sales division's gross margins improved from -19% in 2010 to -14% in 2011 to -5% in 2012, and were positive in Q1 and Q3 of 2012. Thus, rather than projecting a "facade of profitability," the company's original financials only misstated the degree of the company's *un*profitability: SolarCity reported a net *loss* of $91.575 million in 2012, even with the accounting error, which was later restated to $113.726 million. These facts preclude us from holding that the falsity of the erroneous financials was necessarily "immediately obvious" to Defendants–Appellees. *Zucco Partners*, 552 F.3d at 1001. To be sure, Webb's allegations regarding Defendants–Appellees' hands-on approach to management are relevant, and we have taken them "into account when evaluating all circumstances together." *S. Ferry*, 542 F.3d at 786. Independently though they are not strong enough to create an inference of involvement sufficient to satisfy the PSLRA. *See id.*

Therefore, we conclude that on the whole, Webb's narrative of fraud is simply not as plausible as a nonfraudulent alternative. *See ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1035 (9th Cir. 2016). Admittedly, the magnitude of the requisite restatement—15% to 67% per quarter—and the seven-quarter duration of the alleged fraud are troubling and potentially indicative of scienter. *See In re Daou Sys., Inc.*, 411 F.3d 1006, 1018, 1023 (9th Cir. 2005). But even those facts, cobbled together with all of the others aforementioned, are not enough to satisfy the standard required by the PSLRA. Therefore, we affirm the dismissal of Webb's § 10(b) and Rule 10b-5 claims.

II. Webb's § 20(a) Claim

[14] Section 20(a) of the Securities Exchange Act establishes that "[e]very person who, directly or indirectly, controls any person liable under [the Securities Exchange Act and its implementing regulations] shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable." 15 U.S.C. § 78t(a). A plaintiff suing under § 20(a) must demonstrate: "(1) a primary violation of federal securities laws" and "(2) that the defendant exercised actual power or control over the primary violator." *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

[15] The district court dismissed Webb's § 20(a) claim against Rive and Kelly because Webb failed to state a claim of a primary violation of the securities laws. Because we also find that Webb failed to state a claim for a primary violation, we affirm the dismissal of Webb's § 20(a) claim.

CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of the TAC. Plaintiff–Appellant's pending motion for judicial notice is granted. Plaintiff–Appellant shall bear the costs on appeal.

AFFIRMED.

MING DAI, Petitioner,

v.

Jefferson B. SESSIONS III, Attorney General, Respondent.

No. 15-70776

United States Court of Appeals, Ninth Circuit.

Filed March 8, 2018

Submitted October 13, 2017 * San Francisco, California

Background: Alien seeking asylum sought review challenging the Board of Immigration Appeals' (BIA) decision affirming the decision of the Immigration Judge (IJ) finding that alien, a citizen of China, failed to meet his burden of proof for asylum, withholding of removal, and Convention Against Torture (CAT) protection.

Holdings: The Court of Appeals, Reinhardt, Circuit Judge, held that:

(1) the Court of Appeals was required to treat alien's testimony as credible;

(2) alien's testimony set forth sufficient specific facts on a protected ground to constitute past persecution;

(3) alien's testimony was persuasive; and

(4) alien was entitled to a presumption of a well-founded fear of future persecution.

Petition granted and case remanded.

Trott, Circuit Judge, filed a dissenting opinion.

1. Aliens, Immigration, and Citizenship ⚿388

The Court of Appeals cannot deny a petition for review on a ground upon which the Board of Immigration Appeals (BIA) itself did not base its decision.

2. Aliens, Immigration, and Citizenship ⚿403(2)

The Court of Appeals reviews the Board of Immigration Appeals' (BIA) factual findings for substantial evidence.

3. Aliens, Immigration, and Citizenship ⚿639

If a noncitizen seeking asylum establishes past persecution, a rebuttable presumption of a well-founded fear arises, and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42)(A).

4. Aliens, Immigration, and Citizenship ⚿523(1)

An applicant for asylum alleging past persecution has the burden of establishing that: (1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42)(A).

5. Aliens, Immigration, and Citizenship ⚿642

If the testimony of an applicant for asylum satisfies all three requirements that their testimony must be credible, persuasive, and refer to specific facts sufficient to demonstrate that the applicant is a refugee, then it alone meets the applicant's burden of proof. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii).

6. Aliens, Immigration, and Citizenship ⚿567, 572

If the credible testimony of an applicant seeking asylum alone is not sufficiently persuasive, the Immigration Judge (IJ) must give the applicant notice of the corroboration that is required and an oppor-

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

tunity either to produce the requisite corroborative evidence, or to explain why that evidence is not reasonably available. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii).

7. Aliens, Immigration, and Citizenship ⚿567, 572, 643

If the credible testimony of an applicant seeking asylum alone is not sufficiently persuasive, the Immigration Judge (IJ) must provide notice and an opportunity to an applicant seeking asylum to produce corroboration or explain its absence, if an adverse credibility finding will be based on a lack of corroborating evidence. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii).

8. Aliens, Immigration, and Citizenship ⚿580, 643

The Board of Immigration Appeals (BIA) may find that an applicant seeking asylum lied about one particular fact without making a general adverse credibility finding. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii).

9. Aliens, Immigration, and Citizenship ⚿580

A statement by the Board of Immigration Appeals (BIA) that an applicant seeking asylum is 'not entirely credible' is not enough to constitute an adverse credibility finding. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii), 1158(b)(1)(B)(iii).

10. Aliens, Immigration, and Citizenship ⚿580

The Board of Immigration Appeals' (BIA) adverse credibility finding of an applicant seeking asylum must be explicit. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii), 1158(b)(1)(B)(iii).

11. Aliens, Immigration, and Citizenship ⚿638

In the absence of an adverse credibility finding by the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA), the petitioner seeking asylum is deemed credible. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(iii).

12. Aliens, Immigration, and Citizenship ⚿638

The rebuttable presumption provision of the REAL ID Act, which requires that the Board of Immigration Appeals (BIA) must afford a rebuttable presumption of credibility to an applicant seeking asylum when the Immigration Judge (IJ) does not make an adverse credibility finding, applies only to appeals to the BIA, not to petitions for review in the Court of Appeals. Immigration and Nationality Act §§ 101, 208, 240, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(iii), 1229a(c)(4)(C).

13. Federal Courts ⚿3552

When the Court of Appeals reviews a decision of a district court, the Court may affirm on any ground supported by the record even if the district court did not consider the issue.

14. Aliens, Immigration, and Citizenship ⚿618(3)

Neither the Immigration Judge (IJ) nor the Board of Immigration Appeals (BIA) made an adverse credibility determination in the case of an applicant, a citizen of China, who sought asylum after he was allegedly beaten, jailed, and denied food, water, sleep, and medical care after he tried to stop the Chinese police from forcing his wife to undergo an abortion, and therefore, the Court of Appeals was re-

quired to treat his testimony as credible in applicant's petition challenging the BIA's decision affirming that alien failed to meet his burden of proof for asylum. Immigration and Nationality Act §§ 101, 208, 240, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(b)(1)(B)(ii), 1158(b)(1)(B)(iii), 1229a(c)(4)(C).

15. Aliens, Immigration, and Citizenship ⚿642

Testimony of alien, a citizen of China, set forth sufficient specific facts on a protected ground to constitute past persecution so as to support alien's eligibility for asylum that arose when alien was allegedly beaten and jailed after he tried to stop the Chinese police from forcing his wife to undergo an abortion; the harm alien suffered was on account of his resistance to China's coercive population control program, alien was forcibly pushed to the ground twice, repeatedly punched in the stomach while handcuffed, jailed for ten days, fed very little food and water, deprived of sleep through interrogation, and denied medical care, after release alien sought and received medical treatment for his injuries, and alien lost his employment as a result of the occurrence. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42), 1158(b)(1)(B)(ii).

16. Aliens, Immigration, and Citizenship ⚿542

Police officers are the prototypical state actor for asylum purposes. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42).

17. Aliens, Immigration, and Citizenship ⚿530(1)

Physical violence is persecution for asylum purposes. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42).

18. Aliens, Immigration, and Citizenship ⚿530(1)

An applicant for asylum may establish persecution through physical abuse even if he does not seek medical treatment. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42).

19. Aliens, Immigration, and Citizenship ⚿529

Loss of employment is an economic harm can contribute to a finding of persecution for asylum purposes. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42).

20. Aliens, Immigration, and Citizenship ⚿643

Testimony of alien, a citizen of China, was persuasive so as to support his eligibility for asylum arising from when alien was allegedly beaten and jailed after he tried to stop the Chinese police from forcing his wife to have an abortion, even though alien may have been untruthful about how wife initially went to the United States and then returned to China; alien's fear of persecution did not rest solely on wife's treatment, alien suffered his own distinct harms, alien feared being forced to undergo involuntary sterilization should he return to China, any alleged credibility findings regarding alien's truthfulness could not be smuggled into the persuasiveness inquiry, and alien's economic reasons for coming to the United States did not render his testimony about past persecution unpersuasive. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42), 1158(b)(1)(B)(ii).

21. Statutes ⚿1156

Courts should not interpret statutes in a way that renders a provision superfluous.

22. Aliens, Immigration, and Citizenship ⚿520

A valid asylum claim is not undermined by the fact that the applicant had additional reasons, beyond escaping persecution, for coming to or remaining in the United States, including seeking economic opportunity. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42).

23. Aliens, Immigration, and Citizenship ⚿639

Alien, a citizen of China, was entitled to the rebuttable presumption of a well-founded fear of future persecution so as to support his eligibility for asylum arising from when alien was allegedly beaten and jailed after he tried to stop the Chinese police from forcing his wife to undergo an abortion; the record compelled the conclusion that alien testified to sufficient facts that demonstrated his eligibility for asylum in that he was subjected to harm rising to the level of past persecution, that persecution was on account of a protected ground, and the persecution was committed by the government. Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42), 1158(b)(1)(B)(ii).

24. Aliens, Immigration, and Citizenship ⚿501

The decision to grant asylum is discretionary. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(42).

25. Aliens, Immigration, and Citizenship ⚿500

Withholding of removal is governed by the same standards as asylum for demonstrating credibility, sufficiency, and persuasiveness. Immigration and Nationality Act §§ 101, 208, 240, 8 U.S.C.A. §§ 1101(a)(42), 1158(b)(1)(B)(ii), (iii), 1229a(c)(4)(B), (C).

26. Aliens, Immigration, and Citizenship ⚿502

The primary difference between the standards for withholding of removal and asylum is that, in order to be eligible for withholding, the alien must demonstrate that it is more likely than not that he would be subjected to persecution based on a protected ground if removed, which is a higher standard than the well-founded fear required for asylum. Immigration and Nationality Act §§ 101, 208, 240, 8 U.S.C.A. §§ 1101(a)(42), 1158(b)(1)(B)(ii), (iii), 1229a(c)(4)(B), (C).

27. Aliens, Immigration, and Citizenship ⚿599

The Court of Appeals' role in an immigration case is typically one of review, not of first view.

On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. AXXX-XX5-836

David Z. Su, Law Offices of David Z. Su, West Covina, California, for Petitioner.

Aimee J. Carmichael, Trial Attorney; Mary Jane Candaux, Assistant Director; Office of Immigration, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

Before: Sidney R. Thomas, Chief Circuit Judge, and Stephen Reinhardt and Stephen S. Trott, Circuit Judges.

Dissent by Judge Trott

OPINION

REINHARDT, Circuit Judge:

Ming Dai is a citizen of China. He testified that he was beaten, arrested, jailed, and denied food, water, sleep, and medical care because he tried to stop the police from forcing his wife to have an abortion.

The Board of Immigration Appeals (BIA) nevertheless found that Dai was not eligible for asylum or withholding of removal.

There is one clear and simple issue in this case: neither the Immigration Judge (IJ) nor the BIA made a finding that Dai's testimony was not credible. Under our well-established precedent, we are required to treat a petitioner's testimony as credible in the absence of such a finding. We adopted this rule before the REAL ID Act and reaffirmed it after its passage. The dissent clearly disapproves of our rule. We are, however, bound to follow it. We might add, though it does not affect our holding in this case, that we approve of it. We think it not too much to ask of IJs and the BIA that they make an explicit adverse credibility finding before deporting someone on that basis. In any event, under our well-established rule, Dai is unquestionably entitled to relief.

BACKGROUND

I. Dai's Persecution in China [1]

Dai has been married for twenty years to Li Ping Qin. Dai and Qin have a daughter, who was born in 2000. In April 2009, Qin discovered that she was pregnant again. Dai and Qin were "very happy" about the pregnancy and believed they would be able to keep the child if they paid a fine, despite China's One Child policy.

However, the month after Qin found out she was pregnant, she was visited at work by a "family planning officer" who told Qin that she was required to have an abortion. Qin told the officer that she would need to think about it. Two months later, five family planning officers came to Dai and Qin's house early in the morning from "the local family planning office and also the police station." The officers were there to take Qin to the hospital for a forced abortion. Qin told the officers that she didn't want to go and Dai attempted to stop the officers from taking Qin against her will. Dai and the officers began arguing, with the officers telling Dai that Qin had to have the forced abortion as a matter of "Chinese policy" and Dai saying "you can't take my wife away."

When Dai continued resisting the officers' efforts to take Qin for the forced abortion, two of them pushed him to the ground. Dai got up and tried again to stop the officers, so they pushed him to the ground again. This time, the officers handcuffed Dai and repeatedly beat him, causing substantial injuries. While Dai was handcuffed and being beaten, the other officers dragged Qin out of the house.

The police took Dai to the Zha Bei detention center. There, they ordered Dai to confess to resisting arrest. Dai initially refused to confess and insisted that he had the right to protect his family. The officers continued to interrogate him over the next number of days. At times he was deprived of sleep because he was interrogated in the middle of the night. During the ten days he spent in detention, Dai was interrogated approximately seven times. He was fed one meal a day and often denied water. Dai characterized his treatment as "mental[ ] torture." Dai ultimately confessed to resisting arrest and fighting with the officers. He was released about two days after his confession.

Dai's injuries occurred when the officers beat him at his home. Despite telling the police about his injuries, he received no medical attention while in custody. When he was released he went to the hospital for

1. This factual summary is drawn primarily from Dai's testimony before the IJ. As we discuss in more detail below, we treat Dai's testimony as credible because neither the IJ nor the BIA made an adverse credibility finding.

x-rays, which showed that his right arm was dislocated and the ribs on his right side were broken. The doctor put Dai's arm back in place and wrapped it to keep it still for six weeks. Dai did not receive any treatment for his broken ribs.

When Dai returned home he found Qin crying. Qin told him that she had been taken to the Guang Hua hospital in the Chang Ning district, where a doctor made her get undressed and then sedated her. When she woke up, she learned that her pregnancy had been terminated and that an IUD had been implanted, all without her consent.

In addition to Qin's forced abortion and Dai's arrest, detention, and physical and mental abuse, Qin, Dai, and their daughter each suffered other repercussions arising out of Qin's unauthorized pregnancy and Dai's resistance to her forced abortion. Dai was fired from his job, while Qin was demoted and her salary was reduced by thirty percent. Their supervisors specifically informed them that they were fired and demoted because of the above events. Their daughter was also denied admission to more desirable schools despite good academic performance. Her teacher told Qin that this was likewise because of the events resulting from the illegal pregnancy.

On or about January 27, 2012, Dai, Qin, and their daughter arrived in the United States on tourist visas, with authorization to remain until July 26, 2012. Qin and their daughter returned to China in February while Dai remained in the United States. In the time since Qin and their daughter have returned to China, the Chinese police have come looking for Dai multiple times. Dai is afraid that if he returns to China he will be forcibly sterilized.

II. Asylum Application

Approximately eight months after arriving in the United States, Dai filed an affirmative asylum application. The next month, he was interviewed by an asylum officer. The asylum officer took notes during the interview, but did not prepare a verbatim transcript.

During the interview, Dai was not asked whether his wife and daughter had accompanied him to the United States. Rather, the asylum officer inquired whether they ever traveled anywhere outside of China. He told the asylum officer that both his wife and his daughter had been to Taiwan and Hong Kong and that his wife had been to Australia. When asked if they had traveled anywhere else, he said they had not. However, when told that government records showed that his wife and daughter had traveled to the United States with him, he agreed that they had done so. When asked why he did not initially disclose this, Dai said (through an interpreter and according to the non-verbatim notes of the interview), "I'm afraid you ask why my wife and daughter go back." Dai explained that his wife and daughter went back to China "[s]o that my daughter can go to school and in the US you have to pay a lot of money." Finally, Dai was asked, "Can you tell me the real story about you and your family's travel to the US?" Dai responded, "I wanted a good environment for my child. My wife had a job and I didn't and that is why I stayed here. My wife and child go home first."

The asylum officer denied Dai's asylum application.

III. Removal Proceedings

The Department of Homeland Security (DHS) then issued Dai a Notice to Appear. Dai conceded that he was removable and sought asylum, withholding of removal, and CAT protection. At a hearing before the IJ, Dai testified about the events in

China we have described. When asked why he came to the United States, he said, "[b]ecause I was persecuted in China and my wife, my wife was forced to have an abortion and I lost my baby. I was arrested. I was beaten[ ]. I lost my job. America [ ] is a free country and it's [ ] a democratic country. I want to come here [ ] and have my very basic human rights. I really, really hate Chinese dictatorship."

During cross-examination, the government asked Dai about his initial failure to disclose his wife and daughter's travel to the United States. Dai testified that "I was very nervous" and "because I was already in the U.S. and they [ ] came with me to the U.S. ... I thought that you were asking me anywhere other than the U.S." In response to further questioning by the government, Dai testified that his wife and daughter returned to China so that his wife could care for his father-in-law and his daughter could attend school. When asked why he didn't keep them in the US to protect them from forced IUDs or abortions, Dai reminded the government that his wife's IUD was already inserted before she left China and that his daughter was only 13.

When the government asked Dai if there were any other reasons he was afraid to return to China, Dai said, "if I return to China, it's impossible for me to get another job.... Just the sterilization and that." Finally, when asked why he remained in the U.S. when his wife returned to China he responded, "Because at that time, I was in a bad mood and I couldn't get a job, so I want to stay here for a bit longer and another friend of mine is also here." At the time in question (when Qin returned to China in February 2012), Dai did not know about asylum. He first learned about the existence of that process in March of that year.

The IJ did not make an adverse credibility finding. Instead, the IJ found that Dai failed to meet his burden of proof for asylum, withholding of removal, and CAT protection.

IV. BIA Decision

The BIA affirmed the IJ's denial of relief. The BIA first found that Dai "failed to disclose both to the [DHS] asylum officer and the [IJ] that his wife and daughter had traveled with him to the United States and voluntarily returned to China shortly after" [2] and that Dai's reason for concealing this information was that "he believed that the true reasons for their return ... would be perceived as inconsistent with his claims of past and feared persecution." [3]

The BIA acknowledged that the IJ did not make an adverse credibility finding and also did not make one itself. Instead, the BIA held that "the [IJ] need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim." The BIA found that Dai's family returning to China and "his

2. The record clearly demonstrates that Dai did not conceal this information from the IJ. If he concealed it at all, it was only from the asylum officer. To the extent the government defends this finding by the BIA, it simply notes that Dai "did not raise the information during direct examination before the Immigration Judge." However, Dai was not asked about his family's travel to the United States and return to China during direct examination, and when he was asked during cross examination he answered truthfully.

3. The BIA also found that "the respondent's contention that his wife and daughter returned to China before he became aware of the possibility of asylum is not supported by the record." In fact, Dai's testimony on this point was unchallenged and uncontradicted and the government does not defend this erroneous finding before this court.

not being truthful about it" were "detrimental to his claim and [ ] significant to his burden of proof." The BIA concluded that Dai failed to establish eligibility for asylum, withholding of removal, or CAT protection. Dai filed a timely petition for review challenging the BIA's denial of relief.

SCOPE AND STANDARD OF REVIEW

[1, 2] "[W]e cannot deny a petition for review on a ground [upon which] the BIA itself did not base its decision." *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1110 (9th Cir. 2011). We review the agency's factual findings for substantial evidence. *Hamazaspyan v. Holder*, 590 F.3d 744, 747 (9th Cir. 2009).

The scope of review in this case is unclear. While the BIA stated that it "adopt[ed] and affirm[ed] the Immigration Judge's decision," it then went on to discuss and agree with most of the IJ's specific reasons while omitting any discussion of one of them.

On the one hand, we have held that when "the BIA adopts the decision of the IJ and affirms without opinion, we review the decision of the IJ as the final agency determination." *Smolniakova v. Gonzales*, 422 F.3d 1037, 1044 (9th Cir. 2005); *see also Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994). In this case, however, the BIA did not affirm "without opinion."

On the other hand, we have also held that when "the BIA relie[s] upon the IJ's opinion as a statement of reasons" but "state[s] with sufficient particularity and clarity the reasons for denial of asylum and d[oes] not merely provide a boilerplate opinion," we "look to the IJ's oral decision [only] as a guide to what lay behind the BIA's conclusion." *Tekle v. Mukasey*, 533 F.3d 1044, 1051 (9th Cir. 2008) (quotation marks and alterations omitted). "In so doing, we review here the reasons explicitly identified by the BIA, and then examine the reasoning articulated in the IJ's oral decision in support of those reasons.... Stated differently, we do not review those parts of the IJ's ... finding that the BIA did not identify as 'most significant' and did not otherwise mention." *Id.*; *see also Lai v. Holder*, 773 F.3d 966, 970 (9th Cir. 2014). However, in those cases the BIA did not say that it was adopting the decision of the IJ.

Finally, this is not a case in which "the BIA adopt[ed] the immigration judge's decision and also add[ed] its own reasons." *Nuru v. Gonzales*, 404 F.3d 1207, 1215 (9th Cir. 2005). The BIA did not "add[ ] its own reasons;" rather, it identified and expressly agreed with some (but not all) of the IJ's reasons.

We need not, however, resolve the precise scope of review in this case because none of the reasons advanced by the IJ, including the one omitted by the BIA, provides a sufficient basis for the BIA's decision.

DISCUSSION

I. Asylum

Asylum is available to refugees—that is, anyone who is "'unable or unwilling to avail himself or herself of the protection of [his or her native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Baghdasaryan v. Holder*, 592 F.3d 1018, 1022–23 (9th Cir. 2010) (quoting 8 U.S.C. § 1101(a)(42)(A)).[4]

4. By "native country" we mean a person's country of nationality "or, in the case of a person having no nationality, ... [the] coun-

[3, 4] If a noncitizen establishes past persecution, "a rebuttable presumption of a well-founded fear arises, and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (quotation marks and citations omitted). "An applicant alleging past persecution has the burden of establishing that (1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control." *Baghdasaryan*, 592 F.3d at 1023.

[5–7] This case is governed by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302–23. Under the standards established by that Act, an applicant's testimony alone is sufficient to establish eligibility for asylum if it satisfies three requirements: the "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii). In determining whether the testimony is persuasive, "the trier of fact may weigh the credible testimony along with other evidence of record." *Id.* If the applicant's testimony satisfies all three requirements, then it "alone meets the applicant's burden of proof." *Ren v. Holder*, 648 F.3d 1079, 1093 (9th Cir. 2011). If, however, the applicant's credible testimony alone is not sufficiently persuasive, "the IJ must give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available." *Id.*[5] No notice regarding corroboration was given to Dai. We will next examine the three requirements under the Act for meeting the burden of proof, though not in the order listed in the statute.

try in which such person last habitually resided.'' 8 U.S.C. § 1101(a)(42)(A).

5. The IJ must also provide notice and an opportunity to produce corroboration or explain its absence if an adverse credibility finding will be based on a lack of corroborating evidence. *Lai,* 773 F.3d at 975–76.

A. Credibility

[8–10] Dai testified at his removal hearing and the IJ made no adverse credibility finding. When this was called to the BIA's attention, it also made no adverse credibility finding. Although the BIA identified one time that Dai allegedly failed to disclose a fact and indicated that it did not believe Dai's explanation for not doing so, "this sort of passing statement does not constitute an adverse credibility finding." *Kaur v. Holder*, 561 F.3d 957, 962–63 (9th Cir. 2009). The BIA may find that an applicant lied about one particular fact without making a general adverse credibility finding. Even a "statement that a petitioner is 'not entirely credible' is not enough" to constitute an adverse credibility finding, *Aguilera-Cota v. I.N.S.*, 914 F.2d 1375, 1383 (9th Cir. 1990), and the BIA's finding that Dai "failed to disclose" a single fact does not even rise to the level of a finding that a petitioner is "not entirely credible." In short, the adverse credibility finding must be explicit.

Large portions of the dissent are devoted to elaborating on the deference that we owe to credibility findings by the IJ and the BIA. We agree that such findings are entitled to deference, but we cannot defer to a finding that does not exist. The bulk of our dissenting colleague's concerns can therefore be reduced to his objection to

the rule that adverse credibility findings must be explicit. It is difficult to identify, however, a more well-established rule in the review of immigration cases.[6] The dissent offers no reason to overturn our long-standing requirement that adverse credibility findings be explicit and, in fact, the REAL ID Act codifies the principle that such findings must be "explicitly made." 8 U.S.C. § 1158(b)(1)(B)(iii). Therefore, "[t]he IJ's decision not to make an explicit adverse credibility finding," Dissent at 30, means that there is no finding to which we can defer.[7]

Given that there is no adverse credibility finding from the agency, the next question is whether we can *nostra sponte* decide that Dai's testimony is not credible. Prior to the REAL ID Act, we held that in the absence of an explicit adverse credibility finding by the IJ or the BIA we are required to treat the petitioner's testimony as credible. *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *Navas v. I.N.S.*, 217 F.3d 646, 652 n.3 (9th Cir. 2000). The REAL ID Act enacted a variety of changes to the standards governing credibility determinations, including—as noted by the dissent—a provision that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii).

[11] Neither this provision nor anything else in the REAL ID Act explicitly or implicitly repeals the rule that in the absence of an adverse credibility finding by the IJ or the BIA, the petitioner is deemed credible. To the contrary, in a post-REAL ID opinion we stated and applied that rule. *See Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1013 n.1 (9th Cir. 2011); *see also Kazemzadeh v. U.S. Attorney Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (W. Pryor, J.) (post-REAL ID application) ("Where an [Immigration Judge] fails to explicitly find an applicant's testimony incredible and cogently explain his or her reasons for doing so, we accept the applicant's testimony as credible.") (quotation marks omitted). *Hu* controls here, a fact the dissent entirely fails to acknowledge. However, in *Hu* we did not explain why our rule was unaffected by the new language in the REAL ID Act. We take this opportunity to do so now.

[12] Properly understood, the rebuttable presumption provision of the REAL ID Act applies only to appeals to the BIA, not to petitions for review in our court.[8] This is

6. *See, e.g., She v. Holder,* 629 F.3d 958, 964 (9th Cir. 2010); *Tijani v. Holder,* 628 F.3d 1071, 1080 (9th Cir. 2010); *Edu v. Holder,* 624 F.3d 1137, 1143 n.5 (9th Cir. 2010); *Karapetyan v. Mukasey,* 543 F.3d 1118, 1123 n.4 (9th Cir. 2008); *Meihua Huang v. Mukasey,* 520 F.3d 1006, 1007–08 (9th Cir. 2008) (per curiam); *Singh v. Gonzales,* 491 F.3d 1019, 1025 (9th Cir. 2007); *McDonald v. Gonzales,* 400 F.3d 684, 686 n.2 (9th Cir. 2005); *Mansour v. Ashcroft,* 390 F.3d 667, 671–72 (9th Cir. 2004); *Zhang v. Ashcroft,* 388 F.3d 713, 718 (9th Cir. 2004) (per curiam); *Lopez-Alvarado v. Ashcroft,* 381 F.3d 847, 851 (9th Cir. 2004); *Kalubi v. Ashcroft,* 364 F.3d 1134, 1137–38 (9th Cir. 2004); *Mendoza Manimbao v. Ashcroft,* 329 F.3d 655, 658–59 (9th Cir. 2003); *Shoafera v. I.N.S.,* 228 F.3d 1070, 1074 n.3 (9th Cir. 2000); *Navas v. I.N.S.,* 217 F.3d 646, 652 n.3 (9th Cir. 2000); *Prasad v. I.N.S.,* 101 F.3d 614, 616 (9th Cir. 1996); *Hartooni v. I.N.S.,* 21 F.3d 336, 342 (9th Cir. 1994).

7. The dissent places great weight on *Ling Huang v. Holder,* 744 F.3d 1149 (9th Cir. 2014). The distinction between that case and this could not be clearer: "[T]he IJ found that Huang's testimony was not credible." *Id.* at 1151.

8. The proper application of the rebuttable presumption provision is apparent in *She v. Holder,* 629 F.3d 958 (9th Cir. 2010). In that case, we quoted a different pre-REAL ID rule: that "[a]bsent an adverse credibility finding, the BIA is required to 'presume the petitioner's testimony to be credible.' " *Id.* at 964 (quoting *Mendoza Manimbao v. Ashcroft,* 329

demonstrated by the fact that the statute says there is "a rebuttable presumption of credibility *on appeal*." 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C) (emphasis added). In immigration cases, we do not exercise appellate jurisdiction. Rather, decisions by the finder of fact, the IJ, may be appealed to the BIA. *See* 8 C.F.R. § 1003.1(b). We generally cannot review an order of removal unless the non-citizen has exhausted his appeal to the BIA. 8 U.S.C. § 1252(d)(1); *see Ren*, 648 F.3d at 1083–84. The "sole and exclusive means for *judicial* review of an order of removal" is by "a petition for review," not a further appeal. 8 U.S.C. § 1252(a)(5) (emphasis added). Moreover, unlike an appeal, which shifts an existing action to a new court, a petition for review commences a new action against the United States. 28 U.S.C. § 2344; *see also* 8 U.S.C. § 1252(a)(1). Thus, Dai is the petitioner, not the appellant, and the Attorney General is the respondent, not the appellee. A provision that applies "on appeal" therefore does not apply to our review, but solely to the BIA's review on appeal from the IJ's decision.[9]

[13] The inapplicability of the rebuttable presumption provision to review in this court is further confirmed by a fundamental distinction between appellate review and review of administrative decisions that the dissent ignores. When we review a decision of a district court, we may "affirm on any ground supported by the record even if the district court did not consider the issue." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007). When we review an administrative decision, however, "we cannot deny a petition for review on a ground [on which] the BIA itself did not base its decision." *Hernandez-Cruz*, 651 F.3d at 1110; *see also Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007).

The dissent is therefore incorrect to say that "[w]hen it comes to our task of reviewing the credibility of witnesses in a trial court or whether a witness' testimony suffices to carry his burden of proof [ ] there is no material difference between an appeal and a petition for review." Dissent at 38. In an appeal we may, in appropriate circumstances and after affording appropriate deference, reject a district court's credibility finding (whether favorable or adverse) in order to affirm the district court on an alternative ground. However, when the BIA has on appeal neither affirmed an adverse credibility finding made by the IJ nor made its own finding after deeming the presumption of credibility rebutted, we may not deny the petition for review based on lack of credibility, not only because under our well-established case law we must deem the petitioner's testimony credible but also because a denial on that ground would require us to adopt a justification not relied on by the BIA.

[14] The plain text and context of the statute dictate the conclusion that the REAL ID Act's rebuttable presumption of

F.3d 655, 662 (9th Cir. 2003)). In a footnote, we acknowledged that the REAL ID Act prospectively altered this rule so that the BIA must only afford ''a *rebuttable* presumption of credibility'' when the IJ does not make an adverse credibility finding. *Id.* at 964 n.5. Thus, while the dissent is correct that the REAL ID Act affected our precedent, it did not disturb the distinct rule upon which we rely in this case: that in the absence of an adverse credibility finding by either the IJ or the BIA, we are required to treat the petitioner's testimony as credible.

9. The fact that appeals and petitions for review are treated the same for purposes of the Federal Rules of Appellate Procedure, *see* Fed. R. App. P. 20; Dissent at 878–89, is irrelevant. The provision in question, 8 U.S.C. § 1158(b)(1)(B)(iii), is not part of the those rules.

credibility applies only on appeal to the BIA. In the absence of any other provision in the Act affecting the procedures governing credibility findings,[10] our rule that we are required to treat a petitioner's testimony as credible when the agency does not make an adverse credibility finding remains applicable. Because neither the IJ nor the BIA made an adverse credibility determination in Dai's case, we must treat his testimony as credible.

B. Sufficiency

[15, 16] Because Dai's testimony must be deemed credible, we must next consider whether he testified to facts sufficient to establish eligibility for asylum. By statute, "a person . . . who has been persecuted for failure or refusal to [abort a pregnancy or to undergo involuntary sterilization] or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42). The harm Dai suffered was on account of his resistance to China's coercive population control program and thus was on the basis of a protected ground. In addition, "[p]olice officers are the prototypical state actor for asylum purposes." *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005). Therefore, the only question as to the sufficiency of Dai's testimony is whether the harm rose to the level of persecution.

[17, 18] Dai testified that he was beaten, arrested, detained, and deprived of food and sleep because of his attempt to oppose his wife's involuntary abortion. "It is well established that physical violence is persecution." *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009). In *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004), this court held that facts similar to—but less serious than—the facts in this case compelled a finding of persecution. The applicant in *Guo* was arrested, detained for a day and a half, punched in the face, and kicked in the stomach. *Id.* at 1202–03. In contrast, Dai was forcibly pushed to the ground twice, repeatedly punched in the stomach while handcuffed, jailed for ten days, fed very little food and water, deprived of sleep through interrogation, and denied medical care. An applicant may establish persecution through physical abuse even if he does not seek medical treatment, *see Lopez v. Ashcroft*, 366 F.3d 799, 803 (9th Cir. 2004), but Dai did seek and receive such treatment for an injured shoulder and broken ribs.

[19] In addition to the physical harm he suffered, Dai lost his job as a result of this occurrence. Such economic harm can contribute to a finding of persecution. *See Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013).

For these reasons, the harm Dai suffered rose to—and indeed, well surpassed—the established level of persecution. The record therefore compels the conclusion that Dai's testimony sets forth sufficient specific facts to constitute past persecution.

C. Persuasiveness

The BIA did not make an adverse credibility finding, but instead found that Dai had failed to "meet[ ] his burden of proving his asylum claim." As we have explained, *see* pages 13–14, *supra*, an applicant's testimony carries the burden of proof if it is credible, persuasive, and sufficient. Two of

10. The only other significant change regarding credibility adopted by the REAL ID Act is the rule that an adverse credibility finding may now be based on "an inconsistency, inaccuracy, or falsehood [that does not go] to the heart of the applicant's claim." 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C). That rule is irrelevant to this case, as the IJ and BIA did not make an adverse credibility finding.

those requirements have been satisfied: we must treat Dai's testimony as credible and his testimony clearly set out sufficient facts to establish past persecution. We therefore treat the BIA's general statement about Dai's burden of proof as relating to the only remaining requirement for testimony to carry that burden: persuasiveness. However, taking into account the record as a whole, nothing undermines the persuasiveness of Dai's credible testimony—that is, the BIA's determination that Dai's testimony was unpersuasive is not supported by substantial evidence.

In evaluating persuasiveness the BIA is required to "weigh the credible testimony along with other evidence of record." 8 U.S.C. § 1158(b)(1)(B)(ii). The BIA found that Dai's testimony was not persuasive for two reasons. First, the record revealed that Dai's wife Qin and their daughter had traveled to the United States with Dai, and then voluntarily returned to China. Second, Dai initially tried to conceal this fact from the asylum interviewer until he was confronted with it. According to the BIA, "[t]he respondent's family voluntarily returning and his not being truthful about it is detrimental to his claim and is significant to his burden of proof." The IJ identified a third reason for not finding Dai's testimony persuasive: the fact that when asked for "the real story about you and your family's travel to the U.S.," Dai responded, "I wanted a good environment for my child. My wife had a job and I didn't, and that is why I stayed here. My wife and child go home first." However, none of these reasons supports the BIA's conclusion that Dai's testimony was not persuasive in light of the record as a whole.

We have held that a noncitizen's "history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution." *Loho v. Mukasey*, 531 F.3d 1016, 1017–18 (9th Cir. 2008). The BIA relied heavily on *Loho* to justify its decision. However, unlike in *Loho*, Dai never returned to China—only his wife and daughter did.

We have also recognized that a family member's voluntary return—or demonstrated ability to remain in the country without further injury—can be relevant in certain narrow circumstances: when the applicant's "fear of future persecution rests *solely* upon threats received by his family," *Tamang v. Holder*, 598 F.3d 1083, 1094 (9th Cir. 2010) (emphasis added), or when the family member and the applicant are "similarly situated," *Sinha v. Holder*, 564 F.3d 1015, 1022 (9th Cir. 2009).

[20] The IJ found that "the fundamental thrust of [Dai's] claim is that his wife was forced to have an abortion," and Qin "therefore clearly has an equal, or stronger, claim to asylum than [Dai] himself." The IJ also found that Qin was "the primary object of the persecution in China." The BIA adopted this reasoning. However, the findings are contrary to the reasoning of our case law.

It is true that Dai and Qin's persecution arose out of the same general event, but that is not the test that *Tamang* and *Sinha* establish. Dai's fear of persecution does not "rest solely" on Qin's treatment, and Dai and Qin are not "similarly situated." As the harms suffered by Dai and Qin in the past are qualitatively different and give rise to different fears about future persecution, we need not decide who has the "stronger" claim. Neither the statutes nor our case law endorses the IJ and BIA's approach of ranking distinct harms. To the contrary, Dai's claim is independently established by statute and is not

dependent on any comparison with Qin's.[11]

Qin's hypothetical asylum claim arises out of the invasive medical procedure imposed on her against her will—she was "forced to abort a pregnancy [and] to undergo involuntary sterilization." 8 U.S.C. § 1101(a)(42). We certainly agree with the BIA and the government that interference with a person's reproductive freedom is a severe form of persecution and in no way do we suggest that Qin would not have a strong case for asylum had she applied for it.

Dai, however, was "persecuted ... for [ ] resistance to a coercive population control program." *Id.* He was subjected to beatings, prolonged detention, and deprivation of food and sleep—none of which was experienced by Qin. After the incident, Dai was fired from his job while Qin was only demoted. In addition, Qin had already been subjected to the involuntary insertion of an IUD, whereas Dai fears future involuntary sterilization. Since Qin returned to China she has apparently not faced further persecution, but the police have come looking for Dai several times. Dai and Qin's past experiences, as well as their fears about the future, are therefore not so similar as to support the BIA's finding that Qin's voluntary return to China undermines Dai's claim for asylum.

Moreover, Dai's and Qin's respective decisions make sense in context. Qin still had a job in China, and their daughter had a place in school—albeit not in as good a school as she deserved. In this context, it was entirely reasonable to think that the family would be best off if Qin returned to China to keep her job while Dai attempted to establish himself in the United States—hoping that, once he did so, his family would be able to join him. The BIA improperly substituted its own view of what the members of the family should have done for Dai and Qin's own reasoned judgment in a manner that is not supported by substantial evidence in the record.

The BIA's second reason for finding Dai's testimony unpersuasive fares no better. The BIA held that even in the absence of an adverse credibility finding, Dai "not being truthful" about his family's travel to the United States and voluntary return to China "is detrimental to his claim and is significant to his burden of proof."

[21] The BIA's framing of the issue suggests that it is relevant because it casts doubt on Dai's credibility. However, the exercise in which we engage when evaluating persuasiveness requires that in this case we treat Dai's testimony before the IJ as credible. Other evidence is relevant only to the extent that it affects the persuasiveness of the applicant's testimony for reasons *other* than challenging his credibility. Otherwise, the statutory command to "weigh the *credible* testimony along with *other* evidence of record," 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added), would not make sense. Once credibility is decided—here, as we have explained, by the failure of the IJ or the BIA to make an adverse credibility finding—the issue is settled. Credibility concerns that do not justify an adverse credibility finding cannot be smuggled into the persuasiveness inquiry so as to undermine the finding of credibility we are required to afford Dai's testimony.[12] Indeed, despite pointing out

11. "For purposes of determinations under this chapter, a person ... who has been persecuted for ... resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42).

12. According to the dissent, "there is barely a dime's worth of substantive difference between 'credible' and 'persuasive.' " Dissent at 45. This assertion is flatly contradicted by the text of the REAL ID Act, which requires that testimony be both "credible" *and* "persua-

that Dai was "not [ ] truthful" about a tangential point, the BIA never questioned the facts regarding Dai's persecution in China.

Neither the IJ nor the BIA explained how Dai's concealment of his family's travel to the United States and return to China was relevant in any way other than to undermine Dai's credibility. The government likewise offered no such explanation before this court, and in any event we independently discern no relevance beyond Dai's credibility. Therefore, neither the family's return nor Dai's alleged concealment of that fact can support the BIA's finding that Dai's credible testimony was unpersuasive.

[22] Finally, contrary to the portion of the IJ's opinion not mentioned by the BIA, Dai's statement that "My wife had a job and I didn't, and that is why I stayed here," does not render his testimony about his past persecution unpersuasive. A valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States, including seeking economic opportunity. *See Li*, 559 F.3d at 1105 (reversing an adverse credibility determination that was based on an applicant's testimony that economic opportunity was an additional reason for coming to the United States). That is especially true when, as in this case, the loss of economic opportunity in the home country is part of the overall persecution. Dai testified about his reasons for coming to the United States: "I was persecuted in China.... I was arrested. I was beaten[ ]. I lost my job.... I want to come here [ ] and have my very basic human rights." Although Dai acknowledged that he had *additional* reasons for coming to the United States, he never recanted or contradicted his assertion that he feared persecution if he returned to China, which is the only subjective requirement for an asylum claim.

* * *

[23] The BIA did not enter an adverse credibility finding, so we are required to treat Dai's testimony as credible. The record compels the conclusion that he testified to sufficient facts to demonstrate his eligibility for asylum: he was subjected to harm rising to the level of persecution, that persecution was on account of a protected ground, and the persecution was committed by the government. Nothing in the BIA's burden of proof analysis raises questions about whether Dai established either of those elements. Treating that analysis instead as going to the question of persuasiveness, the BIA's concerns are either unsupported by our case law or serve only as attempts to impermissibly undermine the credibility determination. The record therefore compels the conclusion that Dai's testimony satisfies his burden of proof because it meets the three requirements of the statute: it is credible, persuasive, and sets forth sufficient facts. 8 U.S.C. § 1158(b)(1)(B)(ii).

[24] Because Dai has established that he suffered past persecution, he is entitled to a presumption of a well-founded fear of future persecution. During the administrative proceedings, DHS

> made no arguments concerning changed country conditions to the IJ or the BIA, and presented no documentary evidence for that purpose. "In these circumstances, to provide [DHS] with another opportunity to present evidence of

sive." 8 U.S.C. § 1158(b)(1)(B)(ii). "It is a well-established rule of statutory construction that courts should not interpret statutes in a way that renders a provision superfluous." *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 966 (9th Cir. 2013).

changed country conditions, when it twice had the chance but failed to do so, would be exceptionally unfair."

Ndom v. Ashcroft, 384 F.3d 743, 756 (9th Cir. 2004) (quoting *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004)); *see also Quan v. Gonzales*, 428 F.3d 883, 889 (9th Cir. 2005). "In this situation, we are not required to remand for a determination of whether [Dai] is eligible for asylum. We hold that he is eligible for asylum. Because the decision to grant asylum is discretionary, however, we remand for a determination of whether [Dai] should be granted asylum." *Ndom*, 384 F.3d at 756 (citations omitted).

II. Withholding of Removal

[25, 26] Withholding of removal is governed by the same standards as asylum for demonstrating credibility, sufficiency, and persuasiveness. *Compare* 8 U.S.C. § 1158(b)(1)(B)(ii), (iii), *with* § 1229a(c)(4)(B), (C). The primary difference is that, in order to be eligible for withholding, Dai must demonstrate that "it is more likely than not that he would be subjected to persecution" based on a protected ground if removed to China, a higher standard than the well-founded fear required for asylum. *Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004) (quotation marks omitted). However, as with asylum, past persecution gives rise to a presumption of a sufficient likelihood of future persecution. *Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010); *Tamang*, 598 F.3d at 1091; *Mousa v. Mukasey*, 530 F.3d 1025, 1030 (9th Cir. 2008); *Hanna v. Keisler*, 506 F.3d 933, 940 (9th Cir. 2007); 8 C.F.R. § 1208.16(b)(1)(i).

The record compels the conclusion that Dai has established past persecution for his withholding claim for the same reasons as for his asylum claim. The government presented no evidence of changed country conditions, nor did it argue that the resulting presumption has been rebutted or that Dai is barred from withholding of removal for any reason. We therefore remand with instructions to grant Dai withholding of removal. *See Ndom*, 384 F.3d at 756.[13]

CONCLUSION

[27] The dissent is correct that our "role in an immigration case is typically one of review, not of first view." *Gonzales v. Thomas*, 547 U.S. 183, 185, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) (quotation marks omitted). It is the dissent, however, that violates this cardinal rule. We do not doubt that our dissenting colleague could have written a more persuasive opinion on behalf of the BIA denying relief to Dai, but that is not the role of this court. We are limited to reviewing the reasoning actually advanced by the agency and we cannot substitute our own rationales for those it relied on. Here, neither the IJ nor the BIA made an adverse credibility finding, no matter how much the dissent wishes that they had.[14]

13. Dai does not challenge the BIA's denial of CAT relief here, so we do not consider it.

14. With all respect, Judge Trott's lengthy laments regarding the need for the IJ and the BIA to state explicitly that they find a petitioner's testimony not credible are wholly unwarranted. Such has been the law for at least two decades. It is not difficult for an IJ or the BIA to follow that rule: the agency need only include a few words in its decision. When it fails to do so, we can only assume that the failure is deliberate. In any event, the agency's failure in a particular case to make a required finding would hardly warrant Judge Trott's extraordinary discourse regarding our circuit's immigration law in general. In short, the problem which so greatly disturbs Judge Trott is of little moment. At most, he has shown that on occasion the agency has failed to do its job properly. If he's right, then surely it will do better in the future.

Dai's petition for review is **GRANTED** and this case is **REMANDED** to the BIA for the exercise of its statutory discretion and to grant withholding of removal.

TROTT, Circuit Judge, dissenting:

The significance of my colleagues' opinion is not that it remands this case to the Bureau of Immigration Appeals ("BIA") with orders favorable to Ming Dai. In the abstract, this result would be unremarkable. However, the serious legal consequences of their opinion as a circuit precedent are that it (1) demolishes both the purpose and the substance of the REAL ID Act of 2005 ("Act") [1], (2) disregards the appropriate standard of review, and (3) perpetuates our idiosyncratic approach to an Immigration Judge's ("IJ") determination that the testimony of an asylum seeker lacks sufficient credibility or persuasiveness to prove his case. The majority's opinion accomplishes these untoward results by contaminating the issue before us with irrelevancies, the most pernicious of which is a meritless irrebuttable presumption of credibility. The sole issue should be whether Dai's unedited presentation *compels* the conclusion that he carried his burden of proving he is a refugee and thus eligible for a discretionary grant of asylum. Only if we can conclude that no reasonable factfinder could fail to find his evidence conclusive can we grant his petition.

The IJ's decision not to make an explicit adverse credibility finding is a classic red herring that throws our analysis off the scent and preordains a result that is incompatible with the evidentiary record. By omitting from their opinion the IJ's fact-based explanation of his decision, the majority elides and obscures *eight* material findings of fact the IJ *did* make, each of which is entitled to substantial deference. The majority's artificial assertion that "there is no finding to which we can defer" is false. For this reason, I quote in full the IJ's findings and conclusions about the persuasiveness of Dai's presentation in Part IV of my dissent. The eight findings are as follows.

First, the IJ specifically found that the information reported by the asylum officer about his conversation with Dai was accurate. The IJ said,

> As to the contents of [the asylum officer's notes], I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer's notes some substantial weight, in that they are consistent with the respondent's testimony in court.

Accordingly, the IJ accepted as a fact that Dai *admitted* that he did not disclose the consequential truth about his wife's and daughter's travels because he was nervous about how this would be perceived by the asylum officer in connection with his claim.

Second, the IJ accepted Dai's admission as a fact that he concealed the truth because he was afraid of giving straight answers regarding his wife's and daughter's trip to the United States.

Third, the IJ determined that Dai had deliberately omitted highly relevant information from his Form I-589 application for asylum, information that he also tried to conceal from the asylum officer.

Fourth, the IJ found that Dai's omission of his information "is consistent with his

1. Pub. L. No. 109-13, 119 Stat. 231.

lack of forthrightness before the asylum office[r] as to his wife and daughter's travel with him. . . ."

Fifth, the IJ credited Dai's admission that when asked by the asylum officer to "tell the real story" about his family's travels, Dai said he "wanted a good environment for his child, and his wife had a job, but he did not, and that is why he stayed here [after his wife and daughter went back to China].

Sixth, the IJ found that Dai admitted he stayed here after they returned "because he was in a bad mood and he wanted to get a job and 'a friend of mine is here.' "

Seventh, the IJ said "I do *not* find that [Dai's] explanations for [his wife's] return to China while he remained here are adequate." (Emphasis added).

Finally, the IJ also credited Dai's concessions that his wife and daughter returned to China because "his daughter's education would be cheaper in China," and that "his wife wanted to go to take care of her father."

When Dai's subterfuge got to the BIA, the BIA said in its decision that "the record reflects that [Dai] failed to disclose to both the asylum officer and the IJ" the true facts about his family's travels. The BIA noted that Dai had conceded he was not forthcoming about this material information because he believed that the truth about their travels "would be perceived as inconsistent with his claims of past and feared persecution."

The IJ's specific factual findings in connection with Dai's failure to satisfy his burden of proof were not the product of inferences drawn from circumstantial evidence. These findings were directly based upon revealing answers Dai *admitted* he gave to the asylum officer during his interview. These facts are beyond debate, and they undercut Dai's case. To quote the BIA, these facts were "detrimental to his claim" and "significant to his burden of proof." Nevertheless, the majority cavalierly brushes them aside, claiming that an immaterial presumption of credibility overrides all of them.

In this connection, I note a peculiarity in the majority's approach to Dai's case: Nowhere does Dai assert that he is entitled to a conclusive presumption of credibility. His brief does not contain any mention of the presumption argument the majority conjures up on his behalf. The closest Dai comes to invoking the majority's inapt postulate is with a statement that we "should" treat as credible his testimony regarding persecution in China. He does not take issue with the IJ's foundational adverse factual findings, choosing instead to argue that they were not sufficient in the light of the record as a whole to support the IJ's ultimate determination.

For example, Dai acknowledges in his brief that the "IJ's or BIA's factual findings are reviewed for substantial evidence" and that the "REAL ID Act's new standards *governing adverse credibility determinations* applies to applications for asylum, withholding of removal, and CAT relief made on or after May 11, 2005." Blue Br. 10 (emphasis added) (quotation marks omitted). Next, he notes that "an IJ cannot selectively examine evidence in determining *credibility*, but rather must present a reasoned analysis of the *evidence as a whole* and cite specific instances in the record that *form the basis of the adverse credibility finding*." *Id.* (emphasis added) (quotation marks omitted). Moreover, Dai notes that "[t]o support *an adverse credibility determination*, inconsistencies must be considered in light of the *totality of the circumstances*, and all relevant factors" adding that "trivial inconsistencies . . . should not form the basis of *an adverse credibility determination*." *Id.*

at 10–11 (emphasis added) (quotation marks omitted). He contends that he "has provided adequate explanation" for his inconsistencies, *i.e.*, the failure to disclose his family's travels. *Id.* at 14. Finally, after attempting to pick apart the IJ's adverse findings, Dai's bottom line is that "his wife's departure from the United States does not adversely affect his credibility at all," an assertion that ignores his failed coverup of it. *See id.* at 16.

In summary, the majority choose to ignore a material part of the evidentiary record even though Dai implores us to "examine it as a whole," as he did in his brief to the BIA. Dai accepts that the viability of his *entire* presentation is on the line, but the majority ignores his concession. In this connection, the Attorney General has responded only to the claims and arguments Dai included in his brief. The Attorney General has not been given an opportunity to respond to the majority's inventive analysis, nor to the theory concocted by the majority on Dai's behalf. Both sides will be surprised by my colleagues' artful opinion—Dai pleasantly, the Attorney General not so much.

I will have more to say in Part V about our Circuit's misinformed treatment of the role, responsibility, and product of an asylum officer.

For these reasons, I respectfully dissent.

I

Backdrop

Over the years, our Circuit has manufactured a plethora of misguided rules regarding the credibility of political asylum seekers. I begin with this issue because the majority's mishandling of it infects the remainder of their opinion with error. These result-oriented ad hoc hurdles for the government stem from humanitarian intentions, but our court has pursued these intentions with untenable methods that violate the institutional differences between a reviewing appellate court, on one hand, and a trial court on the other, usurping the role of the Department of Homeland Security ("DHS") and the BIA in the process. Referring to our approach to witness credibility as an "idiosyncratic analytical framework," a previous panel of our court described this inappropriate situation as follows:

> The Supreme Court has repeatedly instructed us on the proper standard to apply when reviewing an immigration judge's adverse credibility determination. Time and again, however, we have promulgated rules that tend to obscure that clear standard and to flummox immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents. The result of this sly insubordination is that a panel that takes Congress at its word and accepts that findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude the contrary," ... or follows the Supreme Court's admonition that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it," ... runs a serious risk of flouting one of our eclectic, and sometimes contradictory, opinions.

Jibril v. Gonzales, 423 F.3d 1129, 1138 (9th Cir. 2005) (alteration in original) (citations omitted).

Many of our Circuit's contrived rules on this subject and my colleagues' decision are irreconcilable with the structural principle set forth in Federal Rule of Civil Procedure 52(a)(6) that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity

to judge the witnesses' credibility." Accordingly, we are expected to apply a highly deferential standard to a trial court's determination regarding the credibility of a witness. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–76, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In discussing this rule, the Supreme Court said that "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575, 105 S.Ct. 1504. The Court added that the applicable "clearly erroneous" standard of review "plainly does not entitle a *reviewing* court to reverse the finding of a trier of fact simply because it is convinced that it would have decided the case differently. The *reviewing* court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Id.* at 573, 105 S.Ct. 1504 (emphasis added).

The Supreme Court sharpened this point about our limited role in *Gonzales v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) (per curiam), *vacating* 409 F.3d 1177 (9th Cir. 2005) (en banc). In summarily vacating our obdurate en banc opinion, the Court held that we had exceeded our authority and made a determination that belonged to the BIA. 547 U.S. at 185–86, 126 S.Ct. 1613. The Court agreed with the Solicitor General that "a court's role in an immigration case is typically *one of review, not of first view*." *Id.* at 185, 126 S.Ct. 1613 (emphasis added) (quotation marks omitted). To support its conclusion, the Court cited *INS v. Orlando Ventura*, 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002): a " 'judicial judgment cannot be made to do service for an administrative judgment.' " 547 U.S. at 186, 126 S.Ct. 1613 (quoting *Ventura*, 537 U.S. at 16, 123 S.Ct. 353). More about *Ventura* later.

The majority's opinion's use of an incongruous irrebuttable presumption of credibility to erase the IJ's findings of fact and the BIA's decision and thus to make us a court of "first view" is another example of our continuing intransigence. If, as they say, we are bound by precedent to do it their way, then its time to change our precedent.

II

A False Premise

A.

The majority opinion's assertion that "we must treat [Dai's] testimony as credible" rests on a fallacious premise. Judge Reinhardt writes, "Properly understood, the rebuttable presumption provision of the REAL ID Act applies only to appeals to the BIA, not to petitions for review in our court." From this defective premise, he concludes that we *must* ignore the IJ's detailed analysis and findings of fact about Dai's presentation. When it comes to our task of reviewing the credibility of witnesses in a trial court or whether a witness' testimony suffices to carry his burden of proof, however, there is no material difference between an appeal and a petition for review, none. Federal Rule of Civil Procedure 52(a) makes no such distinction. As *Anderson* said, Rule 52(a) applies to a "*reviewing* court," which is what we are in this capacity. 470 U.S. at 573–74, 105 S.Ct. 1504 (emphasis added); *see Thomas*, 547 U.S. at 185, 126 S.Ct. 1613. Neither the Court nor Rule 52(a) differentiate between appeals and petitions for review. Nor would such a distinction make any sense. As *Anderson* and *Thomas* illustrate, the issue is one of *function*, not of form or

labels. The Act's use of the word "appeal" does not dictate how we must go about our process of review. Using the standards provided by Congress, we are not in a position to weigh a witness's credibility or persuasiveness.

Federal Rule of Appellate Procedure 20, "Applicability of Rules to the Review or Enforcement of an Agency Order," illustrates the soundness of treating appeals and petitions for review with a uniform approach. Rule 20 reads, "All provisions of these rules ... apply to the review or enforcement of an agency order. In these rules, 'appellant' includes a petitioner or applicant, and 'appellee' includes a respondent."

Moreover, and directly to the point, the Act itself does *not* require an IJ to make a specific credibility finding in those precise terms. As the BIA correctly said with respect to the Act, "[c]ontrary to the respondent's argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim." *See* discussion *infra* Section VI. If the IJ does not make such an explicit finding, all the respondent is entitled to is a "*rebuttable* presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). By attempting to restrict this language to an appeal *to the BIA*, the majority opinion conveniently frees itself to apply derelict Ninth Circuit precedent to Dai's testimony and automatically to deem it credible.[2]

Over and over the majority incant an inappropriate and counterintuitive rule that in the absence of a formal adverse credibility finding, "we are required [blindly] to treat the petitioner's testimony as credible." The practical effect of the majority's rule is breathtaking: The *lack* of a formal adverse credibility finding becomes a selective positive credibility finding and dooms a fact-based determination by an IJ and the BIA that an applicant's case is not sufficiently persuasive to carry his burden of proof. The majority's bizarre cherry-picking approach violates all the rules that control our review of a witness's testimony before a factfinder.

B.

But even if we were to assume for the sake of argument that the Act's rebuttable presumption applies only to the BIA, by what logic, reason, or principle does it follow that *we* as a reviewing court are free to clothe an applicant's testimony with a protective presumption of credibility? Are we free to turn a blind eye to conspicuous problems with his testimony identified by an IJ? By the BIA? Free to brush off Rule 52(a) and the Supreme Court's explanation of what the Rule requires?

A conclusive presumption of credibility has no valid place in our task of reviewing the persuasiveness of a witness's testimony. Such an artifice vacuously eliminates relevant factual evidence from consideration and violates Rule 52(a)(6). The deployment of a conclusive presumption becomes a misguided way not only of putting a heavy thumb on one tray of the traditional scales of justice, but also of removing relevant evidence from the other. This approach allows us to evade our responsibilities to examine and to evaluate the *entire* record before an IJ, permitting us instead to disregard facts that would otherwise discredit our final determination.

2. The majority cites *She v. Holder*, 629 F.3d 958, 964 & n.5 (9th Cir. 2010) in support of this ipse dixit claim. However, *She*'s footnote 5 says that because the "rebuttable presumption" provision does not apply retroactively, it had no applicability in *She*'s case.

Judge Reinhardt's opinion writes the REAL ID Act and its reference to a *rebuttable* presumption of credibility out of existence. However, Congress specifically intended the Act to govern *us*, the Ninth Circuit Court of *Appeals*, as demonstrated in Section III of this dissent. The evidentiary record in this case devours any such presumption.

Judge Reinhardt's claim that a petition for review is "a new action against the United States" is irrelevant. No matter what he calls it, we are *reviewing* a decision made by an administrative agency involving the persuasiveness of his case.

III

The REAL ID Act

Congress enacted the REAL ID Act of 2005 because of our Circuit's outlier precedents on this issue and our intransigent refusal to follow the rules. The House Conference Committee Report ("House Report")[3] explained that "the creation of a uniform standard for credibility is needed to address a conflict ... between the Ninth Circuit on one hand and other circuits and the BIA." H.R. Rep. No. 109-72 at 167. The House Report also said that the Act "resolves conflicts between administrative and judicial tribunals with respect to standards to be followed in assessing asylum claims." *Id.* at 162. Nevertheless, my colleagues hold that a key part of the Act does not apply to us, only to the BIA.

As the Act pertains to this case, it established a number of key principles, all of which the majority fails to follow, perpetuating the conflicts Congress attempted to resolve.

First, "[t]he burden of proof is on the applicant to establish that the applicant is a refugee...."[4]

Second, "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant *satisfies the trier of fact* that the applicant's testimony is credible, is *persuasive*, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[5]

Third,

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.[6]

We have attempted in a number of panel opinions after the Act to calibrate our ap-

3. H.R. Rep. No. 109-72 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240.

4. 8 U.S.C. § 1158(b)(1)(B)(i).

5. 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added).

6. 8 U.S.C. § 1158(b)(1)(B)(iii).

proach to applicant credibility and persuasiveness issues, but as the majority opinion illustrates, "old ways die hard." *Huang v. Holder*, 744 F.3d 1149 (9th Cir. 2014) captures where we should be on this issue:

> [W]e have concluded that "the REAL ID Act requires a healthy measure of deference to agency credibility determinations." This deference "makes sense because IJs are in the best position to assess demeanor and other credibility cues that we cannot readily access on review." "[A]n immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence." By virtue of their expertise, IJs are "uniquely qualified to decide whether an alien's testimony has about it the ring of truth."
>
> The need for deference is particularly strong in the context of demeanor assessments. Such determinations will often be based on non-verbal cues, and "[f]ew, if any, of these ephemeral indicia of credibility can be conveyed by a paper record of the proceedings and it would be extraordinary for a reviewing court to substitute its second-hand impression of the petitioner's demeanor, candor, or responsiveness for that of the IJ." Indeed, even before the enactment of the REAL ID Act, we recognized the need to give "special deference to a credibility determination that is based on demeanor," because the important elements of a witness's demeanor that "may convince the observing trial judge that the witness is testifying truthfully or falsely" are "entirely unavailable to a reader of the transcript, such as the Board or the Court of Appeals." The same principles underlie the deference we accord to the credibility determinations of juries and trial judges.

Id. at 1153–54 (alterations in original) (citations omitted). This "healthy measure of deference" should also apply to the agency's determination with respect to whether an applicant has satisfied the agency's "*trier of fact*"—*not us*—that his evidence is persuasive, an issue that is in the wheelhouse of a jury or a judge or an IJ hearing a case as a factfinder.

IV

The IJ's Decision

The IJ in this case concluded that Ming Dai had not satisfied his statutory burden of establishing that he is a refugee pursuant to § 1158(b)(1)(B)(i). The IJ gave as his "principle area of concern" Dai's implausible unpersuasive testimony, another way of saying it wasn't credible. As Dai's brief correctly demonstrates, there is barely a dime's worth of substantive difference between "credible" and "persuasive." Here is how the IJ explained his decision in terms of § 1158(b)(1)(B)(i) and (ii):

> I have carefully considered the respondent's testimony and evidence and for the following reasons, I find that the respondent has failed to meet his burden of proving eligibility for asylum.
>
> The principal area of *concern with regard to the respondent's testimony* arose during the course of his cross-examination. On cross-examination, the respondent was asked about various aspects of his interview with an Asylum Officer. The Department of Homeland Security also submitted the notes of that interview as Exhibit 5. The respondent was asked specific questions regarding several aspects of his testimony before the Asylum Officer. In the course of cross-examination, the respondent was asked regarding his questions and answers as to whether his wife and daughter travelled with him to the United States. The respondent's responses included the

question of whether the asylum officer had asked him if his wife and daughter travelled anywhere other than to Taiwan and Hong Kong. The respondent conceded that he was asked this question and that he replied yes, they had travelled to Taiwan and Hong Kong. The respondent was asked whether the Asylum Officer inquired whether his wife and daughter had travelled elsewhere. The respondent then testified before the Court that he was asked this question, "but I was nervous." In this regard, I note that the respondent did not directly answer the question; instead leapt directly to an explanation for what his answer may have been, namely that he was nervous. The respondent was then asked specifically whether the Asylum Officer asked him if his wife had travelled to Australia in 2007. The respondent confirmed that he had been asked this question, and he confirmed that the answer was in the affirmative. The respondent also confirmed that the Asylum Officer had asked him whether she had travelled anywhere else. He confirmed that he had been so asked. The respondent was then asked whether he answered "no," that she had not travelled anywhere else. The respondent answered that he believed so, that he had so answered. The respondent was then asked, during the course of cross-examination, why he had not said to the Asylum Officer that yes, she had travelled to the United States. The respondent replied that he had not thought of it. He stated that they did come with him (meaning his wife and daughter) and that he thought the Asylum Officer was asking him if they had travelled anywhere other than the United States. He explained that he did so because he assumed the U.S. Government had the records of their travel to the United States. On further questioning, the respondent eventually hesitated at some length when asked to further explain why he did not disclose spontaneously to the Asylum Officer that his wife and daughter had come with him. The respondent paused at some length and I observed that the respondent appeared nervous and at a loss for words. However, after a fairly lengthy pause, the respondent testified that he is afraid to say that his wife and daughter came here and why they went back. The respondent was asked whether he told the Asylum Officer that he was afraid to answer directly. The respondent initially testified that he forgot and did not remember whether he said that. He again reiterated that he was very nervous. He was then asked the question again as to whether he told the Asylum Officer that he was afraid to answer why his wife and daughter had gone back. He then conceded that maybe, yes, he had answered in that fashion. The respondent was asked whether the Asylum Officer inquired why his wife and daughter went back, and the respondent conceded that he had been so asked, and he further conceded that he replied because school in the United States cost a lot of money (referring to the schooling for his daughter). The respondent was then asked to confirm that the Asylum Officer eventually asked him to tell him the real story as to why his family travelled to the United States and returned to China. The respondent confirmed that he was asked this question and when asked, whether he replied that it was because he wanted a good environment for his child and because his wife had a job and he did not and that that is why he stayed here. He confirmed that he did, in fact, say that. The respondent was further asked, during the course of testimony in court, why his wife and daughter returned to China. In this regard,

the respondent testified that they came with him, but returned to China several weeks after arrival. He testified that they did so because his father-in-law was elderly and needed attention, and because his daughter needed to graduate school in China.

The respondent further claimed that his wife had, in fact, suffered past persecution in the form of a forced abortion and the respondent confirmed that he feared his wife and daughter would suffer future persecution. In this regard, the respondent qualified his answer by saying that his wife was now on an IUD, apparently thereby suggesting that the risk of persecution is reduced. However, the respondent did concede that the risk of future persecution also pertains to his daughter. Indeed, in this regard, the respondent testified that this is, at least in part, why he applied for asylum.

As to the contents of Exhibit 5, I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer's notes some substantial weight, in that they are consistent with the respondent's testimony in court. Specifically, I note that the Asylum Officer's notes state that the respondent ultimately indicated that he was afraid of giving straight answers regarding his daughter and wife's trip to the United States and return to China. And while the respondent did not confirm this in court, he did give a similar answer as to why he was testifying in this regard. In other words, the respondent appears to have stated, both before the Asylum Officer and in court that he did not spontaneously disclose the travel of his wife and daughter with him to the United States and their return because *he was nervous about how this would be perceived by the Asylum Officer in connection with his claim.* I further note that the Asylum Officer's notes are internally consistent with regard to references to earlier questions, such as whether the respondent had stated that he applied for a visa with anyone else. *At page 2 of the notes contained in Exhibit 5, the respondent was asked whether he applied for his visa with anyone else and the notes indicated that he stated that, "no, I applied by myself." Similarly, I note that the testimony before the Asylum Officer and the Court is consistent with the omission in the respondent's Form I-589 application for asylum, of an answer to the question of the date of the previous arrival of his wife, if she had previously been in the United States. See* Exhibit 2, page 2, part A.II, question 23. When asked about this omission, the respondent expressed surprise, stating that he told the preparer about their trip and indicated that he thought it had been filled out. Notwithstanding the respondent's statement in this regard, *I do observe that the omission is consistent with his lack of forthrightness before the asylum office as to his wife and daughter's travel with him to the United States and their subsequent return to China shortly thereafter.*

In sum, the respondent's testimony before the Court and his testimony regarding the Asylum Officer notes, as well as the notes themselves, clearly indicate that the respondent failed to spontaneously disclose that his wife and daughter came with him and then returned to China. His testimony and the notes also consistently demonstrate that the respondent paused at length, both before

the Court and before the Asylum Officer, when asked about this topic. His testimony and the Asylum Officer notes are also consistent in indicating that he ultimately testified that he was afraid to say that his wife came here and was afraid of being asked about why she went back. *Furthermore, the respondent has conceded that he was asked to "tell the real story" about his family's travel to the United States by the Asylum Officer, and that he replied that he wanted a good environment for his child and his wife had a job, but he did not, and that is why he stayed here.*

In *Loho v. Mukasey*, 531 F.3d 1016, 1018–19 (9th Cir. 2008), the Ninth Circuit addressed the situation in which an asylum applicant has found safety in the United States and then returns to the country claimed of persecution before eventually finding asylum in the United States. The Ninth Circuit held that the applicant's voluntary return to the country of claimed persecution may be considered in assessing both credibility and whether the respondent has a well-founded fear of persecution in that country. Here, while the respondent himself has not returned to China, his wife and daughter did. Indeed they did so shortly after arriving in the United States, and the respondent confirmed that they did so because the schooling is cheaper for his daughter in China, as well as because his father-in-law is elderly and needed to be cared for. The respondent also told the Asylum Officer that the "real story" about whey [sic] his family returned was that his wife had a job and he did not, and that is why he stayed here. This is consistent with respondent's testimony before the Court that he did not have a job at the time he came to the United States. Furthermore, I note that the respondent's claim of persecution is founded on the alleged forced abortion inflicted upon his wife. That is the central element of his claim. The respondent claims that he himself was persecuted through his resistance to that abortion. Nevertheless, the fact remains that the fundamental thrust of the respondent's claim is that his wife was forced to have an abortion. In this regard, the respondent's wife therefore clearly has an equal, or stronger, claim to asylum than the respondent himself, assuming the facts which he claims are true. The respondent was asked why his wife did not stay and apply for asylum and he replied that he did not know they could apply for asylum at the time they departed. *The respondent was then asked why he stayed here after they returned; he said because he was in a bad mood and he wanted to get a job and a friend of mine is here.*

While *Loho v. Mukasey* applies to the applicant himself returning to China, I find that the reasoning of the Ninth Circuit in that case is fully applicable to the respondent's situation in that his wife, who is the primary object of the persecution in China, freely chose to return to China. *I do not find that the respondent's explanations for her return to China while he remained here are adequate.* The respondent has stated that he was in a bad mood and that he had found a job and had a friend here. The respondent has also indicated that his daughter's education would be cheaper in China than here, and he has also indicated that his wife wanted to go to take care of her father. I do not find that these reasons are sufficiently substantial so as to outweigh the concerns raised by his wife and daughter's free choice to return to China after having allegedly fled that country following his wife's and his own persecution.

> In view of the for[e]going, I find that the respondent has failed to meet his burden of proving eligibility for asylum under Section 208(a) of the Act.

(Emphasis added).

To erase any doubts about Dai's problematic testimony, the following is an excerpt from it.

MS. HANNETT TO MR. DAI

Q. And isn't it also true that the [asylum] officer asked why did they go back and you replied, so that my daughter can go to school and in the U.S., you have to pay a lot of money?

A. Yes, that's what I said.

Q. Okay. And isn't it also true that the officer asked you, can you tell me the real story about you and your family's travel to the U.S., and you replied I wanted a good environment for my child. My wife had a job and I didn't, and that is why I stayed here. My wife and child go home first.

A. I believe I said that.

* * *

Q. So, once you got to the United States, why didn't your wife apply for asylum?

A. My wife just returned to China.

Q. Right, and my question is why didn't she stay here and apply for asylum?

A. At that time, we didn't know the apply, we didn't know that we can apply for asylum.

Q. Well, if you didn't know that you could apply for asylum, why did you stay here after they returned?

A. Because at that time, I was in a bad mood and I couldn't get a job, so I want to stay here for a bit longer and another friend of mine is also here.

The asylum officer's interview notes discussed by the IJ (and found to be consistent with Dai's testimony before the IJ) read as follows:

> Earlier you said your wife has only traveled to Australia, Taiwan and HK. You also said that you traveled to the US alone. Government records indicate that your wife traveled with you to the United States. Can you explain?
>
> [long pause] the reason is I'm afraid to say that my wife came here, then why did she go back.
>
> Your wife went back? Yes
>
> When did she go back to China? February
>
> Why did she go back? Because my child go to school
>
> Earlier you said you applied for your visa alone. Our records indicate that your child also obtained a visa to the US with you. Can you explain?
>
> [long pause]
>
> Daughter came with wife and you in January? Yes
>
> Can you explain? I'm afraid
>
> Please tell me what you are afraid of. That is what your interview today is for. To understand your fears?
>
> I'm afraid you ask why my wife and daughter go back
>
> Why did they go back?
>
> So that my daughter can go to school and in the US you have to pay a lot of money.
>
> Can you tell me the real story about you and your family's travel to the US?
>
> I wanted a good environment for my child. My wife had a job and I didn't

> and that is why I stayed here. My wife and child go home first.

(Bracketed notations in original).

V

The Role of an Asylum Officer

The majority's opinion perpetuates another acute error our Circuit has made in its effort to control the DHS's administrative process. In footnote 2, the majority say that if Dai concealed relevant information "it was only from the asylum officer." *Only* from the asylum officer? So Dai's admitted concealment *under oath* of germane information during a critical part of the evaluation process is of no moment?

The majority's demotion of the role of an asylum officer represents a sub silentio application of another faulty proposition on the books in our circuit: *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005).

> Certain features of an asylum interview make it *a potentially unreliable point of comparison* to a petitioner's testimony for purposes of a credibility determination. *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001), explained the significant procedural distinctions between the initial *quasi-prosecutorial* "informal conferences conducted by asylum officers" after the filing of an asylum application, and the "quasi-judicial functions" exercised by IJs. . . .

Id. at 1087 (emphasis added).

First of all, we may not have in this case a verbatim transcript of Dai's testimony, but we have the asylum officer's notes, which the IJ explicitly found to be accurate. Moreover, when appropriately confronted under oath with the notes, Dai admitted they correctly captured what he said. Under these circumstances, any concern that the asylum interview might be a "potentially unreliable point of comparison" to Dai's testimony is irrelevant. The record (thanks to Dai himself) eliminates any potential for unreliability.

Second, the pronouncement in *Singh v. Gonzales* that an asylum officer's interview in an *affirmative* asylum case is "quasi-prosecutorial" in nature is flat wrong and reveals our fundamental misunderstanding of the process.[7] An asylum officer in an affirmative asylum case does not "prosecute" anyone during the exercise of his responsibilities, and the process is not "quasi-prosecutorial" in nature. In fact, unlike a prosecutor, an asylum officer has the primary authority and discretion to grant asylum to an applicant should the applicant present a convincing case. The asylum officer's role is essentially judicial, not prosecutorial. We miss the mark here because we see only those cases where an affirmative asylum applicant did not present a sufficiently credible persuasive case to an asylum officer to prevail, and we mistakenly conclude from that unrepresentative sample that asylum officers tend to decide against such applicants.

The true facts emerge from DHS's June 20, 2016 report to Congress, *Affirmative Asylum Application Statistics and Decisions Annual Report*, covering "FY 2015 adjudications of affirmative asylum applications by USCIS [U.S. Citizenship & Immigration Services] asylum officers for the stated period."[8] By way of background,

7. An affirmative asylum case differs from a defensive asylum case involving someone already in removal proceedings. *See Obtaining Asylum in the United States,* DEP'T OF HOMELAND SEC., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last updated Oct. 19, 2015).

8. *2016 DHS Congressional Appropriations Reports,* DEP'T OF HOMELAND SEC., https://www.dhs.gov/publication/2016-dhs-congressional-appropriations-reports (last published Feb.

the Report points out that asylum officers have a central determinative role in the process. Asylum determinations "are made by an asylum officer after an applicant files an affirmative asylum application, is interviewed, and clears required security and background checks." *Id.* at 2.

The Report contains statistics about the activity of asylum officers. According to the FY2015 statistics, asylum officers completed 40,062 affirmative asylum cases. They approved 15,999 applications for an approval rate of 47% for interviewed cases. *Id.* at 3.

USCIS has a Policy Manual. Chapter 1 of Volume 1 establishes its "Guiding Principles." [9] A "Core Principal" reads as follows:

> The performance of agency duties inevitably means that some customers will be disappointed if their cases are denied. Good customer service means that everyone USCIS affects will be treated with dignity and courtesy regardless of the outcome of the decision.
>
> * * *
>
> USCIS will approach each case objectively and adjudicate each case in a thorough and fair manner. USCIS will carefully administer every aspect of its immigration mission so that its customers can hold in high regard the privileges and advantages of U.S. immigration.

Id.

Finally, we look at the training given to asylum officers in connection with their interviews of affirmative asylum applicants. In USCIS's Adjudicator's Field Manual, we find in Appendix 15-2, "Non-Adversarial Interview Techniques," the following guidance.[10]

> **I. OVERVIEW**
>
> An immigration officer will conduct an interview for each applicant, petitioner or beneficiary where required by law or regulation, or if it is determined that such interviewed [sic] is appropriate. *The interview will be conducted in a non-adversarial manner*, separate and apart from the general public. The officer must always keep in mind his or her responsibility to uphold the integrity of the adjudication process. As representatives of the United States Government, officers must conduct the interview in a professional manner.
>
> * * *
>
> Due to the potential consequences of incorrect determinations, it is incumbent upon officers to conduct organized, focused, and well-planned, *non-adversarial interviews*. . . .
>
> * * *
>
> **III. NON-ADVERSARIAL NATURE OF THE INTERVIEW**
>
> **A. Concept of the Non-adversarial Interview**
>
> A non-adversarial proceeding is one in which the parties are not in opposition to each other. This is in contrast to adversarial proceedings, such as civil and criminal court proceedings, where two sides oppose each other by advocat-

12, 2018) (follow "United States Citizenship and Immigration Services (USCIS)—Affirmative Asylum Application Statistics & Decisions FY16 Report" hyperlink).

9. *Policy Manual,* U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1PartA-Chapter1.html (Aug. 23, 2017).

10. *Adjudicator's Field Manual—Redacted Public Version,* U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (follow "Appendices" hyperlink; then follow "15-2 Non-Adversarial Interview Techniques" hyperlink) (last visited Feb. 15, 2018) (emphasis added).

ing their mutually exclusive positions before a neutral arbiter until one side prevails and the other side loses. *A removal proceeding before an immigration judge is an example of an adversarial proceeding*, where the Service trial attorney is seeking to remove a person from the United States, while the alien is seeking to remain.

The interview is part of a non-adversarial proceeding. The principal intent of the Service is not to oppose the interviewee's goal of obtaining a benefit, but to determine whether he or she qualifies for such benefit. If the interviewee qualifies for the benefit, it is in the Service's interest to accommodate that goal.

* * *

B. Points to Keep in Mind When Conducting a Non-adversarial Interview

The officer's role in the non-adversarial interview is to ask questions formulated to elicit and clarify the information needed to make a determination on the petitioner or applicant's request. This questioning must be done in a professional manner that is non-threatening and non-accusatory.

1. The officer must:

a. Treat the interviewee with respect. Even if someone is not eligible for the benefit sought based on the facts of the claim, the officer must treat him or her with respect. The officer may hear similar claims from many interviewees, but must not show impatience towards any individual. Even the most non-confrontational officer may begin to feel annoyance or frustration if he or she believes that the interviewee is lying; however, it is important that the officer keep these emotions from being expressed during the interview.

b. Be non-judgmental and non-moralistic. Interviewees may have reacted to situations differently than the officer might have reacted. The interviewee may have left family members behind to fend for themselves, or may be a member of a group or organization for which the officer has little respect. Although officers may feel personally offended by some interviewee's actions or beliefs, officers must set their personal feelings aside in their work, and avoid passing moral judgments in order to make neutral determinations.

c. Create an atmosphere in which the interviewee can freely express his or her claim. The officer must make an attempt to put the interviewee at ease at the beginning of the interview and continue to do so throughout the interview. If the interviewee is a survivor of severe trauma (such as a battered spouse), he or she may feel especially threatened during the interview. As it is not always easy to determine who is a survivor, officers should be sensitive to the fact that every interviewee is potentially a survivor of trauma.

Treating the interviewee with respect and being non-judgmental and non-moralistic can help put him or her at ease. There are a number of other ways an officer can help put an interviewee at ease, such as:

- Greet him or her (and others) pleasantly;
- Introduce himself or herself by name and explain the officer's role;
- Explain the process of the interview to the interviewee so he or she will know what to expect during the interview;
- Avoid speech that appears to be evaluative or that indicates that the officer thinks he or she knows the answer to the question;
- Be patient with the interviewee; and

- Keep language as simple as possible.

d. Treat each interviewee as an individual. Although many claims may be similar, each claim must be treated on a case-by-case basis and each interviewee must be treated as an individual. Officers must be open to each interviewee as a potential approval.

e. Set aside personal biases. Everyone has individual preferences, biases, and prejudices formed during life experiences that may cause them to view others either positively or negatively. Officers should be aware of their personal biases and recognize that they can potentially interfere with the interview process. Officers must strive to prevent such biases from interfering with their ability to conduct interviews in a non-adversarial and neutral manner.

f. Probe into all material elements of the interviewee's claim. The officer must elicit all relevant and useful information bearing on the applicant or beneficiary's eligibility. The officer must ask questions to expand upon and clarify the interviewee's statements and information contained on the form. The response to one question may lead to additional questions about a particular topic or event that is material to the claim.

g. Provide the interviewee an opportunity to clarify inconsistencies. The officer must provide the interviewee with an opportunity during the interview to explain any discrepancy or inconsistency that is material to the determination of eligibility. He or she may have a legitimate reason for having related testimony that outwardly appears to contain an inconsistency, or there may have been a misunderstanding between the officer and the interviewee. Similarly, there may be a legitimate explanation for a discrepancy or inconsistency between information on the form and the interviewee's testimony.

On the other hand, the interviewee may be fabricating a claim. If the officer believes that an interviewee is fabricating a claim, he or she must be able to clearly articulate why he or she believes that the interviewee is not credible.

h. Maintain a neutral tone throughout the interview. Interviews can be frustrating at times for the officer. The interviewee may be long-winded, may discuss issues that are not relevant to the claim, may be confused by the questioning, may appear to be or may be fabricating a claim, etc. It is important that the officer maintain a neutral tone even when frustrated.

2. The officer must not:

- Argue in opposition to the applicant or petitioner's claim (if the officer engages in argument, he or she has lost control of the interview);
- Question the applicant in a hostile or abusive manner;
- Take sides in the applicant or petitioner's claim;
- Attempt to be overly friendly with the interviewee; or
- Allow personal biases to influence him or her during the interview, either in favor of or against the interviewee.

I hope that by exposing the particulars of the affirmative application process we will cease demeaning unspecified "certain features" of the applicant's interview, and that we will correct our uninformed characterization of it as "quasi-prosecutorial."

While under oath, Dai intentionally concealed material information from the asylum officer during a critical aspect of the process. To diminish the import of this

potential crime [11] because the government official was "only" an asylum officer is a serious mistake.

VI

The BIA's Decision

Dai unsuccessfully appealed the IJ's decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. The BIA's decision follows.

> We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. The respondent filed his application for asylum after May 11, 2005, and thus review is governed by the REAL ID Act of 2005.
>
> *We adopt and affirm the Immigration Judge's decision in this case. The Immigration Judge correctly denied the respondent's applications for failure to meet his burden of proof.* The record reflects that the respondent failed to disclose to both the [DHS] asylum officer and the Immigration Judge that his wife and daughter had traveled with him to the United States and voluntarily returned to China shortly after. *The respondent further conceded that he was not forthcoming about this information because he believed that the true reasons for their return—that his wife had a job in China and needed to care for her elderly father, and that their daughter could attend school in China for less money than in the United States—would be perceived as inconsistent with his claims of past and feared future persecution.*
>
> The Immigration Judge correctly decided that the voluntary return of the respondent's wife and daughter to China, after allegedly fleeing following the persecution of the respondent and his wife, prevents the respondent from meeting his burden of proving his asylum claim. *Contrary to the respondent's argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim.* The respondent's family voluntarily returning *and his not being truthful about it is detrimental to his claim and is significant to his burden of proof.*

(Emphasis added) (footnote and citations omitted).

VII

The IJ Becomes a Potted Plant

My colleagues' opinion boils down to this faulty proposition: Simply because the IJ did not say "I find Dai not credible" but opted instead to expose the glaring factual deficiencies in Dai's presentation and to explain in specific detail and at length why Dai had not persuasively carried his burden of proving his case, my colleagues disregard the IJ's decision altogether and claim we must selectively embrace as persuasive Dai's problematic presentation regarding the core of his claim.[12] Out of the blue, unpersuasive becomes persuasive. I invite the reader to review once again the IJ's decision and to decide on the merits whether Dai's case is persuasive. It is anything but.

11. 18 U.S.C. § 1001 makes it a crime knowingly and willfully to make a material false statement in any matter within the jurisdiction of the executive branch of Government.

12. And if an IJ does make an adverse credibility finding, we have manufactured a multitude of ways to disregard it.

My colleagues brush off the conspicuous blatant flaws in Dai's performance involving demeanor, candor, and responsiveness, claiming that "taking into account the record as a whole, nothing undermines the persuasiveness of Dai's credible testimony. . . ." Nothing? They disregard inaccuracies, inconsistencies, and implausibilities in his story, and his barefaced attempt to cover up the truth about his wife's and daughter's travels and situation. They even sweep aside Dai's admission to the asylum officer that the "real story" is that (1) he wanted a good environment for his child, (2) his wife left him behind because she had a job in China and he did not, and (3) he was in a "bad mood," couldn't get a job, and wanted to stay here "for a bit longer." In their opinion, there is not a single word regarding the factors cited by the IJ to explain his observations, findings, and decision, including the fact that Dai's wife, allegedly the initial subject of persecution in China, made a free choice to return. The effect of the presumption is to wipe the record clean of everything identified by the IJ and the BIA as problematic.

The glaring irony in my colleagues' analysis is that once they proclaim that Dai's testimony is credible, they pick and choose only those parts of his favorable testimony that support his case—not the parts that undercut it. If we must accept Dai's presentation as credible, then why not also his "real story" when confronted with the facts that he came to the United States because he wanted a good environment for his daughter, and that he did not return to China with his wife because she had a job and he did not? What becomes of his attempted cover up of the travels of his wife and daughter?

Furthermore, my colleagues' backhanded treatment of the IJ's opinion is irreconcilable with the BIA's wholesale acceptance of it. In words as clear as the English language can be, the BIA said, "We adopt and affirm the Immigration Judge's decision." To compound their error, the majority then seizes upon and pick apart the BIA's summary explanation of why it concluded on de novo review that the IJ's decision was correct. What the BIA did say was that Dai's failure to be truthful about his family's voluntary return to China was "detrimental to his claim" and "significant to his burden of proof."

VIII

Analysis

And so we come at last to the statutory requirement of persuasiveness, an issue uniquely suited to be determined by the "trier of fact," as the Act and 8 U.S.C. § 1158(b)(1)(B)(ii) dictate. The majority opinion rigs this inquiry by freighting it with an incomplete record. The opinion inappropriately sweeps demeanor, candor, and plausibility considerations—as well as the IJ's extensive findings of fact—off the board as though this were a parlor game. Once again, the opinion ignores *Huang*, a post-Act case.

> The need for deference is particularly strong in the context of demeanor assessments. Such determinations will often be based on non-verbal cues, and "[f]ew, if any, of these ephemeral indicia of credibility can be conveyed by a paper record of the proceedings and it would be extraordinary for a reviewing court to substitute its second-hand impression of the petitioner's demeanor, candor, or responsiveness for that of the IJ."

744 F.3d at 1153 (alteration in original) (quoting *Jibril*, 423 F.3d at 1137).

Here, the IJ determined that Dai's testimony was not persuasive based on demeanor, non-verbal cues, and other germane material factors that went to the

heart of his case. The IJ explained his decision in exquisite detail, and our approach and analysis should be simple. In order to reverse the BIA's conclusion that Dai did not carry his burden of proof, "we must determine 'that the evidence not only *supports* [a contrary] conclusion, but *compels* it—and also compels the further conclusion' that the petitioner meets the requisite standard for obtaining relief." *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014) (alteration in original) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992)). If anything, this record compels the conclusion that the IJ and the BIA were *correct*, not mistaken. Are my colleagues seriously going to hold that an IJ cannot take universally accepted demeanor, candor, responsiveness, plausibility, and forthrightness factors into consideration in assessing persuasiveness, as the IJ did here? And that this detailed record, which is full of Dai's admissions of an attempted coverup, *compels* the conclusion that Dai was so persuasive as to carry his burden? Dai accurately understood the damaging implications of his wife's return to China. So did the IJ and the BIA. So would anybody not willfully blinded by an inappropriate conclusive presumption. As the BIA stated, the truth is "inconsistent with his claims of past and feared future persecution."

IX

The More Things Change, The More They Stay The Same

In *Elias-Zacarias*, 921 F.2d 844 (9th Cir. 1990), *rev'd*, 502 U.S. 478, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992), our court substituted the panel's interpretation of the evidence for the BIA's. The Supreme Court reversed our decision, calling the first of the panel's two-part reasoning "untrue," and the second "irrelevant." 502 U.S. at 481, 112 S.Ct. 812. The Court warned us that we could not reverse the BIA unless the asylum applicant demonstrates that "the evidence he presented was *so compelling that no reasonable factfinder could fail to find the requisite fear of persecution*." *Id.* at 483–84, 112 S.Ct. 812 (emphasis added). In our case, we again fail to follow this instruction.

In *INS v. Orlando Ventura*, 537 U.S. 12, 13, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (per curiam), the Court noted that both sides, petitioner and respondent, had asked us to remand the case to the BIA so that it might determine in the first instance whether changed conditions in Guatemala eliminated any realistic threat of persecution of the petitioner. Our panel did not remand the case, evaluating instead the government's claim of changed conditions by itself and deciding the issue in favor of the petitioner. *Id.* at 13–14, 123 S.Ct. 353. The Supreme Court summarily reversed our decision, saying "[T]he Court of Appeals committed clear error here. It seriously disregarded the agency's legally mandated role." *Id.* at 17, 123 S.Ct. 353.

Did we learn our lesson? Hardly. A mere two years after *Ventura*'s per curiam opinion, we knowingly made the same mistake in *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *vacated*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006). We disregarded four dissenters to that flawed opinion, who argued in vain that our court's decision was irreconcilable with *Ventura*. In short order, the Supreme Court vacated our en banc opinion, saying that our "error is obvious in light of *Ventura*, itself a summary reversal" and that the same remedy was once again appropriate. 547 U.S. at 185, 126 S.Ct. 1613.

With all respect, the majority opinion follows in our stubborn tradition of seizing authority that does not belong to us, disregarding DHS's statutorily mandated role.

Even the REAL ID Act has failed to correct our errors.

Thus, I dissent.

Ming DAI, Petitioner,

v.

William BARR, Attorney General, Respondent.

No. 15-70776

United States Court of Appeals, Ninth Circuit.

Submitted October 13, 2017 * San Francisco, California

Filed March 8, 2018

Amended February 22, 2019

On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. AXXX-XX5-836

David Z. Su, Law Offices of David Z. Su, West Covina, California, for Petitioner.

Aimee J. Carmichael, Senior Litigation Counsel; Mary Jane Candaux, Assistant Director; Office of Immigration, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

Before: Sidney R. THOMAS, Chief Judge, and Stephen S. TROTT and Mary H. MURGUIA **, Circuit Judges.

Dissent to Opinion by Judge Trott

ORDER

The dissent filed March 8, 2018, is amended, with the following amended dissent to be substituted in lieu of the original. The petitions for rehearing and rehearing en banc remain pending, and no further action is required of the parties until further order of the court.

TROTT, Circuit Judge, dissenting:

The serious legal consequences of my colleagues' opinion are that it (1) disregards both the purpose and the substance of the REAL ID Act of 2005 ("Act")[1], (2) ignores the appropriate standard of review, and (3) perpetuates our idiosyncratic approach to an Immigration Judge's ("IJ") determination that the testimony of an asylum seeker lacks sufficient credibility or persuasiveness to prove his case. The majority's opinion accomplishes these results by contaminating the issue before us with irrelevancies, the most troublesome of which is a meritless irrebuttable presumption of credibility. The sole issue should be whether Dai's unedited presentation *compels* the conclusion that he carried his burden of proving he is a refugee and thus eligible for a discretionary grant of asylum. Only if we can conclude that no reasonable factfinder could fail to find his evidence conclusive can we grant his petition.

The IJ's decision not to make an explicit adverse credibility finding is a red herring that throws our analysis off the scent and preordains a result that is incompatible with the evidentiary record. By omitting from their opinion the IJ's fact-based explanation of his decision, the majority elides *eight* material findings of fact the IJ *did* make, each of which is entitled to substantial deference. The majority's assertion that "there is no finding to which we can defer" is false. For this reason, I quote in full the IJ's findings and conclu-

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** Prior to his death, Judge Reinhardt fully participated in this case and authored the majority opinion. Following Judge Reinhardt's death, Judge Murguia was drawn by lot to replace him. Ninth Circuit General Order 3.2h. Judge Murguia has reviewed all case materials.

1. Pub. L. No. 109-13, 119 Stat. 231.

sions about the persuasiveness of Dai's presentation in Part IV of my dissent. The eight findings are as follows.

First, the IJ specifically found that the information reported by the asylum officer about his conversation with Dai was accurate. The IJ said,

> As to the contents of [the asylum officer's notes], I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer's notes some substantial weight, in that they are consistent with the respondent's testimony in court.

Accordingly, the IJ accepted as a fact that Dai *admitted* that he did not disclose the consequential truth about his wife's and daughter's travels because he was nervous about how this would be perceived by the asylum officer in connection with his claim.

Second, the IJ accepted Dai's admission as a fact that he concealed the truth because he was afraid of giving straight answers regarding his wife's and daughter's trip to the United States.

Third, the IJ determined that Dai had deliberately omitted highly relevant information from his Form I-589 application for asylum, information that he also tried to conceal from the asylum officer.

Fourth, the IJ found that Dai's omission of his information "is consistent with his lack of forthrightness before the asylum office[r] as to his wife and daughter's travel with him. . . ."

Fifth, the IJ credited Dai's admission that when asked by the asylum officer to "tell the real story" about his family's travels, Dai said he "wanted a good environment for his child, and his wife had a job, but he did not, and that is why he stayed here [after his wife and daughter went back to China].

Sixth, the IJ found that Dai admitted he stayed here after they returned "because he was in a bad mood and he wanted to get a job and 'a friend of mine is here.' "

Seventh, the IJ said "I do *not* find that [Dai's] explanations for [his wife's] return to China while he remained here are adequate." (Emphasis added).

Finally, the IJ also credited Dai's concessions that his wife and daughter returned to China because "his daughter's education would be cheaper in China," and that "his wife wanted to go to take care of her father."

When Dai's subterfuge got to the BIA, the BIA said in its decision that "the record reflects that [Dai] failed to disclose to both the asylum officer and the IJ" the true facts about his family's travels. The BIA noted that Dai had conceded he was not forthcoming about this material information because he believed that the truth about their travels "would be perceived as inconsistent with his claims of past and feared persecution."

The IJ's specific factual findings in connection with Dai's failure to satisfy his burden of proof were not the product of inferences drawn from circumstantial evidence. These findings were directly based upon revealing answers Dai *admitted* he gave to the asylum officer during his interview. These facts are beyond debate, and they undercut Dai's case. To quote the BIA, these facts were "detrimental to his claim" and "significant to his burden of proof." Nevertheless, the majority brushes them aside, claiming that an immaterial presumption of credibility overrides all of them.

In this connection, I note a peculiarity in the majority's approach to Dai's case: Nowhere does Dai assert that he is entitled to a conclusive presumption of credibility. His brief does not contain any mention of the presumption argument the majority conjures up on his behalf. The closest Dai comes to invoking the majority's inapt postulate is with a statement that we "should" treat as credible his testimony regarding persecution in China. He does not take issue with the IJ's foundational adverse factual findings, choosing instead to argue that they were not sufficient in the light of the record as a whole to support the IJ's ultimate determination.

For example, Dai acknowledges in his brief that the "IJ's or BIA's factual findings are reviewed for substantial evidence" and that the "REAL ID Act's new standards *governing adverse credibility determinations* applies to applications for asylum, withholding of removal, and CAT relief made on or after May 11, 2005." Blue Br. 10 (emphasis added) (quotation marks omitted). Next, he notes that "an IJ cannot selectively examine evidence in determining *credibility*, but rather must present a reasoned analysis of the *evidence as a whole* and cite specific instances in the record that *form the basis of the adverse credibility finding*." *Id.* (emphasis added) (quotation marks omitted). Moreover, Dai notes that "[t]o support *an adverse credibility determination*, inconsistencies must be considered in light of the *totality of the circumstances*, and all relevant factors" adding that "trivial inconsistencies . . . should not form the basis of *an adverse credibility determination*." *Id.* at 10–11 (emphasis added) (quotation marks omitted). He contends that he "has provided adequate explanation" for his inconsistencies, *i.e.*, the failure to disclose his family's travels. *Id.* at 14. Finally, after attempting to pick apart the IJ's adverse findings, Dai's bottom line is that "his wife's departure from the United States does not adversely affect his credibility at all," an assertion that ignores his failed coverup of it. *See id.* at 16.

In summary, the majority blue pencils a material part of the evidentiary record even though Dai implores us to "examine it as a whole," as he did in his brief to the BIA. Dai accepts that the viability of his *entire* presentation is on the line, but the majority ignores his concession. In this connection, the Attorney General has responded only to the claims and arguments Dai included in his brief. The Attorney General has not been given an opportunity to respond to the majority's inventive analysis, nor to the theory concocted by the majority on Dai's behalf. Both sides will be surprised by my colleagues' artful opinion—Dai pleasantly, the Attorney General not so much.

I will have more to say in Part V about our Circuit's treatment of the role, responsibility, and product of an asylum officer.

For these reasons, I respectfully dissent.

I

Backdrop

Over the years, our Circuit has manufactured misguided rules regarding the credibility of political asylum seekers. I begin with this issue because the majority's mishandling of it infects the remainder of their opinion with error. These result-oriented ad hoc hurdles for the government stem from humanitarian intentions, but our court has pursued these intentions with methods that violate the institutional differences between a reviewing appellate court, on one hand, and a trial court on the other, usurping the role of the Department of Homeland Security ("DHS") and the BIA in the process. Referring to our approach to

witness credibility as an "idiosyncratic analytical framework," a previous panel of our court described this inappropriate situation as follows:

> The Supreme Court has repeatedly instructed us on the proper standard to apply when reviewing an immigration judge's adverse credibility determination. Time and again, however, we have promulgated rules that tend to obscure that clear standard and to flummox immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents. The result of this sly insubordination is that a panel that takes Congress at its word and accepts that findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude the contrary," ... or follows the Supreme Court's admonition that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it," ... runs a serious risk of flouting one of our eclectic, and sometimes contradictory, opinions.

Jibril v. Gonzales, 423 F.3d 1129, 1138 (9th Cir. 2005) (alteration in original) (citations omitted).

Many of our Circuit's rules on this subject and my colleagues' decision are irreconcilable with the structural principle set forth in Federal Rule of Civil Procedure 52(a)(6) that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Accordingly, we are expected to apply a highly deferential standard to a trial court's determination regarding the credibility of a witness. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–76, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In discussing this rule, the Supreme Court said that "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575, 105 S.Ct. 1504. The Court added that the applicable "clearly erroneous" standard of review "plainly does not entitle a *reviewing* court to reverse the finding of a trier of fact simply because it is convinced that it would have decided the case differently. The *reviewing* court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Id.* at 573, 105 S.Ct. 1504 (emphasis added).

The Supreme Court sharpened this point about our limited role in *Gonzales v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) (per curiam), *vacating* 409 F.3d 1177 (9th Cir. 2005) (en banc). In summarily vacating our en banc opinion, the Court held that we had exceeded our authority and made a determination that belonged to the BIA. 547 U.S. at 185–86, 126 S.Ct. 1613. The Court agreed with the Solicitor General that "a court's role in an immigration case is typically *one of review, not of first view*." *Id.* at 185, 126 S.Ct. 1613 (emphasis added) (quotation marks omitted). To support its conclusion, the Court cited *INS v. Orlando Ventura*, 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002): a " 'judicial judgment cannot be made to do service for an administrative judgment.' " 547 U.S. at 186, 126 S.Ct. 1613 (quoting *Ventura*, 537 U.S. at 16, 123 S.Ct. 353). More about *Ventura* later.

The majority's opinion's use of an incongruous irrebuttable presumption of credibility to erase the IJ's findings of fact and the BIA's decision and thus to make us a

court of "first view" is another example of our intransigence. If, as they say, we are bound by precedent to do it their way, then its time to change our precedent.

II

A False Premise

The majority opinion's assertion that "we must treat [Dai's] testimony as credible" rests on a fallacious premise. Judge Reinhardt writes, "Properly understood, the rebuttable presumption provision of the REAL ID Act applies only to appeals to the BIA, not to petitions for review in our court." From this inapt premise, he concludes that we *must* ignore the IJ's detailed analysis and findings of fact about Dai's presentation. When it comes to our task of reviewing the credibility of witnesses in a trial court or whether a witness' testimony suffices to carry his burden of proof, however, there is no material difference between an appeal and a petition for review, none. Federal Rule of Civil Procedure 52(a) makes no such distinction. As *Anderson* said, Rule 52(a) applies to a "*reviewing* court," which is what we are in this capacity. 470 U.S. at 573–74, 105 S.Ct. 1504 (emphasis added); *see Thomas*, 547 U.S. at 185, 126 S.Ct. 1613. Neither the Court nor Rule 52(a) differentiate between appeals and petitions for review. Nor would such a distinction make any sense. As *Anderson* and *Thomas* illustrate, the issue is one of *function*, not of form or labels. The Act's use of the word "appeal" does not dictate how we must go about our process of review. Using the standards provided by Congress, we are not in a position to weigh a witness's credibility or persuasiveness.

Federal Rule of Appellate Procedure 20, "Applicability of Rules to the Review or Enforcement of an Agency Order," illustrates the soundness of treating appeals and petitions for review with a uniform approach. Rule 20 reads, "All provisions of these rules ... apply to the review or enforcement of an agency order. In these rules, 'appellant' includes a petitioner or applicant, and 'appellee' includes a respondent."

Moreover, and directly to the point, the Act itself does *not* require an IJ to make a specific credibility finding in those precise terms. As the BIA correctly said with respect to the Act, "[c]ontrary to the respondent's argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim." *See* discussion *infra* Section VI. If the IJ does not make such an explicit finding, all the respondent is entitled to is a "*rebuttable* presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). By attempting to restrict this language to an appeal *to the BIA*, the majority opinion frees itself to apply derelict Ninth Circuit precedent to Dai's testimony and automatically to deem it credible.[2]

My colleagues claim that in the absence of a formal adverse credibility finding, "we are required to treat the petitioner's testimony as credible." The practical effect of the majority's rule is breathtaking: The *lack* of a formal adverse credibility finding becomes a selective positive credibility finding and dooms a fact-based determination by an IJ and the BIA that an applicant's case is not sufficiently persuasive to carry his burden of proof. The majority's

2. The majority cites *She v. Holder*, 629 F.3d 958, 964 & n.5 (9th Cir. 2010) in support of this ipse dixit claim. However, *She*'s footnote 5 says that because the "rebuttable presumption" provision does not apply retroactively, it had no applicability in *She*'s case.

approach violates all the rules that control our review of a witness's testimony before a factfinder.

A conclusive presumption of credibility has no valid place in our task of reviewing the persuasiveness of a witness's testimony. Such an artifice eliminates relevant factual evidence from consideration and violates Rule 52(a)(6). The deployment of a conclusive presumption becomes a misguided way not only of putting a heavy thumb on one tray of the traditional scales of justice, but also of removing relevant evidence from the other. This approach allows us to evade our responsibilities to examine and to evaluate the *entire* record before an IJ, permitting us instead to disregard facts that would otherwise discredit our final determination. The evidentiary record in this case devours any such presumption. Judge Reinhardt's opinion writes the REAL ID Act and its reference to a *rebuttable* presumption of credibility out of existence, even though Congress specifically intended the Act to govern *us*, the Ninth Circuit Court of *Appeals*.

Although the case focuses on corroboration of an applicant's testimony, our opinion in *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009) correctly explained the effect of the REAL ID Act on our pre-Act jurisprudence.

> We have a line of circuit authority for the proposition that corroboration cannot be required from an applicant who testifies credibly. In *Ladha v. INS*, [215 F.3d 889, 901 (9th Cir. 2000)] we 'reaffirmed that an alien's testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without the need for any corroboration.' *Kataria v. INS* [232 F.3d 1107, 1113 (9th Cir. 2000)] relied on *Ladha* in stating that 'the BIA may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application.' *Kataria* stated that 'we must accept an applicant's testimony as true in the absence of an explicit adverse credibility finding.'...
>
> Congress abrogated these holdings in the REAL ID Act of 2005....
>
> The statute additionally restricts the effect of apparently credible testimony by specifying that the IJ need not accept such testimony as true....
>
> Congress has thus swept away our doctrine that 'when an alien credibly testifies to certain facts, those facts are deemed true.'

Aden, 589 F.3d at 1044-45. More on the Act in the next section.

III

The REAL ID Act

Congress enacted the REAL ID Act of 2005 because of our Circuit's outlier precedents on this issue and our refusal to follow the rules. The House Conference Committee Report ("House Report")[3] explained that "the creation of a uniform standard for credibility is needed to address a conflict ... between the Ninth Circuit on one hand and other circuits and the BIA." H.R. Rep. No. 109-72 at 167. The House Report also said that the Act "resolves conflicts between administrative and judicial tribunals with respect to standards to be followed in assessing asylum claims." *Id.* at 162. Nevertheless, my colleagues hold that a key part of the Act does not apply to us, only to the BIA.

As the Act pertains to this case, it established a number of key principles, all of which the majority fails to follow, perpetuating the conflicts Congress attempted to resolve.

3. H.R. Rep. No. 109-72 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240.

First, "[t]he burden of proof is on the applicant to establish that the applicant is a refugee . . . ."[4]

Second, "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant *satisfies the trier of fact* that the applicant's testimony is credible, is *persuasive*, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[5]

Third,

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.[6]

We have attempted in a number of panel opinions after the Act to adjust our approach to applicant credibility and persuasiveness issues, but as the majority opinion illustrates, "old ways die hard." *Huang v. Holder*, 744 F.3d 1149 (9th Cir. 2014) captures where we should be on this issue:

> [W]e have concluded that "the REAL ID Act requires a healthy measure of deference to agency credibility determinations." This deference "makes sense because IJs are in the best position to assess demeanor and other credibility cues that we cannot readily access on review." "[A]n immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence." By virtue of their expertise, IJs are "uniquely qualified to decide whether an alien's testimony has about it the ring of truth."
>
> The need for deference is particularly strong in the context of demeanor assessments. Such determinations will often be based on non-verbal cues, and "[f]ew, if any, of these ephemeral indicia of credibility can be conveyed by a paper record of the proceedings and it would be extraordinary for a reviewing court to substitute its second-hand impression of the petitioner's demeanor, candor, or responsiveness for that of the IJ." Indeed, even before the enactment of the REAL ID Act, we recognized the need to give "special deference to a credibility determination that is based on demeanor," because the important elements of a witness's demeanor that "may convince the observing trial judge that the witness is testifying truthfully or falsely" are "entirely unavailable to a reader of the transcript, such as the Board or the Court of Appeals." The same principles

4. 8 U.S.C. § 1158(b)(1)(B)(i).

5. 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added).

6. 8 U.S.C. § 1158(b)(1)(B)(iii).

> underlie the deference we accord to the credibility determinations of juries and trial judges.

Id. at 1153–54 (alterations in original) (citations omitted). This "healthy measure of deference" should also apply to the agency's determination with respect to whether an applicant has satisfied the agency's "*trier of fact*"—*not us*—that his evidence is persuasive, an issue that is in the wheelhouse of a jury or a judge or an IJ hearing a case as a factfinder.

In *Kho v. Keisler*, 505 F.3d 50 (1st Cir. 2007), the First Circuit understood the Act's effect on the issue of an applicant's credibility. Not only did our sister circuit correctly comprehend the Act's impact, but it considered and rejected our approach to this important subject.

> Kho supplements his 'disfavored group' approach with an argument that because the IJ did not make an explicit finding concerning Kho's credibility, his testimony 'must be accepted as true' by this court. Kho bases this proposed rule as well on a series of Ninth Circuit cases. . . .
>
> We have already rejected the proposition that aliens are entitled to a presumption of credibility on review in this court if there is no express credibility determination made by an IJ. . . .
>
> The REAL ID Act also provides no support for Kho's argument. . . .

Kho, 505 F.3d at 56-57.

The court further explained that the Act's reference to a "rebuttable presumption" applies only to an applicant's appeal to the BIA, not to "reviewing courts of appeal." *Id.* at 56.

Thus, not only does my colleagues' opinion violate the directions of the Act, but it creates an intercircuit conflict with *Kho*, and an intra-circuit conflict with *Aden*.

IV

The IJ's Decision

The IJ in this case concluded that Ming Dai had not satisfied his statutory burden of establishing that he is a refugee pursuant to § 1158(b)(1)(B)(i). The IJ gave as his "principle area of concern" Dai's implausible unpersuasive testimony, another way of saying it wasn't credible. As Dai's brief correctly demonstrates, there is barely a dime's worth of substantive difference between "credible" and "persuasive." Here is how the IJ explained his decision in terms of § 1158(b)(1)(B)(i) and (ii):

> I have carefully considered the respondent's testimony and evidence and for the following reasons, I find that the respondent has failed to meet his burden of proving eligibility for asylum.
>
> The principal area of *concern with regard to the respondent's testimony* arose during the course of his cross-examination. On cross-examination, the respondent was asked about various aspects of his interview with an Asylum Officer. The Department of Homeland Security also submitted the notes of that interview as Exhibit 5. The respondent was asked specific questions regarding several aspects of his testimony before the Asylum Officer. In the course of cross-examination, the respondent was asked regarding his questions and answers as to whether his wife and daughter travelled with him to the United States. The respondent's responses included the question of whether the asylum officer had asked him if his wife and daughter travelled anywhere other than to Taiwan and Hong Kong. The respondent conceded that he was asked this question and that he replied yes, they had travelled to Taiwan and Hong Kong. The respondent was asked whether the Asylum Officer inquired whether his wife and daughter had travelled elsewhere.

The respondent then testified before the Court that he was asked this question, "but I was nervous." In this regard, I note that the respondent did not directly answer the question; instead leapt directly to an explanation for what his answer may have been, namely that he was nervous. The respondent was then asked specifically whether the Asylum Officer asked him if his wife had travelled to Australia in 2007. The respondent confirmed that he had been asked this question, and he confirmed that the answer was in the affirmative. The respondent also confirmed that the Asylum Officer had asked him whether she had travelled anywhere else. He confirmed that he had been so asked. The respondent was then asked whether he answered "no," that she had not travelled anywhere else. The respondent answered that he believed so, that he had so answered. The respondent was then asked, during the course of cross-examination, why he had not said to the Asylum Officer that yes, she had travelled to the United States. The respondent replied that he had not thought of it. He stated that they did come with him (meaning his wife and daughter) and that he thought the Asylum Officer was asking him if they had travelled anywhere other than the United States. He explained that he did so because he assumed the U.S. Government had the records of their travel to the United States. On further questioning, the respondent eventually hesitated at some length when asked to further explain why he did not disclose spontaneously to the Asylum Officer that his wife and daughter had come with him. The respondent paused at some length and I observed that the respondent appeared nervous and at a loss for words. However, after a fairly lengthy pause, the respondent testified that he is afraid to say that his wife and daughter came here and why they went back. The respondent was asked whether he told the Asylum Officer that he was afraid to answer directly. The respondent initially testified that he forgot and did not remember whether he said that. He again reiterated that he was very nervous. He was then asked the question again as to whether he told the Asylum Officer that he was afraid to answer why his wife and daughter had gone back. He then conceded that maybe, yes, he had answered in that fashion. The respondent was asked whether the Asylum Officer inquired why his wife and daughter went back, and the respondent conceded that he had been so asked, and he further conceded that he replied because school in the United States cost a lot of money (referring to the schooling for his daughter). The respondent was then asked to confirm that the Asylum Officer eventually asked him to tell him the real story as to why his family travelled to the United States and returned to China. The respondent confirmed that he was asked this question and when asked, whether he replied that it was because he wanted a good environment for his child and because his wife had a job and he did not and that that is why he stayed here. He confirmed that he did, in fact, say that. The respondent was further asked, during the course of testimony in court, why his wife and daughter returned to China. In this regard, the respondent testified that they came with him, but returned to China several weeks after arrival. He testified that they did so because his father-in-law was elderly and needed attention, and because his daughter needed to graduate school in China.

The respondent further claimed that his wife had, in fact, suffered past persecu-

tion in the form of a forced abortion and the respondent confirmed that he feared his wife and daughter would suffer future persecution. In this regard, the respondent qualified his answer by saying that his wife was now on an IUD, apparently thereby suggesting that the risk of persecution is reduced. However, the respondent did concede that the risk of future persecution also pertains to his daughter. Indeed, in this regard, the respondent testified that this is, at least in part, why he applied for asylum.

As to the contents of Exhibit 5, I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer's notes some substantial weight, in that they are consistent with the respondent's testimony in court. Specifically, I note that the Asylum Officer's notes state that the respondent ultimately indicated that he was afraid of giving straight answers regarding his daughter and wife's trip to the United States and return to China. And while the respondent did not confirm this in court, he did give a similar answer as to why he was testifying in this regard. In other words, the respondent appears to have stated, both before the Asylum Officer and in court that he did not spontaneously disclose the travel of his wife and daughter with him to the United States and their return because *he was nervous about how this would be perceived by the Asylum Officer in connection with his claim.* I further note that the Asylum Officer's notes are internally consistent with regard to references to earlier questions, such as whether the respondent had stated that he applied for a visa with anyone else. *At page 2 of the notes contained in Exhibit 5, the respondent was asked whether he applied for his visa with anyone else and the notes indicated that he stated that, "no, I applied by myself." Similarly, I note that the testimony before the Asylum Officer and the Court is consistent with the omission in the respondent's Form I-589 application for asylum, of an answer to the question of the date of the previous arrival of his wife, if she had previously been in the United States. See* Exhibit 2, page 2, part A.II, question 23. When asked about this omission, the respondent expressed surprise, stating that he told the preparer about their trip and indicated that he thought it had been filled out. Notwithstanding the respondent's statement in this regard, *I do observe that the omission is consistent with his lack of forthrightness before the asylum office as to his wife and daughter's travel with him to the United States and their subsequent return to China shortly thereafter.*

In sum, the respondent's testimony before the Court and his testimony regarding the Asylum Officer notes, as well as the notes themselves, clearly indicate that the respondent failed to spontaneously disclose that his wife and daughter came with him and then returned to China. His testimony and the notes also consistently demonstrate that the respondent paused at length, both before the Court and before the Asylum Officer, when asked about this topic. His testimony and the Asylum Officer notes are also consistent in indicating that he ultimately testified that he was afraid to say that his wife came here and was afraid of being asked about why she went back. *Furthermore, the respondent has conceded that he was asked to "tell*

the real story" about his family's travel to the United States by the Asylum Officer, and that he replied that he wanted a good environment for his child and his wife had a job, but he did not, and that is why he stayed here.

In *Loho v. Mukasey*, 531 F.3d 1016, 1018–19 (9th Cir. 2008), the Ninth Circuit addressed the situation in which an asylum applicant has found safety in the United States and then returns to the country claimed of persecution before eventually finding asylum in the United States. The Ninth Circuit held that the applicant's voluntary return to the country of claimed persecution may be considered in assessing both credibility and whether the respondent has a well-founded fear of persecution in that country. Here, while the respondent himself has not returned to China, his wife and daughter did. Indeed they did so shortly after arriving in the United States, and the respondent confirmed that they did so because the schooling is cheaper for his daughter in China, as well as because his father-in-law is elderly and needed to be cared for. The respondent also told the Asylum Officer that the "real story" about whey [sic] his family returned was that his wife had a job and he did not, and that is why he stayed here. This is consistent with respondent's testimony before the Court that he did not have a job at the time he came to the United States. Furthermore, I note that the respondent's claim of persecution is founded on the alleged forced abortion inflicted upon his wife. That is the central element of his claim. The respondent claims that he himself was persecuted through his resistance to that abortion. Nevertheless, the fact remains that the fundamental thrust of the respondent's claim is that his wife was forced to have an abortion. In this regard, the respondent's wife therefore clearly has an equal, or stronger, claim to asylum than the respondent himself, assuming the facts which he claims are true. The respondent was asked why his wife did not stay and apply for asylum and he replied that he did not know they could apply for asylum at the time they departed. *The respondent was then asked why he stayed here after they returned; he said because he was in a bad mood and he wanted to get a job and a friend of mine is here.*

While *Loho v. Mukasey* applies to the applicant himself returning to China, I find that the reasoning of the Ninth Circuit in that case is fully applicable to the respondent's situation in that his wife, who is the primary object of the persecution in China, freely chose to return to China. *I do not find that the respondent's explanations for her return to China while he remained here are adequate.* The respondent has stated that he was in a bad mood and that he had found a job and had a friend here. The respondent has also indicated that his daughter's education would be cheaper in China than here, and he has also indicated that his wife wanted to go to take care of her father. I do not find that these reasons are sufficiently substantial so as to outweigh the concerns raised by his wife and daughter's free choice to return to China after having allegedly fled that country following his wife's and his own persecution.

In view of the for[e]going, I find that the respondent has failed to meet his burden of proving eligibility for asylum under Section 208(a) of the Act.

(Emphasis added).

To erase any doubts about Dai's problematic testimony, the following is an excerpt from it.

MS. HANNETT TO MR. DAI

Q. And isn't it also true that the [asylum] officer asked why did they go back and you replied, so that my daughter can go to school and in the U.S., you have to pay a lot of money?

A. Yes, that's what I said.

Q. Okay. And isn't it also true that the officer asked you, can you tell me the real story about you and your family's travel to the U.S., and you replied I wanted a good environment for my child. My wife had a job and I didn't, and that is why I stayed here. My wife and child go home first.

A. I believe I said that.

* * *

Q. So, once you got to the United States, why didn't your wife apply for asylum?

A. My wife just returned to China.

Q. Right, and my question is why didn't she stay here and apply for asylum?

A. At that time, we didn't know the apply, we didn't know that we can apply for asylum.

Q. Well, if you didn't know that you could apply for asylum, why did you stay here after they returned?

A. Because at that time, I was in a bad mood and I couldn't get a job, so I want to stay here for a bit longer and another friend of mine is also here.

The asylum officer's interview notes discussed by the IJ (and found to be consistent with Dai's testimony before the IJ) read as follows:

Earlier you said your wife has only traveled to Australia, Taiwan and HK. You also said that you traveled to the US alone. Government records indicate that your wife traveled with you to the United States. Can you explain?

[long pause] the reason is I'm afraid to say that my wife came here, then why did she go back.

Your wife went back? Yes

When did she go back to China? February

Why did she go back? Because my child go to school

Earlier you said you applied for your visa alone. Our records indicate that your child also obtained a visa to the US with you. Can you explain?

[long pause]

Daughter came with wife and you in January? Yes

Can you explain? I'm afraid

Please tell me what you are afraid of. That is what your interview today is for. To understand your fears?

I'm afraid you ask why my wife and daughter go back

Why did they go back?

So that my daughter can go to school and in the US you have to pay a lot of money.

Can you tell me the real story about you and your family's travel to the US?

I wanted a good environment for my child. My wife had a job and I didn't and that is why I stayed here. My wife and child go home first.

(bracketed notations in original).

V

The Role of an Asylum Officer

The majority's opinion perpetuates another acute error our Circuit has made in its effort to control the DHS's administrative process. In footnote 2, the majority say that if Dai concealed relevant information "it was only from the asylum officer." *Only* from the asylum officer? So Dai's

admitted concealment *under oath* of germane information during a critical part of the evaluation process is of no moment?

The majority's misunderstanding of the role of an asylum officer represents a sub silentio application of another faulty proposition on the books in our circuit: *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005).

> Certain features of an asylum interview make it *a potentially unreliable point of comparison* to a petitioner's testimony for purposes of a credibility determination. *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001), explained the significant procedural distinctions between the initial *quasi-prosecutorial* "informal conferences conducted by asylum officers" after the filing of an asylum application, and the "quasi-judicial functions" exercised by IJs. . . .

Id. at 1087 (emphasis added).

First of all, we may not have in this case a verbatim transcript of Dai's testimony, but we have the asylum officer's notes, which the IJ explicitly found to be accurate. Moreover, when appropriately confronted under oath with the notes, Dai admitted they correctly captured what he said. Under these circumstances, any concern that the asylum interview might be a "potentially unreliable point of comparison" to Dai's testimony is irrelevant. The record (thanks to Dai himself) eliminates any potential for unreliability.

Second, the pronouncement in *Singh v. Gonzales* that an asylum officer's interview in an *affirmative* asylum case is "quasi-prosecutorial" in nature is flat wrong and reveals our fundamental misunderstanding of the process.[7] An asylum officer in an affirmative asylum case does not "prosecute" anyone during the exercise of his responsibilities, and the process is not "quasi-prosecutorial" in nature. In fact, unlike a prosecutor, an asylum officer has the primary authority and discretion to grant asylum to an applicant should the applicant present a convincing case. The asylum officer's role is essentially judicial, not prosecutorial. We miss the mark here because we see only those cases where an affirmative asylum applicant did not present a sufficiently credible persuasive case to an asylum officer to prevail, and we mistakenly conclude from that unrepresentative sample that asylum officers tend to decide against such applicants.

The true facts emerge from DHS's June 20, 2016 report to Congress, *Affirmative Asylum Application Statistics and Decisions Annual Report*, covering "FY 2015 adjudications of affirmative asylum applications by USCIS [U.S. Citizenship & Immigration Services] asylum officers for the stated period."[8] By way of background, the Report points out that asylum officers have a central determinative role in the process. Asylum determinations "are made by an asylum officer after an applicant files an affirmative asylum application, is interviewed, and clears required security and background checks." *Id.* at 2.

The Report contains statistics about the activity of asylum officers. According to the FY2015 statistics, asylum officers completed 40,062 affirmative asylum cases.

7. An affirmative asylum case differs from a defensive asylum case involving someone already in removal proceedings. *See Obtaining Asylum in the United States,* DEP'T OF HOMELAND SEC., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last updated Oct. 19, 2015).

8. *2016 DHS Congressional Appropriations Reports,* DEP'T OF HOMELAND SEC., https://www.dhs.gov/publication/2016-dhs-congressional-appropriations-reports (last published Feb. 12, 2018) (follow "United States Citizenship and Immigration Services (USCIS) - Affirmative Asylum Application Statistics & Decisions FY16 Report" hyperlink).

They approved 15,999 applications for an approval rate of 47% for interviewed cases. *Id.* at 3.

USCIS has a Policy Manual. Chapter 1 of Volume 1 establishes its "Guiding Principles."[9] A "Core Principal" reads as follows:

> The performance of agency duties inevitably means that some customers will be disappointed if their cases are denied. Good customer service means that everyone USCIS affects will be treated with dignity and courtesy regardless of the outcome of the decision.
>
> * * *
>
> USCIS will approach each case objectively and adjudicate each case in a thorough and fair manner. USCIS will carefully administer every aspect of its immigration mission so that its customers can hold in high regard the privileges and advantages of U.S. immigration.

Id.

Finally, we look at the training given to asylum officers in connection with their interviews of affirmative asylum applicants. In USCIS's Adjudicator's Field Manual, we find in Appendix 15-2, "Non-Adversarial Interview Techniques," the following guidance.[10]

> **I. OVERVIEW**
>
> An immigration officer will conduct an interview for each applicant, petitioner or beneficiary where required by law or regulation, or if it is determined that such interviewed [sic] is appropriate. *The interview will be conducted in a non-adversarial manner*, separate and apart from the general public. The officer must always keep in mind his or her responsibility to uphold the integrity of the adjudication process. As representatives of the United States Government, officers must conduct the interview in a professional manner.
>
> * * *
>
> Due to the potential consequences of incorrect determinations, it is incumbent upon officers to conduct organized, focused, and well-planned, *non-adversarial interviews* . . . .
>
> * * *
>
> **III. NON-ADVERSARIAL NATURE OF THE INTERVIEW**
>
> **A. Concept of the Non-adversarial Interview**
>
> A non-adversarial proceeding is one in which the parties are not in opposition to each other. This is in contrast to adversarial proceedings, such as civil and criminal court proceedings, where two sides oppose each other by advocating their mutually exclusive positions before a neutral arbiter until one side prevails and the other side loses. *A removal proceeding before an immigration judge is an example of an adversarial proceeding*, where the Service trial attorney is seeking to remove a person from the United States, while the alien is seeking to remain.
>
> The interview is part of a non-adversarial proceeding. The principal intent of the Service is not to oppose the interviewee's goal of obtaining a benefit, but to determine whether he or she qualifies for such benefit. If the interviewee quali-

9. *Policy Manual,* U.S. Citizenship & Immigration Servs., https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1-PartA-Chapter1.html (Aug. 23, 2017).

10. *Adjudicator's Field Manual - Redacted Public Version,* U.S. Citizenship & Immigration Servs., https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (follow "Appendices" hyperlink; then follow "15-2 Non-Adversarial Interview Techniques" hyperlink) (last visited Feb. 15, 2018) (emphasis added).

fies for the benefit, it is in the Service's interest to accommodate that goal.

* * *

B. Points to Keep in Mind When Conducting a Non-adversarial Interview

The officer's role in the non-adversarial interview is to ask questions formulated to elicit and clarify the information needed to make a determination on the petitioner or applicant's request. This questioning must be done in a professional manner that is non-threatening and non-accusatory.

1. The officer must:

a. Treat the interviewee with respect. Even if someone is not eligible for the benefit sought based on the facts of the claim, the officer must treat him or her with respect. The officer may hear similar claims from many interviewees, but must not show impatience towards any individual. Even the most non-confrontational officer may begin to feel annoyance or frustration if he or she believes that the interviewee is lying; however, it is important that the officer keep these emotions from being expressed during the interview.

b. Be non-judgmental and non-moralistic. Interviewees may have reacted to situations differently than the officer might have reacted. The interviewee may have left family members behind to fend for themselves, or may be a member of a group or organization for which the officer has little respect. Although officers may feel personally offended by some interviewee's actions or beliefs, officers must set their personal feelings aside in their work, and avoid passing moral judgments in order to make neutral determinations.

c. Create an atmosphere in which the interviewee can freely express his or her claim. The officer must make an attempt to put the interviewee at ease at the beginning of the interview and continue to do so throughout the interview. If the interviewee is a survivor of severe trauma (such as a battered spouse), he or she may feel especially threatened during the interview. As it is not always easy to determine who is a survivor, officers should be sensitive to the fact that every interviewee is potentially a survivor of trauma.

Treating the interviewee with respect and being non-judgmental and non-moralistic can help put him or her at ease. There are a number of other ways an officer can help put an interviewee at ease, such as:

- Greet him or her (and others) pleasantly;
- Introduce himself or herself by name and explain the officer's role;
- Explain the process of the interview to the interviewee so he or she will know what to expect during the interview;
- Avoid speech that appears to be evaluative or that indicates that the officer thinks he or she knows the answer to the question;
- Be patient with the interviewee; and
- Keep language as simple as possible.

d. Treat each interviewee as an individual. Although many claims may be similar, each claim must be treated on a case-by-case basis and each interviewee must be treated as an individual. Officers must be open to each interviewee as a potential approval.

e. Set aside personal biases. Everyone has individual preferences, biases, and prejudices formed during life experiences that may cause them to view others either positively or negatively. Officers should be aware of their personal biases and recognize that they can po-

tentially interfere with the interview process. Officers must strive to prevent such biases from interfering with their ability to conduct interviews in a non-adversarial and neutral manner.

f. Probe into all material elements of the interviewee's claim. The officer must elicit all relevant and useful information bearing on the applicant or beneficiary's eligibility. The officer must ask questions to expand upon and clarify the interviewee's statements and information contained on the form. The response to one question may lead to additional questions about a particular topic or event that is material to the claim.

g. Provide the interviewee an opportunity to clarify inconsistencies. The officer must provide the interviewee with an opportunity during the interview to explain any discrepancy or inconsistency that is material to the determination of eligibility. He or she may have a legitimate reason for having related testimony that outwardly appears to contain an inconsistency, or there may have been a misunderstanding between the officer and the interviewee. Similarly, there may be a legitimate explanation for a discrepancy or inconsistency between information on the form and the interviewee's testimony.

On the other hand, the interviewee may be fabricating a claim. If the officer believes that an interviewee is fabricating a claim, he or she must be able to clearly articulate why he or she believes that the interviewee is not credible.

h. Maintain a neutral tone throughout the interview. Interviews can be frustrating at times for the officer. The interviewee may be long-winded, may discuss issues that are not relevant to the claim, may be confused by the questioning, may appear to be or may be fabricating a claim, etc. It is important that the officer maintain a neutral tone even when frustrated.

2. The officer must not:

- Argue in opposition to the applicant or petitioner's claim (if the officer engages in argument, he or she has lost control of the interview);
- Question the applicant in a hostile or abusive manner;
- Take sides in the applicant or petitioner's claim;
- Attempt to be overly friendly with the interviewee; or
- Allow personal biases to influence him or her during the interview, either in favor of or against the interviewee.

I hope that by exposing the particulars of the affirmative application process we will correct our understanding of the applicant interview process, and that we will drop our uninformed characterization of it as "quasi-prosecutorial." While under oath, Dai intentionally concealed material information from the asylum officer during a critical aspect of the process. To diminish the import of this potential crime [11] because the government official was "only" an asylum officer is a serious mistake.

VI

The BIA's Decision

Dai unsuccessfully appealed the IJ's decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. The BIA's decision follows.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge.

11. 18 U.S.C. § 1001 makes it a crime knowingly and willfully to make a material false statement in any matter within the jurisdiction of the executive branch of Government.

We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. The respondent filed his application for asylum after May 11, 2005, and thus review is governed by the REAL ID Act of 2005.

We adopt and affirm the Immigration Judge's decision in this case. The Immigration Judge correctly denied the respondent's applications for failure to meet his burden of proof. The record reflects that the respondent failed to disclose to both the [DHS] asylum officer and the Immigration Judge that his wife and daughter had traveled with him to the United States and voluntarily returned to China shortly after. *The respondent further conceded that he was not forthcoming about this information because he believed that the true reasons for their return—that his wife had a job in China and needed to care for her elderly father, and that their daughter could attend school in China for less money than in the United States—would be perceived as inconsistent with his claims of past and feared future persecution.*

The Immigration Judge correctly decided that the voluntary return of the respondent's wife and daughter to China, after allegedly fleeing following the persecution of the respondent and his wife, prevents the respondent from meeting his burden of proving his asylum claim. *Contrary to the respondent's argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim.* The respondent's family voluntarily returning *and his not being truthful about it is detrimental to his claim and is significant to his burden of proof.*

(Emphasis added) (footnote and citations omitted).

VII

The IJ Becomes a Potted Plant

My colleagues' opinion boils down to this faulty proposition: Simply because the IJ did not say "I find Dai not credible" but opted instead to expose the glaring factual deficiencies in Dai's presentation and to explain in specific detail and at length why Dai had not persuasively carried his burden of proving his case, we must selectively embrace as persuasive Dai's problematic presentation regarding the core of his claim.[12] I invite the reader to review once again the IJ's decision and to decide on the merits whether Dai's case is persuasive. It is anything but.

My colleagues expunge from the record the blatant flaws in Dai's performance involving demeanor, candor, and responsiveness, claiming that "taking into account the record as a whole, nothing undermines the persuasiveness of Dai's credible testimony. . . ." Nothing? They disregard inaccuracies, inconsistencies, and implausibilities in his story, and his barefaced attempt to cover up the truth about his wife's and daughter's travels and situation. They even sweep aside Dai's admission to the asylum officer that the "real story" is that (1) he wanted a good environment for his child, (2) his wife left him behind because she had a job in China and he did not, and (3) he was in a "bad mood," couldn't get a job, and wanted to stay here "for a bit longer." In their opinion, there is not a single word regarding the factors cited by the IJ to

12. And if an IJ does make an adverse credibility finding, we have manufactured a multitude of ways to disregard it.

explain his observations, findings, and decision, including the fact that Dai's wife, allegedly the initial subject of persecution in China, made a free choice to return. The effect of the presumption is to wipe the record clean of everything identified by the IJ and the BIA as problematic.

The irony in my colleagues' analysis is that once they proclaim that Dai's testimony is credible, they pick and choose only those parts of his favorable testimony that support his case—not the parts that undercut it. If we must accept Dai's presentation as credible, then why not also his "real story" when confronted with the facts that he came to the United States because he wanted a good environment for his daughter, and that he did not return to China with his wife because she had a job and he did not? What becomes of his attempted cover up of the travels of his wife and daughter?

Furthermore, my colleagues' treatment of the IJ's opinion is irreconcilable with the BIA's wholesale acceptance of it. In words as clear as the English language can be, the BIA said, "We adopt and affirm the Immigration Judge's decision." To compound their error, the majority then seizes upon and pick apart the BIA's summary explanation of why it concluded on de novo review that the IJ's decision was correct. What the BIA did say was that Dai's failure to be truthful about his family's voluntary return to China was "detrimental to his claim" and "significant to his burden of proof."

VIII

Analysis

And so we come at last to the statutory requirement of persuasiveness, an issue uniquely suited to be determined by the "trier of fact," as the Act and 8 U.S.C. § 1158(b)(1)(B)(ii) dictate. The majority opinion freights this inquiry with an incomplete record. The opinion sweeps demeanor, candor, and plausibility considerations—as well as the IJ's extensive findings of fact—off the board. Once again, the opinion ignores *Huang*, a post-Act case.

> The need for deference is particularly strong in the context of demeanor assessments. Such determinations will often be based on non-verbal cues, and "[f]ew, if any, of these ephemeral indicia of credibility can be conveyed by a paper record of the proceedings and it would be extraordinary for a reviewing court to substitute its second-hand impression of the petitioner's demeanor, candor, or responsiveness for that of the IJ."

744 F.3d at 1153 (alteration in original) (quoting *Jibril*, 423 F.3d at 1137).

Here, the IJ determined that Dai's testimony was not persuasive based on demeanor, non-verbal cues, and other germane material factors that went to the heart of his case. The IJ explained his decision in exquisite detail, and our approach and analysis should be simple. In order to reverse the BIA's conclusion that Dai did not carry his burden of proof, "we must determine 'that the evidence not only *supports* [a contrary] conclusion, but *compels* it—and also compels the further conclusion' that the petitioner meets the requisite standard for obtaining relief." *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014) (alteration in original) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992)). If anything, this record compels the conclusion that the IJ and the BIA were *correct*, not mistaken. Are my colleagues seriously going to hold that an IJ cannot take universally accepted demeanor, candor, responsiveness, plausibility, and forthrightness factors into consideration in assessing persuasiveness, as the

IJ did here? And that this detailed record, which is full of Dai's admissions of an attempted coverup, *compels* the conclusion that Dai was so persuasive as to carry his burden? Dai accurately understood the damaging implications of his wife's return to China. So did the IJ and the BIA. As the BIA stated, the truth is "inconsistent with his claims of past and feared future persecution."

IX

The More Things Change, The More They Stay The Same

In *Elias-Zacarias*, 921 F.2d 844 (9th Cir. 1990), *rev'd*, 502 U.S. 478, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992), our court substituted the panel's interpretation of the evidence for the BIA's. The Supreme Court reversed our decision, calling the first of the panel's two-part reasoning "untrue," and the second "irrelevant." 502 U.S. at 481, 112 S.Ct. 812. The Court warned us that we could not reverse the BIA unless the asylum applicant demonstrates that "the evidence he presented was *so compelling that no reasonable factfinder could fail to find the requisite fear of persecution*." *Id.* at 483–84, 112 S.Ct. 812 (emphasis added). In our case, we again fail to follow this instruction.

In *INS v. Orlando Ventura*, 537 U.S. 12, 13, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (per curiam), the Court noted that both sides, petitioner and respondent, had asked us to remand the case to the BIA so that it might determine in the first instance whether changed conditions in Guatemala eliminated any realistic threat of persecution of the petitioner. Our panel did not remand the case, evaluating instead the government's claim of changed conditions by itself and deciding the issue in favor of the petitioner. *Id.* at 13–14, 123 S.Ct. 353. The Supreme Court summarily reversed our decision, saying "[T]he Court of Appeals committed clear error here. It seriously disregarded the agency's legally mandated role." *Id.* at 17, 123 S.Ct. 353.

A mere two years after *Ventura*'s per curiam opinion, we knowingly made the same mistake in *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *vacated*, 547 U.S. 183, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006). We disregarded four dissenters to that flawed opinion, who argued in vain that our court's decision was irreconcilable with *Ventura*. In short order, the Supreme Court vacated our en banc opinion, saying that our "error is obvious in light of *Ventura*, itself a summary reversal" and that the same remedy was once again appropriate. 547 U.S. at 185, 126 S.Ct. 1613.

With all respect, the majority opinion follows in our tradition of seizing authority that does not belong to us, disregarding DHS's statutorily mandated role. Even the REAL ID Act has failed to correct our errors.

Thus, I dissent.

AMERICAN BEVERAGE ASSOCIATION; California Retailers Association, Plaintiffs-Appellants,

and

California State Outdoor Advertising Association, Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellee.

the majority's opinion, which would inevitably exist even after further disclosures are attempted, parties may shift to using arbitrators who are unaffiliated with any arbitration firm. These arbitrators may be less likely to have expertise—but be at least equally likely to want to retain the business of potential repeat customers. *Cf. ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 498–99 (4th Cir. 1999) ("[S]ubjecting arbitrators to extremely rigorous disclosure obligations would diminish one of the key benefits of arbitration: an arbitrator's familiarity with the parties' business." (citing *Commonwealth Coatings*, 393 U.S. at 150, 89 S.Ct. 337 (White, J., concurring))).

Although I would affirm the Arbitrator's award in favor of Monster, I note that lack of disclosure about a party's prior arbitrations might require vacatur in some instances. For example, if one of the parties had used the exact same arbitrator to resolve numerous disputes, and the arbitrator always ruled in its favor, vacatur might be appropriate based on the arbitrator's failure to disclose that arbitration history. But the facts of this case are nowhere near so extreme. The Arbitrator had previously decided one dispute between Monster and a distributor, and that proceeding resulted in an award of almost $400,000 *against* Monster. The Arbitrator had also been selected to decide a dispute between Monster and another distributor, which was still pending at the time of the arbitration involving Monster and Olympic Eagle. The disclosure the Arbitrator made to the parties provided accurate information about both arbitrations.

II.

To the extent that the private arbitration system favors repeat players, I think it is unfortunate that so many parties forgo the protections of Article III and turn to arbitration instead. It is especially unfortunate when arbitrations involve a non-repeat player party that had no choice but to agree to arbitration in order to acquire employment, purchase a product, or obtain a necessary service. The majority laudably seeks to mitigate disparities between repeat players and one-shot players in the arbitration system. But I disagree that requiring disclosures about the elephant that everyone knows is in the room will address those disparities. It will only cause many arbitrations to be re-done, and endless litigation over how many repeated arbitrations there will be.

I therefore respectfully dissent.

MING DAI, Petitioner,

v.

William P. BARR, Attorney General, Respondent.

No. 15-70776

United States Court of Appeals, Ninth Circuit.

Filed October 22, 2019

Agency No. AXXX-XX5-836

David Z. Su, Law Offices of David Z. Su, West Covina, California; David J. Zimmer, Goodwin Procter LLP, Boston, Massachusetts; William M. Jay, Goodwin Procter LLP, Washington, D.C.; for Petitioner.

Aimee J. Carmichael, Senior Litigation Counsel; Mary Jane Candaux and John W. Blakeley, Assistant Directors; Donald Keener, Deputy Director; Office of Immigration, Civil Division, United States De-

partment of Justice, Washington, D.C.; for Respondent.

Before: SIDNEY R. THOMAS, Chief Circuit Judge, and STEPHEN S. TROTT and MARY H. MURGUIA, Circuit Judges.

Order; Statement Respecting Denial by Judge TROTT; Dissent by Judge CALLAHAN; Statement Respecting Denial by Judges O'SCANNLAIN and TROTT; Dissent by Judge COLLINS

ORDER

The full court has been advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35. Judge Miller was recused and did not participate in the vote.

The petition for rehearing en banc is denied. Attached are dissents from and statements respecting the denial of rehearing en banc.

TROTT, Circuit Judge,** with whom R. NELSON, Circuit Judge, joins, respecting the denial of rehearing en banc:

Instead of following the REAL ID Act ("Act"), our court has perpetuated a contrived rule that in the absence of an adverse credibility finding, a petitioner must be deemed credible. We then use that conclusion to override an Immigration Judge's ("IJ") and the Board of Immigration Appeals' ("Board") well-supported determination that this petitioner's case was not "persuasive." In so doing, we have rewritten the Act. We have a long history of ignoring Congress and the Supreme Court, and here we have done it again. *See Dai v. Sessions*, 884 F.3d 858, 875–93 (9th Cir. 2018) (Trott, J., dissenting). Moreover, the panel majority opinion creates an intercircuit conflict. I will address that problem later in Part IV.

I

As explained in his thorough and convincing decision, Immigration Judge Stephen Griswold, determined that Dai had not met his statutory burden of persuasion on the central issue of whether he was eligible as a refugee for asylum. The documented fatal flaws in Dai's case were (1) his glaring attempt to deceive the asylum officer by concealing highly probative damaging facts that go to the very core of his case, facts that Dai also omitted from his Form I-589 application for asylum, (2) his admission when pressed that his deceit was intentional, driven by his understanding that the concealed evidence would damage his probability of success, (3) his inadequate explanations for the contradictions in his presentation, (4) his telling demeanor on cross examination, and (5) the "real story" behind his departure from China and his decision not to return with his wife and daughter. The IJ regarded these flaws as demonstrating a "lack of forthrightness." Accordingly, the IJ concluded pursuant to the language of the Act that Dai's case was not "persuasive."

Reviewing de novo whether Dai had adequately met his burden of persuasion that he was eligible for asylum, the Board of Immigration Appeals agreed that he had not. To support its conclusion, the Board

** As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

referenced the same material flaws the IJ found as facts. Their reasoned decision should end this case, but with all respect, the panel majority and now our court have converted this straightforward matter into a textbook example of elevating form over substance, taking a blue pencil to the Act's requirement that an applicant's case must be "persuasive" and inappropriately substituting our judgment for the Board's.

II

Here is Judge Griswold's compelling decision. Reading it illustrates how wrong our court's analysis is.

> I have carefully considered the respondent's testimony and evidence and for the following reasons, I find that the respondent has failed to meet his burden of proving eligibility for asylum.
>
> The principal area of *concern with regard to the respondent's testimony* arose during the course of his cross-examination. On cross-examination, the respondent was asked about various aspects of his interview with an Asylum Officer. The Department of Homeland Security also submitted the notes of that interview as Exhibit 5. The respondent was asked specific questions regarding several aspects of his testimony before the Asylum Officer. In the course of cross-examination, the respondent was asked regarding his questions and answers as to whether his wife and daughter travelled with him to the United States. The respondent's responses included the question of whether the asylum officer had asked him if his wife and daughter travelled anywhere other than to Taiwan and Hong Kong. The respondent conceded that he was asked this question and that he replied yes, they had travelled to Taiwan and Hong Kong. The respondent was asked whether the Asylum Officer inquired whether his wife and daughter had travelled elsewhere. The respondent then testified before the Court that he was asked this question, "but I was nervous." In this regard, I note that the respondent did not directly answer the question; instead leapt directly to an explanation for what his answer may have been, namely that he was nervous. The respondent was then asked specifically whether the Asylum Officer asked him if his wife had travelled to Australia in 2007. The respondent confirmed that he had been asked this question, and he confirmed that the answer was in the affirmative. The respondent also confirmed that the Asylum Officer had asked him whether she had travelled anywhere else. He confirmed that he had been so asked. The respondent was then asked whether he answered "no," that she had not travelled anywhere else. The respondent answered that he believed so, that he had so answered. The respondent was then asked, during the course of cross-examination, why he had not said to the Asylum Officer that yes, she had travelled to the United States. The respondent replied that he had not thought of it. He stated that they did come with him (meaning his wife and daughter) and that he thought the Asylum Officer was asking him if they had travelled anywhere other than the United States. He explained that he did so because he assumed the U.S. Government had the records of their travel to the United States. On further questioning, the respondent eventually hesitated at some length when asked to further explain why he did not disclose spontaneously to the Asylum Officer that his wife and daughter had come with him. The respondent paused at some length and I observed that the respondent appeared nervous and at a loss for words. However, after a fairly lengthy pause, the re-

spondent testified that he is afraid to say that his wife and daughter came here and why they went back. The respondent was asked whether he told the Asylum Officer that he was afraid to answer directly. The respondent initially testified that he forgot and did not remember whether he said that. He again reiterated that he was very nervous. He was then asked the question again as to whether he told the Asylum Officer that he was afraid to answer why his wife and daughter had gone back. He then conceded that maybe, yes, he had answered in that fashion. The respondent was asked whether the Asylum Officer inquired why his wife and daughter went back, and the respondent conceded that he had been so asked, and he further conceded that he replied because school in the United States costs a lot of money (referring to the schooling for his daughter). *The respondent was then asked to confirm that the Asylum Officer eventually asked him to tell him the real story as to why his family travelled to the United States and returned to China.* The respondent confirmed that he was asked this question and when asked, whether he replied that it was because he wanted a good environment for his child and because his wife had a job and he did not and that that is why he stayed here. He confirmed that he did, in fact, say that. The respondent was further asked, during the course of testimony in court, why his wife and daughter returned to China. In this regard, the respondent testified that they came with him, but returned to China several weeks after arrival. He testified that they did so because his father-in-law was elderly and needed attention, and because his daughter needed to graduate school in China.

The respondent further claimed that his wife had, in fact, suffered past persecution in the form of a forced abortion and the respondent confirmed that he feared his wife and daughter would suffer future persecution. In this regard, the respondent qualified his answer by saying that his wife was now on an IUD, apparently thereby suggesting that the risk of persecution is reduced. However, the respondent did concede that the risk of future persecution also pertains to his daughter. Indeed, in this regard, the respondent testified that this is, at least in part, why he applied for asylum.

As to the contents of Exhibit 5, I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer's notes some substantial weight, in that they are consistent with the respondent's testimony in court. Specifically, I note that the Asylum Officer's notes state that the respondent ultimately indicated that he was afraid of giving straight answers regarding his daughter and wife's trip to the United States and return to China. And while the respondent did not confirm this in court, he did give a similar answer as to why he was testifying in this regard. In other words, the respondent appears to have stated, both before the Asylum Officer and in court that he did not spontaneously disclose the travel of his wife and daughter with him to the United States and their return because *he was nervous about how this would be perceived by the Asylum Officer in connection with his claim.* I further note that the Asylum Officer's notes are internally consistent with regard to references to earlier

questions, such as whether the respondent had stated that he applied for a visa with anyone else. *At page 2 of the notes contained in Exhibit 5, the respondent was asked whether he applied for his visa with anyone else and the notes indicated that he stated that, "no, I applied by myself." Similarly, I note that the testimony before the Asylum Officer and the Court is consistent with the omission in the respondent's Form I-589 application for asylum, of an answer to the question of the date of the previous arrival of his wife, if she had previously been in the United States. See* Exhibit 2, page 2, part A.II, question 23. When asked about this omission, the respondent expressed surprise, stating that he told the preparer about their trip and indicated that he thought it had been filled out. Notwithstanding the respondent's statement in this regard, *I do observe that the omission is consistent with his lack of forthrightness before the asylum office as to his wife and daughter's travel with him to the United States and their subsequent return to China shortly thereafter.*

In sum, the respondent's testimony before the Court and his testimony regarding the Asylum Officer notes, as well as the notes themselves, clearly indicate that the respondent failed to spontaneously disclose that his wife and daughter came with him and then returned to China. His testimony and the notes also consistently demonstrate that the respondent paused at length, both before the Court and before the Asylum Officer, when asked about this topic. His testimony and the Asylum Officer notes are also consistent in indicating that he ultimately testified that he was afraid to say that his wife came here and was afraid of being asked about why she went back. *Furthermore, the respondent has conceded that he was asked to "tell the real story" about his family's travel to the United States by the Asylum Officer, and that he replied that he wanted a good environment for his child and his wife had a job, but he did not, and that is why he stayed here.*

In *Loho v. Mukasey*, 531 F.3d 1016, 1018–19 (9th Cir. 2008), the Ninth Circuit addressed the situation in which an asylum applicant has found safety in the United States and then returns to the country claimed of persecution before eventually finding asylum in the United States. The Ninth Circuit held that the applicant's voluntary return to the country of claimed persecution may be considered in assessing both credibility and whether the respondent has a well-founded fear of persecution in that country. Here, while the respondent himself has not returned to China, his wife and daughter did. Indeed they did so shortly after arriving in the United States, and the respondent confirmed that they did so because the schooling is cheaper for his daughter in China, as well as because his father-in-law is elderly and needed to be cared for. The respondent also told the Asylum Officer that the "real story" about whey [sic] his family returned was that his wife had a job and he did not, and that is why he stayed here. This is consistent with respondent's testimony before the Court that he did not have a job at the time he came to the United States. Furthermore, I note that the respondent's claim of persecution is founded on the alleged forced abortion inflicted upon his wife. That is the central element of his claim. The respondent claims that he himself was persecuted through his resistance to that abortion. Nevertheless, the fact remains that the fundamental thrust of the respondent's claim is that his wife was forced to have an abortion. In this re-

> gard, the respondent's wife therefore clearly has an equal, or stronger, claim to asylum than the respondent himself, assuming the facts which he claims are true. The respondent was asked why his wife did not stay and apply for asylum and he replied that he did not know they could apply for asylum at the time they departed. *The respondent was then asked why he stayed here after they returned; he said because he was in a bad mood and he wanted to get a job and a friend of mine is here.*
>
> While *Loho v. Mukasey* applies to the applicant himself returning to China, I find that the reasoning of the Ninth Circuit in that case is fully applicable to the respondent's situation in that his wife, who is the primary object of the persecution in China, freely chose to return to China. *I do not find that the respondent's explanations for her return to China while he remained here are adequate.* The respondent has stated that he was in a bad mood and that he had found a job and had a friend here. The respondent has also indicated that his daughter's education would be cheaper in China than here, and he has also indicated that his wife wanted to go to take care of her father. I do not find that these reasons are sufficiently substantial so as to outweigh the concerns raised by his wife and daughter's free choice to return to China after having allegedly fled that country following his wife's and his own persecution.
>
> In view of the for[e]going, I find that the respondent has failed to meet his burden of proving eligibility for asylum under Section 208(a) of the Act.

(Emphasis added).

III

Assuming for the sake of argument only that the Immigration Judge's findings of Dai's (1) "lack of forthrightness," (2) guilty demeanor, (3) inadequate explanations for his admittedly contradictory answers, and (4) willful concealment of relevant information did not amount to an "explicit" adverse credibility determination, then Dai is statutorily entitled to a "rebuttable presumption of credibility on appeal" – to the Board. On appeal to the Board, however, they dismissed this presumption, as was their statutory prerogative, concluding in the words of the Act that Dai's case was not persuasive:

> We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. The respondent filed his application for asylum after May 11, 2005, and thus review is governed by the REAL ID Act of 2005.
>
> We adopt and affirm the Immigration Judge's decision in this case. The Immigration Judge correctly denied the respondent's applications for failure to meet his burden of proof. The record reflects that the respondent failed to disclose to both the [DHS] asylum officer and the Immigration Judge that his wife and daughter had traveled with him to the United States and voluntarily returned to China shortly after. *The respondent further conceded that he was not forthcoming about this information because he believed that the true reasons for their return – that his wife had a job in China and needed to care for her elderly father, and that their daughter could attend school in China for less money than in the United States – would be perceived as inconsistent with his claims of past and feared future persecution.*

> The Immigration Judge correctly decided that the voluntary return of the respondent's wife and daughter to China, after allegedly fleeing following the persecution of the respondent and his wife, prevents the respondent from meeting his burden of proving his asylum claim. *Contrary to the respondent's argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim.* The respondent's family voluntarily returning *and his not being truthful about it is detrimental to his claim and is significant to his burden of proof.*

(Emphasis added) (footnote and citations omitted).

IV

In *Kho v. Keisler*, 505 F.3d 50 (1st Cir. 2007), the First Circuit understood the Act's effect on the issue of an applicant's credibility. Not only did our sister circuit correctly comprehend the Act's impact, but it considered and rejected our approach to this important subject.

> Kho supplements his 'disfavored group' approach with an argument that because the IJ did not make an explicit finding concerning Kho's credibility, his testimony 'must be accepted as true' by this court. Kho bases this proposed rule as well on a series of Ninth Circuit cases. . . .
>
> We have already rejected the proposition that aliens are entitled to a presumption of credibility on review in this court if there is no express credibility determination made by an IJ. . . .
>
> The REAL ID Act also provides no support for Kho's argument. . . .

Kho, 505 F.3d at 56–57.

The court further explained that the Act's reference to a "rebuttable presumption" applies only to an applicant's appeal to the BIA, not to "reviewing courts of appeal." *Id.* at 56.

Accordingly, not only does our court's decision violate the directions of the Act, but it creates an intercircuit conflict with *Kho*.

V

Whether or not this petitioner attains asylum in our country is of minor concern, but the significant damage our court has done to the Act and to Congress' attempt to stop us from substituting our judgment for the Board's are matters that must be corrected. Thus, I disagree with our decision not to rehear en banc this case.

CALLAHAN, Circuit Judge, with whom BYBEE, BEA, M. SMITH, IKUTA, BENNETT, R. NELSON, BADE, COLLINS, LEE, Circuit Judges, join, dissenting from denial of rehearing en banc:

Under the REAL ID Act of 2005, an immigration judge (IJ) has the task of evaluating an asylum application. Here, in denying en banc review, we have condoned a decision by a three-judge panel that takes the extraordinary position of holding that, absent an explicit adverse credibility ruling, an IJ must take as true an asylum applicant's testimony that supports a claim for asylum, even in the face of other testimony from the applicant that would undermine an asylum claim. This makes no sense and ignores the realities of factfinding. Our decision restores our prior errant rule that Congress abrogated. As we have declined to correct this erroneous decision ourselves, hopefully the Supreme Court will do so.

Before Congress enacted the REAL ID Act, our court had fashioned unique rules devised to restrict the agency's discretion

in adjudicating asylum claims. The REAL ID Act broadened the agency's discretion. In explaining the amendments, Congress singled out our court for adopting rules that strayed from all other circuits and the Board of Immigration Appeals. In this case, the divided panel ignored this history and revived a rule that we previously said was "swept away" by the REAL ID Act. *Aden v. Holder*, 589 F.3d 1040, 1045 (9th Cir. 2009).

The immigration judge here was presented with conflicting statements from the asylum applicant, Ming Dai, about why he came to and sought to remain in the United States. The IJ did not make an express adverse credibility finding but instead found Dai's testimony was not sufficiently persuasive to meet his burden of proof. The panel majority erroneously concluded that, absent an explicit, cogently-explained adverse credibility finding, an IJ is required to accept the favorable portions of an asylum applicant's testimony as the unassailable truth.

According to the panel, in weighing the persuasiveness of the asylum applicant's testimony, an IJ must ignore any unfavorable testimony because such testimony—which could impugn the applicant's credibility—"cannot be smuggled into the persuasiveness inquiry." *Dai v. Sessions*, 884 F.3d 858, 872 (9th Cir. 2018). The panel's holding allowed it to "expunge from the record the blatant flaws in Dai's performance involving demeanor, candor, and responsiveness," *Dai v. Barr*, 916 F.3d 731, 747 (9th Cir. 2018) (Trott, J., dissenting), thus tying the IJ's hands in carrying out the statutory role as trier of fact.

The panel's holding is contrary to the statute, our own precedent, and the rulings of our sister circuits. In addition to overstepping our limited role in reviewing the agency's decision, the holding is also bad policy. Just because testimony is credible (i.e., believable), it doesn't mean it must be wholly accepted as the truth. A factfinder may resolve factual issues against a party without expressly finding that party not credible. This is a regular, non-controversial occurrence in everyday litigation.

On close examination, the panel's artful evasion of the REAL ID Act is nothing short of an outright arrogation of the agency's statutory duty as trier of fact. After adopting its ill-advised rule, the panel took up the mantle of factfinder and pronounced that Dai's testimony is persuasive. In doing so, the panel "intrude[d] upon the [factfinding] domain which Congress has exclusively entrusted to an administrative agency." *INS v. Ventura*, 537 U.S. 12, 16, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943)). We are asking yet again to be summarily reversed for violating the "ordinary remand rule." *See Gonzales v. Thomas*, 547 U.S. 183, 187, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006); *Ventura*, 537 U.S. at 18, 123 S.Ct. 353.

I.

A.

Petitioner Ming Dai, a citizen of China, challenged the IJ's finding—adopted and affirmed by the BIA—that Dai's testimony was not persuasive in showing that he is a refugee. Dai's claim for asylum is premised on events occurring in China in July 2009, when family planning officials came to take his pregnant wife for an abortion. Dai claimed he fought with officers, after which he was detained for ten days and eventually fired from his job. While Dai was detained, his wife was allegedly subjected to a forced abortion.

Dai stated in the affidavit accompanying his application that he sought asylum because he wished to "bring [his] wife and

daughter to safety." In fact, Dai's wife and daughter had entered the United States with him but had voluntarily returned to China shortly thereafter. Dai neglected to disclose this information in his application, affidavit, interview with the asylum officer, or on direct examination before the IJ.

The IJ found Dai's claim for asylum unpersuasive. In the IJ's view, "[t]he principal area of concern" was Dai's testimony during cross-examination. The IJ noted Dai's evasive answers to questions about his interview with the asylum officer. During cross-examination, Dai was asked why he had not revealed that his wife and daughter had come with him to the United States and why they returned to China shortly thereafter. "[A]fter a fairly lengthy pause," and appearing to the IJ to be "nervous and at a loss for words," Dai stated that he was afraid to speak about his wife and daughter. When asked by the asylum officer what he was afraid of, Dai said he was afraid the officer would ask why his wife and daughter willingly went back to China. Dai was apparently concerned that revealing the facts about his wife and daughter would undercut his claim that he wished to bring them to safety. Dai eventually admitted that the "real story" for why he stayed in the United States when his family returned to China was because "he was in a bad mood and he wanted to get a job and a friend of mine is here." In essence, the IJ credited Dai's "real story" that he came to the United States to seek employment, rather than his story that he came to flee persecution.

The BIA adopted and affirmed the IJ's decision, concluding that the voluntary return of Dai's family to China and his failure to be forthcoming with that information was "detrimental to his claim" and "significant to his burden of proof."

B.

Dai sought review in our court. In his brief, Dai presumed the agency made an adverse credibility finding, and he argued only that the IJ's determination that he failed to meet his burden of proof was not supported by substantial evidence. The government, in response, argued Dai failed to show that the record compels a conclusion that he met his burden of proof.

A split panel granted Dai's petition. The majority stated that, under the REAL ID Act, an applicant's testimony alone "is sufficient"[1] to establish eligibility for asylum provided the "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Dai*, 884 F.3d at 867 (citing 8 U.S.C. § 1158(b)(1)(B)(ii)). Departing from the issue as framed by the parties,[2] the majority held that, because neither the IJ nor BIA made an explicit adverse credibility ruling, Dai must be "deemed credible." *Dai*, 884 F.3d at 868. The majority concluded that nothing in the REAL ID Act abrogated our pre-REAL ID Act rule that an applicant must be deemed credible in the absence of an explicit adverse credibility determination. *Id.* at 868–69.

The panel majority then expanded the impact of that holding by adopting a novel

1. The statute actually says "may be sufficient," not "is sufficient." *See* 8 U.S.C. § 1158(b)(1)(B)(ii).

2. As noted in Judge Trott's dissent, because the government "responded only to the claims and arguments Dai included in his brief," it did not have "an opportunity to respond to the majority's inventive analysis, nor to the theory concocted by the majority on Dai's behalf." *Dai*, 916 F.3d at 733 (Trott, J., dissenting). Judge Trott predicted that "[b]oth sides will be surprised by my colleagues' artful opinion—Dai pleasantly, the Attorney General not so much." *Id.*

rule constraining an IJ's ability to weigh the evidence when no express adverse credibility ruling has been made. The majority held that, in weighing the *persuasiveness* of an applicant's claim, an IJ is precluded from considering evidence—even the applicant's own admissions—that might impugn the applicant's credibility. *Id.* at 872 ("Credibility concerns that do not justify an adverse credibility finding cannot be smuggled into the persuasiveness inquiry . . . ."). That remarkable holding bears repeating: An applicant's admissions (or other evidence) that undermine the persuasiveness of an asylum claim must be disregarded if that evidence also bears on the applicant's credibility.

This invented rule enabled the majority to reject the agency's reasons for finding Dai's claim not persuasive. *Id.* at 870–73. Having wiped from the record Dai's unfavorable testimony, the majority assumed the role of trier of fact and pronounced that "nothing [in the (now-cleansed) record] undermines the persuasiveness of Dai's credible testimony." *Id.* at 871. The majority thus held that Dai was eligible for asylum and entitled to withholding of removal. *Id.* at 874. The majority remanded with instructions to grant withholding of removal and to decide whether Dai should also be granted asylum as a matter of discretion. *Id.*

In dissent, Judge Trott wrote that "[t]he practical effect of the majority's rule is breathtaking: The *lack* of a formal adverse credibility finding becomes a selective positive credibility finding and dooms a fact-based determination by an IJ and the BIA that an applicant's case is not sufficiently persuasive to carry his burden of proof." *Dai*, 916 F.3d at 735 (Trott, J., dissenting). Judge Trott argued that "[t]he IJ's decision not to make an explicit adverse credibility finding is a red herring that throws our analysis off the scent and preordains a result that is incompatible with the evidentiary record." *Id.* at 731. Judge Trott asserted that the majority ignored "the IJ's fact-based explanation for his decision" and several material findings of fact, "each of which is entitled to substantial deference." *Id.*

II.

A.

Before the enactment of the REAL ID Act, our court created what we characterized as a "deemed true" rule. *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir. 2000). Under that rule, when "an alien credibly testifies to certain facts, those facts are deemed true." *Id.* The "deemed true" rule developed as an extension of two other rules—the rule that an applicant would be deemed credible in the absence of an adverse credibility ruling and the rule prohibiting factfinders from requiring corroborative evidence from credible applicants.[3] *Id.* at 899–900; *see id.* at 899 (" '[T]his court does not require corroborative evidence,' *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000), from applicants for asylum and withholding of deportation who have testified credibly.").

3. In some of our cases, we have not been careful in our phrasing, using the expressions ''deemed credible'' and ''deemed true'' interchangeably. For example, the primary case that the panel majority cited in support of the proposition that the ''deemed credible'' rule survives the REAL ID Act states that the testimony must be treated as though it is ''true.'' *Hu v. Holder,* 652 F.3d 1011, 1013 n.1 (9th Cir. 2011). Before the REAL ID Act and its introduction of a requirement for corroborative evidence and the weighing of credible evidence, this imprecision of language arguably made no practical difference. The new provisions of 8 U.S.C. § 1158(b)(1)(B) now require adjudicators to distinguish between credibility and truth.

The "deemed true" rule and the rule against requiring corroborative evidence did not escape criticism. In prior opinions, members of our court observed that some of our rules concerning credibility and standard of proof were out of line with the approach followed by other circuits and contrary to the limited standard of review mandated by Congress. *See, e.g.*, *Quan v. Gonzales*, 428 F.3d 883, 892 (9th Cir. 2005) (O'Scannlain, J., dissenting) ("I do not believe that an IJ's decision should be overturned merely because the reviewing panel disagrees with it or can point to a plausibly analogous case from our abundant and inconsistent precedent."); *Jibril v. Gonzales*, 423 F.3d 1129, 1138 (9th Cir. 2005) ("Time and again, however, we have promulgated rules that tend to obscure th[e] clear standard [of review] and to flummox immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents."); *Abovian v. INS*, 257 F.3d 971, 980 (9th Cir. 2001) (Kozinski, J., dissenting from denial of rehearing en banc) ("[T]his case is hardly atypical of our circuit's immigration law jurisprudence. Rather, it is one more example of the nitpicking we engage in as part of a systematic effort to dismantle the reasons immigration judges give for their decisions.").

To correct our misguided rules, Congress passed the REAL ID Act. Congress made clear its intent to bring us—the Ninth Circuit—in line with other circuits and the BIA. *See* H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.), *as reprinted in* 2005 U.S.C.C.A.N. 240 ("[T]he creation of a uniform standard for credibility is needed to address a conflict on this issue between the Ninth Circuit on the one hand and other circuits and the BIA."). The REAL ID Act states that the applicant "may" sustain his burden through testimony alone, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii). That provision also states that "the trier of fact may weigh the credible testimony along with other evidence of record." *Id.* The REAL ID Act creates a "bias toward corroboration" that makes asylum litigation more like other types of litigation in that the trier of fact need not accept testimony as true even if it's credible. *Aden*, 589 F.3d at 1045. Lest there was any doubt that the REAL ID Act abrogated our "presumed true" rule, we expressly stated so in *Aden*: "Congress has thus swept away our doctrine that 'when an alien credibly testifies to certain facts, those facts are deemed true.' " *Id.* (quoting *Ladha*, 215 F.3d at 900).

Ignoring what we said in *Aden*, the panel majority crafted a new rule that, in conjunction with the deemed credible rule, operates to revive the congressionally disapproved "deemed true" rule. This revival occurred in two steps. The panel first held that nothing in the REAL ID Act "explicitly or implicitly repealed the rule that in the absence of an adverse credibility finding by the IJ or the BIA, the petitioner is deemed credible." *Dai*, 884 F.3d at 868.[4]

4. Again, precision of language is important here. Even assuming that when the agency makes no credibility finding, the petitioner's testimony is deemed *credible,* that is not enough. Credibility alone doesn't make a person persuasive or eligible for asylum, nor must credible testimony be accepted as true. *Aden,* 589 F.3d at 1044 (''Credible testimony is not by itself enough.''); *see also Sandie v. Att'y Gen. of U.S.,* 562 F.3d 246, 252 (3d Cir. 2009) (''But the assumption that his testimony is credible does not imply that that testimony is sufficient to meet his burden of proof. In fact, credible testimony alone is not always sufficient to meet the burden of proof.''). An applicant's testimony may be sufficient to

The panel's second, decisive step in reviving our old "deemed true" rule was to limit the evidence an IJ can consider in weighing the persuasiveness of an applicant's testimony. The panel held that if the agency makes no adverse credibility finding, "[c]redibility concerns . . . cannot be smuggled into the persuasiveness inquiry." *Id.* at 872. The panel reasoned that if the agency makes no adverse credibility finding, any evidence that would cast doubt on the applicant's credibility must be ignored when considering the *persuasiveness* of the applicant's claim. The panel deployed its holding to erase from the record Dai's own admissions that undermine his claim. For example, the IJ accepted as fact Dai's admission that he failed to disclose the truth about his wife's and his daughter's travels because he was nervous about how this would be perceived by the asylum officer. The IJ also credited Dai's admitted "real story" for why he stayed in the United States when his wife and daughter returned home: "he was in a bad mood and he wanted to get a job and a friend of mine is here." The panel's decision bars the IJ from considering this and other testimony that could be (and was) construed as detrimental to Dai's case.[5]

The panel's decision ties the hands of IJs who are presented with conflicting evidence, effectively forcing them to accept an applicant's favorable testimony as the whole truth and to disregard unfavorable evidence—even when it is the applicant's own testimony—unless they affirmatively make an adverse credibility finding. The panel's two-fold holding thus transforms the lack of an express adverse credibility ruling into an affirmative conclusion that the applicant's proffered reason for seeking asylum is *true*.

The resuscitation of our old "deemed true" rule flouts Congress's purpose in enacting the REAL ID Act.[6] First, the panel's holding violates the statute's directive that the agency is to conduct the factfinding and that our court may disturb the agency's decision only where "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). "[T]he law is that '[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it.' " *Aden*, 589 F.3d at

show asylum eligibility, ''but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, *is persuasive*, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.'' 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added).

5. In his dissent, Judge Trott identified other examples of Dai's testimony that the IJ relied on in finding his claim unpersuasive. *See Dai*, 916 F.3d at 732 (Trott, J., dissenting) (listing eight findings rendered by the IJ); *id.* at 747–48 (''My colleagues expunge from the record the blatant flaws in Dai's performance involving demeanor, candor, and responsiveness . . . . They disregard inaccuracies, inconsistencies, and implausibilities in his story, and his barefaced attempt to cover up the truth about his wife's and daughter's travels and situation.'').

6. The majority turns somersaults to dodge Congress's explicit attempt to rein us in. The statute provides: ''There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.'' 8 U.S.C. § 1158(b)(1)(B)(iii). The majority, ignoring the phrase ''[t]here is no presumption of credibility,'' apparently presumed it to apply only in immigration court proceedings. The majority reasoned that the ''rebuttable presumption of credibility on appeal'' does not apply in our court because this case is a *petition for review* not an *appeal*. *Dai*, 884 F.3d at 869 (''A provision that applies 'on appeal' therefore does not apply to our review, but solely to the BIA's review on appeal from the IJ's decision.''). According to the majority's logic, this gives us carte blanche to adopt whatever rule we want on the evidence an IJ must (and must not) credit.

1046 (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992)). The majority's holding cannot be squared with the limited nature of our review of the agency's decision.

Second, the majority's revival of the "deemed true" rule nullifies the statutory provision that, "[i]n determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record." 8 U.S.C. § 1158(b)(1)(B)(ii). We have held that this provision means that an "IJ need not accept [credible] testimony as true." *Aden*, 589 F.3d at 1044. If credible testimony must be accepted as true, there would be nothing for the trier of fact to "weigh." *See Doe v. Holder*, 651 F.3d 824, 830 (8th Cir. 2011) ("Congress thus rejected a rule that 'credible' testimony necessarily means that the facts asserted in that testimony must be accepted as true." (citing *Aden*, 589 F.3d at 1045)).[7]

B.

In addition to contravening the language and intent of the REAL ID Act, the panel's decision squarely conflicts with our own precedent and every other circuit to address the issue.

The panel's decision is contrary to *Aden*'s clear acknowledgement that the REAL ID Act abrogated our "deemed true" rule. The decision is also at odds with *Singh v. Holder*, 753 F.3d 826 (9th Cir. 2014). In *Singh*, we held that the agency did not err in discounting the petitioner's credible evidence that the police were looking for him, when weighed against country reports that stated that the police no longer targeted Sikh activists like the petitioner. *Singh*, 753 F.3d at 836. We recognized that "there is a difference between an adverse credibility determination, on the one hand, and a decision concerning how to weigh conflicting evidence, on the other hand." *Id.* We emphasized that, even in the absence of a credibility ruling, the immigration judge was required to weigh the persuasiveness of the testimony against the record as a whole. *Id.*

In *Doe*, the Eighth Circuit held that an applicant's inability to provide important details and key dates—information the immigration judge identified as "damaging to [Doe's] credibility," but without making an "explicit" adverse credibility finding—was sufficient to support the BIA's conclusion that his testimony was unpersuasive. *Doe*, 651 F.3d at 829–30 (alteration in original). The court relied in part on our decision in *Aden* for the proposition that testimony may be "credible" without being persuasive, and thus need not be "accepted as true." *Id.* at 830.

Similarly, the First Circuit has rejected the notion that a reviewing court is bound "to accept a petitioner's statements as fact whenever an IJ simply has not made an express adverse credibility determination." *Kho v. Keisler*, 505 F.3d 50, 56 (1st Cir. 2007). The Tenth Circuit likewise held that the agency was free to "discount" the applicant's testimony based on "gaps" in his story, even though there was no adverse credibility ruling. *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243, 1246 (10th Cir. 2016) (citing *Aden*, 589 F.3d at 1044–45).

7. To be clear, the panel majority held that absent an adverse credibility ruling, the trier of fact must disregard any evidence that would call into question the applicant's credibility. *See Dai*, 884 F.3d at 872 ("Credibility concerns that do not justify an adverse credibility finding cannot be smuggled into the persuasiveness inquiry so as to undermine the finding of credibility we are required to afford Dai's testimony."). There is no meaningful difference between this holding and a suggestion that credible testimony must be accepted as true.

The panel's holding splits with *Aden* and places us again at a table of one when it comes to interpreting the standards applicable to the agency's determination of asylum eligibility.

C.

The panel majority's rule also ignores the common sense reality that triers of fact may—and frequently do—decide factual issues against a party without affirmatively finding that party not credible. Opposing parties who present conflicting factual accounts might both be credible even if only one party's version is true.[8] And even if a witness's testimony is treated as "honest or 'credible,' " the "inability to provide important details and key dates" may render "the testimony unpersuasive in establishing a likelihood of torture." *Doe*, 651 F.3d at 830.

Indeed, we regularly require that juries decide between competing versions of the "facts" and we do not suggest that one perspective can be discounted only if the witness is not believable (i.e., not credible). The REAL ID Act recognizes this reality when it commands the trier of fact to "weigh the credible testimony along with other evidence of record." 8 U.S.C. § 1158(b)(1)(B)(ii). A rule that bars an IJ from questioning the persuasiveness of a witness's testimony unless the witness is affirmatively found to be not credible ignores the realities of factfinding.

The panel's holding here defies common sense for another reason. The evidence that the IJ and the BIA found to weigh against asylum eligibility was Dai's own testimony. As Judge Trott pointed out, the agency thus *credited* Dai's admissions that tended to undercut his claim. It makes no sense to say that the IJ is powerless to *credit* unfavorable testimony given by an applicant unless the IJ expressly finds the applicant *not* credible.

This case is an instance of our court "promulgat[ing] rules that tend to obscure [the proper] standard and to flummox immigration judges." *Jibril*, 423 F.3d at 1138. By essentially forcing IJs to make an express adverse credibility finding whenever they do not accept an applicant's proffered reasons as the whole truth, the panel's holding calls into question virtually every IJ decision denying a claim for asylum that lacks an explicit adverse credibility finding. *Cf. Morgan v. Holder*, 634 F.3d 53, 57 (1st Cir. 2011) (declining to require a "gratuitous credibility determination" when the IJ's decision was premised on the petitioner's "failure to carry his burden of proof"). With all of the cases we see that are adjudicated at the asylum eligibility stage, the impact of the panel's holding will be far-reaching.

D.

The panel's revival of the "deemed true" rule effectively strips the agency of its factfinding role, allowing us to take that role for ourselves. Indeed, that is exactly what the panel did here. After "wip[ing] the record clean of everything identified by the IJ and the BIA as problematic," *see Dai*, 916 F.3d at 748 (Trott, J., dissenting), the majority stepped into the void created by its new rule and weighed for itself the persuasiveness of Dai's testimony. "[T]aking into account the record as a whole," the majority concluded, "nothing undermines the persuasiveness of Dai's credible

8. As we stated in *Aden,* "[a]pparently honest people may not always be telling the truth, apparently dishonest people may be telling the absolute truth, and truthful people may be honestly mistaken or relying on unreliable evidence or inference themselves." *Aden,* 589 F.3d at 1045.

testimony." *Dai*, 884 F.3d at 871.[9] That is not our role.

In addition to creating a rule that conflicts with the statute and precedent, the panel compounded its error by failing to remand to allow the agency the first shot at applying the majority's new rule against "smuggl[ing]" credibility concerns "into the persuasiveness inquiry," *see Dai*, 884 F.3d at 872. The Supreme Court has summarily reversed us on multiple occasions for making this very error. *See, e.g.*, *Thomas*, 547 U.S. at 187, 126 S.Ct. 1613; *Ventura*, 537 U.S. at 18, 123 S.Ct. 353.

In *Ventura*, a panel of our court took it upon itself to consider (and reject) the government's factual argument that had been accepted by the IJ but not ruled on by the BIA. *Ventura*, 537 U.S. at 13–14, 123 S.Ct. 353. The Supreme Court concluded that "well-established principles of administrative law" required a remand to the agency:

> Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. "In such circumstances a 'judicial judgment cannot be made to do service for an administrative judgment.' Nor can an 'appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency.' "

Id. at 16, 123 S.Ct. 353 (citations omitted) (quoting *Chenery Corp.*, 318 U.S. at 88, 63 S.Ct. 454). In summarily reversing us, the Court stated that we "committed clear error," "seriously disregarded the agency's legally mandated role," and "created potentially far-reaching legal precedent . . . without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Id.* at 17, 123 S.Ct. 353.

The clear, unanimous reversal in *Ventura* should have been enough, but, as Judge Trott put it, "old ways die hard." *Dai*, 916 F.3d at 737 (Trott, J., dissenting). Just two years later, we repeated our error in *Thomas*, only this time we were sitting en banc when we adopted a new rule *and* applied it to the case without allowing the agency to consider the question. *Thomas*, 547 U.S. at 184, 126 S.Ct. 1613. The Supreme Court agreed with the Solicitor General that not only was our failure to remand erroneous, our error was "obvious in light of *Ventura*." *Id.* at 185, 126 S.Ct. 1613.

Setting aside for the moment the problems with the majority's new rule, the panel should have remanded to allow the agency an opportunity to determine Dai's eligibility for asylum within the new constraints imposed by the panel's decision.

III.

The panel's insistence that an IJ must accept an applicant's favorable testimony as the whole truth, unless the IJ makes an explicit adverse credibility finding, is contrary to our limited scope of review under the REAL ID Act, contrary to precedent (from both our court and other circuits), contrary to reality, and just plain wrong. And in directing the agency to grant withholding of removal and treat Dai as eligible for asylum, rather than allowing the agency to apply the panel's new rule, the panel disregarded the Supreme Court's repeated admonishment against our seizing the role statutorily given to the agency.

9. When the panel majority quoted the statute's requirement of persuasiveness, it left out the part that an asylum applicant must "satisf[y] the *trier of fact* that the applicant's testimony is . . . persuasive," 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). *See Dai*, 884 F.3d at 867.

I respectfully dissent from the denial of rehearing en banc.

O'SCANNLAIN and TROTT, Senior Circuit Judges, respecting the denial of rehearing en banc:

We agree with the views expressed by Judge CALLAHAN in her dissent from the denial of rehearing en banc.

COLLINS, Circuit Judge, with whom BYBEE, BEA, IKUTA, BENNETT, R. NELSON, and BADE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I agree with Judge Callahan that the panel majority's opinion effectively revives, for a potentially wide swath of cases, this court's discredited prior rule that when an alien seeking asylum is either found or deemed to have testified credibly to certain facts, those facts will be conclusively deemed to be true. As Judge Callahan persuasively explains, the panel majority's effective revival of this previously disavowed "deemed-true" rule contravenes controlling statutory language, the precedent of this court, the decisions of other circuits, and common sense. I therefore join in full her dissent from the order denying rehearing en banc.

In my view, however, the problems with the panel majority's opinion run even deeper, thereby greatly augmenting the potential damage that may flow from its flawed decision. Specifically, the panel majority commits a further serious legal error, and reinforces a circuit split, in holding that the REAL ID Act does not abrogate a second rule that we have applied in asylum cases—namely, the rule that unless the agency has made an *explicit* finding that the applicant's testimony is not credible, this court will conclusively presume that testimony to be credible. As this case well illustrates, we have inflexibly applied this conclusive presumption as, in effect, a "Simon says" rule: even where (as here) the record overwhelmingly confirms that the agency actually *disbelieved* critical portions of the applicant's testimony, we will nonetheless conclusively treat that testimony as credible if the agency did not make an explicit adverse credibility determination. The panel majority's reaffirmation of this unwarranted "deemed-credible" rule thus perpetuates a regime in which—unlike other circuits—this court misreads the evidentiary record in asylum cases through the truth-distorting lens of counterfactual conclusive presumptions. In doing so, the panel majority defies Congress's elimination of the deemed-credible rule in the REAL ID Act, which expressly replaces that rule's conclusive presumption of credibility with (at most) a "*rebuttable* presumption of credibility." 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). But the panel majority here slips the Act's bonds, and we have abetted that escape by failing to take this case en banc. I respectfully dissent.

I.

In reviewing whether substantial evidence supports the agency's factual findings in asylum cases, this court has long employed a variety of "rules that tend to obscure" what should be a clear and deferential standard of review. *Jibril v. Gonzales*, 423 F.3d 1129, 1138 (9th Cir. 2005). Among those rules are a pair of presumptions about how to read the record in asylum cases—namely, our deemed-credible rule and our deemed-true rule. Under our traditional deemed-credible rule, both this court and the Board of Immigration Appeals ("BIA") were required to apply a conclusive presumption that an applicant was credible unless the Immigration Judge ("IJ") made an explicit adverse credibility

finding. *See*, *e.g.*, *Dai v. Sessions*, 884 F.3d 858, 868 (9th Cir. 2018) ("Prior to the REAL ID Act, we held that in the absence of an explicit adverse credibility finding by the IJ or the BIA we are required to treat the petitioner's testimony as credible."); *She v. Holder*, 629 F.3d 958, 964 (9th Cir. 2010) ("Absent an adverse credibility finding, the BIA is required to 'presume the petitioner's testimony to be credible.' "). Under our further deemed-true rule, the facts recited in testimony found to be credible—or presumed to be credible by virtue of our deemed-credible rule—would then in turn be taken as true. *See*, *e.g.*, *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) ("In the absence of an explicit adverse credibility finding, we must assume that Kataria's factual contentions are true."); *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) ("Because the immigration judge found the Yazitchians' testimony credible, and the BIA did not make a contrary finding, we must accept as undisputed the facts as petitioners testified to them.").

By requiring the application of potentially counterfactual conclusive presumptions, these rules create an obvious risk of seriously distorting appellate review of the factual record. Thus, under our deemed-credible rule, no matter how clear it might be from the overall record that the IJ in fact disbelieved portions of the petitioner's testimony, that obvious disbelief must be *ignored* if the IJ did not *explicitly* state that the IJ disbelieved that testimony. In turn, under our deemed-true rule, the facts recited in that now-deemed-credible testimony then have to be taken *as true*.

This case well illustrates the truth-distorting effect of applying these conclusive presumptions. As both the BIA and the IJ explained, Dai's claim that his wife's forced abortion in China caused him to have a well-founded fear of persecution (thereby rendering him eligible for asylum) was severely undercut by the fact that his wife and daughter had not stayed with him in the United States but had voluntarily returned to China—a critical fact that Dai had initially attempted to conceal. *Dai v. Barr*, 916 F.3d 731, 738–42, 746–47 (9th Cir. 2018) (Trott, J., dissenting) (reproducing relevant portions of the IJ's and BIA's decisions).[1] As Judge Trott's panel dissent explains in detail, the IJ made eight specific findings concerning Dai's statements about his wife's and daughter's voluntary return from the United States and about Dai's motivations for staying in this country, and those detailed findings are flatly incompatible with the view that the IJ credited all of Dai's statements. *Id.* at 732. Because the record amply confirms that the IJ obviously (even if not explicitly) disbelieved certain of Dai's statements about his family's return, the BIA properly construed the IJ's findings as establishing that Dai had " '*not be[en] truthful*' " about his " 'family voluntarily returning.' " *Id.* at 747 (quoting BIA decision) (emphasis added by Judge Trott). Put another way, a review of the record confirms that any presumption that the IJ found Dai's core statements to be credible has been overwhelmingly rebutted. Nonetheless, because the IJ did not *explicitly* find Dai's testimony not to be credible, the panel majority invokes a counterfactual conclusive presumption of credibility—and in doing so, it "expunge[s] from the record the blatant flaws in Dai's performance involving demeanor, candor, and responsiveness" and "disregard[s] inaccuracies, inconsistencies, and implausibilities in his story, and

1. At the time Judge Trott filed his amended panel dissent, the case caption had changed to reflect the corresponding change in Attorney General since the earlier filing of the panel opinion. *See* Fed. R. App. P. 43(c)(2).

his barefaced attempt to cover up the truth about his wife's and daughter's travels and situation." *Id.* Moreover, by holding that "[c]redibility concerns that do not justify an adverse credibility finding cannot be smuggled into the persuasiveness inquiry so as to undermine the finding of credibility" required by the deemed-credible rule, *see* 884 F.3d at 872, the panel majority effectively requires that this deemed-credible testimony must also be deemed true. *See* Judge Callahan's Dissent at 1155.

The REAL ID Act sought to eliminate our use of such truth-distorting conclusive presumptions. Indeed, we have previously recognized that the REAL ID Act indisputably "swept away" our deemed-true rule, *Aden v. Holder*, 589 F.3d 1040, 1045 (9th Cir. 2009), and the panel majority's opinion does not expressly dispute that point. Instead, as Judge Callahan explains, the panel majority effectively revives the deemed-true rule, as a *practical* matter, by improperly "limit[ing] the evidence an IJ can consider" in determining whether an alien's credible testimony is sufficiently *persuasive*, in light of the record as a whole, to carry the alien's burden of proof. *See* Judge Callahan's Dissent at 1154; *see also* 8 U.S.C. § 1158(b)(1)(B)(ii) (asylum applicant's testimony may be sufficient to carry burden of proof if it "is credible, *is persuasive*, and refers to specific facts sufficient to demonstrate that the applicant is a refugee") (emphasis added).

As to the deemed-credible rule, the panel majority itself acknowledges that the REAL ID Act frees *the BIA* from having to follow that rule's conclusive presumption, "so that the BIA [now] must only afford 'a *rebuttable* presumption of credibility' when the IJ does not make an adverse credibility finding." *Dai*, 884 F.3d at 868 n.8 (citation omitted); *see also* 8 U.S.C. § 1158(b)(1)(B)(iii) ("if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal"). Nonetheless, the panel majority insists that the REAL ID Act preserves the deemed-credible rule's conclusive presumption in *this court*. 884 F.3d at 868–69. As a result, the panel majority reasoned that if the IJ does not make an explicit adverse credibility determination and the BIA does not explicitly determine that the resulting presumption of credibility on appeal has been rebutted, then this court must conclusively presume the petitioner's testimony to be credible. *Id.* at 869–70. Concluding that "neither the IJ nor the BIA made an adverse credibility determination in Dai's case," the panel majority held that the deemed-credible rule applies and that this court therefore "must treat his testimony as credible." *Id.* at 870.

In my view, the panel majority's invocation of the deemed-credible rule rests on two critical legal errors, and we should have taken this case en banc to correct and clarify the governing principles in this vital area of the law.

II.

First, even if the panel majority were correct in concluding that "neither the IJ nor the BIA made an adverse credibility determination," *Dai*, 884 F.3d at 870; *but see infra* at 1163–65, the REAL ID Act expressly prohibits this court from then applying a conclusive presumption of credibility. Instead, in reviewing the record, we would at most apply a *rebuttable* presumption of credibility—and here the facts found by the IJ overwhelmingly rebut any presumption that the IJ believed Dai's statements concerning his family's return to China. *See Dai*, 916 F.3d at 747 (Trott, J., dissenting) ("Simply because the IJ did not say 'I find Dai not credible' but opted instead to expose the glaring factual defi-

ciencies in Dai's presentation and to explain in specific detail and at length why Dai had not persuasively carried his burden," the majority wrongly holds that "we must selectively embrace [his testimony] as persuasive. . . .").

A.

Section 208(b)(1)(B) of the Immigration and Nationality Act ("INA"), as added by section 101(a)(3) of the REAL ID Act of 2005, Pub. L. 109-13, Div. B, 119 Stat. 302, 303 (2005), *directly* addresses the questions of whether and when a presumption of credibility should be applied in reviewing an application for asylum. Specifically, subsection 208(b)(1)(B)(iii) provides, in relevant part, as follows:

> There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. § 1158(b)(1)(B)(iii). There is an obvious scrivener's error in this run-on sentence (the first comma should have been a semi-colon), but the effect of its "however" clause is nonetheless clear: it abrogates our deemed-credible rule's *conclusive* presumption of credibility and replaces it with only a "*rebuttable* presumption of credibility." *Id.* (emphasis added). As noted earlier, *see supra* at 1158, under our pre-REAL ID Act case law, "in the absence of an explicit adverse credibility finding" by the IJ, both the BIA and this court were "required to treat the petitioner's testimony as credible." *Dai*, 884 F.3d at 868. But after the REAL ID Act's amendments, the IJ's failure to make an explicit adverse credibility determination gives rise only to a *rebuttable* presumption that the IJ found the applicant's testimony to be credible. Thus, if a review of the record otherwise makes clear that (despite the lack of an express credibility determination) the IJ did *not* believe certain aspects of the applicant's statements, the "presumption of credibility on appeal" is rebutted, and the BIA and this court no longer need to close their eyes to that fact and no longer need to pretend that the IJ found the testimony credible.

The panel majority conceded that this statutory language abrogates our deemed-credible rule and replaces it with a " 'rebuttable presumption of credibility on appeal,' " *Dai*, 884 F.3d at 868 (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)), but the majority holds that this provision "applies only to appeals *to the BIA*, not to petitions for review *in our court*," *id.* (emphasis added); *see also id.* at 868 n.8. That is true, the panel majority concludes, because the rebuttable presumption applies by its terms only "on appeal," 8 U.S.C. § 1158(b)(1)(B)(iii), and (unlike the BIA) we exercise review in immigration cases by way of a "petition for review" under section 242(a)(5) of the INA, 8 U.S.C. § 1252(a)(5), and not by way of an "appeal." 884 F.3d at 869 (noting the formal differences between a "petition for review" and an "appeal"). Because, according to the panel majority, *the BIA* here failed to invoke the REAL ID Act's rebuttable presumption to determine that any aspect of Dai's testimony was not credible, *but see infra* at 1163–65, *this court* is required to adhere to our deemed-credible rule and to conclusively presume that Dai's testimony is credible.

This argument fails, because the panel majority's sharp distinction between a "petition for review" and an "appeal" is refuted by the very statutory provision on which the majority relies. Section 242 of the INA does in fact state that our review of removal orders is by means of a "petition for review," 8 U.S.C. § 1252(a)(5), but elsewhere in that very same section, the resulting proceeding in this court is ex-

pressly referred to as an "appeal." *See* 8 U.S.C. § 1252(b)(3)(C) (stating that, if the alien fails to file a brief in support of the "petition for judicial review," then "the court shall dismiss *the appeal*") (emphasis added). Given that the judicial-review provision on which the panel majority relies *itself* expressly refers to a "petition for review" as giving rise to an "appeal," there is no textual basis for the panel majority's conclusion that the reference to an "appeal" in section 208(b)(1)(B)(iii) excludes a "petition for review." *See Pereira v. Sessions*, —— U.S. ——, 138 S. Ct. 2105, 2115, 201 L.Ed.2d 433 (2018) (reaffirming, and applying to the INA, the " 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning' ") (citation omitted). Moreover, applying section 208(b)(1)(B)(iii)'s "rebuttable presumption of credibility on appeal" to *both* the BIA and the courts of appeals is consistent with the ordinary meaning of the phrase "on appeal," which refers to the *process* of appellate review, without regard to whether such review is formally denominated as an "appeal." *See Dai*, 916 F.3d at 735 (Trott, J., dissenting) ("[T]he issue is one of *function*, not of form or labels."). Congress's explicit abrogation of the deemed-credible rule thus extends to this court.

Contrary to the panel majority's view, the abrogation of the deemed-credible rule in this court, and its replacement with a rebuttable presumption of credibility, would not intrude on the agency's factfinding role. *See Dai*, 884 F.3d at 874 & n.14. As applied on appeal, the REAL ID Act's rebuttable presumption provides a rule about *how to read the record of the IJ's factfinding*: if no express adverse credibility determination was made by the IJ, we should presume that the IJ found the applicant's statements credible *unless* (as here) the findings as a whole nonetheless confirm that certain statements were disbelieved by the IJ. The rebuttable presumption is thus not a license for the BIA or this court to engage in factfinding. *Cf.* 8 C.F.R. § 1003.1(d)(3)(iv) ("Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals."). Instead, it is an instruction to stop reading IJ decisions through the distorted lens of our deemed-credible rule. In fact, it is the panel majority's adherence to the deemed-credible rule's *irrebuttable* presumption of credibility that usurps the agency's authority. As this case well illustrates, the effect of that rule is to require the Court *automatically* to accept as credible statements that the IJ plainly disbelieved. *See* 916 F.3d at 747 (Trott, J., dissenting).

B.

But even if the panel majority were correct that the REAL ID Act's "rebuttable presumption" of credibility does not apply to petitions for review in this court, that would *not* have the consequence of preserving the deemed-credible rule. On the contrary, it would have the opposite effect: it would mean that *no* presumption of credibility applies in this court.

The panel majority overlooks the full language of the last sentence of section 208(b)(1)(B)(iii), which (1) establishes a general rule that "[t]here is no presumption of credibility" at all, and (2) then carves out an exception under which a rebuttable presumption of credibility will apply "on appeal" if "no adverse credibility determination is explicitly made." 8 U.S.C. § 1158(b)(1)(B)(iii). Indeed, this sentence of the REAL ID Act previously contained *only* the initial language eliminating entirely any presumption of credibility, *see* 151 Cong. Rec. H536–37 (daily ed. Feb. 10,

2005) (reproducing text of H.R. 418, as considered by the House); the exception to that general rule was later added by a House-Senate conference committee before final passage, *see* H.R. Conf. Rep. No. 109-72, at 73–74 (2005); *see also id.* at 168, *reprinted in* 2005 U.S.C.C.A.N. 240, 293. Accordingly, if the panel majority is correct that the "rebuttable presumption" exception does not apply in this court, then the result would be that the default general rule applies instead—*i.e.*, that "[t]here is no presumption of credibility" in this court. That would abrogate the deemed-credible rule completely, and it would mean that this court would not use any presumption of credibility (rebuttable or irrebuttable) in conducting its otherwise deferential review of the agency's decision. *See Huang v. Holder*, 744 F.3d 1149, 1153 (9th Cir. 2014).

Notably, such a reading of section 208(b)(1)(B)(iii) would bring our approach to review in line with that of the First Circuit, which has "rejected the proposition that aliens are entitled to a presumption of credibility on review in this court if there is no express credibility determination made by an IJ." *Kho v. Keisler*, 505 F.3d 50, 56 (1st Cir. 2007); *see also Zeru v. Gonzales*, 503 F.3d 59, 73 (1st Cir. 2007) ("There is no presumption that an alien seeking refugee status is credible. Nor is there an assumption that if the IJ has not made an express finding of non-credibility, the alien's testimony must be taken as credible."). Although *Kho* agrees with the panel majority's conclusion that the REAL ID Act's rebuttable presumption of credibility does not apply in the courts of appeals, *see* 505 F.3d at 56—a conclusion I think is wrong for the reasons stated above—the First Circuit reached that conclusion only in the course of rejecting the petitioner's contention that the REAL ID Act required the First Circuit to replace its rule of *no presumption* of credibility with a *rebuttable* presumption. *See id.* at 56–57. The resulting First Circuit position—that no presumption of credibility applies—conflicts with our continued adherence to the deemed-credible rule, thereby confirming a circuit split. Moreover, unlike our deemed-credible rule, the First Circuit's no-presumption rule is at least consistent with the default rule that would apply under the REAL ID Act *if* the First Circuit and the panel majority were correct in holding that the rebuttable-presumption exception does not apply in the courts of appeals. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) ("There is no presumption of credibility. . . .").

III.

Second, the panel majority committed a wholly separate legal error in declining to give effect to *the BIA's* express conclusion that, given the IJ's detailed findings, Dai had not been truthful concerning his family's return to China.

While agreeing that *the IJ* had not made an "explicit adverse credibility finding," the BIA here went on to note that the IJ's detailed findings established that Dai had *not* been "truthful" about his "family voluntarily returning" to China. *Dai*, 916 F.3d at 747 (Trott, J., dissenting) (reproducing BIA decision). In thus correctly recognizing that the IJ's findings precluded any suggestion that the IJ found these aspects of Dai's statements credible, the BIA did not engage in its own factfinding, but instead properly read *the record of the IJ's findings* in accord with the applicable rebuttable presumption of credibility. 8 U.S.C. § 1158(b)(1)(B)(iii); *cf.* 8 C.F.R. § 1003.1(d)(3)(iv) (BIA does not engage in independent factfinding).[2] Although the

2. Throughout its opinion, the panel majority uses imprecise language that could be mis-

BIA did not expressly invoke that rebuttable presumption, its *analysis* in construing the IJ's findings reflects precisely what the REAL ID Act authorizes the BIA to do. In turn, the resulting *express* adverse credibility determination that is properly recited in the BIA's decision should have precluded the panel majority from invoking the deemed-credible rule even on that rule's own terms. *Cf. Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (so long as the finding is "explicit," an "adverse credibility finding does not require the recitation of a particular formula").

The panel majority nonetheless refused to give effect to the BIA's explicit determination that the record established that Dai had not been truthful, and it therefore proceeded to apply the deemed-credible rule. The panel majority gave several reasons for doing so, but all of them are flawed.

First, the panel majority wrongly dismissed the BIA's determination as the " 'sort of passing statement [that] does *not* constitute an adverse credibility finding.' " *Dai*, 884 F.3d at 867 (quoting *Kaur v. Holder*, 561 F.3d 957, 962–63 (9th Cir. 2009)) (emphasis added). As Judge Trott's dissent makes clear, the BIA's express adverse credibility determination on this point was not a "passing" one—it related directly to the central issue of why Dai sought to remain in the United States, and it refuted his claim that he had a well-founded fear of persecution if he returned to China. *See Dai*, 916 F.3d at 747–48 (Trott, J., dissenting). For the same reasons, the panel majority is equally wrong in its assertion that Dai's untruthfulness related only to a "tangential point." *Dai*, 884 F.3d at 873.

The panel majority's citation of *Kaur* only highlights its error on this score. In *Kaur*, we held that the BIA erred when it invoked the IJ's vague and passing comment that "there are certain instances where this court does not find the Applicants' testimony to be credible" in order to *overturn* the IJ's explicit "affirmative credibility finding" as to *one* of the two Applicants—*i.e.*, Kaur. 561 F.3d at 962–63; *see also id.* at 962 (noting that the IJ had found that Kaur was "a convincing witness" with a "credible demeanor" and whose "testimony was detailed, consistent and plausible"). As we explained, the IJ's "passing" and "selected reference" was "not even specific to Kaur" and could not properly be read to "undermine or detract" from the specific and detailed "positive credibility finding" as to Kaur. *Id.* at 963; *see also id.* ("From this truncated reference, one would be hard pressed to identify any basis for finding a lack of credibility as the IJ identified none."). Here, in sharp contrast to *Kaur*, (1) the

read to suggest that, under the REAL ID Act, the BIA has independent authority to make an adverse ''finding'' of credibility that the IJ did not make. *See, e.g., Dai*, 884 F.3d at 863 (''We think it not too much to ask of IJs and the BIA that they make an explicit adverse credibility *finding*'') (emphasis added); *id.* at 865 (''The BIA acknowledged that the IJ did not make an adverse credibility finding *and also did not make one itself.*'') (emphasis added); *id.* at 867 (noting that the BIA ''also made no adverse credibility *finding*'') (emphasis added); *id.* at 869 (deemed-credible rule applies ''when the BIA has on appeal neither affirmed an adverse credibility finding made by the IJ *nor made its own finding after deeming the presumption of credibility rebutted*'') (emphasis added). Given that only the IJ engages in factual finding, and not the BIA, *see* 8 C.F.R. § 1003.1(d)(3)(iv), I construe these comments by the panel majority to instead be referring only to the BIA's explicit authority under the REAL ID Act to determine that the record rebuts the presumption that *the IJ* found the applicant credible. To avoid any suggestion that the BIA is itself engaging in independent factfinding, I will refer in this dissent to the BIA's ''determination'' concerning what the IJ's findings show about the applicant's credibility.

BIA did not overturn an express finding of credibility by the IJ; and (2) the BIA made a specific determination that the IJ's findings established that Dai was not credible as to a *particular* point.

Second, the panel majority alternatively stated that the BIA's determination that Dai had "lied about one particular fact" could be disregarded because it did not amount to a "*general* adverse credibility finding." *Dai*, 884 F.3d at 867 (emphasis added). That is plainly incorrect, and the implications of such a rule would be quite troubling. The normal rule in any adjudication is that a trier of fact may believe or disbelieve a witness's testimony in whole or in part, *see*, *e.g.*, *Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013), and there is no basis for adopting, in the immigration context, the distinctive (and illogical) rule that credibility must be determined on a "general" basis. *Cf. Toufighi v. Mukasey*, 538 F.3d 988, 994–95 (9th Cir. 2008) (although, as the applicant noted, "the IJ found him generally credible," this court concluded "that the IJ did make an express adverse credibility determination" as to the specific issue of his "claim that he converted to Christianity"). In support of its position, the panel majority pointed to authority holding that a vague and tentative statement " 'that a petitioner is "not *entirely* credible" is not enough' to constitute an adverse credibility finding," *Dai*, 884 F.3d at 867 (quoting *Aguilera-Cota v. INS*, 914 F.2d 1375, 1383 (9th Cir. 1990)) (emphasis added), but here the BIA's adverse credibility determination was explicit, direct, and specific. Accordingly, nothing in *Aguilera-Cota* supports the panel majority's novel suggestion that a *partial* finding of untruthfulness is inadequate, and that only a "*general* adverse credibility finding" will do. (And if *Aguilera-Cota* had adopted that view, then we should overrule that case en banc as well.)

Moreover, by failing to give effect to the BIA's explicit determination that the record revealed Dai's partial lack of truthfulness, the panel majority effectively created yet another flawed "Simon says" rule, in addition to our deemed-credible rule. Under the panel majority's decision, the BIA's failure to *expressly* state that it was invoking the REAL ID Act's rebuttable presumption in this case means that this court should act as if the BIA had not done so. The panel majority erred by yet again devising counterfactual presumptions that distort our reading of the administrative record on appeal.

* * *

Given that we have eschewed a magic-words approach to explicit credibility determinations, the BIA's express statement that Dai was not "truthful" was a permissible application of the REAL ID Act's rebuttable presumption of credibility, and that statement is sufficiently explicit to preclude application of the deemed-credible rule on its own terms. But more importantly, the REAL ID Act expressly abrogates the deemed-credible rule entirely and replaces it with, at most, a rebuttable presumption of credibility. And here, any presumption that the IJ actually believed Dai's statements about his family's voluntary return has been amply rebutted. Our persistence in applying an irrebuttable presumption that is at odds with the statute and at odds with a common-sense reading of this record is deeply troubling and warrants en banc review.

I respectfully dissent from the denial of rehearing en banc.