No. 20-1390

IN THE

Supreme Court of the United States

MARIO NELSON REYES-ROMERO,

Petitioner,

v.

MERRICK B. GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Lawrence D. Rosenberg
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Adrian N. Roe
ROE & SIMON LLC
428 Blvd. of the Allies
Pittsburgh, PA 15219

Eli M. Temkin
JONES DAY
90 South Seventh St.
Minneapolis, MN 55402

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

The Court should grant certiorari to resolve a circuit split over the scope of federal courts' authority to adjudicate immigration cases *nunc pro tunc*.

Government agents forged Petitioner Reyes's immigration forms in 2011, depriving him of a hearing under favorable Third Circuit law. *See Alaka v. Att'y Gen.*, 456 F.3d 88 (3d Cir. 2006). Under *Alaka*, Reyes's earlier conviction could not qualify as a particularly serious crime and thus could not bar him from immigration relief. When Reyes eventually received an immigration hearing in 2018, he asked the agencies to apply *Alaka*—still good Third Circuit law at the time—but they refused.

Reyes similarly asked the Sixth Circuit to adjudicate his case *nunc pro tunc*, applying *Alaka*, because that case would have governed absent the agents' misconduct. The Sixth Circuit ruled that Reyes's "claim necessarily fail[ed]" because the *nunc pro tunc* doctrine did not allow it to apply *Alaka*. App. 12a. This was a legal determination; the court did not weigh the equities. The Government does not dispute that the facts warrant equitable relief. The only question, then, is whether a federal court has power to grant this relief *nunc pro tunc*.

The courts of appeals are divided. The Government does not dispute this split. A plurality of circuits holds that *nunc pro tunc* adjudication has long been available when the equities so require. *See, e.g.*, *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (Sotomayor, J.). Two circuits have adopted a narrow state-law standard, and the court below limited the doctrine without support.

The plurality approach is correct and would have allowed relief here. In its primary argument, the Government claims *Alaka* was wrongly decided or that it somehow could have avoided *Alaka* in 2011—specifically, the Government says the agency could have simply chosen not to apply *Alaka* in 2011. But that all misses the point: *Alaka* was binding federal case law in the Third Circuit when Reyes was detained there in 2011. Failing to apply *Alaka* would allow the agency to evade judicial precedent—offending the separation of powers, usurping federal courts' constitutional role, and upending reliance interests. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1147 (10th Cir. 2016) (Gorsuch, J.); *see also id.* at 1149–58 (Gorsuch, J., concurring). The *nunc pro tunc* doctrine gives federal courts a mechanism to rein in the agency and apply the law otherwise in effect.

Finally, the Government does not dispute that the question here arises often and is important to applicants and the integrity of our immigration system. This case is an excellent vehicle for review because a federal court already found the facts regarding agency misconduct in forging Reyes's immigration forms and depriving him of a hearing, and that Reyes likely would have won immigration relief if *Alaka* had governed his hearing. The facts thus cleanly frame the legal issue that divides the courts.

ARGUMENT

I. The Courts Of Appeals Are Divided 4-2-2 On The Scope Of Federal Courts' Authority To Grant *Nunc Pro Tunc* Relief In Immigration Cases.

A. The Government does not dispute that courts of appeals split 4-2-2 regarding federal courts' *nunc pro tunc* authority in immigration cases. Numerous courts recognize this split. Pet. 33 (citing *Lupera-Espinoza v. Att'y Gen.*, 716 F.3d 781, 787–88 n.9 (3d Cir. 2013); *Romero-Rodriguez v. Gonzales*, 488 F.3d 672, 674, 678 (5th Cir. 2007); *Fernandes Pereira v. Gonzales*, 417 F.3d 38, 46–47 (1st Cir. 2005); *Fernandes Pereira v. Gonzales*, 436 F.3d 11, 13–14 (1st Cir. 2006) (Lipez, J., dissenting from denial of rehearing en banc); *Compere v. Riordan*, 368 F. Supp. 3d 164, 171 (D. Mass. 2019); *Garcia v. U.S. Citizenship & Immigr. Servs.*, 168 F. Supp. 3d 50, 67–68 (D.D.C. 2016)).

On one end, the plurality takes a broad, flexible approach: "Where *nunc pro tunc* relief is not barred by statute, courts have defined the circumstances in which it is appropriate to award such relief in broad and flexible terms."[1] *Edwards v. INS*, 393 F.3d 299, 310 (2d Cir. 2004). *Nunc pro tunc* "relief should be available whenever necessary 'to put the victim of agency error in the . . . position [he or she] would have occupied but for the error.'" *Id.* (alterations in original)

[1] No one suggests any statutory barrier to *nunc pro tunc* relief here.

(quoting *Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995)).[2]

On the other end, two circuits take the narrowest view. The divided First Circuit has adopted "the limits of the *nunc pro tunc* doctrine under Massachusetts law" by which *nunc pro tunc* relief "may only be used to correct inadvertent or clerical errors." *Fernandes Pereira*, 417 F.3d at 47. The Fifth Circuit has also endorsed this narrow state-law approach. *Romero-Rodriguez*, 488 F.3d at 677.

In between, the Sixth and Eighth Circuits apply a different standard. They recognize that "the equitable power to grant orders *nunc pro tunc* is conceptually broad" but hold it is much more limited in practice. Pet. 23–25; App. 11a–12a.

This split was outcome-determinative here. The Sixth Circuit did not weigh the facts or reach the equities. Instead, it denied relief because it held that *nunc pro tunc* relief was categorically unavailable, and that only a change in Sixth Circuit law could allow *nunc pro tunc* adjudication. In contrast, the Second, Third,

---

[2] *See also* Pet. 16–21 (collecting cases from the Second, Third, Seventh, and Ninth Circuits). The Government claims *Salgado-Diaz* is not a *nunc pro tunc* case. Opp. 21 n.3 (discussing *Salgado-Diaz v. Gonzales*, 395 F.3d 1158 (9th Cir. 2005), *as amended* (Mar. 10, 2005)). *Salgado-Diaz* held, however, that *nunc pro tunc* relief would be available based on agency misconduct: "If [petitioner] establishes that his arrest was unconstitutional, . . . [or] that he was involuntarily removed from the country during his pending deportation proceedings, . . . [he] will be entitled to the relief available at the time of his original hearing, including suspension of deportation under former [statute], as if the arrest and expulsion had not occurred." 395 F.3d at 1167–68.

Seventh, and Ninth Circuits do not impose these limitations; their legal standard allows them to consider the equities broadly in deciding whether *nunc pro tunc* relief is warranted. It is theoretically possible those courts might have denied relief here based on the equities (although the equities strongly favor Reyes)—but they at least would have considered the equities. The Sixth Circuit did not.

B. Unable to deny the split, and apparently endorsing the plurality's broad approach, the Government points out irrelevant factual differences across cases. Opp. 19–23. But this case turns on the legal standard, and the Sixth Circuit applied the wrong one.

Moreover, the Government's discussion of cases in fact demonstrates that *nunc pro tunc* relief is broad and flexible to advance the equities. *Id.* Whether considering the law retroactively or the facts retroactively, Opp. 19–20, the point is to adjudicate as though at an earlier time—to put the applicant in the position he would have occupied absent agency error or misconduct. *See Edwards*, 393 F.3d at 310.

II. The Court Below Added To The Split By Erroneously Limiting Its Authority To Grant *Nunc Pro Tunc* Relief.

A. The Government does not dispute that the facts here warrant *nunc pro tunc* relief if such relief is available. *See* Pet. 30–31. Nor could it, given the DHS agents' deception in forging Reyes's signature, depriving him of statutory process, and "railroad[ing] Reyes[] out of the country." App. 100a. The only question, then, is whether a federal court has the equitable authority to grant *nunc pro tunc* relief by applying the earlier law.

The plurality is correct that federal courts have power to grant *nunc pro tunc* relief when the equities so require, including in cases of agency misconduct. *See* Pet. 25–31. The "far-reaching equitable remedy of granting relief *nunc pro tunc* in certain exceptional cases has long been available under immigration law." *Iavorski*, 232 F.3d at 130 n.4 (Sotomayor, J.). This longstanding doctrine—never objected to by Congress—is consistent with this Court's equitable principles and decades of federal court and agency precedent. *See* Pet. 26–30.

Like the court below, the Government does not identify any authority supporting the Sixth Circuit's novel restrictions on the *nunc pro tunc* doctrine. Nor does the Government advocate for the First and Fifth Circuit's adoption of a narrow state-law *nunc pro tunc* standard. Instead, the Government seems to agree with the plurality—and with Reyes—that *nunc pro tunc* adjudication is a longstanding practice and that federal courts "routine[ly] . . . use . . . the *nunc pro tunc* power to apply an earlier version of the INA itself in a way that benefits the noncitizen." Opp. 20–21; *see also* Opp. 11.

Also like the court below, the Government offers no authority for its assertion that a federal court's *nunc pro tunc* authority does not allow the court to apply earlier law if that law comes from another circuit. Opp. 13–14. It proposes without support that federal courts' supposedly broad, far-reaching equitable power is actually limited to just the court's own law.

The lack of authority is no surprise. The point of *nunc pro tunc* adjudication is to achieve equity. Equity allows a court to apply the law that would have applied

absent agency misconduct. The principle is to avoid harming an applicant—and rewarding the Government—by applying earlier law. Logic does not limit this rule to a given court's underlying law. Neither does any cited authority.

Relatedly, the Government repeatedly claims that Reyes asks to apply the law of a "different" place. Opp. 13, 16, 18, 19, 20, 21. Not so. Reyes seeks to apply the law of the same place—the place where his claims should have been adjudicated in 2011 but for Government misconduct. This is hardly an "unfair advantage," as the Government claims. Opp. 14.

B. Instead of defending the panel's standard or advocating for either of the minority approaches to *nunc pro tunc* authority, the Government throws out several speculative theories of how the agencies could have dodged Third Circuit law in 2011 immigration proceedings.

1. In its lead argument, the Government claims that the law that would have governed Reyes's claims in 2011—then-prevailing Third Circuit law under *Alaka*—was mistaken. Opp. 12–13. This argument misses the point: The Government should not be able to deprive Reyes of that federal case law by forging his forms. The *nunc pro tunc* doctrine gives federal courts a longstanding equitable mechanism to apply the earlier law, even if a politically accountable agency may prefer a different interpretation. *Cf. Gutierrez-Brizuela*, 834 F.3d at 1146 (Gorsuch, J.); *see also id.* at 1149–58 (Gorsuch, J., concurring).

2. The Government speculates that perhaps the Third Circuit could have overruled *Alaka* in Reyes's case. Opp. 14. But the court continued to apply *Alaka*'s

holding long after 2011. *See, e.g.*, *Madrane v. Att'y Gen.*, 648 F. App'x 271, 275 (3d Cir. 2016) ("In this Circuit, an offense must be an aggravated felony to constitute a particularly serious crime.") (citing *Alaka*). And, regardless, *Alaka* was binding Third Circuit law at the time.

3. The Government further speculates it could have moved Reyes such that his 2011 immigration proceedings would not have happened within the Third Circuit. Opp. 14–15. But there is no basis in fact to think Reyes's proceedings would have occurred elsewhere. Reyes was living in New Jersey. App. 3a. He was detained in New Jersey. App. 3a–4a. The Government initiated immigration proceedings in New Jersey. App. 153a. It is rather remarkable that the Government asks the Court to reject equitable relief based on a hypothetical of the agency simply shipping a person to a more government-friendly jurisdiction, with the effect of avoiding controlling circuit precedent.

4. Finally, the Government goes further and argues that the agencies—even within the Third Circuit in 2011—simply could have chosen not to apply *Alaka*. Opp. 15–16. The Government relies on *In re M-H-*, where the agency tried that. *Id.* (citing 26 I. & N. Dec. 46, 49 (BIA 2012)). The Third Circuit did not approve: "The IJ and BIA's blatant disregard of the binding regional precedent [in *Alaka*] [wa]s ultra vires." *Bastardo-Vale v. Att'y Gen.*, 934 F.3d 255, 259 n.1 (3d Cir. 2019) (en banc). The court rejected the argument that "*Brand X* . . . provide[d] the IJ or BIA the authority to ignore the applicable regional circuit's precedent," because the *Alaka* court "viewed the statute as clear" and

"unambiguous." *Id.* (discussing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

Bastardo-Vale did not mince words. Yet the Government still claims the agencies could have just ignored *Alaka* in the same situation. Allowing agencies to do so would undermine federal judicial authority and put people in the untenable situation of not being able to rely on federal courts' "on-point judicial precedent (maybe even Supreme Court precedent) because of its potential susceptibility to revision by an executive agency." *Gutierrez-Brizuela*, 834 F.3d at 1147 (Gorsuch, J.); *see also id.* at 1149–58 (Gorsuch, J., concurring).

The Government's argument illustrates the role of *nunc pro tunc* adjudication in curbing agency overreach. The separation of powers assigns federal courts, not administrative agencies, the role of saying what the law is—at least when the law is unambiguous, as it was in *Alaka*. *Bastardo-Vale*, 934 F.3d at 259 n.1. In other situations where the law is ambiguous, *Brand X* holds that an administrative agency may effectively overrule a federal court. 545 U.S. at 982. Justices of this Court—including the decision's author, Justice Thomas—have repeatedly called to revisit *Brand X* for violating the separation of powers, and raising due process and equal protection concerns, by usurping the federal courts' role and turning the executive agency into "some sort of super court of appeals." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring); *see also Baldwin v. United States*, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from the denial of certiorari). This case would allow the Court to resolve the circuit split and clarify that, even when an executive agency tries to overrule a federal court, the court has

the power to apply earlier law when warranted by the equities.

III. The Question Presented Is Undisputedly Important And Recurring, And This Case Cleanly Frames The Issue.

A. The Government does not dispute that questions about federal courts' *nunc pro tunc* authority in immigration cases are nationally important and recurring. Indeed, the Government concedes that *nunc pro tunc* issues arise "routine[ly]" in immigration cases. Opp. 20–21.

Of course, these questions are of the highest importance to applicants. They are also critical to the integrity of our nation's immigration system, the administrative agencies that apply it, and our constitutional separation of powers. The Government asserts that it can deprive an applicant of his statutory right to immigration proceedings and then, if caught, dodge a federal court ruling that otherwise would have applied. Agency overreach like this warrants review.

B. The Government repeatedly suggests that the court of appeals' ruling rests on alternative holdings that could stand even without the particularly-serious-crime determination—that is, even if the court had applied *Alaka nunc pro tunc*. Opp. 24–25. However, the court's particularly-serious-crime determination is central to its asylum and withholding-of-removal rulings. Only the BIA's decision was before the Sixth Circuit; the IJ's determinations were not. *E.g.*, *Raja v. Sessions*, 900 F.3d 823, 826–27 (6th Cir. 2018); *see also* 3B Am. Jur. 2d Aliens & Citizens § 1730 (Aug. 2021 Update) (collecting cases) ("The court of appeals

reviews only the decision of the [BIA] except to the extent that it expressly adopts the immigration judge's opinion or reasoning."). The BIA's asylum and withholding-of-removal rulings rely entirely on the particularly-serious-crime determination. App. 22a–23a. As a result, the Sixth Circuit's denial of *nunc pro tunc* relief was necessary to its holding.[3]

C. The Government argues that the facts of this case make it a poor vehicle. On the contrary: The facts make this an excellent vehicle because they cleanly frame the legal issue of federal courts' *nunc pro tunc* power in immigration cases. Questions as to federal courts' *nunc pro tunc* authority come up often, as the Government recognizes, but many cases would not present a clean vehicle because it is not clear whether the issue is outcome-determinative. Here, it is. A federal court has already concluded Reyes suffered prejudice, under *Alaka*, and that he likely would have won immigration relief under the earlier law. *See generally* App. 64a–223a.[4] And there is no dispute that the DHS

[3] Reyes challenges only the asylum and withholding-of-removal rulings, either of which would provide him immigration relief. The Government's extended discussion of cancelation of removal and deferral of removal under the Convention Against Torture, Opp. 7–8, 24–25, is irrelevant.

[4] The district court made these findings in two decisions: one dismissing Reyes's indictment and the other granting fees. The Government now tries to cast doubt on the facts by citing the Third Circuit's reversal of the fee opinion. Opp. 4 n.2. But the district court found the facts about the 2011 immigration proceedings in its dismissal ruling, which stands undisturbed. App. 134a–223a. Moreover, the Third Circuit fee opinion addressed whether there was prosecutorial misconduct in 2017–2018. As to the 2011 removal of Reyes, the Third Circuit "share[d] the District Court's view" that proceedings were improper. *United States*

agents' misconduct tilts the equities in Reyes's favor. The only question is whether a federal court has the equitable authority to grant *nunc pro tunc* relief. The Court should take this opportunity to resolve the split.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

August 31, 2021

Respectfully submitted,

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Lawrence D. Rosenberg
Counsel of Record
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Adrian N. Roe
ROE & SIMON LLC
428 Blvd. of the Allies
Pittsburgh, PA 15219

Eli M. Temkin
JONES DAY
90 South Seventh St.
Minneapolis, MN 55402

Counsel for Petitioner

---

v. Reyes-Romero, 959 F.3d 80, 108 (3d Cir. 2020), *cert. denied*, 209 L. Ed. 2d 750 (May 17, 2021). Even the Government admitted as much. *Id.*