No. 19-1155

In the
Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL,
Petitioner,

v.

MING DAI,
Respondent.

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

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute (IRLI) is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

SUMMARY OF THE ARGUMENT

This petition should be granted because the United States Court of Appeals for the Ninth Circuit—the nation's largest—decided an important question of

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[1] *Amicus curiae* notified the parties of its intent to file this *amicus curiae* brie ten days before its due date, and the parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

federal immigration law in a way that not only conflicts with the Immigration and Nationality Act (INA), but also inflicts impracticable and absurd consequences.

The INA provides that asylum applicants bear the burden of establishing that they are refugees. To carry this burden, they must satisfy the trier of fact that their testimony is credible and persuasive, and their testimony must refer to specific facts sufficient to establish that they are refugees. According to the plain text of the statute, no presumption of credibility applies to an applicant's testimony, though if an applicant is denied asylum and no adverse credibility determination has been made explicitly, the applicant has a rebuttable presumption of credibility on appeal.

Despite this statutory text, the Ninth Circuit decided that the INA allows for a *conclusive* presumption of credibility—not merely a *rebuttable* presumption—when no adverse credibility determination has been made explicitly by either an Immigration Judge or the Board of Immigration Appeals (BIA) during prior proceedings.

The plain text of the INA does not create or even allow for the Ninth Circuit's conclusive presumption. As noted, the INA states that no presumption of credibility shall apply, except a *rebuttable* presumption of credibility on appeal in some circumstances. The Ninth Circuit claimed that petitions for review to circuit courts are not appeals for purposes of the statute, but that reading is at odds with the statute's text. Even if it were not, and if petitions for review were correctly deemed not to be "appeals" under the statute, then the statute's prohibition on any kind of

presumption of credibility, except on appeal, would apply to the Ninth Circuit with full force.

Under this Court's absurdity doctrine, it is erroneous to read the language of a statute in a way that allows for impracticable or absurd consequences. The Ninth Circuit's decision has such consequences. They include reversals of denials of immigration relief to applicants even when the record shows, as it does in a concurrent petition, that applicants have failed to carry their statutorily mandated burden of proof, and on the record should not be deemed eligible for the relief they seek. Here, moreover, such consequences are especially damaging because the Ninth Circuit reviews a majority of all petitions for review from the BIA.

ARGUMENT

I. The text of the INA forecloses any conclusive presumption of credibility for aliens' testimony in petitions for review.

The Ninth Circuit held to its preexisting rule that it should apply a conclusive presumption of credibility despite the intervening passage of the REAL ID Act, which provides that no presumption of credibility, except for a rebuttable presumption of credibility on appeal in some circumstances, shall be applied. 8 U.S.C. § 1158(b)(1)(B)(iii). The Ninth Circuit claimed that the intervening provision made no difference because only proceedings before the BIA, an administrative court, count as *appeals* for purposes of the statute. "We acknowledged that the REAL ID Act prospectively altered this rule" with respect to the BIA, but not for "petitions for review" at the court of

appeals. App. 14a n.8. Thus, the REAL ID Act "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 [Immigration Judge] or the BIA, we are required to treat the petitioner's testimony as credible." App. 14a–15a n.8.

Dissenters in earlier proceedings noted the flaws in the Ninth Circuit's reasoning. "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." App. 148a (Collins, C.J., dissenting from denial of rehearing *en banc*). The statute itself describes the "petition for review" at the court of appeals as an "appeal." 8 U.S.C. § 1252(b)(3)(C)). In any case, "[t]he issue is one of function, not of form or labels." App. 77a (Trott, C.J., dissenting).

In any event, if the court of appeals were correct in styling its proceedings as something other than an appeal, then it should have applied *no* presumption of credibility, whether rebuttable or conclusive. The INA provides that "[t]here is no presumption of credibility" *except* in the appeals process that the Ninth Circuit disclaims. 8 U.S.C. § 1158(b)(1)(B)(iii). "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," as opposed to a conclusive presumption of credibility. App. 151a (Collins, C.J., dissenting).

This conclusion comports with well-established doctrine about the role of appellate courts. *See, e.g., Kho v. Keisler*, 505 F.3d 50, 56 (1st Cir. 2007) ("The court reviews agency proceedings but does not act as a finder of fact itself. Hence, it makes no sense to talk about presumptions of credibility which the courts of appeals must apply."); *INS v. Ventura*, 537 U.S. 12, 16 (2002) ("A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'") (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

II. The Ninth Circuit's decision has impracticable and absurd consequences.

Under the long-established—indeed, immemorial—absurdity doctrine, statutory language must be interpreted in a manner that avoids impracticable or absurd results. "If there arise out of [acts of parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void." 1 WILLIAM BLACKSTONE, COMMENTARIES *91. "[T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). This doctrine "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). Mindfulness of absurd consequences is—and always has been—an essential element of reading a text,

notwithstanding even the plainest statutory language. "From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003). "Even the strictest modern textualists properly emphasize that language is a social construct." *Id.* at 2392.

Here, of course, the Ninth Circuit did not even rely on the plain statutory text, which leads to no absurd or impracticable results. *A fortiori*, the Ninth Circuit's strained and implausible reading, which does have such consequences, should be rejected.

Such consequences are easy to imagine. They would occur whenever an applicant for immigration relief who, on the record, was obviously ineligible for that relief, nevertheless gave pertinent testimony that, though rebutted by other evidence, the trier of fact did not explicitly deem non-credible.[2] Indeed, that is

[2] This is especially so because the Ninth Circuit conflates credibility with *truth*. Petition at 20–22. *See also, e.g., Anaya-Ortiz v. Holder*, 594 F.3d 673, 679 (9th Cir. 2010) ("Testimony must be accepted as true in the absence of an explicit adverse credibility finding.") (internal quotation marks omitted). But credibility and truth are not treated as equivalent in the REAL ID Act. "The 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." 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). Thus, "[o]pposing parties who present conflicting factual accounts might both be credible even if only one party's version is true." App. 136a (Callahn, C.J., dissenting).

exactly what happened in proceedings in the Ninth Circuit leading to a concurrent petition to this Court, *Barr v. Alcaraz-Enriquez*, No. 19-1156. There, a thrice-deported repeat offender criminal was denied his application for asylum and withholding of removal. Petition for a Writ of Certiorari at 3, *Barr v. Alcaraz-Enriquez*, No. 19-1156 (Mar. 20, 2020). His convictions for crimes committed in the United States included possession of a controlled substance and domestic violence. In the commission of the latter, he had "repeatedly beaten his girlfriend, dragged her back into a residence when she attempted to flee, thrown her against a staircase, kicked her in the legs and head, and forced her to engage in sex acts against her will . . . resulting in a traumatic condition." *Id.* at 4–5. After being detained following his fourth, and illegal, entry into the United States, the criminal alien applied for withholding of removal, alleging that he would be subject to abuse by police in his home country if he were deported again. *Id.* at 4. During his latest removal proceedings, the criminal alien submitted testimony downplaying and rationalizing his prior conviction for violent criminal behavior. *Id.* at 5. Unpersuaded by the criminal alien's testimony, the Immigration Judge found that the criminal alien presented "a danger to the community of the United States" and denied his application for withholding of removal. *Id.* The BIA affirmed.

Nevertheless, merely because "an explicit adverse credibility finding" had not been made below, the Ninth Circuit presumed that the criminal alien's testimony was true and credible, and remanded the case with

instructions likely to result in withholding of removal. *Id.* at 6.

Such absurd consequences as these are particularly damaging because the Ninth Circuit presides over an outsized share of immigration appeals nationwide. "More than one-quarter of U.S. immigration judges sit within the Ninth Circuit," and the Ninth Circuit reviews a majority of all petitions for review of BIA decisions. Petition at 26. The sheer magnitude of this damage alone makes this case worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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