an alien's eligibility for Section 212(c) relief from removal turned on whether the conviction that rendered the alien removable was "substantially equivalent" to an offense in the INA's list of exclusion grounds. See *Judulang*, 132 S. Ct. at 481-482. The IJ concluded that "the aggravated felony offense of Attempted Murder that is the basis for [petitioner's] removal has no statutory counterpart in the grounds of inadmissibility in [S]ection 212(a) of the INA." Pet. App. 18a. Accordingly, the IJ held that petitioner was ineligible for Section 212(c) relief and ordered that petitioner be removed to Nigeria. *Ibid.*

c. On December 23, 2008, the Board dismissed petitioner's administrative appeal. Pet. App. 12a-15a. The Board explained that although the courts of appeals were split as to whether the comparable-grounds approach should be used to determine an alien's eligibility for Section 212(c) relief, the Fifth Circuit, whose precedent governed petitioner's proceedings, had approved the approach. *Id.* at 13a-14a (citing *Brieva-Perez* v. *Gonzales*, 482 F.3d 356 (5th Cir. 2007), abrogated by *Judulang*, *supra*; and *Blake* v. *Carbone*, 489 F.3d 88 (2d Cir. 2007)). The Board affirmed the IJ's application of the comparable-grounds analysis and held that petitioner was not eligible for a waiver under Section 212(c). *Id.* at 15a.

d. Petitioner did not seek judicial review of the Board's decision by filing a petition for review in the court of appeals. Pet. App. 2a.

2. On January 12, 2009, DHS ordered petitioner to surrender for removal on February 12, 2009. Pet. App. 2a, 10a. Petitioner did not report at that time, thereby violating the conditions of his bond. *Id*. at 2a-3a, 10a; A.R. 56. Petitioner also did not pursue other options to attempt to avoid removal, such as seeking an administrative stay of removal, see 8 C.F.R. 241.6, or by filing a petition for review and seeking a judicial stay of removal.

3. On March 9, 2009, petitioner filed a motion to reopen his removal proceedings and to stay his removal. Pet. App. 10a-11a; A.R. 66. Petitioner argued that he was eligible for adjustment of status, a waiver of inadmissibility under 8 U.S.C. 1182(h)(2), and a waiver of inadmissibility under Section 212(c). Pet. App. 10a-11a. DHS opposed the motion, arguing that (1) petitioner was ineligible for the requested relief; (2) because petitioner had failed to comply with the surrender order, his motion should be dismissed under the fugitive disentitlement doctrine; and (3) because petitioner had failed to comply, his case did not "merit the favorable exercise of discretion required for reopening of deportation proceedings." A.R. 50 (quoting *In re Barocio*, 19 I. & N. Dec. 255, 258 (B.I.A. 1985)); A.R. 48-50. In response, petitioner acknowledged that "he did not report to DHS" even though he had notice of the surrender order, but argued that he could not be deemed a fugitive because his address was known to DHS and he had not fled or made any attempt to evade the authorities. A.R. 38; Pet. App. 3a.

On September 4, 2009, the Board denied the motion to reopen. Pet. App. 10a-11a. The Board held that petitioner was ineligible for further relief under the fugitive disentitlement doctrine. *Id*. at 11a (citing *Giri* v.

Keisler, 507 F.3d 833 (5th Cir. 2007)). The Board observed that "[w]hile it is certainly possible that * * * [petitioner] may eventually decide to comply with a removal order following an adverse ruling in this matter, there is no indication that he will do so." *Ibid.* The Board further held that "where an alien fails to report as ordered for removal, [petitioner] does not merit reopening in the exercise of discretion." *Ibid.* (citing *Barocio*, *supra*). The Board also denied petitioner's request for a stay of removal. *Ibid.*

Again, petitioner did not seek review of the Board's decision in the court of appeals. Pet. App. 4a n.1.

4. On October 2, 2009, petitioner filed a motion to reconsider the Board's September 2009 decision denying reopening. Pet. App. 8a. Because petitioner submitted additional evidence (in the form of an approved visa petition filed on his behalf by his United States citizen son), the Board treated petitioner's motion as also seeking reopening to the extent that it sought relief on the basis of the visa petition. *Ibid.* DHS opposed the motion. *Ibid.*

On March 24, 2010, the Board denied petitioner's motions. Pet. App. 7a-9a. The Board denied petitioner's motion to reconsider on the ground that there was no "legal or factual defect" in its September 2009 denial of petitioner's motion to reopen. *Id.* at 8a. The Board reaffirmed its earlier denial of reopening on fugitive-disentitlement and discretionary grounds. *Id.* at 9a. In particular, the Board explained that it did "not find the facts of this case distinguishable from those in *Matter of Barocio*," *ibid.*, in which the Board had held that the aliens' decision "to disregard the order of deportation against them by refusing to report on their appointed date of departure," demonstrated "that they are willing

to make an appearance only if their motion is granted and they obtain the relief they seek," warranting denial "as a matter of discretion." *Barocio*, 19 I.& N. Dec. at 258.

The Board also held that petitioner's motion to reopen on the basis of the visa petition was time- and number-barred because an alien may file only one motion to reopen within 90 days of the Board's underlying order. Pet. App. 8a; see 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c).

5. Petitioner filed a petition for review of the Board's March 2010 decision in the Fifth Circuit, challenging the Board's refusal to reconsider its denial of his motion to reopen on fugitive-disentitlement and discretionary grounds. Pet. C.A. Br. 2 (issue presented). The court of appeals dismissed the petition on the basis of the fugitive disentitlement doctrine. Pet. App. 1a-6a.

The court explained, as an initial matter, that petitioner had not filed a timely petition for review of the Board's December 2008 determination that petitioner was ineligible for Section 212(c) relief. Pet. App. 2a. Petitioner also had not filed a timely petition challenging the Board's September 2009 denial of petitioner's first motion to reopen, and had not challenged the Board's denial of the second motion to reopen in his appellate briefs. *Id.* at 4a n.1. As a result, the petition for review challenged only the Board's denial of petitioner's motion to reconsider the denial of the first motion to reopen. *Ibid.*

The court declined to consider the merits of that claim, instead concluding that the fugitive disentitlement doctrine justified dismissing the petition. The court emphasized that petitioner acknowledged that he had received notice of the surrender order and that "to

date, he has failed to report as ordered." Pet. App. 3a. The court acknowledged that the Ninth Circuit had held that an alien's failure to report for removal did not make her a fugitive when her whereabouts were known during the judicial proceedings, see *Wenqin Sun* v. *Mukasey*, 555 F.3d 802 (2009), but concluded that the "purposes underlying the fugitive disentitlement doctrine" were best served by treating petitioner as a fugitive. Pet. App. 5a-6a. In particular, the court concluded, applying the doctrine to petitioner would "encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law." *Id.* at 6a. Moreover, the court noted, when an alien fails to comply with a surrender order, immigration officials must expend resources to apprehend him, even if he has not fled, and there is no assurance that he will remain "easy to find once his litigation options are exhausted." *Id.* at 5a. The court accordingly dismissed the petition for review. *Id.* at 6a.

6. a. DHS subsequently took petitioner into custody, where he remains.

b. In October 2011, the court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 19a-20a.

c. On December 12, 2011, this Court issued its decision in *Judulang*, holding that the Board's comparable-grounds approach for determining eligibility for Section 212(c) relief was arbitrary and capricious. 132 S. Ct. at 479. Shortly thereafter, petitioner filed a motion requesting that the court of appeals remand his case to the Board in light of *Judulang*. The court denied that motion. See 2/1/12 Order (No. 10-60300) (5th Cir.).

ARGUMENT

Petitioner contends (Pet. 11-35) that the court of appeals erred in holding that his petition for review should be dismissed under the fugitive disentitlement doctrine. Further review is not warranted. The court of appeals' decision was correct, and it accords with the near-unanimous view that courts may apply the fugitive disentitlement doctrine when an alien has failed to comply with a surrender order but has not actively absconded. Petitioner's contention that the courts of appeals are deeply divided on the issue is incorrect; only the Ninth Circuit has disagreed with the consensus view, and that disagreement does not warrant review. In addition, this case would be a poor vehicle for considering the questions presented because petitioner would receive little benefit from a ruling in his favor.

1. Petitioner first contends (Pet. 13-17, 26-30) that the court of appeals erred in applying the fugitive disentitlement doctrine even though petitioner's failure to comply with the surrender order was not accompanied by flight or escape. The court of appeals' decision was correct and consistent with the near-unanimous view of the other courts of appeals to consider the issue. Further review is not warranted.

a. The court of appeals did not abuse its discretion in dismissing the petition for review pursuant to the fugitive disentitlement doctrine. After DHS's initiation of removal proceedings, petitioner was required to post a bond in order to avoid being placed in custody during the pendency of the proceedings, and he was also informed that he was required to appear at DHS proceedings and to notify DHS of any changes in address. A.R. 201-204. After the Board upheld the immigration judge's order of removal, petitioner was ordered to sur-

render for removal on February 12, 2009. Pet. App. 10a. Petitioner did not surrender as ordered—despite his awareness of the surrender order—but instead chose to disregard his obligation to appear and to violate the terms of his bond. *Ibid.* At no time during the subsequent proceedings before the Board or the Fifth Circuit did petitioner surrender as ordered. See Pet. 10; Pet. App. 7a-9a. For a significant part of the administrative proceedings and the entirety of the proceedings before the Fifth Circuit, then, petitioner remained at large, in violation of the order to surrender and the bond order.

Notably, petitioner could have used administrative and judicial means to attempt to ensure that he would not be removed in February 2009, rather than simply disregarding the surrender order. After receiving the surrender order in January 2009, petitioner could have filed a petition for review of the Board's December 2008 order of removal—and having done so, he could have sought a judicial stay of removal pending the court's consideration of his petition. See generally *Nken* v. *Holder*, 556 U.S. 418, 425 (2009). Alternatively, petitioner could have sought a freestanding administrative stay of removal, which DHS may grant "for such time and under such conditions as [the agency] may deem appropriate." See 8 C.F.R. 241.6(a), 1241.6. Petitioner also could have filed his motion to reopen in the Board before the date on which he was ordered to surrender, and he could have sought an administrative stay of removal in connection with that motion. See 8 C.F.R. 1003.2(f). Instead of pursuing any of these avenues of relief, however, petitioner chose to disregard the surrender order entirely.

In these circumstances, the court of appeals appropriately applied the fugitive disentitlement doctrine in

dismissing petitioner's petition for review. As this Court has explained, the doctrine is animated by several concerns centering around the orderly administration of the judicial system. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239-242 (1993); see also *Degen* v. *United States*, 517 U.S. 820, 824-825 (1996). The doctrine rests in part on enforceability concerns: when an individual has escaped or remains at large in violation of a custodial order, there can be "no assurance that any judgment [the court] issue[s] would prove enforceable." *Ortega-Rodriguez*, 507 U.S. at 239-240. In addition, the doctrine "encourages voluntary surrenders," deters unlawful conduct, and "promotes the efficient, dignified operation" of appellate courts. *Id.* at 241. Finally, the doctrine reflects "a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment."[1] *Id.* at 240.

As the court of appeals correctly recognized, applying the fugitive disentitlement doctrine against "those who evade removal despite their address being known by DHS" furthers the purposes underlying the doctrine.[2] Pet. App. 6a. In particular, permitting applica

[1] Petitioner contends (Pet. 27-28) that the fugitive disentitlement doctrine is exclusively concerned with the enforceability and disentitlement rationales, but *Ortega-Rodriguez*'s discussion of the other policies served by the doctrine refutes that argument. 507 U.S. at 239-241. In *Estelle* v. *Dorrough*, 420 U.S. 534 (1975) (per curiam), moreover, the Court upheld a state statute requiring dismissal of escapees' appeals even after they had been recaptured, even though the enforceability and entitlement rationales were no longer implicated. See *Ortega-Rodriguez*, 507 U.S. at 241 (discussing *Estelle*).

[2] As petitioner acknowledges (Pet. 12), all courts of appeals to have addressed the antecedent question whether the fugitive disentitlement doctrine applies in immigration proceedings have concluded that it

tion of the doctrine "will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law." *Ibid.* It also will serve as an important deterrent against failing to comply with orders to surrender. Because the government "heavily relies on the word and voluntary compliance of numerous aliens within our borders," *Gao* v. *Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007), cert. denied, 552 U.S. 1096 (2008), deterring noncompliance is an important component of the administration of the immigration laws.

Contrary to petitioner's argument (Pet. 28-29), the doctrine's enforceability and disentitlement rationales are also implicated here even though petitioner did not actively flee. With respect to enforceability, petitioner's decision to disregard the surrender order rather than availing himself of administrative or judicial means of seeking a stay of removal raised significant concerns about whether petitioner would comply with court orders in the future. In other words, "it [was] far from clear that [petitioner would] choose to be at home when agents arrive[d] to arrest [him], and hard to see how the judiciary could tell whether to believe a promise to show up if the case should be decided adversely." *Sapoundjiev* v. *Ashcroft*, 376 F.3d 727, 729 (7th Cir. 2004). With respect to disentitlement, petitioner's failure to comply

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does. See, *e.g.*, *Sapoundjiev* v. *Ashcroft*, 376 F.3d 727, 728 (7th Cir. 2004) ("Every circuit that has considered the issue has concluded that the fugitive-disentitlement doctrine applies to immigration cases, and that aliens who avoid lawful custody forfeit judicial review."); *Antonio-Martinez* v. *INS*, 317 F.3d 1089 (9th Cir. 2003); *Bar-Levy* v. *INS*, 990 F.2d 33 (2d Cir. 1993); *Arana* v. *INS*, 673 F.2d 75 (3d Cir. 1982). Those decisions are correct, and as petitioner concedes (Pet. 25), this question does not warrant review.

with a surrender order differed from flight only in degree: petitioner violated his clear obligation to appear and the terms of his bond, forcing the government to deploy scarce resources to ensure compliance. That action was inconsistent with petitioner's reliance on the appellate process to challenge the Board's orders. As the *Gao* court observed, "we should not treat disregard of government directives as a norm," whether or not flight is involved. 481 F.3d at 176 (quotation marks, brackets, ellipses, and citation omitted).

Petitioner also argues (Pet. 26) that he should not be considered a "fugitive" for purposes of the doctrine simply because he did not abscond. To be sure, the Court has generally addressed the doctrine in the context of individuals who have absconded. See, *e.g.*, *Ortega-Rodriguez*, 507 U.S. at 239. But petitioner cites no Supreme Court decision holding that an individual must flee before being considered a fugitive.[3] To the contrary, it is beyond doubt that "one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts * * * whenever he is properly summoned." *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932). Petitioner's refusal to submit to DHS's authority to remove him pursuant to a removal order issued after a hearing unmistakably conveyed that he would comply with the administrative process only as he saw fit. And his continued failure to comply throughout the appellate process gave

[3] In *Degen*, in which an individual who lived in Switzerland and possessed dual Swiss and U.S. citizenship refused to travel to the United States for prosecution, the Court had no need to decide whether Degen was "a fugitive in all the senses of the word debated by the parties," because it concluded that the fugitive disentitlement doctrine would not bar his litigation of a forfeiture suit. 517 U.S. at 828.

rise to significant doubts as to whether he would comply with any order entered by the court. See *Sapoundjiev*, 376 F.3d at 729 ("The point of custody is to end the guessing game. That's why anyone who is told to surrender, and does not, is a fugitive.").

b. Petitioner contends (Pet. 13-17) that there is a well-developed split among the courts of appeals about the propriety of applying the fugitive disentitlement doctrine to aliens who disregard orders to surrender but do not also flee. Contrary to petitioner's argument, only the Ninth Circuit has deviated from the near-consensus that the fugitive disentitlement doctrine may apply in such situations. That disagreement does not merit review.

The Second, Sixth and Seventh Circuits, like the Fifth Circuit, have held that an appeal may be dismissed under the fugitive disentitlement doctrine when the alien has failed to comply with an order to surrender for removal, regardless of whether his whereabouts are known. See *Sapoundjiev*, 376 F.3d at 729; *Garcia-Flores* v. *Gonzales*, 477 F.3d 439, 442 (6th Cir. 2007); *Gao*, 481 F.3d at 176 ("[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.").

Petitioner argues (Pet. 13-16) that unpublished decisions from the Third, Eighth, and Eleventh Circuits conflict with the decision below. As an initial matter, unpublished decisions do not create binding circuit precedent and therefore ordinarily do not give rise to circuit conflicts warranting this Court's review. In any event, these decisions did not hold, as petitioner suggests, that the fugitive disentitlement doctrine may never apply when the alien has refused to appear but his where-

abouts are known. In *Yan Yun Ye* v. *Attorney General*, 383 Fed. Appx. 113, 116 (3d Cir. 2010), the court concluded that the factual circumstances surrounding the alien's failure to appear were insufficiently clear to permit the court to review the Board's application of the fugitive disentitlement doctrine. The court observed that the Board's application of the doctrine might be more "controversial" if it turned out that the alien had actually "presented herself to authorities" at some point during the proceedings.[4] *Ibid.* In *Xiang Feng Zhou* v. *United States Attorney General*, 290 Fed. Appx. 278, 280-281 (11th Cir. 2008), the court credited the alien's representation that he had not received notice of the surrender order and therefore declined to dismiss the petition for review. Finally, in *Nnebedum* v. *Gonzales*, 205 Fed. Appx. 479, 480-481 (8th Cir. 2006), the court denied a motion to dismiss the petition for review based on the fugitive disentitlement doctrine, observing that there was no evidence that the alien was "hiding from authorities or cannot be located." The circumstances on which the government based its assertion of the doctrine are unclear from the order, and in any event, the court did not purport to establish a general rule concerning when the doctrine may be applied to aliens who do not abscond. These three unpublished decisions thus do not conflict with the decision below.

Petitioner next relies (Pet. 15-16) on *Martin* v. *Mukasey*, 517 F.3d 1201 (10th Cir. 2008), but that decision is also consistent with the decision below. In ad-

[4] Petitioner also cites *Arana* v. *INS*, 673 F.2d 75, 77 (3d Cir. 1982), but there the court simply applied the doctrine to an alien who had both failed to appear and concealed his whereabouts. The court did not set forth any general rule about when the doctrine may support dismissing an appeal.

dressing whether the alien was a fugitive, the Tenth Circuit stated that "[a]lthough an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice." *Id.* at 1203 (quoting *Bar-Levy* v. *INS*, 990 F.2d 33, 35 (2d Cir. 1993); citing *Gao*, 481 F.3d at 176, and *Sapoundjiev*, 376 F.3d at 729). The court went on to observe that in addition to failing to appear, the alien had concealed his whereabouts, and "[g]iven that other courts have found each of these individual failures sufficient to constitute fugitive status in an immigration appeal, we have no reservation about concluding that the two failures together render Mr. Martin a fugitive." *Id.* at 1203-1204. The Tenth Circuit's reasoning thus suggests that, if anything, it would adopt the majority view in an appropriate case.

Finally, petitioner relies on the Ninth Circuit's decision in *Wenqin Sun* v. *Mukasey*, 555 F.3d 802 (2009). In that case, the alien had failed to comply with an order to surrender. The Ninth Circuit declined to treat the alien as a fugitive, explaining that "[r]egardless of Sun's conduct at the time she was ordered to report for removal, she is not now a fugitive from justice," *id.* at 804, and she "ha[d] not been a fugitive at least since the time she first filed a petition for review with this court," *id.* at 805. The court's apparent conclusion that an alien, despite her refusal to comply with a DHS surrender order, ceases to be a fugitive by filing a petition for review if her "whereabouts are known to her counsel, DHS, and this court," *ibid.*, is inconsistent with the decision below. The Ninth Circuit's reasoning, however, was premised on the mistaken assumption that "[n]o court has ever applied the doctrine to an alien whose whereabouts are

known and who has not fled from custody." *Id.* at 804. In fact, several courts had already done so. See *Gao*, 481 F.3d at 175 (application of doctrine was based on fact that alien "never reported for custody" and "neglected to contact immigration authorities" while "continu[ing] to carry on his life"); *Sapoundjiev*, 376 F.3d at 729 (noting that "immigration officials know where the family lives"); *Garcia-Flores*, 477 F.3d at 442 (basing application solely on failure to appear, even after alien was taken into custody). The Ninth Circuit also failed to consider the purposes of the fugitive disentitlement doctrine and the extent to which an alien's continuing refusal to comply with a surrender order implicates those purposes. As a result, it is possible that the Ninth Circuit might reconsider its position should the opportunity arise, and any disagreement between *Wenqin Sun* and the decision below does not merit review.

2. Petitioner next contends (Pet. 17-19, 31-33) that the court of appeals erred in dismissing his appeal under the fugitive disentitlement doctrine even though he "is now in custody." Pet. 31. Petitioner argues that a court is not justified in dismissing an appeal when the alien has been returned to custody. Pet. 32; cf. *Ortega-Rodriguez*, 507 U.S. at 249 (reversing dismissal of appeal under fugitive disentitlement doctrine where defendant escaped during district court proceedings and was recaptured "before invocation of the appellate system"). This case presents no opportunity to resolve that question, however, because petitioner was not taken into custody until after the court of appeals had issued its decision. The court therefore had no occasion to consider whether dismissal would ever be appropriate in a situation in which the alien surrenders or is taken into custody during the pendency of the appeal. As a result,

although petitioner is correct that the Seventh Circuit has observed that "the fugitive-disentitlement doctrine applies only while the criminal remains at large," *Sapoundjiev*, 376 F.3d at 730, the Fifth Circuit's dismissal of petitioner's case does not conflict with that observation.[5]

3. Petitioner next argues (Pet. 19-21, 33-35) that the Fifth Circuit treated the fugitive disentitlement doctrine as a jurisdictional bar, thereby disregarding this Court's characterization of the doctrine as "always discretionary" in application. *Ortega-Rodriguez*, 507 U.S. at 250 n.23. Once again, petitioner's argument rests on an incorrect understanding of the Fifth Circuit's decision.

Petitioner's argument that the court treated the doctrine as jurisdictional apparently rests on the court's statement that "we are *barred* from further review of [petitioner's] petition." Pet. App. 6a (emphasis added); Pet. 33. But as petitioner acknowledges (Pet. 19), the court of appeals correctly stated that "[t]he doctrine is an equitable one that a court exercises in its discretion." Pet. App. 4a (internal quotation marks and citation omitted). The court went on to consider the purposes of the doctrine, and concluded that "[a]pplying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law." *Id*. at 6a. The court's use of the phrase "barred from further review" to describe the consequence of its conclusion that the fugitive disentitlement doctrine applied therefore does not suggest that the court viewed the

[5] Petitioner also relies on *Nen Di Wu* v. *Holder*, 646 F.3d 133, 136 (2d Cir. 2011), but that case did not concern an alien who surrendered or was taken into custody during the pendency of his appeal.

doctrine as jurisdictional. And although petitioner suggests that the court did not devote sufficient attention to his individual circumstances, this Court has made clear that "courts may exercise [their] discretion by developing generally applicable rules to cover specific, recurring situations." *Ortega-Rodriguez*, 507 U.S. at 250 n.23.

The court of appeals' decision is thus consistent with the decisions on which petitioner relies (Pet. 20-21), all of which state—like the decision below—that the fugitive disentitlement doctrine is discretionary. Petitioner's argument is at bottom a disagreement with the court's exercise of its discretion, but that fact-bound issue does not warrant review.

4. Petitioner argues (Pet. 21-24) that the application of the fugitive disentitlement doctrine is a recurring and exceptionally important question because "[n]early 400,000 people were deported from the United States in fiscal year 2011." Pet. 21. Petitioner rightly does not assert, however, that all of those individuals are affected by the fugitive disentitlement doctrine. Nor does he attempt to demonstrate that the doctrine is regularly employed in removal proceedings. To the contrary, the paucity of circuit-court decisions concerning fugitive disentitlement strongly suggests that the issue does not arise with any frequency. When it does arise, courts are largely in agreement over the doctrine's applicability, and in any event, courts are free to exercise their discretion in individual cases to consider an alien's petition for review despite his refusal to comply with a surrender order. In these circumstances, the questions presented are not sufficiently important to warrant review.

5. This case is a poor vehicle for considering the questions presented because petitioner would receive

little tangible benefit from a ruling in his favor. If this Court were to hold that the Fifth Circuit erred in dismissing petitioner's petition for review, on remand the court of appeals would adjudicate the petition for review. But as the court of appeals observed, the petition for review challenges only the Board's denial of petitioner's motion to reconsider the Board's September 2009 denial of his first motion to reopen. See Pet. App. 4a n.1 (explaining that petitioner did not file a timely petition for review of the Board's September 2009 denial of petitioner's first motion to reopen, and that petitioner had abandoned any challenge to the Board's denial of his second motion to reopen).

In the reconsideration decision that petitioner challenges in his petition for review, the Board "decline[d] to revisit" the two grounds on which it had denied petitioner's first motion to reopen proceedings in September 2009: first, that the fugitive disentitlement doctrine warranted denial of the motion to reopen, and second, in the alternative, that because petitioner had failed to "report as ordered for removal," reopening was not warranted "in the exercise of discretion." Pet. App. 9a. The Fifth Circuit would review the Board's decision for abuse of discretion, see *Guevara* v. *Gonzales*, 450 F.3d 173 (2006), a "standard [that] is especially deferential in light of the BIA's broad latitude in reopening and reconsidering cases," *Victor* v. *Holder*, 616 F.3d 705, 709 (7th Cir. 2010). Given the Board's broad discretion in considering motions to reconsider, see 8 C.F.R. 1003.2(a), the Board's express invocation of its discretion as an alternative ground for denying reconsideration, and the highly deferential nature of the Fifth Circuit's review, it is extremely unlikely that the Fifth Circuit would conclude that the Board abused its discretion. Petitioner

would therefore be unlikely to receive any concrete benefit from this Court's review.

For the same reasons, a favorable decision in this case also would not enable petitioner to take advantage of this Court's recent decision in *Judulang* v. *Holder*, 132 S. Ct. 476 (2011).[6] But see Pet. 10-11, 34. Although the Board concluded that petitioner was not eligible for Section 212(c) relief based on the comparable-grounds approach that this Court abrogated in *Judulang*, Pet. App. 12a-15a, petitioner has forfeited any challenge to that ruling. Petitioner did not seek judicial review of the Board's determination that he was not eligible for Section 212(c) review, and as a result of his failure to comply with the surrender order and the Board's consequent denial of his motions to reopen and reconsider on discretionary grounds, the Board's application of the comparable-grounds analysis is not—and could not be—at issue in petitioner's Fifth Circuit petition for review. *Id.* at 4a n.1; Pet. C.A. Br. 2; Gov't C.A. Br. 9-10. As a result, even if this Court were to rule in petitioner's favor on the fugitive disentitlement issue and remand for consideration of the petition for review, the court of appeals would have no occasion to consider the comparable-grounds issue.

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[6] Petitioner does not contend that this Court should grant certiorari, vacate the Fifth Circuit's decision, and remand in light of *Judulang*. For the reasons stated in the text, there is no warrant to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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