No. 20-1390

In the Supreme Court of the United States

MARIO NELSON REYES-ROMERO, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner, who is a noncitizen, entered the United States without inspection, was placed in administrative removal proceedings in Pennsylvania in 2011, and was found removable and removed from the United States. Petitioner later reentered the United States without inspection, and a federal court found that his 2011 administrative removal proceedings were invalid. The government initiated new removal proceedings in 2018 in Ohio. The question presented is:

Whether the immigration judge and the Board of Immigration Appeals that oversaw and reviewed petitioner's new removal proceedings in the Sixth Circuit were required, under the *nunc pro tunc* doctrine, to apply a 2011 Third Circuit decision that has since been overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is not published in the Federal Reporter but is reprinted at 832 Fed. Appx. 426. The decisions of the Board of Immigration Appeals (Pet. App. 18a-24a) and the immigration judge (Pet. App. 25a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2020. The petition for a writ of certiorari was filed on April 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a citizen of El Salvador who entered the United States unlawfully and was removed from the United States in 2011 following a state-law conviction

for aggravated assault. Pet. App. 3a-4a. He reentered the United States without inspection in 2012. *Id.* at 4a. In 2018, a federal district court dismissed an indictment charging petitioner with unlawful reentry on the ground that the 2011 removal had been unlawful. *Ibid.* The government initiated new removal proceedings. *Id.* at 5a. An immigration judge (IJ) found that petitioner was present in the United States without admission or parole and denied petitioner's requests for asylum, withholding of removal, deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 113, and cancellation of removal. Pet. App. 25a-62a. The Board of Immigration Appeals (Board) dismissed his appeal. *Id.* at 18a-24a. The court of appeals denied his petition for review. *Id.* at 3a-13a.

1. Petitioner entered the United States without inspection in 2004. See Pet. App. 3a. In 2008, he stabbed an unarmed man in the back with a knife during an altercation. *Ibid.*; Administrative Record (A.R.) 1913. A New Jersey grand jury charged petitioner with two counts of aggravated assault, one count of unlawfully possessing a weapon, and one count of possessing a weapon for an unlawful purpose, all in violation of New Jersey law. A.R. 1913-1914. Pursuant to a plea agreement, petitioner pleaded guilty to second-degree aggravated assault and the remaining charges against him were dismissed. Pet. App. 3a-4a; A.R. 1909. The statute under which he was convicted provided that a "person is guilty of aggravated assault if he * * * [a]ttempts to cause serious bodily injury to another, or causes such injury purposely or knowingly[,] or under circumstances

manifesting extreme indifference to the value of human life recklessly causes such injury." N.J. Stat. Ann. § 2C:12-1(b)(1) (West Supp. 2007). Petitioner was sentenced to three years of imprisonment, to be followed by three years of parole supervision. A.R. 1909-1910.

A noncitizen who is not a lawful permanent resident and who has been convicted of an "aggravated felony" may be found removable in administrative removal proceedings—that is, without a hearing before an IJ.[1] See 8 U.S.C. 1228(b)(1); 8 C.F.R. 238.1(b)(2)(i). In 2011, after petitioner was released from New Jersey custody, the Department of Homeland Security (DHS) placed petitioner in administrative removal proceedings under Section 1228, on the ground that his state conviction constituted an aggravated felony. Pet. App. 136a-137a; see 8 U.S.C. 1101(a)(43)(F), 1228(b)(1). DHS removed petitioner to El Salvador in 2011, but he reentered the United States without inspection the following year. Pet. App. 4a.

2. In 2017, a federal grand jury in the United States District Court for the Western District of Pennsylvania returned an indictment charging petitioner with unlawful reentry, in violation of 8 U.S.C. 1326. See Pet. App. 4a. The district court granted petitioner's motion to dismiss the indictment under 8 U.S.C. 1326(d), concluding that petitioner's 2011 removal had been invalid and that he met the remaining requirements for dismissal under that provision. Pet. App. 135a-223a. The court noted that it "reache[d] no conclusion as to whether [petitioner] can, should, or will now be removed from the United States in a manner consistent with federal law."

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

Id. at 136a; see *id.* at 216a ("Whether [petitioner] will be subject to new proceedings aimed at now effectuating his removal from the United States in conformity with the law is a matter in the next instance for the administrative immigration process.").[2]

3. a. In 2018, DHS initiated removal proceedings against petitioner in Cleveland, Ohio, because petitioner was being held in a detention facility in Ohio. Pet. App. 5a, 26a. Petitioner conceded that he was present in the United States without admission or parole but requested asylum, withholding of removal, deferral of removal under the CAT, and cancellation of removal. *Id.* at 27a.

After conducting three individual hearings, at which petitioner and numerous witnesses testified, the IJ found that petitioner was removable and was not entitled to any of the forms of relief that he requested. Pet. App. 25a-61a. The IJ initially determined that petitioner's conviction for New Jersey aggravated assault made him removable under 8 U.S.C. 1182(a)(2)(A)(i)(I),

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[2] Following the dismissal of the unlawful-reentry charge, the district court granted petitioner attorney's fees and costs under the Hyde Amendment, 18 U.S.C. 3006A note. *United States* v. *Reyes-Romero*, 364 F. Supp. 3d 494 (W.D. Pa. 2019). The Third Circuit reversed the award of attorney's fees and costs, *United States* v. *Reyes-Romero*, 959 F.3d 80 (2020), and this Court denied certiorari, No. 20-718 (May 17, 2021). That district court decision is reproduced at Pet. App. 66a-123a, and petitioner repeatedly relies on that decision in this Court, see, *e.g.*, Pet. 8-10, 30. But the Third Circuit reversed the district court's decision and explicitly repudiated many of the district court's factual findings on which petitioner relies in this Court. Compare, *e.g.*, Pet. 10, 30 (quoting the district court's criticism of the DHS officers' testimony), with *Reyes-Romero*, 959 F.3d at 103 (finding that "while we recognize certain weaknesses in the officers' testimony, we discern no basis in the record to conclude that the officers were deliberately perjuring themselves").

which provides that "any alien convicted of * * * a crime involving moral turpitude * * * is inadmissible." Pet. App. 40a-42a. The IJ explained that "[a] crime involves moral turpitude when it requires reprehensible conduct that is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,'" *id.* at 41a (quoting *In re Solon*, 24 I. & N. Dec. 239, 240 (B.I.A. 2007)), and "a crime involving moral turpitude must also require a 'culpable mental state,' including specific intent, deliberateness, willfulness, or recklessness," *ibid.* (quoting *In re Silva-Trevino*, 26 I. & N. Dec. 826, 834 (B.I.A. 2016)). Because a conviction for New Jersey aggravated assault "require[d] that [petitioner] attempted to cause serious bodily injury, knowingly caused serious bodily injury, or recklessly caused serious bodily injury," the IJ found that it was "a categorical match for a crime involving moral turpitude." *Id.* at 42a.

Turning to petitioner's applications for relief from removal, the IJ found that petitioner and his witnesses were both credible and generally consistent. Pet. App. 43a-44a. The IJ determined, however, that petitioner was not entitled to asylum for three independent reasons. *Id.* at 44a-56a. *First*, the IJ found that petitioner is statutorily barred from receiving asylum because he was convicted of a "particularly serious crime" and thus "constitutes a danger to the community of the United States," 8 U.S.C. 1158(b)(2)(A)(ii) and (iii). See Pet. App. 45a-53a. The IJ noted that, although the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that a noncitizen "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime," 8 U.S.C.

1158(b)(2)(B)(i), that provision is not exclusive, and the INA permits the agency to find that other crimes are also particularly serious. See Pet. App. 45a-46a (citing *In re M-H-*, 26 I. & N. Dec. 46 (B.I.A. 2012)). The IJ explained that, to determine whether a crime that is not an aggravated felony is a particularly serious crime, an IJ "must examine the nature of the conviction, the circumstances and underlying facts of the conviction, and the type of sentence imposed." *Id.* at 46a. Applying that framework, the IJ found that petitioner's conviction for aggravated assault was a particularly serious crime, and thus petitioner was not entitled to asylum. *Id.* at 51a-52a. The IJ rejected petitioner's contention that the IJ was required to follow an out-of-circuit case that had found that only an aggravated felony qualified as a particularly serious crime, see *Alaka* v. *Attorney Gen.*, 456 F.3d 88, 104 (3d Cir. 2006), overruled by *Bastardo-Vale* v. *Attorney Gen.*, 934 F.3d 255 (3d Cir. 2019) (en banc). The IJ found that the Board's contrary "interpretation * * * remains valid" and that petitioner's "removal proceedings are within the jurisdiction of the Sixth Circuit, where the" Board's "approach is utilized." Pet. App. 52a-53a. *Second*, the IJ found that petitioner was not entitled to asylum because he failed to "establish by a preponderance of the evidence that he has a well-founded fear of persecution on account of a protected ground if he returns to El Salvador or Honduras." *Id.* at 55a; see 8 U.S.C. 1101(a)(42)(A); 8 U.S.C. 1158(b)(1). And *third*, recognizing that the decision whether to grant asylum is ultimately discretionary, see 8 U.S.C. 1158(b)(1)(A); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987), the IJ determined that, "even if [petitioner] were otherwise eligible" for asylum, the IJ "would find that [petitioner] does not

merit relief in the exercise of discretion, due to the nature of his aggravated assault conviction" which involved "stab[bing] the victim in the back." Pet. App. 55a.

The IJ further concluded that petitioner was not entitled to any of the other forms of relief that he sought. Pet. App. 56a-60a. The IJ determined that petitioner was not entitled to withholding of removal, see 8 U.S.C. 1231(b)(3), both because he failed to establish a clear probability of persecution and because his conviction for a particularly serious crime is a bar to withholding of removal. Pet. App. 57a; see 8 U.S.C. 1231(b)(3)(A) and (B)(ii). The IJ also determined that petitioner was not eligible for deferral of removal under the CAT because he "failed to demonstrate that it is more likely than not that he will be tortured if removed to El Salvador or Honduras." Pet. App. 58a; see 8 C.F.R. 1208.16(c). And the IJ likewise determined that petitioner did not meet any of the requirements necessary to make him eligible for cancellation of removal. A noncitizen who is not a lawful permanent resident is eligible for consideration for a discretionary grant of cancellation of removal if he (1) "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application," (2) "has been a person of good moral character during such period," (3) has not committed any of various offenses, including certain crimes involving moral turpitude, and (4) "establishes that removal would result in exceptional and extremely unusual hardship" to a qualifying relative who is a United States citizen or lawful permanent resident. 8 U.S.C. 1229b(b)(1). The IJ found that petitioner did not meet the continuous-physical-presence requirement; that he did not provide evidence of good moral character; that his conviction for

aggravated assault was for a crime of moral turpitude that disqualified him from cancellation of removal; and that he did not establish that his removal would result in exceptional and extremely unusual hardship to his son, who is a United States citizen. Pet. App. 59a-60a.

b. The Board dismissed petitioner's appeal. Pet. App. 18a-24a. As relevant here, the Board "adopt[ed] and affirm[ed]" the IJ's "particularly serious crime findings," concluding that "[o]n this record * * * the [IJ] properly determined that [petitioner's] conviction for aggravated assault qualifies as 'particularly serious,'" and therefore petitioner was not eligible for asylum or withholding of removal. *Id.* at 22a-23a. The Board found that the IJ "did not commit legal error or clear factual error in denying" petitioner's application for deferral of removal under the CAT. *Id.* at 23a. And the Board determined that petitioner was not entitled to a remand to seek cancellation of removal because the IJ "found and [petitioner] conceded on appeal" that he is not eligible for cancellation of removal "because he cannot be found to be a person of good moral character." *Ibid.*

c. Petitioner filed a petition for review with the court of appeals, which the court denied in an unpublished opinion. Pet. App. 3a-13a.

i. The court of appeals rejected petitioner's contention that, because his 2011 removal proceedings were invalid, he was entitled to "*nunc pro tunc* relief" and the court "should order the BIA to use its equitable power to grant an order now as if it were granted * * * in 2011." Pet. App. 10a (internal quotation marks omitted). Petitioner hoped to make use of the Third Circuit's case law as it existed in 2011, under which he could have argued that, in light of *Alaka*, *supra*, a conviction

does not qualify as a particularly serious crime unless it is an aggravated felony; that his New Jersey aggravated assault conviction was not for an aggravated felony; and that he was therefore never convicted of a particularly serious crime. As the court of appeals explained, in 2019 the en banc Third Circuit "expressly overruled *Alaka* and held that * * * the phrase 'particularly serious crimes' includes but is not limited to aggravated felonies." Pet. App. 9a (quoting *Bastardo-Vale* v. *Attorney Gen.*, 934 F.3d 255, 258 (3d Cir. 2019) (en banc)).

In rejecting petitioner's proposed approach, the court of appeals explained that the Board may use its *nunc pro tunc* power to apply the law as it existed at the time of the noncitizen's violation of the immigration laws (in addition to other uses that the court found irrelevant here). Pet. App. 11a. But the court found that "[t]here are two obvious and significant problems with" petitioner's invocation of the *nunc pro tunc* doctrine. *Ibid.* The court first noted "that there has been no change in *Sixth Circuit* law" and explained that "for [petitioner] to obtain relief from removal, the panel (and the BIA) would have to apply Third-Circuit law (as of 2011) in contravention of contemporaneous, controlling Sixth Circuit precedent." *Ibid.* The court thus found that "even analyzing [petitioner]'s claims as of 2011, he was then, as now, barred from relief under Sixth Circuit precedent." *Ibid.* The court also noted that when the district court in the Western District of Pennsylvania determined that petitioner's 2011 removal was invalid, it found that the appropriate "remedy" was "a 'clean' removal hearing in the immigration court, so that he could raise his claims for relief to an IJ without limitation due to the 2011 administrative removal." *Ibid.*

"[T]hat is exactly what happened in this case," the court of appeals found, and the district court that oversaw petitioner's unlawful-reentry prosecution "did not even suggest, much less hold, that [petitioner] was entitled to *nunc pro tunc* relief." *Id.* at 11a-12a.

ii. The court of appeals upheld the Board's denial of asylum and withholding of removal, finding that "because [petitioner] committed a 'particularly serious crime,' he is barred by statute from receiving asylum or withholding." Pet. App. 12a. The court further found that "[e]ven if [petitioner's claims] were not barred by statute, based on the record evidence, the IJ did not clearly err" in concluding that petitioner "failed to prove a 'well-founded fear' or 'clear probability' of future persecution if returned to El Salvador or Honduras." *Ibid.*

The court of appeals also upheld the Board's finding that petitioner is not entitled to CAT protection, concluding that "because he committed a 'particularly serious crime,' he is barred by statute from CAT relief." Pet. App. 12a. Again, the court further found that, "[e]ven if [petitioner] were not barred by statute, based on the record evidence, the IJ did not clearly err" in concluding that petitioner "failed to prove 'that it is more likely than not that he will be tortured if removed to El Salvador or Honduras.'" *Id.* at 12a-13a.

4. Petitioner was removed from the United States in September 2019; he reentered the United States without inspection and was apprehended in Texas in March 2021. 21-cr-555 D. Ct. Doc. 1 (S.D. Tex. Mar. 16, 2021). In April 2021, a federal grand jury in the United States District Court for the Southern District of Texas returned an indictment charging petitioner with unlawful reentry, in violation of 8 U.S.C. 1326. 21-cr-555 D. Ct.

Doc. 12 (S.D. Tex. Apr. 6, 2021). Petitioner pleaded guilty to the unlawful-reentry charge and is currently awaiting sentencing. See 21-cr-555 D. Ct. Doc. 17 (S.D. Tex. June 1, 2021); 21-cr-555 D. Ct. Doc. 18 (S.D. Tex. June 2, 2021).

ARGUMENT

Petitioner renews (Pet. 23) his argument that the IJ and Board were required to provide him with "*nunc pro tunc* relief" and "apply the law that would have governed" as if his applications for relief had been adjudicated in 2011 and in the Third Circuit. The court of appeals correctly rejected petitioner's argument, and its fact-bound resolution of that claim does not conflict with any decisions of this Court or those of another court of appeals. And, in any event, this case would be a poor vehicle for resolving any issues related to the immigration courts' *nunc pro tunc* authority because of the idiosyncratic nature of petitioner's claim and because of the entirely independent bases on which petitioner's requests for relief were also denied. Further review is unwarranted.

1. a. The court of appeals correctly found that petitioner was not entitled to *nunc pro tunc* relief on the facts here. Although "[i]t has long been the administrative practice to exercise the discretion permitted by" certain provisions in the INA "*nunc pro tunc*," the immigration courts do so only "where complete justice to an alien dictates such extraordinary action." *In re T-*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tunc* is conceptually broad," *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008), its application is wholly discretionary and is limited to extraordinary cases—not

to every case where a noncitizen would otherwise be eligible for relief.

As relevant here, immigration courts may use the *nunc pro tunc* power "to apply the law as it existed at the time of the" noncitizen's "violation" of the immigration laws "instead of current law." *Ramirez-Canales*, 517 F.3d at 910. That generally means that, in certain cases, the agency may choose, in the exercise of its discretion, to apply an earlier version of the INA in a way that benefits the noncitizen. See, *e.g.*, *Patel* v. *Gonzales*, 432 F.3d 685, 694 (6th Cir. 2005) (explaining that "the IJ has the authority to issue *nunc pro tunc* orders granting waiver under the 1993 version of the INA"). An immigration court may also use its *nunc pro tunc* authority in other situations that are not directly at issue here—for example, "to permit an alien to reapply for admission after being deported," Pet. App. 11a (citation omitted), or to grant an noncitizen status *nunc pro tunc* to prevent a previous action from being a violation of the INA, see *In re T-*, 6 I. & N. Dec. at 413 (finding that respondent could have been lawfully admitted had he received a certain waiver at the time of admission and granting that waiver, *nunc pro tunc*, because his only offense, in light of "many sympathetic and mitigating factors," was "not such a heinous crime as to warrant [his] banishment"); *In re L-*, 1 I. & N. Dec. 1, 6 (A.G. 1940) (granting discretionary relief, *nunc pro tunc*, that could have been granted in exclusion proceedings when the noncitizen previously reentered the United States, but which was not available in the current deportation proceedings).

The court of appeals did not err in declining to order the immigration courts to grant *nunc pro tunc* relief. As of 2011, when petitioner's administrative removal

proceedings occurred, both the Board and the Sixth Circuit had correctly concluded, based on the plain text of the INA, that a crime need not be an aggravated felony in order to constitute a "particularly serious crime." See *Ikharo* v. *Holder*, 614 F.3d 622, 633 (6th Cir. 2010), vacated and remanded on other grounds, 565 U.S. 1104 (2012); *In re N-A-M-*, 24 I. & N. Dec. 336, 337-341 (B.I.A. 2007), aff'd, 587 F.3d 1052 (10th Cir. 2009) (per curiam), cert. denied, 562 U.S. 1141 (2011); cf. *In re M-H-*, 26 I. & N. Dec. 46, 47-50 (B.I.A. 2012). The court of appeals therefore correctly found that the application of the law as of the time of petitioner's prior administrative removal proceedings would not have changed the outcome of his case, because in 2011 the INA provided that a crime need not be an aggravated felony in order to constitute a "particularly serious crime" and both the Sixth Circuit and Board read that provision according to its plain text. Put another way, there was no earlier version of the INA to apply—or even an earlier interpretation from the Sixth Circuit or the Board—that might have benefited petitioner here.

b. Petitioner instead suggests (Pet. 33) that the Board was required to adjudicate his claims not only as if the adjudication occurred at an earlier time (2011), but also as if it occurred in a different place (the Third Circuit). Petitioner has not cited any authority for the extraordinary position that *nunc pro tunc* authority requires—or even permits—an adjudicator to apply the case law of a different jurisdiction as it existed at a different time. Indeed, application of the Third Circuit's decision in *Alaka* to petitioner's removal proceedings would turn the equitable *nunc pro tunc* power on its head by requiring the Sixth Circuit and immigration courts to apply an interpretation of the law that (1) the

Board and Sixth Circuit have always recognized as erroneous, (2) no court of appeals other than the panel in *Alaka* ever agreed with, see *Bastardo-Vale* v. *Attorney Gen.*, 934 F.3d 255, 267 (3d Cir. 2019) (en banc), and (3) the en banc Third Circuit has since recognized had been erroneous, see *id.* at 258. That would not be "complete justice to" a noncitizen, *In re T-*, 6 I. & N. Dec. at 413; rather, it would provide petitioner with an unfair advantage based on a Third Circuit panel's misreading of the plain text of the INA—a reading that has since been reversed, and could perhaps have been reversed in *petitioner's* case had it proceeded in the Third Circuit.

In any event, it is pure speculation that, had petitioner requested asylum, withholding of removal, or other relief from removal in 2011, a hearing on those applications would have occurred within the Third Circuit. Petitioner's 2011 administrative removal proceedings occurred in New Jersey because he was referred to the Marlton, New Jersey, office of DHS by the New Jersey state prison where he was incarcerated for his aggravated assault conviction. 19-1923 C.A. App. at 184 (3d Cir. Oct. 9, 2019). Had petitioner's requests for relief been the subject of a hearing before an IJ, it is possible that, due to capacity restraints in detention facilities or other reasons related to the administration of such facilities, petitioner could have been transferred to another facility within the jurisdiction of another court of appeals. If such a transfer had occurred, and if the IJ had subsequently changed the venue of the proceedings, petitioner's hearing could have occurred in that other jurisdiction. See, *e.g.*, *Calla-Collado* v. *Attorney Gen.*, 663 F.3d 680, 682-683 (3d Cir. 2011) (per curiam) (noncitizen detained in New Jersey transferred to Louisiana and then, at the noncitizen's request, back to New

Jersey); *Gandarillas-Zambrana* v. *Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir.) (noncitizen detained in Virginia transferred to Louisiana), cert. denied, 516 U.S. 806 (1995). And a noncitizen does not generally have a right to have his claims in immigration court considered within a certain jurisdiction. See *Calla-Collado*, 663 F.3d at 685 ("An alien * * * does not have the right to be detained where he believes his ability to obtain representation and present evidence would be most effective."); *Gandarillas-Zambrana*, 44 F.3d at 1256 (explaining that the government "necessarily has the authority to determine the location of detention of an alien in deportation proceedings, and therefore, to transfer aliens from one detention center to another"; noting that "[t]he INA guarantee[s] [a noncitizen] the same rights and privileges at a deportation proceeding in" all locations; and finding that "[a]ccordingly, there is nothing inherently irregular, not to say unconstitutional, about [a] transfer") (citation omitted).

What is more, it is by no means clear that the immigration courts or the Third Circuit would have applied *Alaka* had petitioner's removal proceedings been conducted within the Third Circuit in 2011. As the Board observed in 2012—and therefore might well have observed before petitioner's hypothetical 2011 proceedings reached the Board—the Third Circuit's decision in *Alaka* "did not expressly determine that the language in question was unambiguous." *In re M-H-*, 26 I. & N. Dec. at 49. Thus, in *In re M-H-*, the Board determined that there was still "room for agency discretion" to find that the term "particularly serious crimes" is not limited to aggravated felonies, and the Board applied that conclusion even "to cases arising in the Third Cir-

cuit." *Ibid.* That approach led to the en banc Third Circuit's decision to overrule *Alaka* (while criticizing the Board for not following it before it was overruled). See *Bastardo-Vale*, 934 F.3d at 259 n.1.

It is therefore not apparent that, had petitioner received a hearing before an IJ based on his 2011 detention, his hearing would have been in the Third Circuit—much less that, even if it had occurred in the Third Circuit, the Board would have applied *Alaka*'s restrictive interpretation of "particularly serious crime." Similarly, if petitioner had sought review in the Third Circuit, that court might have rejected *Alaka*, as it did in *Bastardo-Vale*. Given those uncertainties about what decisional law would have been applied in petitioner's hypothetical earlier removal proceeding, petitioner cannot show that "complete justice * * * dictates [the] extraordinary action" of requiring the immigration courts to rely on since-reversed case law from a different time and a different place. *In re T-*, 6 I. & N. Dec. at 413.

c. To the extent that petitioner suggests (Pet. 31, 33) that he was entitled to a novel application of the *nunc pro tunc* remedy because the government acted in bad faith by transferring him from Pennsylvania to Ohio or did so in order to take advantage of the Sixth Circuit's case law, the facts here do not support such inferences. According to government records, petitioner was transferred to the Northeast Ohio Correctional Center in Youngstown, Ohio, in 2017—while his initial unlawful-reentry prosecution was pending in the Western District of Pennsylvania. The basis for that transfer is explained by the fact that "the Western District of Pennsylvania" —the district where he had been indicted for unlawful reentry—"does not have a federal holding facility." *United States* v. *Grant*, 979 F.3d 1141, 1142 (6th Cir.

2020), cert. denied, No. 20-8064 (June 14, 2021). As a result, it was not unusual for a federal detainee being tried in the Western District of Pennsylvania to be "detained at the Northeast Ohio Correctional Center * * * before trial and/or sentencing." *Ibid.*; see *e.g.*, *Banks* v. *United States Att'y*, No. 08-HC-2117, 2017 WL 9989891, at *1 (E.D.N.C. July 14, 2017) (noting that an individual was being held at the Northeast Ohio Correctional Center in Youngstown, Ohio "because his testimony was required for a renewed bond hearing conducted in the Western District of Pennsylvania"). After the district court in the Western District of Pennsylvania dismissed the unlawful-reentry indictment, petitioner was transferred into immigration custody at the same Youngstown facility, and then new charges of inadmissibility were filed in the immigration court that had jurisdiction over that facility. There is therefore no basis for concluding that petitioner's transfer—which predated any indication that the district court would dismiss petitioner's criminal indictment or find that his 2011 removal order was invalid—was motivated by a desire to avoid Third Circuit case law governing removal proceedings that had not been initiated as of the time of his transfer.

Not does petitioner indicate that he or his attorney sought to have him transferred out of the Youngstown facility or requested a change of venue for petitioner's 2018 removal proceedings. Such a transfer may well have been granted had petitioner timely requested it before the IJ. Cf. *Calla-Collado*, 663 F.3d at 682-683 (noting that the IJ granted a noncitizen's request for a change of venue from Louisiana to New Jersey).

2. Contrary to petitioner's assertion (Pet. 16-28), the court of appeals' unpublished decision below does not

conflict with any decision of this Court or of another court of appeals. Further review of the court of appeals' resolution of petitioner's fact-bound claims is unwarranted.

a. Petitioner's claim (Pet. 26-28) that the decision below conflicts with decisions of this Court is misplaced. Petitioner does not identify any decision in which this Court required either a federal court or the immigration courts to apply the earlier case law of a different circuit. Instead, he relies (*ibid.*) on three cases: a 1934 tax decision that noted "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong," *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 61-62 (1934); a decision that explicitly did not "reach the question * * * whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws," *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (per curiam); and a decision that engaged in statutory interpretation to determine whether Congress's repeal of a specific provision of the INA should be applied retroactively, *INS* v. *St. Cyr*, 533 U.S. 289, 315-326 (2001). The court of appeals' resolution of petitioner's fact-bound request to apply an earlier and invalidated decision from a different circuit does not conflict with any of those decisions from this Court.

And the decision below does not, as petitioner insinuates, implicate the Fifth Amendment's Due Process Clause. See Pet. 27 (citing *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1963-1964 (2020), and *Reno* v. *Flores*, 507 U.S. 292, 306 (1993)). Due process does not require a federal court or an immigration court to apply *nunc pro tunc* the case law that might have been applied in a different jurisdiction. See *Babcock* v. *Commissioner of*

Soc. Sec., 959 F.3d 210, 218 (6th Cir. 2020) (explaining that an individual "cannot sustain a due-process * * * claim solely on the basis of a circuit split"), cert. granted, 141 S. Ct. 1463 (2021); *Habibi* v. *Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) ("No court has ever held that the mere existence of a circuit split on an issue of statutory interpretation violates due process or equal protection[.]"). Nor does due process require a federal court or immigration court to go a step further and apply *nunc pro tunc* the case law of another jurisdiction that could have been applied in that other jurisdiction only at an earlier time.

b. Petitioner claims that *nunc pro tunc* relief "would have been available" to him in the Second, Third, Seventh, and Ninth Circuits, and he further claims that the decision below conflicts with decisions from the First and Fifth Circuits. Pet. 21; see Pet. 16-22. Those claims lack merit. Petitioner identifies no case in which a court of appeals ordered the Board to exercise its *nunc pro tunc* power to apply the earlier case law of a different circuit, and he has not otherwise identified any conflict among the courts of appeals that merits this Court's review in this case.

i. In *Edwards* v. *INS*, 393 F.3d 299 (2004), see Pet. 17-18, the Second Circuit considered the application of an INA provision that permitted waiver of deportation in certain circumstances, but barred a noncitizen from receiving a waiver if he had served five or more years in prison on an aggravated felony offense. See 393 F.3d at 302-303. The noncitizen petitioners in *Edwards* had "accrued more than five years' imprisonment subsequent to the legally erroneous denial of" their applications for a waiver. *Id.* at 312. On those facts, the court

found "that an award of *nunc pro tunc* relief is the appropriate remedy," and thus the noncitizens' requests for a waiver of deportation were properly adjudicated "as if [they] had not yet accrued five years' imprisonment." *Id.* at 302, 312. *Edwards* involved an entirely different exercise of the *nunc pro tunc* authority than the relief that petitioner seeks: the power to consider a noncitizen's application for relief on the *facts* that existed at an earlier point in time, not under the *law* that existed at an earlier point in time and in a different jurisdiction. See p. 12, *supra*. Nothing in *Edwards* suggests that, on the facts of this case, the Second Circuit would require the Board to apply the case law that a different circuit applied at a different time.

Petitioner's assertion (Pet. 18-20) that the Seventh Circuit's decision in *Batanic* v. *INS*, 12 F.3d 662 (1993), and the Ninth Circuit's decision in *Castillo-Perez* v. *INS*, 212 F.3d 518 (2000), conflict with the decision below is likewise misplaced. In *Batanic*, the Board found that "it did not have the authority to * * * consider" an asylum request *nunc pro tunc*—that is, "as though it had been made prior to" recent amendments to the INA. 12 F.3d at 664. Those amendments had gone into effect while the noncitizen's removal proceedings were ongoing, and the removal proceedings had been extended due to an infringement on the noncitizen's right to counsel. *Id.* at 663-664. The Seventh Circuit reversed the Board, finding that the text of the relevant provisions of the INA, along with due process problems created by the Board's reading of those provisions, required the court to construe the statutory text so as not to preclude the Board from considering an asylum application under the prior version of the INA. *Id.* at 665-668. *Batanic* is thus a routine example of the use of the

nunc pro tunc power to apply an earlier version of the INA itself in a way that benefits the noncitizen.

The Ninth Circuit's decision in *Castillo-Perez* is of a piece. In *Castillo-Perez*, a noncitizen's initial removal proceedings were infected by an infringement on his right to counsel; by the time he sought to reopen his proceedings in the immigration courts based on that ineffective assistance, an amendment to the relevant statutes had affected his eligibility for relief from removal. 212 F.3d at 521-523, 528. Like the Seventh Circuit in *Batanic*, the Ninth Circuit in *Castillo-Perez* concluded that, as a matter of statutory interpretation and due process, the Board was required to apply the prior version of the relevant immigration statutes. *Id.* at 528. But neither *Batanic* nor *Castillo-Perez* suggests that either the Seventh or the Ninth Circuit would require the Board to apply the case law of a different circuit as it existed at an earlier time—particularly where the Board and the Seventh or Ninth Circuit disagreed with that case law at all times and the other circuit had since overruled its outlier decision.[3]

And the Third Circuit's decision in *Cheruku* v. *Attorney General*, 662 F.3d 198 (2011), does not conflict with the court of appeals' decision in this case. See Pet. 20-21. The *Cheruku* court noted that "the BIA has generally limited the grant of orders *nunc pro tunc* to a few limited circumstances" including "to apply the law as it

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[3] Petitioner also relies (Pet. 20) on *Salgado-Diaz* v. *Ashcroft*, 395 F.3d 1158 (9th Cir. 2005). But *Salgado-Diaz* involved an equitable-estoppel claim that a noncitizen raised against the government, and the Ninth Circuit therefore did not consider the immigration courts' *nunc pro tunc* authority. *Id.* at 1165-1167. An equitable-estoppel claim is analytically distinct from a request for *nunc pro tunc* relief, see *id.* at 1166, and no such claim is at issue here.

existed when the alien violated the immigration laws." 662 F.3d at 208. Given the text of the specific provisions of the INA that were at issue there, the Third Circuit concluded that "the BIA did not err in holding [that] equitable *nunc pro tunc* relief is foreclosed by the plain language of the statute." *Id.* at 209. The Third Circuit is thus in agreement with the Sixth Circuit that in certain cases and on certain facts the Board may use its *nunc pro tunc* power "to apply the law as it existed," Pet. App. 11a (citation omitted), but that does not establish that *Cheruku* (which did not require or approve *nunc pro tunc* relief) conflicts with the court of appeals' denial of *nunc pro tunc* relief in this case. Nor does the unpublished decision in *Jacobo* v. *Attorney General*, 459 Fed. Appx. 112 (3d Cir. 2012), see Pet. 21, suggest a conflict among the courts of appeals on the question presented. There, whether the noncitizen was entitled to *nunc pro tunc* relief under a time-limited settlement agreement "turn[ed] on her date of entry" into the United States. *Jacobo*, 459 Fed. Appx. at 117. And the court did not suggest that (or consider whether) the immigration courts are required to apply case law that could only have been applied at an earlier time by immigration courts situated within another court of appeals.

ii. Petitioner asserts (Pet. 23) that the First and Fifth Circuits apply a more "narrow approach" to *nunc pro tunc* relief in the immigration context than the Sixth Circuit does, and he concedes that "*nunc pro tunc* relief would not have been available" in those circuits on the facts of "this case." Those courts' decisions accordingly do not conflict with the decision below. But neither do they suggest that any other court has confronted the question whether, under the Board's *nunc pro tunc* au-

thority, a noncitizen in removal proceedings in one circuit is entitled to the application of another circuit's since-vacated case law. To the extent that different courts of appeals may take different approaches to other issues related to the immigration courts' exercise of their *nunc pro tunc* powers on different facts, see Pet. 22-23, the fact-bound decision below does not implicate any such differences.

3. In any event, even if questions related to *nunc pro tunc* relief in the immigration context warranted this Court's review, this case would be a poor vehicle in which to address them.

Because petitioner's claim for *nunc pro tunc* relief is atypical, this case does not present an appropriate context in which to broadly address the correct approach that the immigration courts should take when exercising their discretionary *nunc pro tunc* authority. If granted, petitioner's request for *nunc pro tunc* relief would require the immigration courts within the Sixth Circuit—and, in turn, the Sixth Circuit itself—to apply a Third Circuit panel decision that was in disagreement with all other courts of appeals to reach the issue, see *Bastardo-Vale*, 934 F.3d at 267, and that the en banc Third Circuit "has since * * * repudiated and expressly overruled," Pet. App. 9a. Petitioner has not pointed to any other instance in which a court of appeals has considered whether the immigration courts are permitted to apply previous (or current) case law of a different circuit—let alone whether the *nunc pro tunc* authority requires the immigration courts to apply an outlier, out-of-circuit panel decision that has since been reversed. Nor has petitioner cited an example in which the Board considered whether its *nunc pro tunc* authority permits it to take such actions. Indeed, the Board below did not

have a clear opportunity to consider those issues because petitioner did not frame any request for application of Third Circuit precedent as a request for the Board to make use of *nunc pro tunc* authority. See A.R. 39-40, 53-54. The idiosyncratic fact pattern here therefore does not provide a sound basis for resolving broader questions related to the immigration courts' *nunc pro tunc* powers.

Finally, this Court's review is also unwarranted because petitioner has failed to demonstrate that a decision in his favor would affect the outcome of this case. Even if petitioner's conviction for New Jersey aggravated assault were not treated as a particularly serious crime for the purposes of this case, petitioner still would not be entitled to any of the four forms of relief that he sought because all of his requests for relief were also denied on alternative grounds. *First*, in addition to denying petitioner's request for asylum based on his conviction for a particularly serious crime, the IJ denied his asylum application on two other independent bases: that he did not establish a well-founded fear of persecution and that he was not entitled to asylum in the exercise of discretion. See pp. 6-7, *supra*. The court of appeals found that the IJ did not clearly err in reaching the first of those two conclusions (and did not reach the second). See p. 10, *supra*. *Second*, the IJ determined that petitioner was not entitled to withholding of removal because he failed to establish a clear probability of persecution, and, again, the court of appeals found that the IJ did not clearly err in reaching that conclusion. See pp. 7, 10, *supra*. *Third*, the IJ also found that petitioner was not eligible for deferral of removal under the CAT because he failed to show that it was more

likely than not that he would be tortured. See p. 7, *supra*. The Board found no legal or clear factual error in that conclusion, and the court of appeals agreed. See pp. 8, 10, *supra*. And *fourth*, the IJ found that petitioner did not meet any of the four requirements for eligibility for cancellation of removal—none of which turns on whether his aggravated-assault conviction was for a particularly serious crime. See pp. 7-8, *supra*. The Board explicitly agreed with the IJ's finding that petitioner is ineligible for cancellation of removal because he is not a person of good moral character. See p. 8, *supra*.

Petitioner does not contend that he would be able to overcome any of those independent bars to relief. Further review of his claims is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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