No. 19-1156

IN THE
Supreme Court of the United States

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,

v.

CESAR ALCARAZ-ENRIQUEZ,
Respondent.

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

BRIEF FOR RESPONDENT

ROBERT JOBE
THE LAW OFFICES OF
ROBERT JOBE
100 Bush Street
Suite 1250
San Francisco, CA 94104

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
NATHANIEL A.G. ZELINSKY*
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondent

(additional counsel listed on inside cover)

KRISTINA ALEKSEYEVA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

*Admitted only in Connecticut; practice supervised by principals of the firm admitted in D.C.

QUESTION PRESENTED

Whether a court of appeals reviewing the denial of an application for asylum or withholding of removal may deem the applicant non-credible where neither the immigration judge nor the Board of Immigration Appeals made an adverse credibility finding.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 19-1156

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,
v.

CESAR ALCARAZ-ENRIQUEZ,
Respondent.

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

BRIEF FOR RESPONDENT

INTRODUCTION

The Immigration and Nationality Act establishes a three-tiered scheme for reviewing claims for asylum and withholding of removal. At the first tier, an immigration judge acts as trier of fact, determining—among other things—"whether or not the [applicant's] testimony is credible." 8 U.S.C. § 1229a(c)(4)(B). At the second tier, the Board of Immigration Appeals ("BIA") acts as appellate tribunal; by statute, it must apply "a rebuttable presumption of credibility" if the immigration judge failed to "explicitly ma[k]e" an "adverse credibility determination." *Id.* § 1229a(c)(4)(C). Then, at the third tier, a court reviews the BIA's decision under administrative-law principles, including "the substantial-evidence standard." *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1692 (2020).

The question presented is how a court should conduct that review when neither the immigration judge nor the BIA found the applicant's testimony non-credible. In that circumstance, may a court uphold the BIA's decision on the ground that the applicant's testimony was not credible?

The answer, quite clearly, is no. Basic principles of administrative law prohibit a court from upholding an agency's decision on the basis of a factual finding—especially an adverse credibility finding—that the agency did not make. And the substantial-evidence standard requires courts to review agency decisions against the backdrop of the standard of proof that the agency itself was required to apply. Here, that means that where the immigration judge did not "explicitly ma[k]e" an adverse credibility finding, and the BIA failed to find the statutory "presumption of credibility" "rebutt[ed]," a reviewing court must presume that the applicant testified credibly.

Despite seeking certiorari on this question, *see* Pet. I, the Government makes little effort to demonstrate otherwise. Indeed, the entirety of its argument on the question presented takes up less than three pages of its brief. *See* U.S. Br. 28-31. Instead, the Government opts to focus on two different issues: one legal, the other factual. Neither offers a viable basis for reversal.

First, the Government contends that even if courts must assume that an applicant's testimony was *credible* in the absence of an adverse credibility finding by the agency, they need not assume that the applicant's testimony was *true*. But that point is not in dispute. Both respondents and the Ninth Circuit have expressly distinguished credibility from truth, and

explained that an agency may disbelieve credible testimony so long as it offers a reasoned basis for that determination.

Second, the Government argues that the Ninth Circuit misapplied these settled principles to the facts of this case. But this Court did not grant review on that factbound question, and it is the Court's usual practice not to wade into case-specific disputes over whether the substantial-evidence test was satisfied. In any event, the unanimous panel below got it right. The immigration judge was presented with two flatly irreconcilable accounts concerning Cesar Alcaraz-Enriquez's domestic-assault conviction from 15 years earlier. Without deeming either account non-credible, or explaining why it found one account more believable than the other, the BIA accepted the account unfavorable to Alcaraz and found him ineligible for withholding of removal on that basis. The Ninth Circuit properly remanded the case to the agency so that it could explain why it weighed the evidence as it did and provide a reasoned explanation for its decision that would be amenable to judicial review.

That was a textbook application of familiar administrative-law principles. The Government invites the Court to water down those principles and permit courts to uphold an agency's decision based on findings it did not make and reasoning it did not offer. The Court should reject that invitation and affirm.

STATEMENT

A. Statutory Background

1. "Since 1980, the [INA] has provided two methods through which an otherwise deportable alien who claims that he will be persecuted if deported can seek relief." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 423

(1987). The Attorney General must withhold removal of a noncitizen to a country in which "the alien's life or freedom would be threatened" on account of "the alien's race, religion, nationality, membership in particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). And the Attorney General may grant asylum to persons who have "a well-founded fear of persecution" in the country in which they last resided. *Id.* §§ 1101(a)(42), 1158(b)(1)(A). Congress has made these forms of relief available to all but the most dangerous or culpable individuals—for instance, those who have committed "particularly serious crime[s]" or "participated in the persecution" of others. *Id.* §§ 1158(b)(2)(A)(i)-(ii), 1231(b)(3)(B)(i)-(ii).

Proving eligibility for asylum or withholding of removal often presents special "difficulties." *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987). "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees § 196 (1979). Sometimes, "[t]he alien's own testimony" is "the only evidence available" to demonstrate that she qualifies for relief. *Mogharabbi*, 19 I. & N. Dec. at 445. As a result, much turns on whether the officer adjudicating an applicant's claim deems that testimony "credible." *Id.*

The BIA has established detailed rules to ensure that immigration judges make credibility determinations reasonably and fairly. For decades, it has held that an immigration judge must base credibility determinations on "specific and cogent reasons"

grounded in the record. *In re S-A-*, 22 I. & N. Dec. 1328, 1331 (BIA 2000) (citing *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998)). Where an immigration judge offers such reasons, the BIA will generally defer to the immigration judge's findings, given the immigration judge's superior ability to "observe [the witnesses'] demeanor" and assess their "accuracy, reliability, and truthfulness." *In re Kulle*, 19 I. & N. Dec. 318, 331 (BIA 1985); *see* 8 C.F.R. § 1003.1(d)(3)(i) ("findings as to the credibility of testimony" are reviewed for "clear[] erro[r]"). But where an immigration judge fails to give specific reasons for a credibility finding, the BIA "declines to defer to the Immigration Judge's determination." *In re S-A-*, 22 I. & N. Dec. at 1332.

2. In the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, Congress codified and expanded these rules for reviewing credibility findings. That statute sets forth two parallel (and largely identical) sets of instructions regarding how credibility determinations should be made in asylum and withholding of removal proceedings. *See id.* § 101(a)-(b) (codified at 8 U.S.C. §§ 1158(b)(1)(B), 1229a(c)(4), 1231(b)(3)(C)). In each case, it sets up a three-tiered scheme of review that augmented the one the agency had long followed.

At the first tier, the REAL ID Act provides that an immigration judge is responsible for *making credibility determinations*. The Act states that "[i]n evaluating the testimony of the applicant or other witness in support of the application [for relief from removal], the immigration judge *will determine* whether or not the testimony is credible." 8 U.S.C. § 1229a(c)(4)(B) (emphasis added). The statute then sets forth a detailed list of criteria on which "the immigration judge may base a credibility determination," including

factors dependent on first-hand observation like the applicant's "demeanor, candor, or responsiveness." *Id.* § 1229a(c)(4)(C). The statute adds that immigration judges should make those determinations without placing a thumb on the scale: In proceedings before the immigration judge, "[t]here is no presumption of credibility." *Id.*; *see id.* § 1229a(c)(4)(A) (stating that, in general, an applicant for relief from removal "has the burden of proof").

At the second tier, the Act provides that the BIA must review the immigration judge's findings pursuant to *a rebuttable presumption of credibility*. The REAL ID Act did not alter the BIA's settled rule that, where an immigration judge makes a credibility determination, the BIA reviews that determination for "clear[] erro[r]." 8 C.F.R. § 1003.1(d)(3)(i). But the Act established a new rule for cases in which the immigration judge fails to make an adverse credibility determination. Following the statement that "[t]here is no presumption of credibility," it provides: "however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1229a(c)(4)(C). Thus, if the immigration judge does not explicitly find the applicant non-credible, then the BIA—the agency's "appellate body," 8 C.F.R. § 1003.1(d)(1)—must rebuttably presume that the applicant is credible. *See, e.g.*, *In re Ramirez*, 2012 WL 3911867, at *2 n.2 (BIA 2012).

At the third and final tier, courts of appeals *review the BIA's credibility determinations for substantial evidence.* As this Court has explained, when a noncitizen petitions for review of a BIA decision in a court of appeals, the court must review the BIA's factual findings pursuant to "the substantial-evidence standard."

Nasrallah, 140 S. Ct. at 1692 (citing 8 U.S.C. § 1252(b)(4)(B)). Courts therefore must ensure that the agency has offered a "sufficien[t]" evidentiary basis for its credibility determinations, *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted), and provided reasons for those determinations that meet the minimum standards of rationality that all agencies are expected to follow, *see Dir., Office of Workers' Comp. Programs, Dep't of Labor* v. *Greenwich Collieries*, 512 U.S. 267, 279 (1994).

B. Factual Background

Cesar Alcaraz-Enriquez ("Alcaraz") was born in Mexico and brought to the United States when he was eight years old. Pet. App. 16a. Since that time, Alcaraz has spent most of his life in the United States. *Id*. at 16a-17a. Both of his parents and all three of his siblings lawfully reside in this country, either as citizens or as permanent residents. *Id*. at 16a. When Alcaraz was a child, his mother sought to make Alcaraz a citizen, as well, but her attorney told her that his office was broken into and that he was unable to complete the necessary paperwork. J.A. 256.

Since early adulthood, Alcaraz has repeatedly been diagnosed with severe mental illness, including schizophrenia and depression, and has endured profound challenges related to that condition. Pet. App. 18a-19a; *see* J.A. 211, 259. When he was 18, Alcaraz began abusing cocaine and methamphetamines. J.A. 178, 257. When he was 19, Alcaraz had a daughter with his girlfriend, Esmeralda. Pet. App. 17a. The following year, Alcaraz and Esmeralda had a physical altercation, the exact circumstances and nature of which are heavily disputed. *See infra* pp. 11-12. Alcaraz subsequently pleaded no contest to domestic assault

and possession of methamphetamines, and was sentenced to two years in prison. Pet. App. 17a.

While incarcerated, Alcaraz exhibited increasingly severe signs of mental illness. He became "bone-thin" and disoriented, told visitors that "someone had placed a chip in his head," and attempted suicide by slicing his wrist with a razor. *Id.*; J.A. 198-199. Officials confined Alcaraz to a bed for his safety and medicated him for three months. Pet. App. 17a.

Upon his release from prison in 2001, Alcaraz was removed to Mexico. *Id.* While living there, Alcaraz insisted that "someone was following him," became "completely disoriented," and disappeared for several days until the Mexican army found him on the side of the road with his feet "blistered and bleeding from walking so much." J.A. 200, 202-203. Alcaraz's father visited Mexico and took Alcaraz to a doctor, who diagnosed Alcaraz with schizophrenia and depression. J.A. 259. Alcaraz was then placed in a rehabilitation facility, but the quality of his care was so poor that Alcaraz's family concluded that if he did not return home, he was "going to die." J.A. 210, 213, 260.

In 2004, Alcaraz returned to the United States to live with his family. Pet. App. 17a. There, his condition improved. *Id.* at 18a. Doctors at a medical facility in Santa Clara diagnosed him with paranoid schizophrenia and gave him monthly counseling and medication. *Id.* His family reported that his behavior returned to "normal," J.A. 212, and that he was "thriving," J.A. 260.

In 2007, however, Alcaraz was again removed to Mexico. Pet. App. 18a; J.A. 212-213. Fearing that Alcaraz would not be safe if returned to a rehabilitation center, Alcaraz's family rented him an apartment in

Tijuana and subsidized his living. J.A. 213; Pet. App. 18a.

While Alcaraz was living alone in Mexico, his condition once again deteriorated. In 2013, Alcaraz and a neighbor had an altercation, and police were called. Pet. App. 18a. The officers arrested Alcaraz and placed him in jail for two days. *Id.* When Alcaraz returned to his apartment to collect his belongings, he found that someone had padlocked his door. *Id.*; J.A. 181-182. The police were called again, and they accused Alcaraz of being a drug addict and beat him with batons. Pet. App. 18a. Then they drove Alcaraz to an unknown location, where for a period of eight hours the officers beat Alcaraz, pepper sprayed him, and Tasered him. *Id.*; J.A. 184-185, 265-266. Following that assault, local authorities imprisoned Alcaraz for approximately three months, and released him only after he pleaded guilty to assault. Pet. App. 18a-19a; J.A. 185-186.

After Alcaraz's release, his father traveled to Mexico to rent Alcaraz an apartment and live with him for a month. Pet. App. 19a. He also took Alcaraz to a psychologist, who again diagnosed Alcaraz with paranoid schizophrenia. *Id.* But Alcaraz's challenges continued. In December 2013, he left his apartment, became disoriented, and could not find his way home. *Id.* His family searched for him at hospitals and morgues, posted fliers, and reported his disappearance. *Id.* Unable to find Alcaraz, they believed he was dead. *Id.*

In February 2014, Alcaraz called his family from San Diego. *Id.* He reported that, after several months, he had wandered to the San Ysidro port of entry and walked across the border through the vehicle-only lane. *Id.* Immigration officers spotted him

there and took him into custody. *Id.* The Government once again sought to remove Alcaraz to Mexico. *Id.* at 11a.

C. Procedural History

In removal proceedings, Alcaraz conceded that he was removable due to his controlled substance conviction from 15 years earlier. Pet. App. 11a. But with the aid of a lawyer, Alcaraz sought humanitarian relief: If returned to Mexico, Alcaraz pleaded, he would face a severe threat to his life and freedom because of his psychological condition. He requested asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").

1. An immigration judge denied Alcaraz relief and ordered him removed. The judge found that Alcaraz was categorically ineligible for asylum because of his prior domestic-assault conviction. *Id.* at 12a. He also concluded that, while Alcaraz "was credible as far as testifying to the harm he suffered while in the custody of the police" in Mexico—and while reports persuasively indicated that persons with mental illness are pervasively mistreated in Mexico—Alcaraz's mistreatment did not "amount to torture." *Id.* at 20a.

The judge thus focused his analysis on whether Alcaraz had committed a "particularly serious crime" that barred him from obtaining withholding of removal. *Id.* at 12a (citing 8 U.S.C. § 1231(b)(3)). Because the particularly-serious-crime inquiry is conducted case-by-case, not categorically, the judge explained that he would examine "all reliable information" to determine "the nature of the [domestic-assault] conviction" and "the circumstances and underlying facts" of the offense. *Id.* (citing *In re Frentescu*,

18 I. & N. Dec. 244 (BIA 1982); *In re N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007)).

The Government and Alcaraz, however, presented "directly contradict[ory]" accounts of the nature and circumstances of Alcaraz's domestic-assault conviction. *Id.* at 2a. For its part, the Government introduced a 1999 probation report in which a probation officer recorded what Alcaraz and his girlfriend Esmeralda had allegedly told police officers about the facts of the crime 15 years earlier. *Id.* at 12a-14a.[1] According to that report, Esmeralda told officers that Alcaraz repeatedly hit, dragged, and kicked her, threw her against the stairs, and forced her to have sex with him. *Id.* at 12a-13a; *see* J.A. 218. Esmeralda said that Alcaraz's mother intervened unsuccessfully to stop the assault, and then drove Esmeralda home after the altercation ended. J.A. 218. According to the probation officer, Alcaraz disputed Esmeralda's account: he said that he and Esmeralda were having an argument, and that he punched her once when she "was about to hit him" and then pushed her as she attempted to leave. Pet. App. 14a; *see* J.A. 219. The probation officer reported that Alcaraz expressed remorse for these actions, and categorically denied raping Esmeralda or committing the other severe acts of violence she alleged. J.A. 220-222.

Testifying in person at the immigration hearing, Alcaraz reiterated his account and provided additional detail about the dispute. Pet. App. 14a. Alcaraz explained that the altercation began because he saw

---

[1] Alcaraz's attorney objected to the admission of this report on the ground that it was a "triple hearsay document" and the witnesses were unavailable for cross-examination. J.A. 195. The immigration judge overruled the objection. J.A. 196.

Esmeralda hitting his infant daughter excessively. J.A. 176-177, 192-193, 264. When he asked her to stop, she refused, and he became "very upset" and struck Esmeralda to "defend [his] daughter." J.A. 177, 193, 264. Alcaraz once again denied dragging Esmeralda, kicking her, forcing her to have sex with him, or engaging in any other violent acts. J.A. 190-192. He also submitted a letter from his mother, who stated that when she saw Esmeralda immediately after the altercation, "she looked completely fine" and did not have "any bruises or signs of trauma." J.A. 256. Alcaraz's mother said she later asked Esmeralda "why she was doing this," and Esmeralda responded "that her parents[] gave her an ultimatum: either she reports [Alcaraz] or she will be disowned and live on the streets with her baby." J.A. 257.

Despite being presented with these sharply conflicting accounts, the immigration judge did not determine "whether or not [Alcaraz's] testimony [wa]s credible," as the REAL ID Act requires. 8 U.S.C. § 1229a(c)(4)(B). Instead, he accepted the unfavorable account in the probation officer's report without explanation, stating simply that "the probation officer's evaluation" and the fact that Esmeralda "received multiple injuries, both physically and emotionally," when considered alongside the elements of the offense and Alcaraz's sentence, rendered the crime "particularly serious." Pet. App. 15a.

2. Alcaraz appealed to the BIA, which summarily "adopt[ed] and affirm[ed] the decision of the Immigration Judge." *Id.* at 7a. The Board stated that the immigration judge "was not required to adopt [Alcaraz]'s version of events over other plausible alternatives," and that he "properly considered all evidence of record in assessing the seriousness of the respondent's

conviction." *Id.* at 8a. It also found that the judge "properly denied [Alcaraz]'s CAT claim." *Id.*

3. Alcaraz filed a petition for review in the Ninth Circuit. In a unanimous memorandum decision, a panel comprised of Circuit Judges Bea and N.R. Smith and District Judge Nye held that "[t]he BIA erred" when it based its " 'particularly serious crime' determination * * * at least in part, on a probation report, which directly contradicts Alcaraz's testimony." *Id.* at 2a. "This was error," the panel explained, "for two reasons." *Id.*

First, " 'where the BIA does not make an explicit adverse credibility finding, the court must assume that the petitioner's factual contentions are true.' " *Id.* (brackets omitted) (quoting *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 679 (9th Cir. 2010)). The BIA therefore erred "when it credited the probation report over Alcaraz's testimony without making an explicit adverse credibility finding as to Alcaraz." *Id.* at 3a.

Second, a noncitizen "in removal proceedings must be given 'a reasonable opportunity to * * * cross-examine witnesses presented by the government.' " *Id.* (quoting 8 U.S.C. § 1229a(b)(4)(B)). "Alcaraz was never given any sort of opportunity to cross-examine the witnesses whose testimony was embodied in the probation report, and upon which testimony the BIA ultimately relied in denying his petition." *Id.* That too "was error." *Id.*

In light of these defects, the court of appeals remanded the case to the BIA "for reconsideration of [the withholding of removal] claim." *Id.* at 2a. It denied Alcaraz's petition as to his CAT claim. *Id.* at 4a.

4. The Government petitioned for panel rehearing. That petition was held pending resolution of the

petition for rehearing in *Dai*, which the panel said "squarely presented a question bearing on the merits of this case." Pet. App. 5a. After the Ninth Circuit denied rehearing in *Dai*, the panel here denied rehearing as well. *Id.* No judge dissented.

SUMMARY OF ARGUMENT

Where neither an immigration judge nor the BIA deems an applicant's testimony non-credible, a reviewing court must presume that the applicant testified credibly. That conclusion flows from basic principles of administrative law and the text of the REAL ID Act; indeed, the Government makes no serious effort to argue otherwise. And this rule compels affirmance of the judgment below.

I. The INA requires courts of appeals to review the BIA's factual findings pursuant to the "substantial-evidence standard." *Nasrallah*, 140 S. Ct. at 1692. That standard does not permit reviewing courts to weigh the evidence themselves or enter new factual findings. Rather, it requires courts to evaluate the *agency's* factual findings to determine whether they rest on a sufficient evidentiary basis.

As pertinent here, that review consists of three parts. First, a court must evaluate an agency's factual findings solely on the basis of the justifications that the agency itself offered. Second, a court must determine whether the agency identified evidence sufficient to satisfy the standard of proof to which the agency itself was subject. And, third, the court must ensure that the agency weighed all relevant record evidence before reaching its conclusion.

II. These settled principles compel the conclusion that, where neither the immigration judge nor the BIA made an explicit adverse credibility finding, the

reviewing court must presume that the applicant testified credibly.

A. This rule entails a straightforward application of the *Chenery* principle: If the agency did not find an applicant non-credible, then a reviewing court may not uphold the agency's decision on the basis of such a finding. Indeed, adherence to *Chenery* is particularly important in the context of credibility determinations. An administrative finder of fact is uniquely well-suited to assess credibility, because it is the only decisionmaker that observed the witness firsthand. And a court of appeals reviewing a cold record cannot meaningfully evaluate the agency's credibility determination unless the agency clearly articulated its finding and the basis on which it rests.

B. This rule also follows from the text of the REAL ID Act. Under the Act's three-tiered scheme of review, the BIA must presume that an applicant testified credibly if the immigration judge did not "explicitly ma[k]e" an adverse credibility finding, 8 U.S.C. § 1229a(c)(4)(C); a reviewing court, in turn, must evaluate the BIA's findings for substantial evidence against the backdrop of that presumption. Putting these rules together, that means that where (1) the immigration judge did not explicitly make an adverse credibility finding and (2) the BIA did not find that presumption rebutted, then (3) the court must presume that the agency found the applicant credible.

The Government contends that the statutory phrase stating "[t]here is no presumption of credibility" bars reviewing courts from assuming that an applicant testified credibly. But text, context, and structure all make plain that this directive applies exclusively to immigration judges, not reviewing courts. And, in any

event, reviewing courts do not assess credibility directly; they simply review the BIA's findings in light of the presumption to which the Board is subject.

C. Contrary to the Government's charge, respondent's position is not unduly "rigid." It simply enforces long-settled principles of administrative law and clear statutory text. Despite being in widespread use for decades, the rule's practical consequences have been extremely modest.

III. Although reviewing courts must presume that an applicant's testimony was *credible* in the absence of an adverse credibility finding by the agency, they need not presume that the applicant's testimony was *true*. Credibility and truth are distinct concepts, and the REAL ID Act makes clear that the agency may disbelieve credible testimony. Nonetheless, both the Act and familiar principles of administrative law require the agency to "weigh" credible testimony "along with the other evidence of record," 8 U.S.C. § 1229a(c)(4)(B), and offer a reasoned basis for disbelieving such testimony. Thus, if an agency declines to credit credible testimony, it must at minimum explain why.

IV. The Ninth Circuit correctly applied these principles here. Neither the immigration judge nor the BIA explicitly made an adverse credibility finding, and so the BIA was required to deem Alcaraz credible. Nonetheless, the BIA credited an account in a probation report that directly contradicted Alcaraz's testimony, without weighing that account against Alcaraz's credible testimony or explaining why it considered that account more believable. The Ninth Circuit's decision to remand the case in light of this error was a textbook

application of familiar administrative-law principles. The judgment should be affirmed.

ARGUMENT

The Government is correct that the substantial-evidence standard "dictate[s] the outcome in these cases." U.S. Br. 17. But it misapprehends both what that standard requires and what its upshot is here. Properly understood, the substantial-evidence test instructs courts to evaluate the reasons *the agency* gave for its factual findings—not to identify other justifications that the court believes the record "could" support. *Id.* at 21. Here, that standard dictates that a court may not uphold a BIA decision on the ground that an applicant is non-credible where neither the BIA nor the immigration judge explicitly made an adverse credibility finding. The Government musters hardly any argument to the contrary. And this conclusion both answers the question this Court granted certiorari to resolve and compels affirmance of the judgment below.

I. THE SUBSTANTIAL-EVIDENCE STANDARD ESTABLISHES THREE PERTINENT RULES GOVERNING REVIEW OF AGENCY FINDINGS.

In administrative law, "'substantial evidence' is a 'term of art' used * * * to describe how courts are to review agency factfinding." *Biestek*, 139 S. Ct. at 1154 (quoting *T-Mobile South, LLC* v. *City of Roswell*, 574 U.S. 293, 301 (2015)). It dictates an essentially backward-looking inquiry: A court applying the substantial-evidence standard "looks to an existing administrative record and asks whether it contains 'sufficien[t] evidence' to support the agency's factual determinations." *Id.* (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). The reviewing court

does not evaluate or weigh the evidence itself, but assesses "the reasonableness of what *the agency* did on the basis of the evidence before it." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (emphasis added).

This is "a deferential standard. But deference is not abdication." *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 917 (D.C. Cir. 2011) (Kavanaugh, J.). As pertinent here, the substantial-evidence test consists of three parts, which together ensure that the agency offered a sufficient and adequately reasoned basis for its factual findings.

A. Courts May Uphold An Agency's Factual Findings Only On The Grounds Clearly Expressed By The Agency.

First, it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) (*Chenery I*)). This rule ensures that courts do not intrude "into the domain which Congress has set aside exclusively for the administrative agency," the entity entrusted by law with weighing evidence and making policy judgments. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*). It also "promotes 'agency accountability,' * * * by ensuring that parties * * * can respond fully and in a timely manner to an agency's exercise of authority." *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (quoting *Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986)). "Permitting agencies to invoke belated justifications," the Court has explained, would "upset 'the orderly functioning of the process of

review,'" and unfairly "forc[e] both litigants and courts to chase a moving target." *Id.* (quoting *Chenery I*, 318 U.S. at 94).

The *Chenery* rule comes with an "important corollary." *Chenery II*, 332 U.S. at 196-197. Because a court cannot "be compelled to guess at the theory underlying the agency's action," "the basis upon which [the agency action] purports to rest * * * must be set forth with such clarity as to be understandable." *Id.* Although the agency's explanation "need not be elaborate or even sophisticated," it must be "clear enough to enable judicial review." *T-Mobile South*, 574 U.S. at 302.

Both the *Chenery* rule and its corollary apply with full force in the context of substantial-evidence review. As the Court explained in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), courts may uphold an agency's findings for "substantial evidence" only on "the same basis articulated in the order by the agency itself." *Id.* at 169. And "the orderly functioning of the process of substantial-evidence review requires that the grounds upon which the administrative agency acted be clearly disclosed." *T-Mobile South*, 574 U.S. at 301 (brackets omitted) (quoting *Chenery I*, 318 U.S. at 94). Accordingly, "[a] court reviewing an agency's adjudicative action should accept the *agency*'s factual findings if those findings are supported by substantial evidence." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 112-113 (1992). It "should not supplant the agency's findings merely by identifying alternative findings that *could be* supported by substantial evidence." *Id.* (emphasis added).

B. Courts Must Assess The Agency's Factual Findings Against The Standard Of Proof The Agency Was Required To Apply.

Second, a court conducting substantial-evidence review must evaluate the agency's decision against the "standard of proof" that the agency itself was required to apply. *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 373-374 (1998). The substantial-evidence test looks to whether the evidence before the agency was "'sufficien[t] * * *' to support the agency's factual determinations." *Biestek*, 139 S. Ct. at 1154 (citation omitted). Reviewing courts accordingly must identify the evidentiary threshold the agency had to satisfy, and then "determine whether substantial evidence supports the conclusion that the required standard has or has not been met." *Allentown Mack*, 522 U.S. at 376.

The Court has applied this straightforward rule in many cases, including several involving review of the BIA's factfindings. In *Woodby* v. *INS*, 385 U.S. 276 (1966), for instance, the Court overturned two of the BIA's deportation orders on substantial-evidence review because the agency had not found that the Government satisfied the requisite "standard of proof"—in that case, showing deportability by "clear, unequivocal, and convincing evidence." *Id.* at 279, 286 & n.19. Similarly, in *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469 (1963), the Court found a deportation order "not supported by substantial evidence" because the Government had not "fulfilled its burden of proving" the applicant deportable. *Id.* at 473, 478-480. And in *Allentown Mack*, the Court emphasized—indeed, devoted a whole section of its opinion to explaining—that it was required to "measure the evidentiary

support for the [National Labor Relations] Board's decision against" the "standard of proof" that "*the Board* * * * formally announced": whether the employer proved its case by a "preponderance of the evidence." 522 U.S. at 373-374 (emphasis added). As Justice Scalia summarized in his opinion for the Court: "Reviewing courts are entitled to take [the agency's] standards [of proof] to mean what they say, and to conduct substantial-evidence review on that basis." *Id.* at 376-377.[2]

It follows that courts conducting substantial-evidence review must take into account any "evidentiary presumptions" that the agency was required to apply. *Id.* at 378. Evidentiary presumptions simply establish the "burden of pro[of]" on a given factual question. *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 781 (1979). They state, in effect, that the factfinder must "infer[] or assum[e] that a fact exists * * * unless the adversely affected party overcomes it with other evidence." *Presumption*, Black's Law Dictionary (11th ed. 2019); *see, e.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979) (noting "the common definition of 'presume' as 'to suppose to be true without proof'" (citation omitted)). Consequently, when a court evaluates an agency's findings on a factual question governed by an

[2] This approach is not unique to the administrative-review context. This Court has long "analogiz[ed]" the substantial-evidence standard to the test used to "review * * * jury findings." *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951)). And in both criminal and civil proceedings, the sufficiency of the evidence is determined by asking whether a reasonable jury could have found that the evidence met the applicable standard of proof. *See Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979); *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 399-400 (2006).

evidentiary presumption, it must assess whether the agency's evidence was sufficient to invoke or rebut the presumption.

That is exactly what this Court did in *Baptist Hospital*. The question there was whether the NLRB had substantial evidence to support its finding that allowing a union to solicit employees in the public areas of Baptist Hospital would not have "ill effects * * * on patient care." 442 U.S. at 775-777. The Court first noted that the Board had validly adopted an evidentiary presumption that union solicitation does not "adversely affect patients" except in "immediate patient-care areas." *Id.* at 778, 781; *see Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483 (1978) (upholding this presumption). It then evaluated whether "the evidence presented by the Hospital may be regarded fairly as insufficient to rebut the Board's presumption." *Baptist Hosp.*, 442 U.S. at 786. Concluding that the evidence was "sufficient to rebut the Board's presumption" for some areas of the hospital, *id.* at 789, and "insufficient" for others, *id.* at 786, it vacated the Board's decision in part for lack of substantial evidence, *id.* at 790.

C. Courts Must Ensure That The Agency Took Into Account Any Relevant Evidence In The Record.

Third, the substantial-evidence standard requires that an agency's findings of fact reflect consideration of "the whole record." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951); *see* 5 U.S.C. § 556(d) ("[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party"). The essence of reasoned decisionmaking is a willingness to consider

facts and arguments that run counter to a decisionmaker's favored outcome. Accordingly, this Court has long held that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera*, 340 U.S. at 488; *see FCC* v. *Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955) (explaining that an agency must "consider[] the whole record * * * pro and con," before reaching a conclusion); *Am. Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 522 (1981) (similar).

This principle has found footing in many of the Court's cases. In *Allentown Mack*, for example, the Court held the NLRB's finding unsupported by substantial evidence principally because the agency "entirely ignored" and "excluded from consideration" the testimony of witnesses who suggested that the union might not retain majority support. 522 U.S. at 368-369. In *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the Court likewise vacated an agency's decision because the agency failed to give "any consideration whatsoever" to an alternative to its selected policy that was identified in the record. *Id.* at 48, 51.[3] Numerous lower-court cases are to similar effect. *See, e.g.*, *Genuine Parts Co.* v. *EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018) (EPA erred by "rely[ing]

[3] This requirement is sometimes described as a component of arbitrary-and-capricious review. *See, e.g.*, *State Farm*, 463 U.S. at 43-44 (invoking both arbitrary-and-capricious and substantial-evidence standards). The Court has not sharply distinguished between the two tests, *see T-Mobile*, 574 U.S. at 302 (describing *State Farm* as articulating the standard for "substantial-evidence review"), and the label makes no practical difference here, as the BIA's decisions are subject to review on both grounds, *see, e.g.*, *Judulang* v. *Holder*, 565 U.S. 42 (2011).

on portions of studies in the record that support its position, while ignoring cross sections in those studies that do not").

II. A REVIEWING COURT MUST ASSUME THAT AN APPLICANT TESTIFIED CREDIBLY WHERE NEITHER THE IMMIGRATION JUDGE NOR THE BIA EXPLICITLY MADE AN ADVERSE CREDIBILITY FINDING.

These established principles dictate that where neither the immigration judge nor the BIA explicitly found that an applicant testified non-credibly, a reviewing court must presume that the applicant's testimony was credible. That rule follows directly from *Chenery*. It is also supported by the evidentiary presumption the Congress imposed on the agency in the REAL ID Act. The Government's arguments to the contrary—which span all of three pages, *see* U.S. Br. 28-31, despite the fact that this is the sole question presented in this case, Pet. I—do not demonstrate otherwise.

A. The *Chenery* Rule Bars Courts From Deeming Testimony Non-Credible In The Absence Of An Adverse Credibility Finding By The Agency.

To start, this conclusion entails a straightforward application of the *Chenery* principle. Under *Chenery*, a court may uphold an agency's decision "only on the grounds that the agency invoked when it took the action." *Michigan*, 576 U.S. at 758. It follows that if neither the immigration judge nor the BIA found that an applicant testified non-credibly, a reviewing court may not uphold the agency's decision on that basis. By doing so, a court would "supply a reasoned basis for the agency's action that the agency itself has not

given." *State Farm*, 463 U.S. at 43 (citing *Chenery II*, 332 U.S. at 196). That is precisely what *Chenery* bars. *See, e.g.*, *Pasternack* v. *Nat'l Transp. Safety Bd.*, 596 F.3d 836, 838-839 (D.C. Cir. 2010) (Kavanaugh, J.) (declining to uphold an agency decision on the basis of a "credibility determination" that the agency "simply did not [make]").

Indeed, allowing courts to affirm the BIA based on credibility findings the agency never made would undermine each of the values that the *Chenery* rule is designed to protect. It would usurp a domain—the weighing of evidence and the determination of questions of fact—that Congress entrusted to the agency alone. *Accord* U.S. Br. 21 ("[I]t 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."). It would shield the agency from "accountability" on a matter of the utmost importance, by allowing it to deny humanitarian relief—and order a person removed from the country to a place where he fears persecution or death—for a reason that cannot be found in the agency's written decision. *Bowen*, 476 U.S. at 643. And it would encourage the Government to sandbag litigants and the court, by enabling government counsel to provide "*post hoc* justifications" for its decision that litigants were not apprised of below, and that the Government often has strategic incentives not to press until it reaches the court of appeals. *Regents*, 140 S. Ct. at 1909; *see T-Mobile*, 574 U.S. at 304 n.3 (noting concern that an agency will "sandbag[]" a litigant with a new explanation "after the challenging entity has shown its cards").

Sanctioning such a stark departure from *Chenery* would be particularly unsound in the context of

credibility determinations. As this Court has time and again observed, appellate tribunals are uniquely ill-suited to make credibility findings. "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985); *see Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985). And only an administrative factfinder who "sees the witnesses and hears them testify" can properly assess whether their testimony is reliable and trustworthy. *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam).

The text of the INA reflects special sensitivity to the comparative institutional competence of factfinder and appellate tribunal in assessing credibility. The Act is replete with provisions stating that credibility findings must be made by immigration judges. *See, e.g.*, 8 U.S.C. § 1229a(c)(4)(B) ("*the immigration judge* will determine whether or not the testimony is credible" (emphasis added)); *id.* § 1229a(c)(4)(C) ("*the immigration judge* may base a credibility determination on" various factors (emphasis added)); *id.* § 1231(b)(3)(C) ("*the trier of fact* * * * shall make credibility determinations" (emphasis added)). The Act also instructs immigration judges to base those determinations on considerations such as "the demeanor, candor, or responsiveness of the applicant or witness," that only the immigration judge can assess. *Id.* § 1229a(c)(4)(C). These provisions embody an insight the BIA has long understood: "immigration judges are generally in the best position to make determinations as to the credibility of witnesses," because they "ha[ve] the advantage of observing the respondent as the respondent testifies." Board of Immigration Appeals:

Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002).

It follows that immigration judges not only must be the ones to make credibility findings; they also must make those findings "clearly enough to enable judicial review." *T-Mobile*, 574 U.S. at 303. Appellate courts reviewing a "cold record[]" cannot independently assess whether the immigration judge had a reasoned basis for its credibility determination unless the fact-finder describes the factors—a halting delivery, a pained demeanor—that led her to disbelieve the witness. *Walton Mfg. Co.*, 369 U.S. at 408. That is why the BIA and courts have held for decades that they will uphold an immigration judge's credibility finding only if it is "supported by specific and cogent reasons." *In re A-S-*, 21 I. & N. Dec. at 1109; *see, e.g.*, *Singh* v. *Gonzales*, 495 F.3d 553, 557 (8th Cir. 2007) (Colloton, J.) (explaining that the "specific, cogent reasons" standard "is best understood as an application of the familiar [*Chenery*] principle"). Although no "particular words" are required, *De Leon-Barrios* v. *INS*, 116 F.3d 391, 394 (9th Cir. 1997), "an agency must give [courts] enough to ascertain whether sufficient evidence supports an adverse credibility determination." *Lin Yan* v. *Holder*, 559 F. App'x 658, 659 (10th Cir. 2014) (Gorsuch, J.). At minimum, that means that the credibility determination itself must be "clearly disclosed." *T-Mobile*, 574 U.S. at 301 (quoting *Chenery I*, 318 U.S. at 94).

The Government makes no serious attempt to square its position with *Chenery* or with the unique role the INA assigns immigration judges in assessing credibility. Instead, the Government's theory appears to be that the substantial-evidence test compels courts to uphold an asylum or withholding-of-removal

decision if "the IJ and Board *could* reasonably determine" that an applicant's testimony was non-credible, even if the agency never articulated that justification for its decision. U.S. Br. 34 (emphasis added). But that is precisely what this Court has said *Chenery* forbids: A reviewing court "should not supplant the agency's findings merely by identifying alternative findings that *could be* supported by substantial evidence"; it may only review "the *agency*'s factual findings" themselves. *Arkansas*, 503 U.S. at 112-113 (1992) (first emphasis added); *see* 8 U.S.C. § 1252(b)(4)(B) (instructing courts of appeals to review "the *administrative* findings of fact" (emphasis added)). Giving courts a green light to uphold an agency's decision on the basis of credibility findings the agency never made—and that courts themselves are neither statutorily authorized nor institutionally equipped to make—would flout that settled rule.

B. The Text Of The REAL ID Act Imposes A Presumption Of Credibility That Courts Must Give Force To When Reviewing BIA Decisions.

The text of the REAL ID Act leads to the same result.

1. As noted above, the statute establishes a three-tiered scheme for reviewing credibility determinations. *See supra* pp. 5-7. At the first tier, the immigration judge is required to make credibility determinations without applying any "presumption of credibility." 8 U.S.C. § 1229a(c)(4)(C). At the second tier, the BIA must apply a "rebuttable presumption of credibility" when the immigration judge failed to "explicitly ma[k]e" an "adverse credibility determination." *Id.* And at the third tier, the court of appeals is

required to review the BIA's credibility findings for "substantial evidence." *See Nasrallah*, 140 S. Ct. at 1692.

Simply following this scheme from head to tail leads to the same place as *Chenery*. If the immigration judge does not "explicitly ma[k]e" an adverse credibility determination, then the "rebuttable presumption of credibility" *attaches*. And if the BIA does not find the presumption "rebutt[ed]" by identifying evidence that the applicant is non-credible, then the presumption of credibility *holds*. That means that where neither the immigration judge nor the BIA explicitly found the applicant non-credible, the BIA is statutorily compelled to deem the applicant credible. *See Presumption*, Black's Law Dictionary (11th ed. 2019) (a "presumption" means that a factfinder must "infer[] or assum[e] that a fact exists * * * unless the adversely affected party overcomes it with other evidence"). Indeed, that is just how the BIA understands the statute. *See Ramirez*, 2012 WL 3911867, at *2 n.2; *In re Morales*, 2015 WL 3932344, at *1 (BIA 2015).

A reviewing court in turn must give force to that statutory requirement. As this Court has repeatedly explained, courts applying substantial-evidence review must evaluate the agency's findings against the backdrop of the "standard of proof" applicable to the agency. *Allentown Mack*, 522 U.S. at 373-374. That includes any "evidentiary presumptions" to which the agency is subject. *Id.* at 378; *see Baptist Hosp.*, 442 U.S. at 782-783, 786-787. Accordingly, when the presumption of credibility holds, a reviewing court must assess the BIA's findings against the backdrop of that rule: That is, it must assume that the applicant testified credibly, and assess whether the BIA identified a

reasoned basis for its findings notwithstanding that legally compelled finding.

This conclusion follows *a fortiori* from prior cases in which this Court has assessed an agency's factual findings against the backdrop of the standard of proof that governs the agency's decisionmaking. In *Allentown Mack* and *Baptist Hospital*, the Court overturned the NLRB's factual findings because the agency did not identify evidence *sufficient* to meet the burden of proof or overcome the evidentiary presumption that the agency imposed *on itself*. *See Allentown Mack*, 522 U.S. at 371, 373-374; *Baptist Hosp.*, 442 U.S. at 782-783, 786-787. In *Woodby*, the Court vacated the BIA's deportation decision because the agency failed to apply the standard of proof that the Court *inferred* should govern deportation proceedings. 385 U.S. at 285-286. Here, the substantial-evidence test dictates that where the BIA identifies *no* evidence to overcome a standard of proof imposed *by statute*, courts must hold that the standard was not in fact overcome.

2. The Government's contrary interpretation lacks merit. The Government argues that the statutory statement "[t]here is no presumption of credibility" applies to reviewing courts, and bars them from assuming that an applicant was credible even where both the immigration judge and the BIA failed to find the applicant non-credible. U.S. Br. 29. Neither part of that argument is plausible.

a. As an initial matter, the text and context of the provision on which the Government relies make clear that it is addressed to immigration judges, not reviewing courts.

Start with the text. The relevant sentence consists of a rule followed by a qualification: "[t]here is no presumption of credibility[;] however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1229a(c)(4)(C). The phrase "if no adverse credibility determination is explicitly made" is plainly directed exclusively at immigration judges. An immigration judge is "the only entity that can 'ma[k]e'" a credibility determination. *Tyler* v. *Cain*, 533 U.S. 656, 663 (2001). And an immigration judge is the only entity that can make a decision of any kind before a case is "on appeal" to the BIA—as the sentence indicates must occur, by shifting verb tense from "is" when the determination is made to "shall" when the case is "on appeal." *See United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). It follows that the opening clause is directed exclusively at immigration judges, as well. Otherwise, the subject of the rule "there is no presumption of credibility" would differ from the subject of the qualification "if no adverse credibility determination is explicitly made"—a profoundly ungrammatical way for Congress to draft a statute.[4]

---

[4] The Government suggests that if the phrase "[t]here is no presumption" applied exclusively to immigration judges, then the "however" clause would be superfluous. U.S. Br. 30. That is plainly incorrect. The "however" clause does not create an "exception" to the "rule" stated in the prior clause (*id.*), but directs the BIA to apply a *contrary* rule: that it should apply a rebuttable presumption of credibility. If that clause were omitted, then the meaning of the statute would substantially change, as the BIA would no longer be required to apply a presumption "on appeal." 8 U.S.C. § 1229a(c)(4)(C).

The statute's broader context confirms that this clause is addressed exclusively to immigration judges. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). The "no presumption" clause appears in a section entitled "Removal proceedings," 8 U.S.C. § 1229a, and in a subsection describing the factors "the immigration judge" may consider in determining credibility, *id.* § 1229a(c)(4)(C). All of the surrounding subsections address other steps of the process before the agency. *See id.* § 1229a(c)(5) (notice of decision to the applicant); *id.* § 1229a(c)(6) (motions to reconsider); *id.* § 1229a(c)(7) (motions to reopen). And none of those provisions are addressed to reviewing courts; rather, the standards of review for courts are set forth in a separate section of the Code. *See id.* § 1252. It stands to reason, then, that the "no presumption" clause is addressed to immigration judges, as well, and not to courts that fall outside the ambit of that provision entirely. *See Steadman* v. *SEC*, 450 U.S. 91, 100 n.20 (1981) (finding it "implausible to think that the drafters * * * would place a scope-of-review standard in the middle of a statutory provision designed to govern evidentiary issues in adjudicatory proceedings"); *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 439-440 (2011) (interpreting provision in light of its "placement").

The Government argues that because Congress specifically referred to immigration judges in other "credibility-related provisions," the omission of a similar reference in the no-presumption clause indicates that Congress "intended that rule to apply more broadly." U.S. Br. 30-31 (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). But where, as here, Congress phrases a provision in the passive voice, the Court often infers the clause's intended subject from

surrounding or related provisions. *See, e.g.*, *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 128-129 (1977). And the fact that this clause cannot sensibly be applied to appellate courts—who do not "ma[k]e" credibility determinations, let alone before cases are "on appeal," 8 U.S.C. § 1229a(c)(4)(C)—is more than sufficient to overcome the sort of negative inference the Government proposes. *See Clay* v. *United States*, 537 U.S. 522, 528-529 (2003) (finding *Russello* principle inapplicable in light of context); *Wilson*, 503 U.S. at 333-335 (inferring that passively phrased clause was directed at the Attorney General, not at courts, because it could not be applied by courts rationally or at the correct time).

b. In any event, even if this provision applied to reviewing courts, it would not help the Government. Reviewing courts do not themselves make credibility findings; that is the agency's job. Rather, courts *review the BIA's findings* for substantial evidence. Only in the course of conducting that review do they give force to the presumption that Congress made applicable to the BIA itself.

It is thus immaterial whether Congress made courts themselves subject to a statutory presumption of credibility. What matters is that the BIA is subject to a presumption of credibility, and that courts must review the agency's findings in light of that rule. Indeed, most evidentiary rules apply only to the agency, not the reviewing court. *See, e.g.*, *Allentown Mack*, 522 U.S. at 373-374 (self-imposed standard of proof); *Baptist Hosp.*, 442 U.S. at 775-778 (self-imposed presumption). But courts regularly enforce those rules in the course of their review.

Not only is the Government's interpretation premised on a fallacy, but it would lead to an anomalous result at odds with basic principles of administrative law. On the Government's view, the BIA is *required* to apply a rebuttable presumption of credibility when reviewing the immigration judge's findings, but the court of appeals is free to *ignore* that presumption when making credibility determinations of its own. The consequence of that reading would be that the BIA must make credibility findings that the courts of appeals may in turn supplant with different credibility determinations on review. It is difficult to imagine a clearer inversion of the roles of court and agency, or of the principle—specifically embodied in the INA—that substantial-evidence review functions to evaluate "the reasonableness of what *the agency* did on the basis of the evidence before it." *Carlo Bianchi*, 373 U.S. at 715 (emphasis added); *see* 8 U.S.C. § 1252(b)(4)(B) (instructing courts to review "the *administrative* findings of fact" (emphasis added)).

C. The Approach Dictated By *Chenery* And The Text Of The REAL ID Act Is Not Unduly "Rigid."

The Government claims that respondent's position would impose an unduly "rigid, 'categorical rule'" on the BIA. U.S. Br. 28-29 (quoting *Biestek*, 139 S. Ct. at 1157). Not so. The only rules we ask courts to enforce are the *Chenery* principle this Court has adhered to for more than seven decades and a presumption expressly imposed by statute. Holding an agency to those rules is the bread-and-butter of administrative review.

Those rules, moreover, are not "rigid" or "categorical." Unlike the evidentiary rule the Court rejected in

Biestek, the statutory presumption of credibility and *Chenery* do not restrict the quality or quantity of evidence agencies can rely on in making credibility findings. *See Biestek*, 139 S. Ct. at 1156-57. Agencies remain completely free to make credibility findings on the basis of any reasonable evidence, including the panoply of factors Congress expressly listed by statute. *See* 8 U.S.C. § 1229a(c)(4)(C). Nor do these rules require agencies to incant "particular words" in making credibility findings. *De Leon-Barrios*, 116 F.3d at 394. They simply must make those findings "clear enough to enable judicial review." *T-Mobile*, 574 U.S. at 302.

Notably, immigration judges have had little difficulty complying with this standard. Courts have widely held for decades that they will not deem an applicant non-credible in the absence of an explicit adverse credibility finding by the immigration judge or the BIA. *See* Opp. 21-26. Yet after an exhaustive search of Ninth Circuit precedent, we have found an average of *one case per year* in which the court invoked this rule, and only a handful of cases *ever* in which the Ninth Circuit reversed or remanded a case on the basis of this rule. *Id.* at 26-28. In almost none of those cases was there any question that the immigration judge had failed to make a credibility finding; in virtually every instance, the immigration judge was simply silent on the question of the applicant's credibility. *Id.* at 28.

Moreover, this standard has little if any effect on immigration judges' incentives to make explicit credibility findings. Regardless of what rule courts apply when conducting substantial-evidence review, the BIA is required by statute to presume that an applicant's testimony is credible in the absence of an

"explicit[]" adverse credibility finding by the BIA. *See* 8 U.S.C. § 1229a(c)(4)(C). Given that the overwhelming majority of asylum and withholding-of-removal decisions are conclusively resolved by the BIA, *see* Opp. 29-30, an immigration judge's incentives will thus be the same irrespective of what rule reviewing courts apply: Either make an express adverse credibility finding, or the applicant's testimony will be deemed credible "on appeal." 8 U.S.C. § 1229a(c)(4)(C).

Perhaps for this reason, the Government itself "urge[d]" lower courts until recently that they should apply the very rule that respondents propose. *Haider* v. *Holder*, 595 F.3d 276, 282 & n.4 (6th Cir. 2010). Likewise, all of the en banc dissenters in *Dai* acknowledged or assumed that courts must presume that an applicant was credible in the absence of an adverse credibility finding by the agency. *Dai* Pet. App. 119a-120a (Trott, J., respecting the denial of rehearing en banc); *id.* at 131a & n.4 (Callahan, J., dissenting from denial of rehearing en banc); *id.* at 147a-148a (Collins, J., joined by six other judges, dissenting from denial of rehearing en banc).[5] And even in this Court, the Government spends less than three pages of its brief

[5] Some *en banc* dissenters suggested that reviewing courts should themselves be able to find the statutory "presumption of credibility" "rebutted," even in the absence of a BIA finding to that effect. *Dai* Pet. App. 147a-148a. The Government does not embrace that argument, and for good reason. That argument would create the same *Chenery* problems as the Government's position, by allowing the court to deem the applicant non-credible even where the agency did not. And it would controvert the text of the statute, which provides that the presumption may be rebutted "on appeal," 8 U.S.C. § 1229a(c)(4)(C), not in judicial-review proceedings, which are initiated through a "petition for review," *id.* § 1252(b).

critiquing the rule, despite having sought and obtained review of that very question.

There is neither a plausible legal argument, nor a valid pragmatic concern, to support the view that reviewing courts may deem an applicant non-credible where neither the immigration judge nor the BIA made such a finding. The Court should reject that position, and reaffirm the foundational precepts of administrative law the court applied below.

III. IMMIGRATION JUDGES AND THE BIA MAY DECLINE TO ACCEPT CREDIBLE TESTIMONY AS TRUE IF THEY PROVIDE A REASONED BASIS FOR THAT DECISION.

The Government spends much of its brief arguing that even if courts must assume that testimony is *credible* in the absence of an adverse credibility finding by the immigration judge or the BIA, they need not presume that testimony is *true*. *See* U.S. Br. 26-28, 31-34 The Government observes that "credibility" and "truth" are generally distinct concepts, and that it is possible to deem testimony credible but nonetheless deny its veracity. U.S. Br. 27-28.

As we explained in our brief in opposition, we agree. *See* Opp. 2-3, 18-21.[6] The INA itself makes clear that

---

[6] Contrary to the Government's suggestion, we did not argue that "[p]roperly distinguishing credibility from persuasiveness or truthfulness * * * render[s] the INA's references to credibility 'meaningless.'" U.S. Br. 33 (purportedly quoting Opp. 16). We argued that "allowing courts to make *de novo* credibility determinations" in the absence of an adverse credibility finding by the agency "would make the statutory 'rebuttable presumption of credibility' all but meaningless, because any finding of credibility made by the BIA pursuant to that presumption would cease to

credible testimony need not be deemed truthful, by providing both that an immigration judge "shall weigh the credible testimony along with other evidence of record," and that she may demand that an applicant "provide evidence which corroborates otherwise credible testimony." 8 U.S.C. § 1229a(c)(4)(B). If credible testimony were automatically to be accepted as true, then no such weighing or corroboration would be necessary.

To be sure, some courts elided this distinction prior to the enactment of the REAL ID Act. The Ninth Circuit, for instance, referred interchangeably to "credibility" and "truth" in a number of cases decided before 2005. *See, e.g.*, *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("Testimony must be accepted as true in the absence of an explicit adverse credibility finding."); *Navas* v. *INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000) ("Where the BIA does not make an explicit adverse credibility finding, we must assume that the applicant's factual contentions are true."). That blurring was perhaps explainable by the fact that no statutory text distinguished between the concepts at that time, and the distinction typically "made no practical difference." *Dai* Pet. App. 129a n.3 (Callahan, J., dissenting from denial of rehearing en banc).

Since the enactment of the REAL ID Act, however, every court of appeals to consider the question has explicitly recognized the distinction between credibility and truth. In *Aden* v. *Holder*, 589 F.3d 1040 (9th Cir.

---

have effect as soon as the applicant filed a petition for review." Opp. 16 (quoting 8 U.S.C. § 1229a(c)(4)(C)). The Government has plucked the word "meaningless" out of this sentence and reappropriated it to support a proposition—that credibility is the same as truth—that we elsewhere rejected. *See* Opp. 18-21.

2009), the Ninth Circuit explained that the REAL ID Act "restricts the effect of apparently credible testimony by specifying that the IJ need not accept such testimony as true." *Id.* at 1044; *see Singh* v. *Holder*, 753 F.3d 826, 836-837 (9th Cir. 2014) (citing several cases to the same effect). Likewise, the Tenth Circuit has held that "credibility alone is not determinative," and that " 'other evidence of record' [may] call[] into question the persuasiveness of [the applicant]'s testimony. *Gutierrez-Orozco* v. *Lynch*, 810 F.3d 1243, 1246 (10th Cir. 2016); *see also, e.g.*, *Doe* v. *Holder*, 651 F.3d 824, 830 (8th Cir. 2011); *Antropova* v. *Holder*, 553 F. App'x 49, 50 (2d Cir. 2014).

But the fact that the BIA may disbelieve credible testimony does not mean that it is free to disregard such evidence *without explanation*. The INA states that the agency "shall weigh the credible testimony along with other evidence of record." 8 U.S.C. § 1229a(c)(4)(B). Under the ordinary meaning of the word "weigh," that means that an agency must "consider carefully" credible testimony and "balanc[e]" it against any opposing evidence before disregarding it. *Weigh*, Merriam-Webster Dictionary (online ed. 2021); *see Steadman*, 450 U.S. at 99 (describing agencies' general obligation to "weigh the evidence" before reaching a decision).

The substantial-evidence standard points to the same conclusion. That standard requires an agency to consider "the whole record * * * pro and con" before reaching a conclusion. *Allentown*, 349 U.S. at 364; *see supra* pp. 22-24. As the Government acknowledges (U.S. Br. 21-22, 34), an agency therefore cannot "stand mute and arbitrarily disbelieve credible evidence." *Greenwich Collieries*, 512 U.S. at 279 (quoting S. Rep. No 79-752, at 22 (1945)); *see Dickinson* v. *United*

States, 346 U.S. 389 (1953) (reversing decision in light of unexplained failure to accept testimony whose credibility the agency did not dispute). Rather, it must at minimum explain why "contrary evidence" was of the "kind and quality" that led it to disbelieve a person's otherwise credible account. *Greenwich Collieries*, 512 U.S. at 279 (citation omitted).

IV. THE NINTH CIRCUIT CORRECTLY APPLIED THE SUBSTANTIAL-EVIDENCE STANDARD TO THE FACTS OF THIS CASE.

Because the principles that govern this case are either uncontested, *see supra* Part III, or barely so, *see supra* Part II, all that remains is to determine whether the Ninth Circuit applied those principles correctly in its unanimous memorandum opinion below.

On that question, the scope of the Court's inquiry should be narrow. As the Court has repeatedly explained, where a statute "places responsibility for determining substantial evidence questions in the courts of appeals," this Court "appl[ies] the familiar rule that '[it] will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below." *Donovan*, 452 U.S. at 523 (quoting *Universal Camera*, 340 U.S. at 491)).[7] Moreover, the Government petitioned for

[7] *See also FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 453 (1986); *Beth Israel Hosp.*, 437 U.S. at 507; *Mobil Oil Corp.* v. *Fed. Power Comm'n*, 417 U.S. 283, 291-292, 324, 327 (1974); *Golden State Bottling Co., Inc.* v. *NLRB*, 414 U.S. 168, 419 (1973);

certiorari solely on the question "[w]hether a court of appeals may conclusively presume an applicant's testimony is credible and true." Pet. I. It did not request (and this Court surely would not have granted) review of the Ninth Circuit's factbound substantial-evidence analysis.

Thus, the proper question is not whether the Court, "in the first instance, would find [the BIA]'s findings supported by substantial evidence." *Donovan*, 452 U.S. at 523. It is whether the Ninth Circuit " 'misapprehended or grossly misapplied' the substantial evidence test." *Id.* Regardless whether this Court's review is searching or narrow, however, the judgment below should be affirmed.

1. As an initial matter, the Ninth Circuit correctly held that it was required to presume that Alcaraz's testimony regarding his prior domestic-assault conviction was credible. Pet. App. 2a-3a. Recall that Alcaraz—a resident of the United States since he was eight years old—sought withholding of removal on the ground that he was beaten, abused, and afforded grossly inadequate care by Mexican authorities due to his schizophrenia. *See supra* pp. 7-10. The dispositive issue in the proceedings below was whether Alcaraz's prior domestic assault conviction was so "serious" as to categorically preclude him from seeking that relief. Pet. App. 12a. Alcaraz testified that, contrary to the Government's portrayal, he hit his girlfriend once to protect his infant daughter, and did not commit the severe acts of physical or sexual violence that the Government claims. *Id.* at 14a.

Walton Mfg. Co., 369 U.S. at 408-409; *FTC* v. *Standard Oil Co.*, 355 U.S. 396, 400-401 (1958); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951).

Neither the immigration judge nor the BIA found that Alcaraz's testimony about his prior domestic-assault conviction was non-credible. The immigration judge simply summarized Alcaraz's testimony without comment. *Id.* at 13a-14a. And the BIA said only that "the Immigration Judge was not *required* to adopt [Alcaraz]'s version of events over other plausible alternatives." *Id.* at 8a (emphasis added). Neither component of the agency purported to assess the credibility of Alcaraz's testimony, or pointed to factors that would support an adverse credibility finding: They did not, for instance, discuss the statutory criteria on which an immigration judge "may base a credibility determination," 8 U.S.C. § 1229a(c)(4)(C), or give reasons—let alone "specific, cogent" ones—for deeming the testimony non-credible. *Singh*, 495 F.3d at 557.[8]

As a consequence, the Ninth Circuit was required to presume that Alcaraz testified credibly. Under *Chenery*, the court was barred from upholding the BIA's decision on the basis of a credibility finding the BIA did not make, let alone justify. And under the text of the REAL ID Act, the "presumption of credibility" was triggered (by the immigration judge's failure to "explicitly ma[k]e" an "adverse credibility determination"), and unrebutted (given the BIA's failure to identify any evidence that Alcaraz was non-credible). 8 U.S.C. § 1229a(c)(4)(C). The court was thus required to review the BIA's decision against the backdrop of that presumption of credibility.

[8] Nor was Alcaraz's testimony inherently incredible. It was corroborated by his mother's independent account, *see* J.A. 256-257, and was materially consistent with the account he gave police and the probation officer 15 years earlier, *see* J.A. 219, 221-222.

2. The next step for the Ninth Circuit was therefore to determine whether the BIA gave an adequate basis for crediting the probation report over Alcaraz's presumptively credible testimony. As noted above, an agency need not believe credible testimony. But it must "weigh" that testimony against contrary evidence in the record, 8 U.S.C. § 1229a(c)(4)(B), and provide a reasoned explanation why it accepted "contrary evidence" over a credible account, *Greenwich Collieries*, 512 U.S. at 279 (quoting S. Rep. No. 79-752, at 22).

As the Ninth Circuit concluded, neither the immigration judge nor the BIA gave any explanation for their decision to "credit[ ] the probation report over Alcaraz's testimony." Pet. App. 3a. The immigration judge simply recited the two "directly contradict[ory]" accounts it received, *id.* at 2a, and then accepted the probation report as true without giving a shred of explanation as to why he found it more believable than Alcaraz's account. *See id.* at 14a-15a (accepting Esmeralda's account that she "received multiple injuries, both physically and emotionally" and relying on "the probation officer's evaluation" of Alcaraz's dangerousness). That is textbook arbitrary decisionmaking: An agency may not decline to "give[ ] * * * weight" to testimony that contradicts the agency's favored account for "irrational" reasons, let alone for no reasons at all. *Allentown Mack*, 522 U.S. at 369-371; *see Greenwich Collieries*, 512 U.S. at 279 (agency cannot "stand mute and arbitrarily disbelieve credible evidence" (citation omitted)).

The BIA's reasoning was even thinner. The Board stated that the immigration judge's findings were not "clearly erroneous" because the immigration judge "considered all evidence of record * * *, including weighing and comparing the respondent's testimony

at the hearing and the probation officer's report issued during the time of his conviction." Pet. App. 8a. But as just noted, the immigration judge did not engage in any "weighing and comparing" of the two accounts. *Id.* And the BIA did not do any independent weighing or evaluation of its own.

The Government tries but fails to identify some justification for the agency's decision to credit the probation report over Alcaraz's testimony. It asserts that "[t]he IJ found that evidence [in the probation report] outweighed respondent's testimony." U.S. Br. 24. But the only page of the immigration judge's decision it cites leads back to the same unreasoned conclusion cited above. *See* Pet. App. 14a. The Government also claims "that the IJ and the Board were [not] *required* to accept [Alcaraz's] testimony over the probation report and other evidence that contradicted it." U.S. Br. 33 (emphasis added). True enough. But the agency needed to give some *reason* for declining to credit Alcaraz's testimony; otherwise, the court could not determine whether the agency satisfied the Government's own rule that "neither the IJ nor the Board may '*arbitrarily* disbelieve credible evidence' offered in support of an alien's claim." U.S. Br. 21 (quoting *Greenwich Collieries*, 512 U.S. at 279); *see id.* at 34. Without some explanation from the agency, the court had no basis to determine whether the agency disbelieved Alcaraz's testimony for arbitrary reasons, or for no reasons at all.

Accepting the Government's position that this decision was good enough for government work would mark a substantial degradation of the standards for administrative decisionmaking. Suppose that the EPA was faced with two competing accounts about whether a property was contaminated and—with

millions of dollars on the line—credited one account over the other without a shred of explanation. Or suppose that the SEC was deciding whether to bar a person for life from serving as an investment adviser and, without any justification for its finding, announced that it disbelieved the person's sworn testimony and ended his career on that basis. The consequences in this case are, if anything, more severe; if upheld, the agency's decision would compel the removal of a severely mentally ill individual to a country in which he has repeatedly been beaten, mistreated, and placed in mortal danger. It is neither unreasonable nor the slightest extension of this Court's precedents to demand that the agency explain the basis for the finding on which it rested that harsh and likely irrevocable sanction.

3. Failing to find any flaw in the Ninth Circuit's reasoning, the Government turns to its language. The Government notes that the panel quoted "circuit precedent" stating that, where the BIA does not explicitly make an adverse credibility finding, "[the court] must assume that the [alien's] factual contentions are *true*." U.S. Br. 18 (quoting Pet. App. 2a). The Government claims that the court therefore "based" its holding on an impermissible "presumption of truthfulness," and its decision should be overturned on that basis alone. *Id.* at 28, 31.

That argument is unsound. This Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). And although the panel should not have relied on a quotation from a pre-REAL ID Act opinion—when the difference between credibility and truth was often elided because it made "no practical difference," *Dai* Pet. App. 129a n.3 (Callahan, J., dissenting from denial of rehearing

en banc)—the panel's judgment did not depend in any respect on its choice to cite a case that used the word "true." The "err[or]" the panel identified was that the agency "credited the probation report over Alcaraz's testimony" without adequate (or any) justification. Pet. App. 3a. And for all the reasons just noted, that problem persists even if the panel presumed only that Alcaraz's testimony was credible. Subbing in a citation to a case that used the word "credible" rather than "true" would not alter the judgment in any respect.

This Court has repeatedly held—in decisions stretching back centuries—that even substantive errors by the court below do not warrant reversal if the judgment itself was correct. *See, e.g.*, *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *J.E. Riley Inv. Co.* v. *Comm'r*, 311 U.S. 55, 59 (1940); *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821). And it has time and again affirmed judgments despite disagreeing with the substance of the reasoning offered by the court below. *See, e.g.*, *NLRB* v. *Noel Canning*, 573 U.S. 513, 557 (2014) ("Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed."). Here, the error in the Court's unpublished memorandum opinion was not substantive or a matter of poor reasoning; it was a poorly selected quotation. It should not affect this Court's disposition.

4. Because the agency erred by failing to offer a reasoned justification for declining to credit Alcaraz's testimony, the Ninth Circuit properly remanded the case to the agency so that it could reconsider Alcaraz's claim for withholding of removal. Pet. App. 2a-3a. That decision is of course not the end of the case. When a court remands a case to an agency because

the "grounds [for the agency's decision] are inadequate," the agency generally has the option "to do one of two things." *Regents*, 140 S. Ct. at 1907. "[T]he agency can offer 'a fuller explanation of the agency's reasoning at the time of the agency action' "—for instance, by elaborating on the reasons why it weighed the evidence as it did. *Id.* at 1907-08 (emphasis omitted) (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990)). "Alternatively, the agency can 'deal with the problem afresh' by taking *new* agency action," provided it "compl[ies] with the procedural requirements for new agency action." *Id.* at 1908 (quoting *Chenery II*, 332 U.S. at 201).

That means that, in general, an error like the one identified in this case will have limited practical consequences.[9] In the typical case, the BIA may attempt to rectify its error simply by giving an adequate explanation for why it declined to credit the applicant's credible testimony. *See Alpharma, Inc.* v. *Leavitt*, 460 F.3d 1, 9 (D.C. Cir. 2006) (Garland, J.) (upholding agency decision following remand because the agency "provide[d] a satisfactory explanation" for its initial decision). Or, if the BIA declines to avail itself of that option—perhaps because it determines, on second thought, that the evidence could not support its initial conclusion—it may remand the case to the immigration judge, who can "bring its expertise to bear upon

[9] As we indicated in our brief in opposition, we know of no case prior to *Dai* in which the Ninth Circuit relied on the presumption of credibility as a basis for awarding the applicant relief from removal, rather than remanding the case to the agency or affirming the agency's decision on some alternative ground. *See* Opp. 27-28. We express no view on whether the Ninth Circuit erred by declining to remand in *Dai*. *See Dai* Pet. I (second question presented).

the matter," "evaluate the evidence," and "make [a new] determination" that is amenable to judicial review. *INS* v. *Orlando Ventura*, 537 U.S. 12, 17 (2002) (per curiam).

In this case, the BIA will be required to take the second route. That is because the Ninth Circuit held that, in addition to failing to give an adequately reasoned basis for its decision, the agency committed a second, procedural error: It did not allow Alcaraz to cross-examine the witnesses whose statements were described in the probation report, as the INA requires. Pet. App. 3a. The Government did not seek certiorari on that holding, *see* Pet. I, and so this case will need to be sent back to the immigration judge so that he can fix both issues. *See, e.g.*, *West* v. *Gibson*, 527 U.S. 212, 223 (1999).

Contrary to the government's suggestion, there is nothing extraordinary about this outcome. It is, rather, a vindication of the respective roles of agency and court: on the agency's part, to render minimally reasoned decisions; and on the court's, to hold agencies to that commitment. The Court should not accept the Government's invitation to water down those principles, and to allow an agency to expel one of society's most vulnerable individuals from the United States—and to a place where he reasonably fears persecution and death—without adequately explaining the factual basis on which that decision rests.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

ROBERT JOBE
THE LAW OFFICES OF
ROBERT JOBE
100 Bush Street
Suite 1250
San Francisco, CA 94104

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
NATHANIEL A.G. ZELINSKY*
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

KRISTINA ALEKSEYEVA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

*Admitted only in Connecticut; practice supervised by principals of the firm admitted in D.C.

Counsel for Respondent

JANUARY 2021

ADDENDUM

ADDENDUM

STATUTORY PROVISIONS INVOLVED

1. **5 U.S.C. § 556 provides in pertinent part:**

Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

* * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby,

adopt procedures for the submission of all or part of the evidence in written form.

* * * * *

2. **8 U.S.C. § 1101 provides in pertinent part:**

Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who 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. For

purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

3. **8 U.S.C. § 1158 provides in pertinent part:**

Asylum

* * * * *

(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.

* * * * *

4. **8 U.S.C. § 1229a provides in pertinent part:**

Removal proceedings

* * * * *

(c) Decision and burden of proof

* * * * *

(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. **8 U.S.C. § 1231 provides in pertinent part:**

Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(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.

* * * * *

6. **8 U.S.C. § 1252 provides in pertinent part:**

Judicial review of orders of removal

* * * * *

(b) Requirements for review of orders of removal

* * * * *

(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.

* * * * *

REGULATORY PROVISION INVOLVED

1. **8 C.F.R. § 1003.1 provides in pertinent part:**

Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(d) *Powers of the Board—*

(1) *Generally*. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

* * * * *

(3) *Scope of review*.

(i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be

reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

* * * * *