No. 20-____

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

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

QUESTION PRESENTED

The *nunc pro tunc* doctrine allows a court to decide a matter "now for then," as though at an earlier date. The circuit courts have split over their power to grant *nunc pro tunc* relief in immigration cases. A plurality of courts views *nunc pro tunc* relief as broadly available when the equities require it. Two circuits take a narrow state-law view, allowing the *nunc pro tunc* doctrine only to correct clerical or inadvertent errors. Two others fall in between.

Here, Petitioner's asylum and withholding-of-removal claims should have been heard in 2011 within the Third Circuit. At that time, he had a strong case for asylum and other relief. But, as a federal court found, two federal officers forged forms that deprived Petitioner of a hearing in 2011, and he was deported. Petitioner's hearing did not happen until 2018, after his reentry—and, in the meantime, the government had moved him to the Sixth Circuit. Under Sixth Circuit law, he was then barred from relief.

Petitioner asked for adjudication *nunc pro tunc* under the Third Circuit law that would have applied in 2011, if not for the government misconduct. The court below, which falls in the middle of the circuit split, ruled that *nunc pro tunc* relief was not available to apply that earlier law.

The question presented is: When circumstances such as agency misconduct deprive an immigration applicant of a fundamental right, may a federal court grant *nunc pro tunc* relief to remedy the deprivation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Mario Nelson Reyes-Romero, as petitioner, and former U.S. Attorney General William P. Barr, as respondent. There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

United States Court of Appeals for the Sixth Circuit:

Mario Nelson Reyes-Romero v. William P. Barr, No. 19-3783 (Nov. 2, 2020).

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CONSTITUTIONAL AND STATUTORY AUTHORITIES

INTRODUCTION

This case presents a circuit split on a discrete question of federal courts' equitable authority: Do courts have the power to adjudicate immigration cases *nunc pro tunc*—now for then—when the equities so require?

Here, Petitioner had a strong case for asylum and withholding from removal under earlier-applicable law, but forgery by two federal officers deprived him of a hearing. By the time he got a hearing, the government had moved him to a different circuit, where different law applied, and he was barred from relief.

In the Second, Third, Seventh, or Ninth Circuit, the *nunc pro tunc* doctrine would have allowed a court to decide Petitioner's case under the earlier-applicable law that would have governed if not for the government's misconduct. The First and Fifth Circuits, in contrast, draw from Massachusetts state law to hold that courts' *nunc pro tunc* authority is limited to correcting clerical and inadvertent errors. The Sixth and Eighth Circuits fall somewhere in between, and the court below decided that *nunc pro tunc* relief was unavailable here.

Federal courts' equitable authority to apply earlier law should not vary by circuit, and the government should not be permitted to manipulate differences in law between the circuits just by moving a detained noncitizen—especially when the government's own misconduct deprived the noncitizen of the beneficial, earlier law in the first place. The Court should grant certiorari to resolve the circuit split and provide uniform standards for federal courts' *nunc pro tunc* authority.

* * *

The facts here demonstrate the split over *nunc pro tunc* authority, and why it matters. Petitioner Mario Nelson Reyes-Romero ("Reyes") was detained in New Jersey in 2011. The government then deported him without holding a hearing, based on a purported waiver of rights.

But, as a federal court later found, Reyes did not actually waive his right to a hearing. Instead, two Department of Homeland Security officers forged the forms. A federal court called this "a level of law enforcement outrageousness I have not seen in any other case since I have been a federal judge." App. 83a (quoting transcript).

If Reyes had received a hearing in 2011, he would have had a strong case for asylum and other relief. As the federal court found, he would likely have succeeded on his claims, based on his family's history of persecution. Reyes had previously pleaded guilty to assault, but the past conviction would not have barred immigration relief—at least under Third Circuit law as of 2011.

After Reyes was deported in 2011, he reentered the United States and was detained for illegal reentry in 2017, in Pennsylvania. A federal district court threw out the illegal-reentry charge based on extensive findings of DHS agents' misconduct that invalidated Reyes's 2011 removal, and because Reyes likely would have won immigration relief but for that misconduct.

But the government was not done. While the illegal-reentry charge was pending, the government moved Reyes from Pennsylvania to Ohio. Now, within the Sixth Circuit, the government started removal proceedings anew. And, in the Sixth Circuit, the law was

different—there, Reyes's 2009 conviction indeed precluded asylum and other relief.

Reyes asked for adjudication *nunc pro tunc* under the Third Circuit law that would have governed his 2011 immigration proceedings, if not for the government's misconduct. The agencies refused, and so did the Sixth Circuit.

Nunc pro tunc relief would have been broadly available in the Second, Third, Seventh, and Ninth Circuits, subject to the equities. It would not have been available in the First or Fifth Circuits, which limit *nunc pro tunc* relief to correction of clerical or inadvertent errors. The Sixth and Eighth Circuits appear to occupy a middle ground. Here, that meant denying relief.

As the plurality of circuits holds, and consistent with this Court's precedent, *nunc pro tunc* adjudication should be available when agency error or misconduct, coupled with a change in law, otherwise would preclude relief. If not, the government could take advantage of a change in law and gain advantage from its own misdeeds—exactly as it did here.

In any event, the availability of *nunc pro tunc* relief in immigration cases should not vary by circuit. Courts have repeatedly noted the circuit split and lack of definitive or consistent authority. This case presents a clean vehicle to resolve the split because the denial of *nunc pro tunc* relief was outcome-determinative, and because a federal court has already found egregious government misconduct that prejudiced Petitioner.

The Court should grant certiorari to resolve the circuit split and provide a uniform approach to federal courts' *nunc pro tunc* authority in immigration cases.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a) is unpublished and available at 832 F. App'x 426. The Board of Immigration Appeals' decision (App. 14a) is unreported. The Immigration Judge's decision (App. 25a) is unreported.

JURISDICTION

The Sixth Circuit entered judgment on November 2, 2020. App. 1a. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari to 150 days from the lower court judgment or denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

8 U.S.C. § 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a

petition for review filed with an appropriate court of appeals in accordance with this section.

STATEMENT

1. "'*Nunc pro tunc*' is a fancy phrase for backdating. Translated as 'now for then,' it is an ancient tool of equity designed to give retroactive effect to the order of a court." *Sierra Club v. Whitman*, 285 F.3d 63, 67 (D.C. Cir. 2002) (citation omitted). In many areas, the *nunc pro tunc* doctrine has a narrow scope. *See, e.g.*, *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696, 700–01 (2020) (noting in a different context that *nunc pro tunc* orders can only correct the record to match what has actually occurred).

In immigration cases, however, "[t]he equitable remedy of *nunc pro tunc* . . . relief has a long and distinguished history." *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004). Agencies historically have granted *nunc pro tunc* relief when necessary to "mitigat[e] potentially harsh results of the immigration laws." *Id.* (collecting cases). Congress has never countermanded this longstanding practice. *Id.* at 309.

The courts of appeals are split, as this Petition explains, but the plurality of circuits applies a similar standard, holding that federal courts also may grant *nunc pro tunc* relief broadly in the immigration context. *See, e.g.*, *Edwards*, 393 F.3d at 308–12 & n.12. Under the law of these circuits, *nunc pro tunc* relief is available to place noncitizens in positions in which they would have been "but for . . . significant error[s] in their immigration proceedings." *Id.* at 308–09. Accordingly, courts have required *nunc pro tunc* adjudication of asylum applications when procedural defects in removal proceedings—coupled with changes in

law—otherwise would have barred noncitizens from relief. *See, e.g.*, *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). Courts have specifically recognized that *nunc pro tunc* relief is available when government misconduct otherwise would permanently deprive a noncitizen of his rights. *See Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1164, 1167–68 (9th Cir. 2005), *as amended* (Mar. 10, 2005).

As discussed in detail below, the Second, Third, Seventh, and Ninth Circuits apply this broad approach to *nunc pro tunc* relief. The First and Fifth Circuits take a narrower state-law view. The Sixth and Eighth Circuits fall somewhere in between. That difference was outcome-determinative in this case.

2. This Petition arises from the government's extreme misconduct that deprived Petitioner Reyes of a removal hearing in 2011. The removal hearing at that time would have occurred before an immigration court located within the Third Circuit. As a federal district court later found, Reyes likely would have obtained immigration relief under Third Circuit law as of 2011. Due to government misconduct, however, Reyes was removed in 2011 without a hearing. He later returned to the United States—again to a location within the Third Circuit—before the government arrested him, detained him, and then moved him to a detention facility within the Sixth Circuit. Reyes eventually had a removal hearing in 2018. At this point, though, the immigration agencies applied Sixth Circuit law, which barred Reyes from relief.

a. Reyes first arrived in the United States from El Salvador in 2004, at age 14, and lived in New Jersey. App. 3a. He pleaded guilty to "aggravated assault" in

2009 after defending a friend in an altercation. App. 3a–4a, 30a.

In 2011, the government initiated removal proceedings in New Jersey. App. 136a–37a, 153a. DHS officers gave him forms that were meant to inform him of his rights and allow him to request an immigration hearing. App. 137a, 141a–47a. As a federal district court later found, however, the DHS officers manipulated those forms to document, falsely, that Reyes had waived his right to a hearing and consented to removal. App. 218a, 220a; *see generally* App. 134a–223a. The government then deported Reyes without holding a hearing. App. 4a, 162a–63a.

b. In 2017, Reyes was arrested in Pennsylvania and charged with illegal reentry. App. 4a. He moved to dismiss the indictment, arguing that his 2011 deportation was invalid and could not support an illegal-reentry charge. *Id.* The United States District Court for the Western District of Pennsylvania conducted a series of hearings and considered extensive evidence, including testimony from the agents. App. 134a–59a.

After the district court expressed concerns both as to what had occurred and what the agents said about it, the government filed its own motion to dismiss the indictment. App. 74a–86a, 137a, 202a–03a. The government took the position that, if the court dismissed the case on the government's motion, the government could simply try to rely on the flawed 2011 administrative removal order and remove Reyes again. App. 81a–86a, 203a. Reyes objected. App. 82a.

The district court denied the government's attempt to dismiss the illegal-reentry indictment, but it granted Reyes's motion to dismiss with prejudice. App.

202a, 216a. It explained that "the process used to remove [Reyes] in 2011 was contrary to law," as it had been based on "illegitimate and ineffective waivers of [Reyes's] rights contained in the two involved Forms." App. 136a, 138a.

The court made extensive findings about those forms in its dismissal order and a later order granting attorneys' fees and costs. Initially, the district court record had contained only black-and-white copies of the relevant immigration forms. App. 109a. These copies had numerous "facial defects." App. 103a–04a. For one, the hearing-request form had conflicting boxes marked both requesting and waiving a hearing. App. 71a. The times listed on the forms also did not add up: Reyes "supposedly waived his rights to contest removal or apply for judicial review on the I-851 twenty (20) minutes *before* he acknowledged receipt of the I-851 and an hour before it was ever 'issued.'" App. 73a. "In short, he supposedly signed away his rights before he was charged and before those rights were read to him in Spanish." App. 155a–56a. Additionally, the markings attributed to Reyes were check marks on one form and X marks on the other—"yet key ones (check marks) matched other markings attributed to the Officers on each such Form." App. 73a. In sum, the forms facially showed "that there was no valid waiver due to their patent inconsistency." App. 104a.

The government had then put on testimony from the two DHS officers who had purportedly informed Reyes of his rights and signed the forms. *Id.* "[T]hings inexorably went from bad to worse as their testimony shifted from essentially incoherent to false." *Id.*; *see also* App. 148a ("[T]his testimony was, at key points, internally inconsistent, contradictory in comparison

with the content of the Forms, and simply nonsensical."); App. 213a (describing "apparent fallacies, inconsistencies, and inaccuracies of the Officers' testimony"). The officers' testimony "was plainly selfserving prevarication which contradicted the Forms." App. 107a. The officers even described their own testimony as "nonsensical." App. 109a. The government eventually declined to vouch for or rely on this testimony. App. 213a.

Then, ten weeks after the officers testified, the government first produced color copies of the two forms. App. 87a–88a, 214a. "[T]he color copies of the Forms removed all doubt." App. 109a.

> At that point, the cat was conclusively out of the bag. The color copy of I-826, which showed that Reyes-Romero had selected two contradictory options with respect to seeking a hearing, also showed that the selection marks indicating a desire to waive the right to a hearing was made partially in light blue ink, the same light blue ink that marks Officer Darji's signature. The selection next to the option *requesting* a hearing is entirely in black, the same black that marks Reyes-Romero's signature.

App. 87a; *see also id.* n.17. Based on these forms and the officers' testimony, the court found "that Reyes-Romero did not place the blue markings on the I-826 where he purported to waive a hearing. Rather, one of the DHS Officers made that notation." App. 103a n.29.

The court thus concluded that the "Officers well knew that they had cooked up Reyes-Romero's 2011 Removal." App. 102a n.27. The "two Forms are shams, and the result of the involved Officers electing to run roughshod over not only what they testified were the

standard and required DHS procedures, but also over any semblance of due process." App. 158a–59a. The court found that the officers' conduct was "egregious":

> [W]hat was true [of the officers' testimony] demonstrated a level of law enforcement outrageousness I have not seen in any other case since I have been a federal judge. . . . [Their testimony] was the single mo[]st troubling thing I have read not only in the time I have been a district judge, but in the time I have been a lawyer.

App. 83a (final alteration in original) (quoting transcript). As a result, Reyes's case was fundamentally unfair because he "was not given sufficient opportunity to understand or review his rights (including to judicial review) . . . before signing them away." App. 163a.

The district court held "that the flaws in the 2011 Removal Proceeding were so central to any notion of a legitimate removal proceeding that prejudice can and must be presumed in this case." App. 164a–65a. Beyond this presumption, the court also found prejudice based on a likelihood of relief, but for the government's "fundamental errors." App. 163a–98a.

To start, Reyes's 2009 guilty plea did not bar him from asylum. App. 166a–80a. Under controlling Third Circuit law, an offense could qualify as a "particularly serious crime"—precluding asylum and withholding of removal—only if the offense was an "aggravated felony." App. 166a n.19, 179a–80a n.38 (citing *Alaka v. Att'y Gen.*, 456 F.3d 88, 104 (3d Cir. 2006)), 195a–97a. Reyes's prior offense was not an "aggravated felony," under Third Circuit law, so it did not preclude relief. App. 166a–80a.

Having rejected a bar to immigration relief, the district court addressed Reyes's likelihood of success on the merits. App. 163a–98a. It found that he likely would have obtained asylum, as "[m]ultiple members of [Reyes's] family have applied for, and in some cases been granted, asylum . . . on the basis of the same events." App. 180a–90a. Among other things, Reyes's brother had been granted asylum based on gangs' threats to the family after the brother refused to join them. App. 182a. Additionally, Reyes's sister had suffered a history of rape and abuse by a man in El Salvador. App. 181a. Reyes's sister and their mother testified against the rapist. *Id.* The rapist and his fellow gang members repeatedly threatened to murder Reyes's sister and her family, and to burn down their house. App. 181a.

Reyes's cousin had also testified in a rape trial over the border in Honduras. App. 182a. That alleged rapist's father threatened to kill the cousin and his family, then sent hitmen to carry out his threat. *Id.* The hitmen killed one of Reyes's cousins. *Id.* Another cousin escaped, and hitmen were again sent to bomb their home. *Id.* Reyes's surviving cousin and an aunt escaped and came to Reyes's family in El Salvador, but they were again discovered by associates of the rapist's father, before they fled for the United States. *Id.*

Based on this history of violence and threats against Reyes's family, the court found Reyes was "clearly at risk of further persecution." App. 185a. On largely the same grounds, the court found that Reyes likely could have prevailed on his claims under the Convention Against Torture ("CAT") and for withholding of removal. App. 190a–98a. The government did not appeal.

The court subsequently awarded Reyes attorneys' fees and litigation costs, finding that the position of the United States was "frivolous and in bad faith." App. 100a. "The federal government plainly railroaded Reyes-Romero out of the country in 2011," and that "the Officers lied and were motivated to lie in a weak attempt to sell to the Court the nonsense they generated in 2011 plainly evidences conscious doing of wrong." App. 100a–01a (internal quotation omitted). The Third Circuit later reversed as to attorneys' fees, and Reyes filed a separate and now-pending petition for a writ of certiorari. *United States v. Reyes-Romero*, 959 F.3d 80, 108 (3d Cir. 2020), *petition for cert. filed* (U.S. Nov. 20, 2020) (No. 20-718).

c. When Reyes was arrested in 2017, he was living in Pennsylvania. Certified Administrative Record ("CAR") 946, 1916. The arrest took place there as well. App. 4a; CAR 1917. After he was arrested, though, the government moved him to a detention facility in Ohio, at the same time his illegal-reentry case proceeded in the Western District of Pennsylvania. App. 5a; CAR 946. He was now located within the Sixth Circuit, where—in contrast to the Third Circuit—a past conviction could be deemed a "particularly serious crime," and thus preclude asylum or withholding of removal, even if the conviction was not for an "aggravated felony." App. 5a–6a (comparing *Ikharo v. Holder*, 614 F.3d 622, 633 (6th Cir. 2010), with *Alaka*, 456 F.3d at 104).

Once the district court dismissed the illegal-reentry charge, the government initiated new removal proceedings—this time, in Cleveland. App. 5a. Reyes objected to the proceeding because, among other reasons, the government's misconduct had denied him the opportunity to present his case in a timely manner. CAR

39–40. Reyes also applied for asylum, withholding of removal, and protection under the CAT. App. 3a.

The Immigration Judge ("IJ") found Reyes and his witnesses credible but nevertheless deemed him removable and denied his application for relief. App. 43a–44a; *see generally* App. 25a–63a. Among other things, the IJ concluded that Reyes's 2009 offense qualified as a "particularly serious crime" and thus precluded asylum and withholding of removal. App. 51a–53a, 57a. The IJ declined to apply then-current Third Circuit law holding that a conviction may qualify as a "particularly serious crime" only if it is an "aggravated felony." App. 51a–53a. Instead, the IJ relied on contrary Board of Immigration Appeals ("BIA") cases and supportive Sixth Circuit case law. *Id.* The IJ did not directly address Reyes's claim that the district court's findings were binding under the doctrine of collateral estoppel. In the alternative, the IJ also stated that it was not persuaded on the merits of Reyes's claims. App. 53a–56a.

d. Reyes appealed the IJ's ruling, and the BIA dismissed the appeal. App. 24a. As relevant here, the BIA concluded that Reyes is barred from immigration relief because his 2009 conviction qualifies as a "particularly serious crime." App. 22a–23a. The BIA stated that the federal district court's decision did not establish collateral estoppel on this point because consideration of Reyes's prior conviction "was not necessary and essential to the judgment on the merits in the litigation before the District Court judge." App. 21a–22a.

Additionally, the BIA did not apply then-current Third Circuit law, under *Alaka*, that an offense may qualify as a "particularly serious crime" only if it is an

aggravated felony; instead, the BIA relied on contrary administrative rulings. App. 22a. *Contra Alaka*, 456 F.3d at 104; *see also Bastardo-Vale v. Att'y Gen.*, 934 F.3d 255, 259–60 n.1 (3d Cir. 2019) (en banc) (overruling *Alaka* while disapproving of "[t]he IJ and BIA's blatant disregard of the binding regional precedent [under *Alaka*] [as] ultra vires" until the court overruled *Alaka*). The BIA acknowledged the IJ's "alternative finding" as to Reyes's fear of future persecution, but the BIA did not uphold or rely on this "alternative finding" in rejecting Reyes's asylum and withholding-of-removal claims. App. 20a, 21a–24a. Instead, the BIA relied solely on the "particularly serious crime" determination to bar relief. App. 22a–23a.

e. Reyes filed a petition for review before the United States Court of Appeals for the Sixth Circuit. App. 3a. Among other things, Reyes argued that he is entitled to *nunc pro tunc* relief—putting him in the position he would have occupied if he had the opportunity to present his case to the immigration court in 2011—because DHS's conduct in falsifying his waiver prevented him from seeking removal at that time. App. 10a.

The Sixth Circuit denied Reyes's petition. App. 13a. As to Reyes's *nunc pro tunc* argument, the court of appeals recognized that courts' *nunc pro tunc* authority is "conceptually broad," giving courts the "equitable power" to apply the doctrine "as justice requires so long as it is not barred by statute." App. 11a (quoting *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008)). It stated, however, that the doctrine applies in only "two general situations," including "to ap-

ply the law as it existed at the time of the [government's] violation instead of current law." *Id.* (quoting *Ramirez-Canales*, 517 F.3d at 910).

The court recognized that Reyes's request fit this change-in-law category, but the court nevertheless denied *nunc pro tunc* relief for two reasons. *Id.* First, "there ha[d] been no change in *Sixth Circuit* law," and the court declined to apply the law that would have governed in Reyes's 2011 immigration proceedings—that is, Third Circuit law as of 2011. *Id.* Second, the court stated that the district court had ruled only that Reyes "was entitled—as his remedy—to 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," and that in fact he had already received a "clean" hearing. App. 11a–12a. In so holding, the court appears to have rejected entirely the possibility of applying the Third Circuit law that would have applied had Reyes received the removal hearing to which he was entitled in 2011. *See id.*

Based on these determinations, the court concluded that Reyes's 2009 conviction qualified as a "particularly serious crime" that precluded him from asylum or withholding of removal. App. 12a. As to the merits of Reyes's asylum, withholding, and CAT claims, the court mentioned only the IJ's findings, App. 12a–13a, as the BIA did not rely on this purported alternative basis for denying relief.

This petition follows.

REASONS FOR GRANTING THE PETITION

In some circuits, a court could have applied the earlier law that would have governed if not for the government's misconduct. The Sixth Circuit, however, ruled that *nunc pro tunc* relief was unavailable in this situation.

Federal courts' equitable *nunc pro tunc* authority should not vary by circuit—particularly when the government can just move a detained applicant to a different location to take advantage of another court's more-restrictive approach. And the government should not benefit from its misdeeds. The Court should grant certiorari to resolve the circuit split and provide uniform standards for federal courts' *nunc pro tunc* authority.

I. The Courts Of Appeals Are Divided 4–2–2 On The Availability Of *Nunc Pro Tunc* Relief In Immigration Cases.

The circuits are divided 4–2–2 as to the standard for granting *nunc pro tunc* relief in immigration matters. The plurality of circuits allows *nunc pro tunc* relief broadly when justice so requires. A minority of circuits, however, takes a narrower state-law view, and the Sixth and Eighth Circuits fall somewhere in between. This three-way split allows the government—as it did here—to move a noncitizen to a different circuit and thus avail itself of government-friendly substantive law and a more-restrictive *nunc pro tunc* approach adopted by certain circuits.

A. The Second, Third, Seventh, and Ninth Circuits take a wide view of *nunc pro tunc* relief. *E.g.*, *Edwards*, 393 F.3d at 310 ("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. This remedy, according to the Second Circuit, "should be granted or refused, as justice may require." *Id.* (citing *Mitchell v. Overman*, 103 U.S. 62 (1882)). "[S]uch relief," moreover, "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) (quoting *Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995)).

"In the immigration context," the Second Circuit has explained, "these standards mandate that an award of *nunc pro tunc* relief ordinarily be available where agency error would otherwise result in an alien being deprived of the opportunity to seek a particular form of deportation relief." *Id.* at 310–11. Responding to the First Circuit's contrary, narrow view that the *nunc pro* tunc doctrine allows only correction of inadvertent or clerical errors, the Second Circuit stated, "[w]hatever the merits of that position . . . in other areas of the law, it is clearly not the approach that has been taken in the immigration context." *Id.* at 309 n.12 (citing *Castillo-Perez v. INS*, 212 F.3d 518, 528 (9th Cir. 2000); *Batanic*, 12 F.3d at 667–68).

Following this analysis, the Second Circuit turned to the two specific petitions under consideration. In both cases, the petitioners had been denied deportation relief under § 212(c) of the Immigration and Nationality Act because certain statutory amendments were applied to pending cases. *Id.* at 302–05. Subsequently, however, courts held that these § 212(c) amendments did not apply to pending cases. *Id.* at 303.

While courts were considering the proper application of the § 212(c) amendments, however, the *Edwards* petitioners became ineligible for § 212(c) relief on other grounds; the statute barred relief for applicants who had served five or more years in prison for an aggravated felony, and the *Edwards* petitioners reached the five-year mark after the agencies had erroneously denied § 212(c) relief. *Id.* at 304–06.

The Second Circuit provided both petitioners *nunc pro tunc* relief, allowing them to avoid disqualification because of their prison terms and receive the benefit of the previous court rulings on the § 212(c) amendments. *Id.* at 312. Specifically, in one of the component cases, the Second Circuit affirmed the district court's ruling that the petitioner was not barred from immigration relief, remanding to the agency for adjudication on the merits. *Id.* at 306, 312. In the second case, the court of appeals did not bother with remand: In light of the record and because immigration relief would have been warranted if the case had been properly decided at the original time, the court ordered the agencies to "take whatever administrative steps are necessary to grant Petitioner . . . relief." *Id.* at 312.

2. The Seventh Circuit has similarly ordered *nunc pro tunc* adjudication when procedural defects in removal proceedings—coupled with changes in law—would have made an applicant ineligible for asylum. *Batanic*, 12 F.3d 662. Specifically, the Seventh Circuit held that where the "procedural defect has . . . resulted in the loss of an opportunity for statutory relief," that defect can be cured only by an opportunity to apply for *nunc pro tunc* relief. *Id.* at 667. In *Batanic*, the petitioner was deprived of his right to counsel in the original deportation hearing, at which he failed to request

asylum. *Id.* at 663–64. The BIA ultimately granted the petitioner a new hearing because of this error. *Id.* at 664. While the petitioner's appeal to the BIA was pending, though, new amendments to the asylum statute rendered him ineligible for the relief that would have been available previously. *Id.* The Seventh Circuit held that simply granting the petitioner a new hearing was not sufficient; rather, the *nunc pro tunc* doctrine required giving him the advantage of the law in effect at the time of his original hearing. *Id.* at 667. The court therefore reversed the BIA's judgment and ordered the agency to allow the petitioner to apply for asylum under the earlier law. *Id.* at 668.

3. Like the Seventh Circuit, the Ninth Circuit has held that the "only effective remedy" for a defect like ineffective assistance of counsel, coupled with a change in law, is to grant "a hearing under the law that applied to [the applicant] at the time his original hearing occurred." *Castillo-Perez*, 212 F.3d at 528 (citing *Batanic*, 12 F.3d at 667); *see also Guadalupe-Cruz v. INS*, 250 F.3d 1271, 1212 (9th Cir. 2001) (ordering *nunc pro tunc* relief based on agency error).

In *Castillo-Perez*, the petitioner had received ineffective assistance of counsel in immigration proceedings and moved to reopen the matter. 212 F.3d at 521–22. In the intervening time, however, a change in law had undercut his claim for immigration relief. *Id.* at 522. The BIA found he had a prima facie claim of ineffective assistance but nevertheless denied relief based on the new law. *Id.* The Ninth Circuit then granted *nunc pro tunc* relief, ordering the agencies to apply the law that would have governed at the time of the petitioner's immigration hearing, if not for the ineffective assistance. *Id.* at 528. "[R]egardless of whether or not

[the new law] should, as a general matter, apply retroactively, it cannot be applied to [petitioner]." *Id.*

The Ninth Circuit held similarly in another case involving government misconduct. *See Salgado-Diaz* , 395 F.3d 1158. In that case, a noncitizen alleged he had been in the midst of immigration proceedings when officers arrested him and asked him to sign a form. *Id.* at 1160. He complied, understanding that the form was needed to verify his ongoing immigration proceedings. *Id.* Instead, the form was actually for voluntary departure. *Id.* The government then removed him to Mexico. *Id.* The noncitizen soon reentered the United States and immigration proceedings started again. *Id.* Before they concluded, though, a change in law diminished the noncitizen's chance of success. *Id.* at 1161. The Ninth Circuit applied the *nunc pro tunc* doctrine: If the noncitizen could prove that the government had improperly removed him, he would "be entitled to the relief available at the time of his original hearing . . . as if the arrest and expulsion had not occurred." *Id.* at 1164, 1167–68.[1]

4. The Third Circuit also appears to take a broad approach to *nunc pro tunc* relief. That court recognizes that such relief "has 'long [been] employed by the immigration authorities, based on what they believe to be implied statutory authority to provide relief from the harsh provisions of the immigration laws in sympathetic cases.'" *Cheruku v. Att'y Gen.*, 662 F.3d 198,

[1] In dictum, the Ninth Circuit has also articulated the *nunc pro tunc* doctrine in arguably more narrow terms. *See Singh v. Mukasey*, 533 F.3d 1103, 1110 (9th Cir. 2008). In that case, however, the court ultimately denied relief because there had not been an agency error, so regardless *nunc pro tunc* relief would not have been warranted. *See id.*

207–09 (3d Cir. 2011) (alteration in original) (citation omitted). The Third Circuit has acknowledged that the BIA may use *nunc pro tunc* relief "to correct an error in immigration proceedings," consistent with the broad approach. *Id.* at 208 (citing *Edwards*, 393 F.3d at 309). The court ultimately denied relief in the *Cheruku* case because a statute had foreclosed *nunc pro tunc* relief in this particular circumstance, but the court nevertheless agreed with the plurality that *nunc pro tunc* relief generally may be available to correct errors. *Id.* at 209.

The Third Circuit again endorsed the broad approach where a noncitizen alleged that the government's mistake deprived her of the opportunity to apply for immigration relief and thus led to an improper removal order. *Jacobo v. Att'y Gen.*, 459 F. App'x 112, 116 (3d Cir. 2012). Assuming these allegations were true, "she might be entitled to *nunc pro tunc* relief in the BIA or in [the court of appeals]." *Id.* at 117 (citing cases including *Edwards* and *Batanic*).

* * *

As explained in this section, the Second, Third, Seventh, and Ninth Circuits allow *nunc pro tunc* relief in immigration cases when the equities so require. Had Reyes's case been heard by one of these courts, *nunc pro tunc* relief would have been available.

B. On the other side of the split, the First and the Fifth Circuits both take a narrow view of *nunc pro tunc* relief.

1. The First Circuit has adopted "the limits of the *nunc pro tunc* doctrine under Massachusetts law," under which *nunc pro tunc* relief "may only be used to

correct inadvertent or clerical errors." *Fernandes Pereira v. Gonzales*, 417 F.3d 38, 47 (1st Cir. 2005) ("*Fernandes Pereira I*"). For example, if a court has "fail[ed] to sign an order on an intended date," the court can "label[] the order '*nunc pro tunc*' and mak[e] it effective as of the earlier date." *Gutierrez-Castillo v. Holder*, 568 F.3d 256, 262 (1st Cir. 2009). The First Circuit will not grant *nunc pro tunc* relief, however, "to remedy 'a defect in a judgment, order or decree which expressed exactly the intention of the [agency] at the time when it was made.'" *Fernandes Pereira I*, 417 F.3d at 47 (alteration in original) (quoting *Fierro v. Reno*, 217 F.3d 1, 5 (1st Cir. 2000)). In adopting this narrow approach to *nunc pro tunc* relief, the First Circuit expressly recognized that it created a split with the Second, Seventh, and Ninth Circuits. *Id.* at 46–47.

A divided First Circuit denied rehearing in that case, with Judge Lipez dissenting from the denial of rehearing en banc. *See Fernandes Pereira v. Gonzales*, 436 F.3d 11 (1st Cir. 2006) ("*Fernandes Pereira II*"). The dissent would have denied *nunc pro tunc* relief on equitable grounds but cautioned that the court's overly broad opinion "add[ed] to a circuit split" and "improperly limit[ed] the availability of equitable relief for immigrants." *Id.* at 11–13 (Lipez, J., dissenting from denial of rehearing en banc); *see generally id.* at 11–17. Additionally, the dissent disagreed with the court's application of a Massachusetts state-law approach to *nunc pro tunc* relief. *Id.* at 16 n.7.

2. The Fifth Circuit similarly holds that a court's authority to grant *nunc pro tunc* relief is confined "to correct limited types of errors, namely clerical or other record keeping errors." *Romero-Rodriguez v. Gonzales*,

488 F.3d 672, 677 (5th Cir. 2007). Explicitly acknowledging the split, the Fifth Circuit rejected the Second Circuit's approach and agreed with the First Circuit "that the courts' *nunc pro tunc* authority is [not] any broader in the context of immigration law than it is in other contexts." *Id.* at 677–79 & n.6. At the same time, the court also recognized that the BIA has greater discretion than courts to grant *nunc pro tunc* relief, and accordingly remanded for the BIA to apply agency precedent. *Id.* at 679–80.

* * *

Reyes seeks *nunc pro tunc* relief to apply the law that would have governed in his earlier immigration proceedings, but for the government's misconduct. This relief does not fall within the narrow scope of correcting an inadvertent or clerical error. Thus, under the First and Fifth Circuits' narrow approach, *nunc pro tunc* relief would not have been available in this case.

C. The Sixth and Eighth Circuits occupy a middle ground. They recognize the broad approach, at least nominally, but in practice significantly limit *nunc pro tunc* relief.

1. The Eighth Circuit recently set out the *nunc pro tunc* standard by citing the Second Circuit's broad approach: "*Nunc pro tunc* relief, in the immigration context, is most commonly used to provide relief 'where agency error would otherwise result in [a petitioner] being deprived of the opportunity to seek a particular form of deportation relief.'" *Al-Saadoon v. Barr*, 973 F.3d 794, 800 (8th Cir. 2020) (alteration in original) (quoting *Edwards*, 393 F.3d at 311). The court qualified this broad formulation, however, by explaining

that *nunc pro tunc* relief commonly has been used only either (1) for the Attorney General to permit a previously deported noncitizen to reapply for admission upon reentry, or (2) to apply earlier law that has since changed. *Id.* at 800 n.4 (citing *Ramirez-Canales*, 517 F.3d at 910). The *Al-Saadoon* court ultimately denied relief because the case did not fit either of those two categories, and there had not been an agency error, among other reasons. *Id.* at 800–05 & n.4.

2. The Sixth Circuit has also cited the Second Circuit's broad approach to *nunc pro tunc* relief: "As an equitable power, its scope is broad, and should be applied as justice requires so long as it is not barred by statute." *Ramirez-Canales*, 517 F.3d at 910 (citing *Edwards*, 393 F.3d at 310). Like the Eighth Circuit, though, the Sixth Circuit has held that the availability of *nunc pro tunc* relief "appears to be limited to two general situations": (1) allowing "the Attorney General[] discretion to permit an alien to reapply for admission after being deported and subsequently reentering the country," and (2) applying previous law as if it were current law. *Id.* In *Ramirez-Canales*, the Sixth Circuit held that the petitioner did not fit the second basis for *nunc pro tunc* relief, and the court remanded for the agencies to consider whether he qualified under the first. *Id.* at 910–11. The court thus took a narrower approach than the Second Circuit, but it is not as restrictive as the First and Fifth Circuits.

In the present matter, however, the Sixth Circuit went further. It imposed two novel—and seemingly contradictory—restrictions: denying *nunc pro tunc* relief because there had been no change in Sixth Circuit

law, and also entirely rejecting the possibility of applying earlier law, as discussed further in the following section. App. 11a–12a.

* * *

The circuits are thus split 4–2–2 in their approach to *nunc pro tunc* relief. As discussed further below, federal courts have repeatedly recognized this split and the lack of uniform standards. *E.g.*, *Garcia v. U.S. Citizenship & Immigr. Servs.*, 168 F. Supp. 3d 50, 67–68 (D.D.C. 2016).

II. *Nunc Pro Tunc* Relief Is Available To Allow Application Of The Law That Would Have Governed Absent Government Misconduct.

A. Reyes argued below that he was entitled to *nunc pro tunc* relief. The Sixth Circuit did not reach the equities but instead decided that *nunc pro tunc* relief was unavailable. App. 10a–12a. The court recognized that *nunc pro tunc* authority is "conceptually broad," but it stated that in practice the BIA considers such relief only in "two general situations": "to retroactively grant the Attorney General's discretion to permit an alien to reapply for admission after being deported and subsequently reentering"; and "to apply the law as it existed at the time of the violation instead of current law." App. 11a (quoting *Ramirez-Canales*, 517 F.3d at 910).

The court below went further, imposing two novel limitations within the applying-previous-law authority. First, it denied *nunc pro tunc* relief because there had been no change in Sixth Circuit law. *Id.* The court thus determined it was unable to apply the law that would have governed in Reyes's 2011 proceedings—

Third Circuit law under *Alaka*. *See id.* The court functionally concluded that only a change in law applicable within the Sixth Circuit could warrant *nunc pro tunc* relief. *See id.* It did not cite any support for this restriction. *See id.*

Second, despite holding that a change in Sixth Circuit law could warrant *nunc pro tunc* relief, the court conflictingly decided that, at most, Reyes "was entitled—as his remedy—to 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." *Id.* That is, at most the 2011 removal would not be held against Reyes. *See id.* This ruling rejected entirely the possibility of applying the earlier-controlling law. *See id.* Again, the court did not cite any authority for this. *See id.* Nor did it explain how to square this more-restrictive rule with its recognition that *nunc pro tunc* could allow application of earlier law. *See id.*

1. The Sixth Circuit's narrowing of *nunc pro tunc* relief lacks support and runs contrary to this Court's admonitions in several lines of cases. The Court has long recognized the "fundamental and unquestioned . . . 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) (collecting cases). This equitable principle goes by various names, but "[t]he label counts for little," as it is "more nearly ultimate than either waiver or estoppel." *Id.*

Consistent with this broad principle, the Court has indicated that the government's affirmative miscon-

duct may warrant equitable relief in immigration matters. *See, e.g.*, *INS v. Miranda*, 459 U.S. 14, 17 (1982) (per curiam) (citing *INS v. Hibi*, 414 U.S. 5, 8–9 (1973) (per curiam) and *Montana v. Kennedy*, 366 U.S. 308, 314–15 (1961)). Accordingly, in determining whether an immigration applicant is entitled to equitable relief, the Court has directed lower courts to consider whether the government engaged in affirmative misconduct. *See id.* Courts have thus granted equitable relief based on government misconduct: "[I]f petitioner can . . . prove that the [agency] deprived him of his right to have his immigration status determined in the pending deportation proceeding, the government cannot rely on the post-expulsion events its own misconduct set in motion." *Salgado-Diaz*, 395 F.3d at 1166; *see also, e.g.*, *Schwebel v. Crandall*, 967 F.3d 96, 102–07 (2d Cir. 2020); *Fano v. O'Neill*, 806 F.2d 1262, 1265–66 (5th Cir. 1987) (concluding a noncitizen's "allegations of willfulness, wantonness, and recklessness are broad enough to encompass the type of conduct sufficient for estoppel"). In keeping with the Court's affirmative-misconduct cases, courts have recognized their power to grant *nunc pro tunc* relief if justice so requires. *See, e.g.*, *Salgado-Diaz*, 395 F.3d at 1167–68.

The Court's recognition of equitable relief in immigration matters aligns with requirements of fairness to applicants. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). Applicants have the right, at least, to procedures set out in statute, and due process may require more for "aliens who have established connections in this country." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1963–64 (2020). Courts have thus concluded

that due process requires *nunc pro tunc* application of earlier law, where the equities favor this relief, in cases of government misconduct. *See, e.g.*, *Castillo-Perez*, 212 F.3d at 528; *Batanic*, 12 F.3d at 666–68.

2. Considerations of fairness have also led the Court to require adjudication under previously applicable law when a statute does not preclude such relief. *See INS v. St. Cyr*, 533 U.S. 289, 323–25 (2001). As here, a noncitizen might plead guilty to an offense in reliance on an understanding that, under then-applicable law, such conviction will not necessarily preclude immigration relief. *Id.* "[I]t would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' to hold that . . . subsequent restrictions deprive [the noncitizen] of any possibility of such relief." *Id.* at 323–24 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'

Id. at 316 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).[2]

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[2] To be clear, Reyes is not making a retroactivity argument here—that is, the question is not whether *Bastardo-Vale* generally applies retroactively. Instead, the question is whether the

3. Based on this Court's precedent, the Sixth Circuit here erred in imposing novel limitations on the equitable power to grant *nunc pro tunc* relief. The court below should have followed the plurality approach, applying the *nunc pro tunc* doctrine if the equities so required. *Nunc pro tunc* relief is a "'far-reaching equitable remedy' applied in 'certain exceptional cases,' typically aimed at 'rectify[ing] any injustice [to the parties] suffered by them on account of judicial delay.'" *Iouri v. Ashcroft*, 487 F.3d 76, 88 (2d Cir. 2007) (quoting *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (Sotomayor, J.) and *Weil v. Markowitz*, 829 F.2d 166, 175 (D.C. Cir. 1987)). This remedy "has long been available under immigration law." *Iavorski*, 232 F.3d at 130 n.4 (collecting cases). Indeed, in the first reported I & N decision, then-Attorney General Robert Jackson granted *nunc pro tunc* relief. *See Matter of L-*, 1 I & N. Dec. 1 (BIA 1940); *see also Judulang v. Holder*, 565 U.S. 42, 47 (2011); *Edwards*, 393 F.3d at 309. Courts and agencies have repeatedly and flexibly applied the *nunc pro tunc* doctrine, and Congress has not stepped in. *See Edwards*, 393 F.3d at 309.

Given these principles and longstanding historical practice, and the lack of congressional disapproval, the court of appeals here erred in narrowing the availability of *nunc pro tunc* relief. *See, e.g.*, *Edwards* at 309 n.12 (collecting cases and rejecting the minority's restrictive approach to *nunc pro tunc* relief in immigration cases). "Whatever the merits of [the restrictive] position may be in other areas of the law, it is clearly

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door is open for a court to consider whether the equities require *nunc pro tunc* relief based on government misconduct. *See Castillo-Perez*, 212 F.3d at 528.

not the approach that has been taken in the immigration context." *Id.* The Sixth Circuit's novel restrictions have no basis in statute or Supreme Court precedent—or any other authority, for that matter. These limitations would effectively eliminate a federal court's power to use *nunc pro tunc* relief to apply earlier law, without even considering the equities. And the Sixth Circuit's approach flouts this Court's maxim that a party should not gain an advantage from its own misconduct—as the facts here show.

B. The equities warrant relief in this case. As the district court found with great detail, government officers "cooked up" Reyes's 2011 removal, deporting him based on forms the officers themselves forged. App. 102a n.27, 103a n.29. And then they lied about it to a federal court. *E.g.*, App. 107a ("plainly selfserving prevarication"); *see also* App. 74a, 83a, 102a–09a, 151a, 211a–13a. And only after all of this did the government turn over the color copies of the forms that "conclusively" showed the forms were "shams." App. 87a, 158a–59a, 214a. The government's "egregious" misconduct led the district court to find "a level of law enforcement outrageousness I have not seen in any other case since I have been a federal judge." App. 83a. (quoting transcript). As to the officers' testimony: "It was the single mo[]st troubling thing I have read not only in the time I have been a district judge, but in the time I have been a lawyer." *Id.* (alteration in original) (quoting transcript).

What is more, Reyes suffered prejudice based on his likelihood of obtaining relief but for the government's forgery. *See* App. 163a–98a. As the district court found, Reyes was "clearly at risk of further persecution," based on the history of violence and threats against his

family. App. 185a. The government's misconduct thus deprived Reyes of his chance at asylum or withholding in 2011.

And that is not all. On top of everything, when the government arrested Reyes in 2017, it did so in Pennsylvania. App. 4a. In Pennsylvania, Reyes still had a chance at asylum or withholding of removal, under *Alaka*. *Alaka* was still good law when the IJ denied relief, and it was still good law when the BIA dismissed Reyes's appeal. But the government moved Reyes to Ohio. There, *Alaka* did not control, allowing the government to proceed with removal.

This mix of government misconduct, forgery, and prejudice makes it difficult to imagine a fact pattern more deserving of equitable relief. The government already improperly deported Reyes once. It should not be permitted to benefit by moving Reyes to a circuit with more favorable law than the circuit where it initially undertook to remove Reyes. This type of misconduct, coupled with a difference in law, is precisely the situation where the equities merit adjudication under the law that would have controlled absent government misconduct. *See, e.g.*, *Salgado-Diaz*, 395 F.3d at 1164, 1167–68.

III. The Question Presented Is Important, And This Case Is An Ideal Vehicle For Resolving It.

A. This Court should also grant the Petition because questions about the proper application of *nunc pro tunc* relief are nationally important and recurring. The issue's importance could hardly be greater for individual applicants. *See, e.g.*, *Delgadillo v. Carmichael*,

332 U.S. 388, 391 (1947) (discussing the "high and momentous" stakes of deportation); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (noting that removal is "the equivalent of banishment or exile"). Removal thus "cannot be made a 'sport of chance'" that turns on the circuit in which a removal proceeding takes place. *Judulang*, 565 U.S. at 58–59 (citation omitted). But the current split among the circuits' *nunc pro tunc* precedent creates exactly that problem.

The issue is also important to the integrity of the nation's immigration system. *Nunc pro tunc* relief prevents the government from profiting from its own misconduct. Courts and agencies recognize that the remedy "achieve[s] equitable results serving the interests of the agency and the individual alike." *Jacobo*, 459 F. App'x at 117 (quoting *In re Lei*, 22 I. & N. Dec. 113, 132 (BIA 1998)). Indeed, allowing the government to relocate a noncitizen involuntarily and thereby prejudice the noncitizen's opportunity for relief would be "a perversion of the administrative process." *Cf. Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (rejecting BIA's dismissal of appeal after the government removed the petitioner while her appeal was pending); *see also id.* at 245–46 (Kethledge, J., concurring) ("The government forcibly removed [petitioner] from the United States, and now claims she abandoned her appeal because she left the country. To state that argument should be to refute it.").

Without guidance from this Court, an applicant's access to *nunc pro tunc* relief depends on the particular circuit in which the applicant is located: A noncitizen could be subject to the plurality's broad approach, *see Edwards*, 393 F.3d at 308–12, the Sixth Circuit's novel restrictions, *see* App. 11a–12a, or the First and Fifth

Circuits' narrow approach drawn from Massachusetts state law, *see Fernandes Pereira II*, 436 F.3d at 16 n.7 (Lipez, J., dissenting from denial of rehearing en banc); *Romero-Rodriguez*, 488 F.3d at 677–678 & n.6. This split—and the government's efforts here to move Reyes to a less applicant-friendly circuit—show the need for the Court to provide uniform standards in applying immigration laws. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 700–01 (2001) (addressing "the Nation's need to 'speak with one voice' in immigration matters"). It is no surprise, then, that federal courts have repeatedly noted this split. *See, e.g.*, *Lupera-Espinoza v. Att'y Gen.*, 716 F.3d 781, 787–88 n.9 (3d Cir. 2013); *Romero-Rodriguez*, 488 F.3d at 674, 678; *Fernandes Pereira I*, 417 F.3d at 46–47; *Fernandes Pereira II*, 436 F.3d at 13–14 (Lipez, J., dissenting from denial of rehearing en banc); *Compere v. Riordan*, 368 F. Supp. 3d 164, 171 (D. Mass. 2019); *Garcia*, 168 F. Supp. 3d at 67–68.

B. Although *nunc pro tunc* issues come up often, many of those cases may not present a clean vehicle to resolve the circuit split because it is not clear whether *nunc pro tunc* relief, if granted, would lead the applicant to prevail on the merits. Here, in contrast, a federal court has already concluded that Reyes suffered prejudice and likely would have won immigration relief under then-applicable Third Circuit law. *See generally* App. 64a–223a. Additionally, there can be no serious dispute that the equities favor *nunc pro tunc* relief here, based on the district court's findings as to the government's egregious misconduct. *See generally id.* As a result, this petition tees up a clean legal issue: whether the court of appeals had the power to grant the requested *nunc pro tunc* relief. The Court should

use this case to provide uniform standards and resolve the split among the circuits.

CONCLUSION

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

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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