IN THE
Supreme Court of the United States

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JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,

v.

MING DAI,
Respondent.

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JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,

v.

CESAR ALCARAZ-ENRIQUEZ,
Respondent.

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

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RESPONDENTS' JOINT AND UNOPPOSED
MOTION FOR DIVIDED ARGUMENT

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Pursuant to Rules 21 and 28.4 of this Court, Respondents Ming Dai and Cesar Alcaraz-Enriquez jointly move for oral argument to be divided equally between the Respondents in these separate, consolidated cases. Divided argument is necessary because the Government's position turns largely on the specific facts of each case and its disposition below, which vary considerably, and because requiring one attorney to represent both Respondents in a single oral argument would prejudice Respondents and lead to unnecessary confusion. Furthermore, this Court granted both cases despite the Solicitor General's request that it hold one case pending resolution of the other, indicating that the Court recognized that they were meaningfully different.

This Court has granted divided argument in other consolidated cases arising from separate removal proceedings, even where the dissimilarities were far less important than they are here. *See, e.g.*, *Holder* v. *Martinez Gutierrez*, 565 U.S. 1104 (2012) (mem.); *Holder* v. *Sawyers*, 565 U.S. 1104 (2012) (mem.). The Court should follow the same approach in these cases. The Government has informed Respondents that it does not object to this motion.

1. These consolidated cases arise out of two separate removal proceedings with widely divergent fact patterns.

Ming Dai, the Respondent in No. 19-1155, is a Chinese national who sought asylum and withholding of removal after he was beaten, detained, and fired from his job for resisting Chinese family-planning officers' efforts to take his wife for a forced abortion. In immigration court, Dai gave live testimony and produced corroborating evidence demonstrating that he was persecuted due to his resistance to that forced abortion and that he reasonably feared future persecution, including forced sterilization, if he returned to China. Without acknowledging Dai's corroborating evidence or deeming Dai's testimony non-credible, the immigration judge and the Board of Immigration Appeals ("BIA") denied relief. The court of appeals granted Dai's petition for review. It held that because the agency did not find Dai non-credible, the court could not uphold the agency's decision by making its own adverse credibility finding. The court further held that, without finding Dai non-credible, the evidence compelled the conclusion that Dai was eligible for asylum and entitled to withholding of removal.

Cesar Alcaraz-Enriquez ("Alcaraz"), the Respondent in No. 19-1156, is a Mexican national who suffers from schizophrenia, and who sought withholding of removal after he was beaten and imprisoned by Mexican authorities because of his mental illness. An immigration judge held that Alcaraz was ineligible for relief because a probation report from fifteen years earlier contained an account stating that Alcaraz severely assaulted his girlfriend. Although Alcaraz vigorously disputed that account and introduced corroborating evidence supporting his recollection, the immigration judge accepted the facts alleged in the probation report as true without further explanation, and the BIA summarily affirmed that decision. The court of appeals, however, remanded the case to the agency, explaining that because the BIA did not find Alcaraz's testimony non-credible, it erred by failing to explain why it credited the account in the probation report over Alcaraz's contrary testimony.

2. In its merits brief in this Court, the Government's central contention is that the court of appeals should have upheld both agency decisions because each decision was supported by substantial evidence in the agency record. Gov't Br. 20-25, 31-34. The Government argues, in response to the first question presented in *Dai* and the only question presented in *Alcaraz*, that the panels rejected the agency decisions at issue by improperly presuming Respondents' testimony to be "credible and true." *Id.* at I, 26-31. In response to Respondents' arguments that each panel applied only a presumption of credibility, not truth, the Government argues that the factual record in each case supports the agency's decision *even if* the court below correctly treated Respondents' testimony as credible. The Government also argues, in response to the

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second question presented in *Dai*—a question that is not presented in *Alcaraz*—that the court of appeals erred by failing to remand the case to the agency to re-adjudicate asylum eligibility and entitlement to withholding of removal. *Id.* at 35-38.

3. Given the distinct facts and dispositions in each case, this Court would benefit from a separate presentation on each question from each Respondent's counsel. *See* Stephen M. Shapiro *et al.*, Supreme Court Practice 777 (10th ed. 2013) ("Having more than one lawyer argue on a side is justifiable * * * when they represent different parties with different interests or positions."). Although Respondents are generally in agreement as to the relevant statutory question—whether a court of appeals can make its own *de novo* credibility determination when neither the immigration judge nor the BIA found the applicant non-credible—that question has become a relatively minor aspect of these cases, and occupies less than three pages of the Government's brief. These cases now turn far more on the specific facts of each Respondent's case, the disposition below, and the implications of the statutory rule for each Respondent's petition for review.

a. Because each case rests on a different evidentiary record and involves different factual findings, the application of the substantial-evidence standard to each case is different, as well. Much of the Government's brief is devoted to arguing that substantial evidence supports each of the two decisions under review, an argument that requires it to separately discuss the evidence presented in each case and explain why, in the Government's view, it supports the agency's decision. *See* Gov't Br. 6-14, 22-24, 35-38 (discussing the evidence in *Dai*); *id.* at 14-17, 24-25

(discussing the evidence in *Alcaraz*). Each Respondent, in turn, devotes substantial portions of his brief to rebutting these fact-intensive arguments, and explaining why, given the specific facts at issue, substantial evidence does *not* support the agency's decision in his case. *See* Dai Br. 11-19, 40-45; Alcaraz Br. 7-14, 40-49.

Moreover, the nature of each Respondent's substantial-evidence argument is different, and that difference necessarily informs the legal standard each finds appropriate. Dai argues that, because of his detailed testimony and corroborating evidence and the lack of conflicting evidence, the only permissible way to reject his asylum eligibility or entitlement to withholding was to find him non-credible—which the agency never did. Dai Br. 40-45. Alcaraz, by contrast, argues that because the agency did not find Alcaraz's testimony non-credible, it did not adequately explain why it chose to credit an account that "directly contradict[ed]" Alcaraz's version of events. Alcaraz Br. 43-45.

Given how important the specific facts of each case are, it would be extremely difficult for one attorney to represent both Respondents in the same oral argument. For one thing, while Respondents' arguments do not directly conflict, an attorney representing one Respondent would emphasize points that are not necessarily in the other Respondent's interest. For instance, an attorney representing Dai would likely emphasize the lack of conflicting record evidence. *E.g.*, Dai Br. 41-42 (taking no position on whether the agency's reasoning in *Alcaraz* was sufficient to justify its choice of one account over the other). An attorney representing Alcaraz, on the other hand, would emphasize the need for the agency to explain its reasons for crediting

one of two conflicting accounts. *See* Alcaraz Br. 22-24, 39-40, 43-45. Moreover, requiring one attorney to jump between the specific facts at issue in each case in response to questions would make argument more confusing than if the cases were separately presented.

Unsurprisingly, then, this Court routinely grants divided argument where two consolidated cases present distinct fact-intensive questions. *See, e.g.*, *Abbott* v. *Perez*, 138 S. Ct. 1544 (2018) (mem.) (granting divided argument in consolidated cases presenting different claims of racial gerrymandering); *Turner* v. *United States*, 137 S. Ct. 1248 (2017) (mem.) (granting divided argument in consolidated cases presenting distinct *Brady* claims); *Ziglar* v. *Abbasi*, 137 S. Ct. 615 (2017) (mem.) (granting divided argument in consolidated cases presenting distinct *Bivens* claims); *Kansas* v. *Gleason*, 135 S. Ct. 2917 (2015) (mem.) (granting divided argument in consolidated cases presenting different sentencing issues); *Rapanos* v. *United States*, 546 U.S. 1000 (2005) (mem.) (granting divided argument in consolidated cases presenting factually distinct positions concerning application of the Clean Water Act). Indeed, this Court granted divided argument in another case in which this Court consolidated two cases originating from separate removal proceedings, even though the factual differences there were far less important than here. *Holder* v. *Martinez Gutierrez*, 565 U.S. 1104 (2012) (mem.); *Holder* v. *Sawyers*, 565 U.S. 1104 (2012) (mem.).

b.   Divided argument is also appropriate because these consolidated cases present distinct but overlapping questions. In *Alcaraz*, the sole question presented

is whether the court of appeals erred by holding that it was not permitted to evaluate Alcaraz's credibility where the agency did not make an adverse credibility finding. *See* Alcaraz Pet. I. In *Dai*, by contrast, the Court also granted certiorari on a second question: whether the panel should have remanded the case to the agency after concluding that Dai's testimony could not be treated as non-credible. *See* Dai Pet. I.

Neither Respondent's attorney would be in a position to address both questions in a way that would be equitable to both Respondents. Alcaraz takes no position on the second question presented in *Dai*, and is likely to emphasize the court's decision to remand his case as a consideration supporting the reasonableness of the judgment below. *E.g.*, Alcaraz Br. 46-48 & n.9 (noting that the agency will have another opportunity to explain its decision on remand, and taking no position on whether the disposition in *Dai* was appropriate). Dai's attorney, by contrast, will argue both questions, and has no reason to emphasize the relevance of a remand in *Alcaraz*. This Court often grants divided argument where, as here, consolidated cases present overlapping but distinct questions that may cause parties to have different interests. *See, e.g.*, *Gleason*, 135 S. Ct. 2917 (granting divided argument where one of two consolidated cases presented a second question); *Turner*, 137 S. Ct. 1248 (granting divided argument where consolidated cases presented different but overlapping questions).

c. Given the different factual issues and dispositions below, Respondents unsurprisingly take somewhat different approaches to the legal question at issue. There is a dispute as to whether the court of appeals even applied the same rule in

each case: The Government contends that the panel in *Alcaraz* "expressly" applied a presumption of truthfulness, Gov't Br. 31, whereas the panel in *Dai* "applied such a rule in substance," *id.* at 26. Although each Respondent disputes those characterizations, their grounds for doing so differ, *compare* Dai Br. 38-39, *with* Alcaraz Br. 45-46, and Respondents have divergent interests in defending the different formulations used by the Ninth Circuit, *see* Dai Br. 39-40 (declining to defend the formulation used by the panel in *Alcaraz*).

Further, Respondents make distinct arguments in defending the rule that they both contend the court of appeals actually applied—that is, that a court of appeals may not find an applicant non-credible if the immigration judge and the BIA failed to make an adverse credibility finding. *Compare* Dai Br. 28-36, *with* Alcaraz Br. 17-37. This Court often grants divided argument where separately-counseled parties file separate briefs emphasizing different arguments in support of the same basic legal proposition. *See, e.g.*, *Fulton* v. *City of Philadelphia*, 141 S. Ct. 230 (2020) (mem.); *Kelly* v. *United States*, 140 S. Ct. 661 (2019) (mem.); *Rucho* v. *Common Cause*, 139 S. Ct. 1316 (2019) (mem.); *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 951 (2019) (mem.); *McDonald* v. *City of Chicago*, 559 U.S. 902 (2010) (mem.).

4. Divided argument is particularly appropriate here given the Court's decision to grant certiorari in both *Dai* and *Alcaraz*. Although the Government requested that the Court grant the petition in *Dai* and hold the petition in *Alcaraz*, this Court granted certiorari in both cases, suggesting that the Court understood the two cases to have important differences. Granting divided argument would ensure that the

interests of both Respondents are adequately represented and that any important distinctions between the cases can be explored at argument.

Respectfully submitted,

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