Nos. 19-1155 and 19-1156

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

MING DAI

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

CESAR ALCARAZ-ENRIQUEZ

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a court of appeals may conclusively presume that an asylum applicant's testimony is credible and true whenever an immigration judge or the Board of Immigration Appeals adjudicates an application without making an explicit adverse credibility determination.

2. Whether, in *Dai* v. *Barr*, No. 15-70776 (Mar. 8, 2018), the court of appeals violated the ordinary remand rule as set forth in *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam), when it determined in the first instance that Dai was eligible for asylum and entitled to withholding of removal.

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OPINIONS BELOW

In *Barr* v. *Dai*, No. 19-1155 (*Dai*), the opinion of the court of appeals (*Dai* Pet. App. 1a-67a) is reported at 884 F.3d 858. The order of the reconstituted panel of the court of appeals adhering to its prior opinion following Judge Reinhardt's death, along with Judge Trott's amended dissent (*Dai* Pet. App. 68a-109a), is reported at 916 F.3d 731. The order of the court of appeals denying rehearing en banc (*Dai* Pet. App. 110a-157a) is reported at 940 F.3d 1143. The decisions of the Board of Immigration Appeals (*Dai* Pet. App. 158a-164a) and the

immigration judge (*Dai* Pet. App. 165a-177a) are unreported.

In *Barr* v. *Alcaraz-Enriquez*, No. 19-1156 (*Alcaraz*), the opinion of the court of appeals (*Alcaraz* Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 727 Fed. Appx. 260. The order of the court of appeals denying rehearing (*Alcaraz* Pet. App. 5a) is unreported. The decisions of the Board of Immigration Appeals (*Alcaraz* Pet. App. 6a-9a) and the immigration judge (*Alcaraz* Pet. App. 10a-22a) are unreported.

JURISDICTION

In *Dai*, the judgment of the court of appeals was entered on March 8, 2018. A petition for rehearing was denied on October 22, 2019 (*Dai* Pet. App. 110a-157a). On January 10, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 19, 2020. On February 7, 2020, Justice Kagan further extended the time to and including March 20, 2020. In *Alcaraz*, the judgment of the court of appeals was entered on March 9, 2018. A petition for panel rehearing was denied on November 22, 2019 (*Alcaraz* Pet. App. 5a). On February 11, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 20, 2020. The petitions in both cases were filed on that date, and were granted on October 2, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-63a.

STATEMENT

A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes the Attorney General or the Secretary of Homeland Security to make a discretionary grant of asylum to an alien who establishes that he is a "refugee," which the INA defines as one who is unwilling or unable to return to or avail himself of the protection of his home 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." 8 U.S.C. 1101(a)(42)(A); 8 U.S.C. 1158(b)(1)(A); see 8 U.S.C. 1101(a)(42)(B) (providing that 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"). An alien may seek to establish his eligibility for asylum either by filing an affirmative asylum application that will be considered in the first instance by an asylum officer in United States Citizenship and Immigration Services in the Department of Homeland Security, see 8 U.S.C. 1158(a), or by asserting his eligibility for asylum before an immigration judge (IJ) in the Department of Justice after removal proceedings have been initiated against him, see 8 U.S.C. 1229a.

As amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, the INA provides that the "testimony of the applicant [for asylum] may be sufficient to sustain the applicant's burden" of establishing his refugee status 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). In making that determination, "the trier of fact may weigh the credible testimony along with other evidence of record." *Ibid.* The statute further provides that the trier of fact should consider the "totality of the circumstances" in making a credibility determination. 8 U.S.C. 1158(b)(1)(B)(iii). And finally, the statute provides that "[t]here is no presumption of credibility" for an alien's testimony about eligibility for asylum; "however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." *Ibid.*

2. The INA also authorizes an alien who has been placed in removal proceedings to apply for protection known as withholding of removal. 8 U.S.C. 1231(b)(3). If the alien demonstrates that, "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," "the alien's life or freedom would be threatened" in the country to which he would otherwise be removed, then the alien may not be removed to that country. 8 U.S.C. 1231(b)(3)(A). This protection is not applicable, however, "if the Attorney General decides that * * * the alien, having been convicted by a final judgment of a particularly serious crime[,] is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B)(ii).

An alien who applies for withholding of removal bears the burden of proving his eligibility for that form of protection. 8 U.S.C. 1229a(c)(4)(A), 1231(b)(3)(C); 8 C.F.R. 1208.16(b) and (d)(2). The applicant's entitlement to protection is evaluated in the first instance by an IJ. 8 U.S.C. 1229a(a)(1) and (c)(4). In determining whether an applicant has demonstrated that his life or freedom would be threatened for a reason described in

Section 1231(b)(3)(A), "the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B)," described above. 8 U.S.C. 1231(b)(3)(C). For all other determinations necessary for a grant of withholding, the IJ is charged with "determin[ing] whether or not the [applicant's] testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof." 8 U.S.C. 1229a(c)(4)(B). "In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record." *Ibid.* The statute further provides that the IJ should consider the "totality of the circumstances" in making a credibility determination. 8 U.S.C. 1229a(c)(4)(C). And as with eligibility for asylum, the statute provides that "[t]here is no presumption of credibility" for the applicant's testimony about eligibility for withholding of removal; again, "however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." *Ibid.*

3. An alien who has been found ineligible for asylum or withholding of removal and is ordered removed by an IJ may appeal to the Board of Immigration Appeals (Board or BIA). See 8 C.F.R. 1003.1(b). If the Board affirms the IJ, the alien may file a "petition for review" in the court of appeals for the judicial circuit in which the IJ completed the proceedings. 8 U.S.C. 1252(b)(2); see 8 U.S.C. 1252(a)(1). The INA provides that on petition for review, the court of appeals must treat "the administrative findings of fact [as] conclusive unless any

reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

B. Procedural History

1. Dai

a. Respondent Ming Dai, a native and citizen of China, entered the United States on a tourist visa in 2012. *Dai* Pet. App. 5a. Later that year, Dai filed an affirmative application for asylum. J.A. 140-155. Dai claimed that in 2009, after his wife became pregnant with their second child, family-planning officials and police officers came to his home to take his wife to have a forced abortion. J.A. 154. According to Dai, he tried to prevent them from taking her, resulting in a physical altercation in which police dislocated Dai's shoulder and broke one of his ribs. J.A. 70-73, 154. Dai asserted that he was subsequently detained in custody for ten days, and was released only after he signed a confession admitting to fighting with the police. J.A. 59-62, 67-68. Dai claimed that when he arrived home, he learned his wife had been subjected to a forced abortion and that an intrauterine device had been implanted without her consent. J.A. 120, 154. According to Dai, he was subsequently fired from his job, his wife was demoted, and his daughter was denied admission to superior schools, all because of his resistance to China's family-planning policies. J.A. 155. In applying for asylum, Dai stated that "I eventually found a way to reach the USA," and asked that the government "[p]lease grant me asylum so that I can bring my wife and daughter to safety in the USA." *Ibid.*

An asylum officer interviewed Dai in connection with his asylum application. J.A. 109-126. During the interview, the asylum officer asked Dai whether he had applied with anyone else for his visa to enter the United

States. J.A. 115. Dai stated that he had not. *Ibid.* And when the officer asked Dai whether his wife and daughter had travelled to anywhere other than Taiwan, Hong Kong, and Australia, Dai likewise answered that they had not. J.A. 117.

Government records indicated, however, that Dai's wife and daughter had both traveled to the United States with him in January 2012. J.A. 124-125. Unlike Dai, though, they returned to China the following month. *Ibid.* When the asylum officer asked Dai to explain why he had not disclosed that information on his application or in his responses to interview questions, Dai paused for a long time before admitting that he was afraid to say that his wife and daughter had come to the United States, because he would then be asked why they had gone back to China. *Ibid.* After being asked to tell the "real story," Dai said that he "wanted a good environment" for his daughter; that his daughter returned to China to go to school and his wife returned to her job; and that Dai did not have a job in China and that was why he had stayed in the United States. *Id.* at 112. The asylum officer declined to grant Dai's affirmative application for asylum. *Dai* Pet. App. 6a, 168a-169a.

b. The Department of Homeland Security thereafter initiated removal proceedings, and Dai renewed his application for asylum and sought withholding of removal. *Dai* Pet. App. 6a, 168a-169a. During cross-examination before an IJ, Dai "hesitated at some length" when asked about why he had not disclosed that his wife and daughter had joined him in the United States, and "appeared nervous and at a loss for words." *Id.* at 170a-171a. He eventually conceded that he had been "afraid" to answer why his wife and daughter had gone back, and confirmed that the "real story" as to why

his family traveled to the United States and returned to China, while he stayed here, was that he wanted "a good environment" for his child and because his wife had a job and he did not. J.A. 91-94. Dai further testified that his wife and daughter had returned to China because his father-in-law was in poor health and needed attention, and his daughter needed to graduate from high school in China. J.A. 95. Asked why he did not return to China with his family, Dai responded, "[b]ecause 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." J.A. 103.

The IJ found Dai removable and denied his applications for asylum and withholding of removal. *Dai* Pet. App. 176a. The IJ concluded that Dai "failed to meet his burden of proving eligibility for asylum." *Id.* at 169a. "The principal area of concern with regard to [Dai's] testimony," the IJ observed, "arose during the course of [Dai's] cross-examination" when Dai was "asked about various aspects of his interview with an Asylum Officer." *Ibid.*

The IJ explained that both Dai's testimony and his answers to the asylum officer "clearly indicate that [Dai] failed to spontaneously disclose that his wife and daughter came with him and then returned to China." *Dai* Pet. App. 173a. Dai had "paused at length, both before the Court and before the Asylum Officer, when asked about this topic." *Ibid.* The IJ found that significant, because Dai's "claim of persecution is founded on the alleged forced abortion inflicted upon his wife." *Id.* at 174a. The IJ concluded, "I do not find that [Dai's] explanation for her return to China while he remained here [is] adequate." *Id.* at 175a. While Dai "has stated that he was in a bad mood and that he had found a job

and had a friend here," that "his daughter's education would be cheaper in China," and that "his wife wanted to go to take care of her father," the IJ concluded that those reasons would not have been "sufficiently substantial" to explain why Dai's wife and daughter—but not Dai himself—made the "free choice to return to China after having allegedly fled that country following his wife's and his own persecution." *Ibid.* "Given that [Dai] has failed to meet his burden of proof for asylum," the IJ found that "he has necessarily failed to meet the higher burden for withholding of removal" as well. *Id.* at 176a.

c. The BIA "adopt[ed] and affirm[ed]" the IJ's decision, concluding that the IJ had "correctly denied [Dai's] applications for failure to meet his burden of proof." *Dai* Pet. App. 163a. The BIA determined that Dai's "family voluntarily returning" and Dai's "not being truthful about it is detrimental to his claim and is significant to his burden of proof." *Id.* at 163a-164a. The Board further stated that the IJ "need not have made an explicit adverse credibility finding to nevertheless determine that [Dai] did not meet his burden of proving his asylum claim." *Id.* at 164a.

d. Dai filed a petition for review in the Ninth Circuit, which was granted by a divided panel. *Dai* Pet. App. 1a-67a. In an opinion by Judge Reinhardt, the court of appeals held that neither the IJ nor the BIA had made an explicit finding that Dai's testimony was not credible, and that "in the absence of an explicit adverse credibility finding by the IJ or the BIA," an asylum applicant's

testimony must be "deemed credible." *Id.* at 12a-14a.[1] The court based that result on circuit precedent predating the amendments made by the REAL ID Act regarding the alien's burden of proof and the assessment of credibility. The court described that precedent as holding "that in the absence of an explicit adverse credibility finding by the IJ or the BIA[, the court is] required to treat the [alien's] testimony as credible." *Id.* at 13a (citing *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *Navas* v. *INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000)). The court acknowledged (*id.* at 13a-14a) that Congress, in the REAL ID Act, provided for a "rebuttable presumption of credibility on appeal" when "no adverse credibility determination is explicitly made," 8 U.S.C. 1158(b)(1)(B)(iii). But the court concluded that the statutory rebuttable presumption applies only "on appeal" to the Board, and does not apply on petition for review in the court of appeals. *Dai* Pet. App. 14a (citation omitted). The court therefore concluded that Section 1158(b)(1)(B)(iii) did not override circuit precedent it described as requiring the court to treat his testimony as credible. *Id.* at 16a-17a.

In light of that rule, the court of appeals held that Dai's testimony was sufficient to carry his burden, because Dai "testified to sufficient facts to demonstrate his eligibility for asylum." *Dai* Pet. App. 24a. The court held that the Board's focus on Dai's "not being truthful," *id.* at 164a, represented an "attempt[] to impermissibly undermine the credibility" that Ninth Circuit

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[1] Judge Reinhardt passed away while the government's petition for rehearing was pending, and Judge Murguia was selected to replace Judge Reinhardt on the panel. *Dai* Pet. App. 68a n.**. Judge Murguia and Chief Judge Thomas—who was a member of the original panel—adhered to Judge Reinhardt's opinion. See *ibid.*

precedent dictated must be accorded to Dai's testimony, *id.* at 24a. See *id.* at 23a (concluding that it was inappropriate to attach significance to "concealment" by Dai that might in other circumstances have "undermine[d] [Dai's] credibility"). The court further held that although the Board must "'weigh the *credible* testimony along with *other* evidence of record,' 8 U.S.C. 1158(b)(1)(B)(ii)" to determine the persuasiveness of the alien's testimony, *id.* at 22a, once credibility is decided—in this case, the court determined, by the failure of the IJ or the Board to make an adverse credibility finding—"the issue is settled." *Ibid.* "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 [that the court is] required to afford Dai's testimony." *Id.* at 22a-23a.

Based on that rationale, the court of appeals held that Dai was eligible for asylum, and remanded to the Board for the discretionary determination of whether to grant asylum. *Dai* Pet. App. 25a. The court further determined that the same analysis that led it to conclude that Dai was eligible for asylum also established that Dai was entitled to withholding of removal, and it instructed the agency to grant Dai withholding of removal on remand. *Id.* at 25a-26a.

Judge Trott dissented. *Dai* Pet. App. 68a-109a. He criticized the majority for employing what he referred to as a "meritless irrebuttable presumption of credibility" that is inconsistent with the statutory limits on judicial review of removal orders. *Id.* at 69a. In his view, under the substantial-evidence standard of review, "[t]he sole issue should be whether [respondent's] unedited presentation compels the conclusion that he carried his burden," such that "no reasonable factfinder

could fail to find his evidence conclusive." *Ibid.* (emphasis omitted); see *id.* at 108a (quoting *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992)). Pointing to inconsistencies in Dai's asylum application and statements that had been identified by the IJ and the Board, Judge Trott concluded that no such conclusion was compelled here, and that the majority's contrary ruling was "another example of [the Ninth Circuit's] intransigence" in immigration cases. *Id.* at 76a.

Beyond his disagreement with the majority's presumption of credibility, Judge Trott also criticized the majority's decision to conclusively declare Dai eligible for asylum and entitled to withholding of removal, rather than remanding to the Board to allow it to make those determinations in light of the court of appeals' announced standard. *Dai* Pet. App. 107a-109a. Judge Trott noted that this Court had summarily reversed the Ninth Circuit on several occasions for making that same error, see *ibid.* (citing *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam), and *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam)), and wrote that "the majority opinion follows in our tradition of seizing authority that does not belong to us," *id.* at 109a.

e. The court of appeals denied the government's petition for rehearing en banc, with ten active judges dissenting from, and two senior judges disagreeing with, that decision. *Dai* Pet. App. 110a-157a.

Judge Callahan, joined by Judges Bybee, Bea, M. Smith, Ikuta, Bennett, R. Nelson, Bade, Collins, and Lee, wrote that the majority had "take[n] 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 asy-

lum, even in the face of other testimony from the applicant that would undermine an asylum claim." *Dai* Pet. App. 123a. She explained that the panel majority had imposed that rule in two steps: first, by holding that in the absence of an adverse credibility finding, the court must deem the alien's testimony credible; and second, by holding that any evidence that would cast doubt on the alien's credibility cannot be relied upon to find the alien's testimony not to be sufficiently persuasive to carry his burden of proof. *Id.* at 131a-132a. Judge Callahan wrote that the panel majority's approach "ignores the realities of factfinding," explaining that "[j]ust 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." *Id.* at 123a-124a. That principle is confirmed here, she wrote, by the statutory provision allowing the trier of fact to "weigh the credible testimony along with other evidence of record," 8 U.S.C. 1158(b)(1)(B)(ii). *Dai* Pet. App. 134a. "If credible testimony must be accepted as true," Judge Callahan noted, "there would be nothing for the trier of fact to 'weigh.'" *Ibid.*

Judge Collins also issued a dissent from the denial of rehearing en banc, joined by Judges Bybee, Bea, Ikuta, Bennett, R. Nelson, and Bade. *Dai* Pet. App. 140a-157a. Judge Collins agreed with the criticisms in Judge Callahan's dissent, but added that "the problems with the panel majority's opinion run even deeper" by requiring 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." *Id.* at 141a. In Judge Collins' view, following the

REAL ID Act, any presumption of credibility can be rebutted (before the Board or the court of appeals) "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." *Id.* at 147a-148a. Judge Collins was of the view that the "rebuttable presumption" created by the REAL ID Act should be applicable in both the courts of appeals and before the Board. *Id.* at 148a-150a. But if that provision did not apply in the courts of appeals, he noted, that would mean that the courts should not apply *any* presumption of credibility. *Id.* at 150a-151a.

Two senior judges—Judge Trott, in an opinion that restated some points from his panel dissent, and Judge O'Scannlain, who noted that he agreed with Judge Callahan's dissent from denial of rehearing en banc—also expressed disagreement with the panel's opinion. *Dai* Pet. App. 111a-122a, 140a.

2. Alcaraz-Enriquez

a. Respondent Cesar Alcaraz-Enriquez (Alcaraz), a native and citizen of Mexico, entered the United States for the first time in 1986 or 1987. *Alcaraz* Pet. App. 16a-17a. He was previously removed in 2001, 2005, and 2007. *Id.* at 17a-18a. During his previous periods in the United States, Alcaraz was convicted of multiple crimes. J.A. 230-254. Of particular relevance here, Alcaraz was convicted in 1999 of inflicting corporal injury on a spouse or cohabitant in violation of Cal. Penal Code § 273.5(a) (West 1999), false imprisonment in violation of Cal. Penal Code §§ 236-237 (West 1999), and possession of a controlled substance in violation of Cal. Health & Safety Code § 11377 (West 1999). J.A. 241-242.

b. Alcaraz again attempted to enter the United States unlawfully in December 2013. *Alcaraz* Pet. App.

11a. Alcaraz was detained, and in proceedings before an IJ he conceded that he was removable under 8 U.S.C. 1182(a)(2)(A)(i)(II) because of his prior conviction for possession of a controlled substance. *Alcaraz* Pet. App. 11a. Alcaraz contended, however, that he was entitled to withholding of removal, based on allegations that he had previously been assaulted by police in Mexico and that he would be subject to abuse if he returned. *Id.* at 11a, 18a-21a.

The IJ determined that Alcaraz was not eligible for withholding of removal in light of Alcaraz's prior conviction for inflicting corporal injury on a spouse or cohabitant. *Alcaraz* Pet. App. 12a-15a. In making that determination, the IJ considered a probation report created in connection with that earlier conviction, which contained witnesses' descriptions of how Alcaraz 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 sexually assaulted her. *Id.* at 12a-14a; J.A. 218-222. The IJ also considered more generally the fact that the charged crime was inherently serious, with the prosecution being required to prove that the defendant willfully inflicted harm on the victim, resulting in a traumatic condition. *Alcaraz* Pet. App. 14a-15a. Against those considerations, the IJ weighed Alcaraz's testimony during the removal proceedings about the circumstances of the earlier conviction, in which Alcaraz acknowledged hitting his girlfriend but downplayed the seriousness of the assault and claimed that it had been prompted by his belief that she was hitting his minor daughter. *Id.* at 14a; J.A. 189-193. Based on his assessment of Alcaraz's testimony and the other evidence, the

IJ found that the offense qualified as a "particularly serious crime" under Section 1231(b)(3)(B)(ii), and showed that Alcaraz presented "a danger to the community of the United States" for purposes of that provision. 8 U.S.C. 1231(b)(3)(B)(ii); see *Alcaraz* Pet. App. 14a-15a. The IJ therefore determined that Alcaraz was not eligible for withholding of removal. *Alcaraz* Pet. App. 14a-15a.

c. The Board affirmed. *Alcaraz* Pet. App. 6a-9a. It held that the IJ had "properly considered all evidence of record in assessing the seriousness of [Alcaraz's] conviction [for inflicting corporal injury,] including weighing and comparing [Alcaraz's] testimony at the hearing and the probation officer's report issued during the time of his conviction." *Id.* at 8a. It observed that "[i]n weighing the evidence of record, the [IJ] was not required to adopt [Alcaraz's] version of events over other plausible alternatives," and held that "[Alcaraz] did not satisfy his burden of establishing that his conviction for corporal injury under section 273.5(A) was not for a particularly serious crime." *Ibid.*

d. The court of appeals granted Alcaraz's petition for review in part, remanding to the Board for reconsideration of his claim for withholding of removal. See *Alcaraz* Pet. App. 1a-4a. The court held that under its decisions in *Navas*, *supra*, and *Kalubi*, *supra*, "[w]here the BIA does not make an explicit adverse credibility finding, [the court] must assume that [the petitioner's] factual contentions are true." *Alcaraz* Pet. App. 2a (citation omitted; brackets in original). Applying that precedent here, the court held that "the BIA erred when it credited the probation report over Alcaraz's testimony without making an explicit adverse credibility finding as to Alcaraz." *Id.* at 3a. The court also held

that "[t]he BIA's failure to give Alcaraz an opportunity to confront" the "witnesses whose testimony was embodied in the probation report * * * was error." *Ibid.* Accordingly, it remanded to the Board for reconsideration of Alcaraz's claim. *Ibid.*

e. The government filed a petition for panel rehearing, asking the panel to hold that petition while the en banc court of appeals considered the government's petition for rehearing en banc in *Dai*, which the court of appeals had decided the day before its decision in *Alcaraz*. See *Alcaraz* Pet. App. 1a, 5a; *Dai* Pet. App. 1a. After the court of appeals denied the petition for rehearing en banc in *Dai*, *Dai* Pet. App. 110a, the panel denied the government's petition for panel rehearing in *Alcaraz*, noting that the petition for rehearing en banc in *Dai* had "squarely presented a question bearing on the merits of this case" but had "failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration and was thus denied." *Alcaraz* Pet. App. 5a.

SUMMARY OF ARGUMENT

I. The IJs who heard respondents' testimony determined that respondents had not established the factual predicates necessary to be eligible for the relief and protection they seek. In both cases, the Board agreed. The INA, codifying the substantial-evidence standard of review in administrative law generally, thus required the court of appeals to accept those determinations "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). That standard should have dictated the outcomes in these cases: even if the court of appeals might have assessed the evidence differently, the decisions that the IJs and

the Board reached here unquestionably reflected a reasonable view of the evidence before them.

Rather than adhere to the INA's statutory standard of review, however, the court of appeals in *Alcaraz* applied circuit precedent under which, because the IJs had not explicitly found respondents' testimony incredible, "[the court] must assume that the [alien's] factual contentions are *true*." *Alcaraz* Pet. App. 2a (quoting *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 679 (9th Cir. 2010)) (emphasis added; first set of brackets in original). And in *Dai*, the court cited prior circuit decisions so holding and applied such a rule in substance, see *Dai* Pet. App. 13a, 16a, 22a-23a, as Judge Callahan explained in dissent, see *id.* at 124a, 127a-128a, 131a-133a. That was error: the INA does not authorize the courts of appeals to presume that an alien's testimony is true where the Board has found otherwise.

Respondents attempt to recast the court of appeals' decisions as embodying merely a presumption of "credibility," rather than truthfulness. But a presumption of credibility likewise does not support the Ninth Circuit's disposition of these cases, for two reasons. First, the INA also does not establish a presumption of credibility applicable in the courts of appeals. On the contrary, it establishes a general rule that "[t]here is no presumption of credibility" in assessing an alien's eligibility for asylum or entitlement to withholding of removal, 8 U.S.C. 1158(b)(1)(B)(iii); see 8 U.S.C. 1229a(c)(4)(C), subject to a single exception that is inapplicable in a court of appeals.

Second, even if the court of appeals could presume that respondents' testimony in support of their eligibility for relief or protection was *credible*, it does not follow that the Board was "[un]reasonable," 8 U.S.C.

1252(b)(4)(B), in concluding that other evidence (including, in Dai's case, other aspects of his own testimony) outweighed that eligibility-supporting testimony or that the alien's testimony was insufficiently persuasive to carry his burden of proof. To say that evidence is "credible" means simply that it is "[c]apable of being believed." *The American Heritage Dictionary of the English Language* 438 (3d ed. 1996) (*American Heritage Dictionary*). It does not mean that the evidence *must* be believed. Indeed, the INA expressly contemplates that IJs will "weigh the credible testimony" against other evidence, including other credible testimony, in order to decide which evidence is most "persuasive." 8 U.S.C. 1158(b)(1)(B)(ii); see 8 U.S.C. 1229a(c)(4)(B). So long as the result of that weighing is one that a "reasonable adjudicator" could reach, the court of appeals must sustain it. 8 U.S.C. 1252(b)(4)(B).

II. After setting aside a reasonable decision of the Board that it should have upheld, the court of appeals compounded its error in *Dai* by barring the Board from further considering Dai's eligibility for asylum and entitlement to withholding of removal. Rather than remand to the Board for reconsideration of those issues in light of its opinion, the court resolved them for itself in Dai's favor. Doing so was inconsistent with this Court's admonitions that when a court of appeals determines that administrative findings are insufficient to support the denial of asylum, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (citation omitted). And the court of appeals' disregard of the "ordinary remand requirement," *ibid.* (citation omitted), was particularly egregious here, where there is simply no basis for

contending that the result the court of appeals imposed was the only possible result the Board could have reached on further consideration. This Court has summarily reversed the Ninth Circuit for similar errors before. See *id.* at 18; *Gonzales* v. *Thomas*, 547 U.S. 183, 187 (2006) (per curiam). If the Court reaches this second question at all, it should reverse the Ninth Circuit for the error again here.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY FAILING TO APPLY THE SUBSTANTIAL-EVIDENCE STANDARD OF REVIEW REQUIRED BY THE INA

A. The INA Requires A Court Of Appeals To Sustain The Board's Determination That An Alien Has Not Proven His Eligibility For Relief, So Long As That Determination Is Supported By Substantial Evidence

Through an amendment to the INA in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress directed that a court of appeals reviewing an order of removal must accept the Board's findings of fact as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). In doing so, Congress codified this Court's holding in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), that an asylum applicant who "seeks to obtain judicial reversal of the BIA's determination" that he is ineligible for asylum or not entitled to withholding of removal "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution," *id.* at 483-484. See *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1692 (2020).

That standard is, to state the obvious, "highly deferential." *Nasrallah*, 140 S. Ct. at 1692. It is also familiar, embodying "the substantial-evidence standard" that is common throughout administrative law. *Ibid.*; see 5 U.S.C. 706(2)(E) (allowing a reviewing court to set aside agency action that is "unsupported by substantial evidence"). And as with the application of the substantial-evidence standard in other contexts, application of the substantial-evidence standard to removal proceedings means that it is the agency—not a reviewing court—that has responsibility to choose from among the competing factual narratives the record before it could plausibly support. Congress's choice in this regard reflects the fact that IJs and the Board have "examined more of these cases than any court ever has or ever can," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 460 (1987) (Powell, J., dissenting), and are thus particularly well-suited to evaluating the sorts of evidentiary claims that frequently arise in removal proceedings. See *INS* v. *Orlando Ventura*, 537 U.S. 12, 17 (2002) (per curiam) (explaining that the INA entrusts the agency with making evidentiary determinations so that it can "bring its expertise to bear" on immigration-related questions).[2]

Accordingly, while neither the IJ nor the Board may "*arbitrarily* disbelieve credible evidence" offered in support of an alien's claim, they may decline to find that evidence persuasive (and thus find the alien ineligible for relief) if the record contains "contrary evidence" of the "kind and quality" that makes such a decision reasonable. *Director, Office of Workers' Compensation*

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[2] Further reflecting the expertise that IJs develop through their experience hearing large numbers of removal cases, the Board has directed that even within the agency, IJs' factual determinations are reviewed under a clear-error standard. See 8 C.F.R. 1003.1(d)(3).

Programs v. *Greenwich Collieries*, 512 U.S. 267, 279 (1994) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (Senate Report on the Administrative Procedure Act)) (emphasis added). It is likewise "within the province of the" IJ or the Board "to credit part of [a] witness' testimony without accepting it all," *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U.S. 459, 467 (1968), and thus to conclude that the portions of an alien's testimony that undermine his eligibility for relief outweigh those portions that support such eligibility. So long as "on [the agency] record it would have been possible for a reasonable jury to reach the Board's conclusion," *Allentown Mack Sales & Service, Inc.* v. *National Labor Relations Board*, 522 U.S. 359, 366-367 (1998), a reviewing court may not set the Board's determination aside. See 8 U.S.C. 1252(b)(4)(B); *Elias-Zacarias*, 502 U.S. at 483-484.

B. The Board's Determinations Here Easily Satisfy The Substantial-Evidence Standard

Under a proper application of the substantial-evidence standard codified in Section 1252(b)(4)(B), the court of appeals should have rejected respondents' challenges to the Board's determinations that Dai was ineligible for asylum and that neither respondent was eligible for withholding of removal. We address each case in turn.

1. In *Dai*, the IJ focused on specific problems with Dai's testimony that led the IJ to find Dai had not proven past persecution or a well-founded fear of future persecution. See *Dai* Pet. App. 175a-176a. Specifically, the IJ "d[id] not find that [Dai's] explanations for [his wife's] return to China while he remained here are adequate." *Id.* at 175a. Dai "allegedly fled [China] following his wife's and his own persecution"; but if that were

really the *true* reason they had left China, the IJ concluded, Dai's wife would have needed more "substantial" "reasons" for returning than the ones Dai offered. *Ibid.*; see *id.* at 174a (expressing skepticism about "the alleged forced abortion inflicted upon his wife"). Especially given Dai's "lack of forthrightness" about those facts, the IJ reasonably found that Dai "failed to meet his burden" of showing his eligibility for asylum or entitlement to withholding of removal. *Id.* at 173a, 176a.

The Board "adopt[ed] and affirm[ed]" the IJ's decision, amplifying in the process some of the IJ's key findings. *Dai* Pet. App. 163a. It explained that Dai "failed to disclose" his wife's voluntary return precisely because he recognized that disclosing it "would be perceived as inconsistent with his claims of past and feared future persecution"—*i.e.*, his claim of "allegedly fleeing" China because of coercive population control policies. *Id.* at 163a-164a. Both Dai's "family voluntarily returning and his not being truthful about it," the Board found, thus "significant[ly]" undermined Dai's attempt to prove he had previously faced persecution and feared he would face it again if he returned to China. *Id.* at 164a.

Perhaps a different factfinder could have concluded that Dai's family returned to China *despite* a well-founded fear of persecution, because "his daughter's education would be cheaper" there and "his wife wanted to go to take care of her father." *Dai* Pet. App. 175a. But in light of the evidence in the administrative record, the decisions of the IJ and Board to reject those reasons as "not * * * sufficiently substantial" to explain his family's return if they had truly been subject to persecution, *ibid.*, were well within the range of conclusions

that a "reasonable adjudicator" could reach, 8 U.S.C. 1252(b)(4).

2. In *Alcaraz*, too, substantial evidence supports the Board's determination that Alcaraz's prior conviction for domestic violence qualified as a "particularly serious crime," 8 U.S.C. 1231(b)(3)(B)(ii), and thus made him ineligible for withholding of removal. The IJ observed that the nature of the crime of conviction was inherently serious, because the prosecution had been required to prove that the defendant willfully inflicted harm on the victim, resulting in a traumatic condition. *Alcaraz* Pet. App. 14a-15a. The IJ also considered a probation report containing witnesses' statements that Alcaraz had sexually assaulted his girlfriend and struck her in particularly vicious ways.[3] *Id.* at 12a-14a; see pp. 15-16, *supra*. The IJ found that evidence outweighed respondent's testimony, offered during the removal proceeding, that his crime had not been particularly serious because, although he had struck his girlfriend while using methamphetamines, he had done so only because she had, he maintained, hit their daughter. *Alcaraz* Pet. App. 14a; see *id.* at 12a-13a, 17a; J.A. 176-178, 189-193. The Board affirmed, concluding that the IJ had "properly considered all evidence of record in assessing the seriousness of the respondent's conviction, including weighing and comparing the respondent's testimony at the hearing and the probation officer's report issued during the time of his conviction." *Id.* at 8a.

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[3] The Ninth Circuit has held that in making a particularly serious crime determination, "[t]he factors to be considered are: (1) 'the nature of the conviction,' (2) 'the type of sentence imposed,' and (3) 'the circumstances and underlying facts of the conviction.'" *Bare* v. *Barr*, 975 F.3d 952, 961-962 (2020) (quoting *In re N-A-M-*, 24 I. & N. Dec. 336, 342 (B.I.A. 2007)).

Again, perhaps it is conceivable that a different fact-finder, presented with the same evidence, would have concluded that Alcaraz's conviction for willfully inflicting harm on his girlfriend, producing a traumatic condition, had occurred in a way that made it not a "particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii). But given the evidence of record, including the probation report containing witnesses' descriptions of Alcaraz's engaging in especially vicious conduct, the Board's determination was unquestionably one that a "reasonable adjudicator" could reach, 8 U.S.C. 1252(b)(4).[4]

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[4] As the government observed in recommending that the Court not grant plenary review in *Alcaraz* but instead hold the *Alcaraz* petition pending a decision in *Dai*, see *Alcaraz* Cert. Reply Br. 11-12, the court of appeals separately determined that Alcaraz should have been given an opportunity to cross-examine the witnesses whose statements appeared in the probation report. See *Alcaraz* Pet. App. 2a-3a. Alcaraz did not assert in his brief in opposition that the decision below could be affirmed on that alternative basis, however, and indeed argued that his case provided a better vehicle than *Dai* for addressing the validity of the Ninth Circuit's presumption about an alien's testimony. See *Alcaraz* Br. in Opp. 30-35. Alcaraz has thus waived any argument that the IJ's decision to admit the probation report without allowing for cross-examination would provide a sufficient basis, by itself, for the Court to affirm the court of appeals' judgment. See, *e.g.*, *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019); *City of Canton* v. *Harris*, 489 U.S. 378, 383-384 (1989). In any event, the court of appeals' treatment of the government's petition for rehearing reflects a recognition that if Ninth Circuit precedent regarding the presumption it applied were to be overruled, that might change the proper disposition of the case; there otherwise would have been no reason to hold in abeyance the petition for panel rehearing of its unpublished decision in *Alcaraz*. See *Alcaraz* Cert. Reply Br. 11-12; *Alcaraz* Pet. App. 5a.

C. The Court of Appeals Overturned The Board's Reasonable Determinations Based On An Erroneous Judicially Created Presumption

Because the Board's determinations in both cases reflected reasonable views of the record, Section 1252(b)(4) required the court of appeals to accept them. The court did not do so. Instead, the court in *Alcaraz* applied circuit precedent under which, "[w]here the BIA does not make an explicit adverse credibility finding, [the court of appeals] must assume that [the alien's] factual contentions are true." *Alcaraz* Pet. App. 2a (quoting *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 679 (9th Cir. 2010)) (first set of brackets in original). And in *Dai*, the court cited prior circuit decisions so holding and applied such a rule in substance, see *Dai* Pet. App. 13a-14a (discussing *Hu* v. *Holder*, 652 F.3d 1011, 1013 n.1 (9th Cir. 2011); *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *Navas* v. *INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000)), 16a, 22a-23a, as Judge Callahan explained in dissent, see *id.* at 124a, 127a-128a, 131a, 132a-133a; see *Dai* Pet. App. 13a-14a. Because the Board's factual determinations were contrary to testimony that was covered in each case by the Ninth Circuit's judicially created presumption, the court granted the petitions for review. That was error.[5]

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[5] At the certiorari stage, Dai argued that the court of appeals had not applied a presumption of truthfulness in his case, but only a more limited presumption of credibility. See *Dai* Br. in Opp. 13-17. As the judges dissenting from rehearing en banc below explained, the panel majority applied a presumption of truthfulness in substance, even though it did not explicitly state that it was presuming Dai's testimony was "true." See *Dai* Pet. App. 132a (Callahan, J.,

Nothing in the INA authorizes a court of appeals to concluded that an alien's "factual contentions are true," and that contrary factual determinations by the IJ or Board accordingly are impermissible, merely because the agency decisions do not contain an "explicit adverse credibility finding." *Alcaraz* Pet. App. 2a (citation omitted). On the contrary, the INA provides that "[i]n determining whether the applicant [for asylum] 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); see 8 U.S.C. 1229a(c)(4)(B) ("In determining whether the applicant [for withholding of removal] has met [the applicant's] burden, the immigration judge shall weigh the credible testimony along with other evidence of record."). This provision means that even if the trier of fact concludes that some or all of the alien's testimony may be "credible"—*i.e.*, "[c]apable of being believed," *American Heritage Dictionary* 438—the trier of fact remains free to conclude that the testimony's probative force is outweighed by "other evidence" that the trier of fact finds more persuasive. 8 U.S.C. 1158(b)(1)(B)(ii); see 8 U.S.C.

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dissenting from denial of rehearing en banc). And all of the decisions that the court cited for the "rule" that it stated "controls here" expressly invoked the presumption of truthfulness. *Dai* Pet. App. 14a; see *Hu*, 652 F.3d at 1013 n.1 (holding that unless the Board makes "an explicit adverse credibility finding, we assume that the facts in [the alien's testimony] are *true*") (emphasis added); *Kalubi*, 364 F.3d at 1137 ("Testimony must be accepted as *true* in the absence of an explicit adverse credibility finding.") (emphasis added); *Navas*, 217 F.3d at 652 n.3 (Absent "an explicit adverse credibility finding, we must assume that the applicant's factual contentions are *true*.") (emphasis added). In any event, a presumption of credibility does not provide a proper basis for setting aside the Board's decision. See pp. 28-34, *infra*.

1229a(c)(4)(B). The mere absence of a finding that testimony is not *credible*, therefore, does not mean that the testimony must be *true*.

Under Section 1252(b)(4), so long as the determination reached after weighing all the evidence of record is one that a "reasonable adjudicator" could reach, the court of appeals must defer to it. 8 U.S.C. 1252(b)(4). A court of appeals is not free to disregard that statutorily mandated deference based on its case-specific assessment that a particular alien's testimony should have been believed. A fortiori, neither is it free to do so based on a judge-made categorical presumption that *all* aliens' testimony should be believed unless the IJ or the Board states explicitly on the record that the testimony is not credible. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

D. Respondents' Arguments That The Decisions Below Properly Rest On A Presumption of Credibility Are Wrong

Respondents make no effort to justify the presumption of truthfulness recited in the court of appeals' decision in *Alcaraz* and in the earlier circuit precedents that the court found controlling in *Dai*. Instead, they argue that the INA requires courts of appeals to apply a presumption of *credibility*, and that this credibility presumption required the court of appeals to set aside the Board's decisions here. See *Dai* Br. in Opp. 21-26; *Alcaraz* Br. in Opp. 11-18. Respondents are wrong on both points.

1. As an initial matter, the INA does not require courts of appeals to presume that an alien's testimony is credible. That sort of rigid, "categorical rule" would

be in considerable tension with the "case-by-case" evaluation based on the whole record that substantial-evidence review ordinarily entails. *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1157 (2019). And, indeed, in enacting the REAL ID Act in 2005, Congress provided that ordinarily "[t]here is no presumption of credibility" in assessing an alien's eligibility for asylum or entitlement to withholding of removal. 8 U.S.C. 1158(b)(1)(B)(iii) (asylum); see 8 U.S.C. 1231(b)(3)(C) (making the same rule applicable to evaluation of whether the alien has shown a qualifying threat to "life or freedom" for purposes of withholding of removal); 8 U.S.C. 1229a(c)(4)(C) (making the same rule applicable to all applications for relief or protection from removal more generally).

Congress created just one exception to that general rule: "[I]f 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); see 8 U.S.C. 1229a(c)(4)(C), 1231(b)(3)(C). As the court of appeals recognized in *Dai* and both respondents concede, however, "the rebuttable presumption provision of the REAL ID Act applies only to appeals to the BIA, not to petitions for review in [the courts of appeals]." *Dai* Pet. App. 14a.; see *Alcaraz* Br. in Opp. 13 (acknowledging that "an 'appeal' from an immigration court is to the BIA") (citation omitted); *Dai* Br. in Opp. 23 (acknowledging that "the court of appeals * * * hears immigration matters not on appeal but on a 'petition for review'") (citing 28 U.S.C. 2344).

Because that exception applies only before the Board, review in the courts of appeals is properly carried out under the INA's general rule that "[t]here is no presumption of credibility" accorded to aliens' testimony. 8 U.S.C. 1158(b)(1)(B)(iii); see 8 U.S.C.

1229a(c)(4)(C), 1231(b)(3)(C). Rather than giving force to that statutory rule, however, the court of appeals instead defaulted to pre-REAL ID Act circuit precedent. See *Dai* Pet. App. 14a. It reasoned that because the "rebuttable presumption provision" is inapplicable to a court of appeals' consideration of a petition for review, the REAL ID Act therefore did not "repeal[]" the Ninth Circuit's pre-existing *irrebuttable* presumptions. *Ibid.* That analysis was backwards: when the statutory exemption does not apply, it is the statutory rule that applies, not a different and contrary judge-made rule.

Respondents seek to defend the court of appeals' result by arguing that while the exception applies on review before the Board, the general rule applies only to IJs. See *Dai* Br. in Opp. 22-23; *Alcaraz* Br. in Opp. 15-16. That argument makes little sense: if the general rule applied only to IJs, there would have been no need to create an exception to the rule for proceedings before the Board. And where Congress intended credibility-related provisions of the relevant sections to apply specifically to IJs, it said so expressly. See, *e.g.*, 8 U.S.C. 1229a(c)(4)(B) ("In determining whether the applicant has met [the applicant's] burden, *the immigration judge* shall weigh the credible testimony along with other evidence of record.") (emphasis added); 8 U.S.C. 1229a(c)(4)(C) ("[T]he *immigration judge* may base a credibility determination on" various factors.) (emphasis added); 8 U.S.C. 1158(b)(1)(B)(ii) ("In 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.") (emphasis added); 8 U.S.C. 1158(b)(1)(B)(iii) ("[A] *trier of fact* may base a credibility determination on [certain specified criteria].") (emphasis added). That Congress included no

such limitation in the general rule barring use of a presumption of credibility indicates that it intended that rule to apply more broadly. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

2. In any event, even if a presumption that an alien's testimony is credible did apply in the courts of appeals, that presumption would not empower a reviewing court to set aside a decision in which both the IJ and the Board have reasonably determined that other evidence in the record outweighs the testimony supporting the alien's claims.

In ruling for respondents below, the court of appeals treated all of the testimony respondents offered in support of their claims as necessarily true, and thus as sufficient to establish their claims. See p. 26, *supra*. It said that expressly in *Alcaraz*, treating Alcaraz's "factual contentions a[s] true" and on that basis holding that the IJ and Board had "erred when [they] credited the probation report over Alcaraz's testimony." *Alcaraz* Pet. App. 2a-3a (citation omitted). The court's language in *Dai* was less direct, but the substance of its decision there was the same: it held that the IJ and Board had erred by relying on aspects of Dai's testimony that undermined his claims of persecution and determining that Dai had not carried his burden of proof on his claims. See *Dai* Pet. App. 18a-24a. And the Court then affirmatively declared Dai eligible for asylum and entitled to withholding of removal. *Id.* at 25a-26a. Those

legal determinations would only be possible based upon a finding that Dai's claims of persecution were true.

A presumption limited only to credibility, in contrast, could not support the result in either case. As Judge Callahan explained in her dissent from denial of rehearing en banc in *Dai* (*Dai* Pet. App. 136a-138a), there is a material difference between the "credibility" of an alien's testimony and its underlying truthfulness or ultimate persuasiveness. To be "credible," as noted above, is simply to be "[c]apable of being believed." *American Heritage Dictionary* 438. And the INA provides that, in order for an alien to carry his burden without corroboration, his testimony must be both "credible" and "persuasive." 8 U.S.C. 1158(b)(1)(B)(ii); see 8 U.S.C. 1229a(c)(4)(B). That statutory text "contemplates that an alien's testimony may be 'credible' yet not 'persuasive,' for otherwise the second determination would be superfluous." *Doe* v. *Holder*, 651 F.3d 824, 830 (8th Cir. 2011).

A factfinder accordingly can conclude that testimony is facially "credible," in the sense that it is *capable* of being believed, but find that the testimony is not actually true or ultimately is not sufficiently persuasive to establish essential elements of the alien's burden of proof in light of the record as a whole. That could readily occur, for example, when two credible witnesses testify to contradictory things and a factfinder is required to decide which, if either, is telling the truth or what the ultimate factual circumstances were or are. *Dai* Pet. App. 136a-137a (Callahan, J., dissenting from denial of rehearing en banc). Indeed, the presumption of credibility applicable before the Board potentially applies to the testimony of any "applicant or witness" who testifies in the removal proceedings, 8 U.S.C. 1158(b)(1)(B)(iii),

raising the possibility of two competing accounts that are both presumed to be credible and yet cannot both be believed.

Presuming that an alien's testimony was credible, therefore, does not establish that an IJ or the Board lacked a "reasonable" basis for choosing not to believe it, or for finding on the basis of all the evidence that the testimony is not sufficiently persuasive to establish the alien's eligibility for relief. 8 U.S.C. 1252(b)(4). Thus, even assuming Alcaraz's testimony about the circumstances in which he struck his girlfriend was capable of being believed, that would not mean that the IJ and the Board were required to accept his testimony over the probation report and other evidence that contradicted it. See *Alcaraz* Pet. App. 7a-9a, 12a-15a. And even assuming Dai's testimony that he was persecuted for attempting to prevent a forced abortion was capable of being believed, that would not mean that the IJ and the Board were required to accept that testimony as true in the face of evidence related to his family's return to China that the IJ and Board concluded was inconsistent with Dai's claims. *Dai* Pet. App. 163a-164a, 175a-176a.

3. Properly distinguishing credibility from persuasiveness or truthfulness in this way does not render the INA's references to credibility "meaningless." *Alcaraz* Br. in Opp. 16.

Where an IJ accepts an alien's testimony as sufficient to carry the alien's burden of proof and therefore rules in favor of the alien, the "rebuttable presumption of credibility on appeal" to the Board helps to ensure due respect for the IJ's factual determination. 8 U.S.C. 1158(b)(1)(B)(iii); see 8 U.S.C. 1229a(c)(4)(C); see also 8 C.F.R. 1003.1(d)(3) (providing, as a regulatory matter, that the Board will set aside an IJ's findings of fact only

if they are "clearly erroneous"). Because of the finding of credibility made or imputed to the IJ in that circumstance, the Board cannot "stand mute and arbitrarily disbelieve [the] evidence." *Greenwich Collieries*, 512 U.S. at 279 (citation omitted). Instead, the "credible *and credited* evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated." *Ibid.* (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946) (House Report on Administrative Procedure Act)) (emphasis added).

But such a presumption would have little, if any, effect in circumstances like the ones presented here, where an IJ determines that testimony supporting an alien's claim is not persuasive (even if credible) and the Board affirms. Contrary to Alcaraz's arguments, a decision by a court of appeals declining to set aside the shared determination by the IJ and the Board in that scenario is not inconsistent with the asserted presumption because it is not "based on lack of credibility," and neither does it involve "'deny[ing] a petition for review on a ground [on which] the BIA itself did not base its decision.'" *Dai* Pet. App. 16a (citation omitted; second set of brackets in original); see *Alcaraz* Br. in Opp. 14 (citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947)). Instead, it simply reflects recognition that the IJ and Board could reasonably determine that the testimony, even if capable of being believed, was ultimately unpersuasive—and that Congress required the court of appeals to defer to that reasonable determination. See 8 U.S.C. 1252(b)(4)(B). The court of appeals' failure to heed that statutory command requires reversal in both cases.

II. THE COURT OF APPEALS COMPOUNDED ITS ERROR IN *DAI* BY FAILING TO FOLLOW THE ORDINARY REMAND RULE

The court of appeals compounded its error in *Dai* by requiring the Board to treat Dai as eligible for asylum and entitled to withholding of removal, rather than allowing the Board to address those issues again on remand. *Dai* Pet. App. 25a-26a. Even if the court had been justified in setting aside the Board's decision, there was no justification for conclusively resolving those issues in Dai's favor rather than simply vacating the Board's decision and remanding. Indeed, this Court has summarily reversed the court of appeals for making that same error in the past, as several of the dissenting Ninth Circuit judges noted. See *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam); *Ventura*, *supra*; *Dai* Pet. App. 125a (Callahan, J., dissenting from denial of rehearing en banc) ("We are asking yet again to be summarily reversed for violating the 'ordinary remand rule.'") (quoting *Thomas*, 547 U.S. at 187); *Dai* Pet. App. 108a-109a (Trott, J., dissenting) (similar).

A. This Court has explained that, "[w]ithin broad limits[,] the law entrusts the agency to make the basic asylum eligibility decision." *Ventura*, 537 U.S. at 16. Accordingly, when a court of appeals determines that the findings of the IJ or the Board are insufficient to support the denial of relief or protection, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* (citation omitted). Doing so permits "[t]he agency * * * [to] bring its expertise to bear upon the matter" in light of any deficiencies identified by the court of appeals, including by reevaluating the existing record and providing "informed discussion and analysis" under a

proper framework, *id.* at 17, and it allows for receipt of additional evidence if appropriate, *id.* at 18. A court of appeals that undertakes those tasks itself "seriously disregard[s] the agency's legally mandated role." *Id.* at 17; see *Thomas*, 547 U.S. at 185-187 (similar).

B. The court of appeals demonstrated just such "serious[] disregard[]" here. *Ventura*, 537 U.S. at 17. Having concluded (erroneously) that the absence of an explicit adverse credibility finding allowed it to disregard all of the evidence in the record supporting the IJ's and the Board's decisions not to credit Dai's testimony, the court did not simply vacate the Board's decision and remand to allow for further evaluation and, if appropriate, additional evidence. Instead, the court deemed the testimony *actually* true and ultimately persuasive, and ordered relief accordingly—conclusively determining that Dai had carried his burden of proving eligibility for asylum and entitlement to withholding of removal. *Dai* Pet. App. 24a-26a.

In doing so, the court of appeals deprived the IJ and the Board of the opportunity, on remand, to reassess or expand the record and, if they so determine, state more explicitly that they find Dai's testimony not credible or that his failure to testify in a "truthful" fashion rendered his testimony insufficiently credible to carry his burden in light of all the circumstances and evidence in the record. *Dai* Pet. App. 164a. The fact that the IJ and the Board found that the discrepancies in Dai's testimony were enough to deny him relief without the need for an explicit adverse credibility determination does not suggest that no adverse credibility determination would be warranted. Accordingly, even if greater clarity from the IJ or the Board were required—and for the reasons discussed above, it was not, see pp. 20-34,

supra—the court of appeals should have given them the opportunity to provide that clarity, rather than finally resolving the issues itself.

Beyond displacing the agency's role in assessing what evidence is credible, moreover, the court of appeals also improperly chose to draw its own inferences from the evidence it deemed credible, rather than allowing the agency to determine what inferences to draw in the first instance. The court decided, for example, that Dai's wife and daughter had "entirely reasonable" motives for returning to China; that Dai's untruthfulness about his family's travel did not mean that Dai was concerned about what that travel might suggest about the genuineness and persuasiveness of his claims of persecution; and that Dai's work-related reasons for remaining in the United States were merely *in addition* to his asserted persecution-related reasons for remaining. *Dai* Pet. App. 22a-24a. As this Court explained in *Ventura*, however, a court may not conduct a "*de novo* inquiry" into the factual record and "reach its own conclusions based on [that] inquiry." 537 U.S. at 16 (citation omitted). Because the IJ and the Board could have drawn different inferences from the evidence even accepting that evidence as credible, the court should have given them an opportunity to do so in light of its decision.

Finally, the court of appeals failed to afford the Board an opportunity to decide whether remand to the IJ would be appropriate to address, or to take new evidence on, the effect of any changes in country conditions that occurred during the more than four years that Dai's case was pending before the court. See 15-70776 Docket entry No. (Docket entry No.) 1 (Mar. 12, 2015);

Docket entry No. 51 (Oct. 30, 2019); see also Docket entry No. 11 (Nov. 9, 2015) (Government Response Brief). For example, there is strong evidence that while the case was pending in the court of appeals, China changed its national policy to permit married couples to have two children. Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Country Report on Human Rights Practices for 2016: China* 54, https://www.justice.gov/sites/default/files/pages/attachments/2017/03/06/dos-hrr_2016_china.pdf ("On January 1, [2016,] the government raised the birth limit imposed on its citizens from one to two children per married couple, thereby ending the 'one-child policy' first enacted in 1979."). Yet the court's decision precludes the Board from considering whether remand to the IJ would be appropriate to address, or take new evidence on, changes in China's family-planning policies that might be relevant to Dai's claim.

The court of appeals' errors in this regard are not new. This Court has twice summarily reversed decisions of the Ninth Circuit that purported to conclusively hold an alien eligible for asylum in just the same fashion. See *Thomas*, 547 U.S. at 187; *Ventura*, 537 U.S. at 16-18. As Judge Trott put it in dissent, "the majority opinion follows in [that] tradition," "seizing authority that does not belong to us." *Dai* Pet. App. 108a-109a.

If the Court reaches this issue at all, it should reverse the aspect of the court of appeals' decision declaring Dai eligible for asylum and entitled to withholding of removal, see *Dai* Pet. App. 24a-26a, and order the Ninth Circuit to allow the Board to consider those issues anew on remand.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1158 provides:

Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

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. In 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. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

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.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsec-

tion may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual res-

idence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General.

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[1] So in original. Probably should be "sections".

An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the

absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands

The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are

brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

2. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's

counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No

decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge 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.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to

apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

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[1] So in original.

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

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[2] So in original. A closing parenthesis probably should appear.

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

3. 8 U.S.C. 1231 provide:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment.

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B).".

Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request

[3] So in original. Probably should be followed by a closing parenthesis.

to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with

the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States,

an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall

be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless—

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway—

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not exhausted all appeal rights.

(2) Stay of removal

(A) In general

The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that—

(i) immediate removal is not practicable or proper; or

(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.

(B) Payment of detention costs

During the period an alien is detained because of a stay of removal under subparagraph (A)(ii),

the Attorney General may pay from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"—

(i) the cost of maintenance of the alien; and

(ii) a witness fee of $1 a day.

(C) Release during stay

The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on—

(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;

(ii) condition that the alien appear when required as a witness and for removal; and

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

Except as provided in subparagraph (B) and subsection (d),[4] of this section, an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien—

(i) while the alien is detained under subsection (d)(1) of this section, and

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[4] So in original. Probably should be subsection "(e)".

(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to—

(I) subsection (d)(2)(A) or (d)(2)(B)(i) of this section,

(II) subsection (d)(2)(B)(ii) or (iii) of this section for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be obtained from the country to which the stowaway is to be returned, or

(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if—

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than

120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

(d) Requirements of persons providing transportation

(1) Removal at time of arrival

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States shall—

(A) receive an alien back on the vessel or aircraft or another vessel or aircraft owned or operated by the same interests if the alien is ordered removed under this part; and

(B) take the alien to the foreign country to which the alien is ordered removed.

(2) Alien stowaways

An owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft arriving in the United States with an alien stowaway—

(A) shall detain the alien on board the vessel or aircraft, or at such place as the Attorney General shall designate, until completion of the inspection of the alien by an immigration officer;

(B) may not permit the stowaway to land in the United States, except pursuant to regulations of the Attorney General temporarily—

(i) for medical treatment,

(ii) for detention of the stowaway by the Attorney General, or

(iii) for departure or removal of the stowaway; and

(C) if ordered by an immigration officer, shall remove the stowaway on the vessel or aircraft or on another vessel or aircraft.

The Attorney General shall grant a timely request to remove the stowaway under subparagraph (C) on a vessel or aircraft other than that on which the stowaway arrived if the requester has obtained any travel documents necessary for departure or repatriation of

the stowaway and removal of the stowaway will not be unreasonably delayed.

(3) Removal upon order

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel, aircraft, or other transportation line shall comply with an order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be removed under this chapter.

(e) Payment of expenses of removal

(1) Costs of removal at time of arrival

In the case of an alien who is a stowaway or who is ordered removed either without a hearing under section 1225(a)(1)[5] or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival, the owner of the vessel or aircraft (if any) on which the alien arrived in the United States shall pay the transportation cost of removing the alien. If removal is on a vessel or aircraft not owned by the owner of the vessel or aircraft on which the alien arrived in the United States, the Attorney General may—

(A) pay the cost from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"; and

(B) recover the amount of the cost in a civil action from the owner, agent, or consignee of the

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[5] So in original. Probably should be "1225(b)(1)".

vessel or aircraft (if any) on which the alien arrived in the United States.

(2) Costs of removal to port of removal for aliens admitted or permitted to land

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(3) Costs of removal from port of removal for aliens admitted or permitted to land

(A) Through appropriation

Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(B) Through owner

(i) In general

In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

(ii) Aliens described

An alien described in this clause is an alien who—

(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or

(II) is an alien crewman permitted to land temporarily under section 1282 of this title and is ordered removed within 5 years of the date of landing.

(C) Costs of removal of certain aliens granted voluntary departure

In the case of an alien who has been granted voluntary departure under section 1229c of this title and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(f) Aliens requiring personal care during removal

(1) In general

If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.

(2) Costs

The costs of providing the service described in paragraph (1) shall be defrayed in the same manner

as the expense of removing the accompanied alien is defrayed under this section.

(g) Places of detention

(1) In general

The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service—Salaries and Expenses", without regard to section 6101 of title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

(2) Detention facilities of the Immigration and Naturalization Service

Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(i) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General—

(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or

(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.

(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who—

(A) has been convicted of a felony or two or more misdemeanors; and

(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;

(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or

(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.

(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.

(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.

(5) There are authorized to be appropriated to carry out this subsection—

(A) $750,000,000 for fiscal year 2006;

(B) $850,000,000 for fiscal year 2007; and

(C) $950,000,000 for each of the fiscal years 2008 through 2011.

(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes.

4. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by rea-

son of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall

transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of

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[1] See References in Text note below.

the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other

than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.