No. 19-1155

IN THE

Supreme Court of the United States

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,

v.

MING DAI,
Respondent.

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a court of appeals may decide in the first instance that an asylum applicant's testimony was not credible when neither the immigration judge nor the Board of Immigration Appeals found that the applicant's testimony lacked credibility.

2. Whether the court of appeals must remand to the agency to determine whether an applicant is eligible for asylum when the court of appeals has concluded that the evidence compels a finding of past persecution and the government never argued that country conditions changed either before the agency or the court of appeals panel.

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INTRODUCTION

Petitioner Ming Dai testified that, on July 13, 2009, at 7:30am, three Chinese family-planning officers and two police officers arrived at the home he shared with his wife, Li Qin, and their daughter. At that time, Qin was approximately four months pregnant with their second child. The family-planning officers insisted that Qin's pregnancy violated Chinese policy and that she must have an abortion. Qin refused, and Dai unsuccessfully sought to prevent the officers from taking Qin by force. The family-planning officers dragged Qin from the house, forced her to undergo an abortion, and inserted an IUD to prevent her from conceiving another child. The police officers beat Dai and detained him for ten days, largely depriving him of food, water, and sleep. After seeking treatment for his injuries, Dai returned home, where he found Qin crying. He fears that if he returns to China, he will be forcibly sterilized.

Dai submitted significant corroborating evidence. He introduced his medical records, which showed that, on July 23, 2009, he was treated for a dislocated shoulder and broken ribs. He introduced Qin's medical records, which showed that, on July 13, 2009, she underwent "[s]urgery" to "[t]erminate the gestation" and insert an "IUD." Dai also submitted the State Department's 2011 Human Rights Report, which discussed China's use of "physical coercion" to meet "birth limitation targets," including the "abortion of unauthorized pregnancies" and "sterilization." And he submitted a 2011 report from The Guardian describing how a woman had recently "died during a forced abortion on her seven-month foetus." Lawyers representing "victims of similar cases" explained that

this "happens everywhere in China," though the Chinese government attempts to "silence the lawyers, activists and individuals who try to complain."

Dai ultimately came to the United States and sought asylum and withholding of removal. These forms of relief protect those, like Dai, who fear returning home because they have "been persecuted for … resistance to a coercive population control program[]" or have "a well founded fear" of "involuntary sterilization." 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42). Thus, unless Dai lied or was mistaken, he is eligible for relief absent exceptions the government never invoked.

The government opposed Dai's applications largely by attacking his credibility, cross-examining Dai on his purported reluctance to disclose his wife and daughter's return to China to care for Qin's ailing father. The government introduced no evidence that Dai's testimony could be credible and yet *wrong*: It neither introduced evidence that conflicted with Dai's testimony nor disputed the prevalence of forced abortions and sterilizations in China. The question before the agency thus turned on Dai's credibility.

Under the Immigration and Nationality Act (INA), evaluating credibility to root out fraudulent claims is a job for immigration judges (IJs). The statute gives IJs significant authority to evaluate credibility, including based on "demeanor" and similar factors that can be evaluated *only* in immigration court. 8 U.S.C. § 1158(b)(1)(B)(iii). But when an IJ's decision rests on an adverse credibility finding, the IJ must make that finding "explicitly" or else credibility is "presum[ed]" before the Board of Immigration Appeals (BIA or Board). *Id.*

The IJ indisputably made no adverse credibility finding here. Instead, the IJ held that Dai "failed to meet his burden of proof" because Qin returned to China to care for her father and Dai was hesitant to disclose this fact to his asylum officer. *See* Pet. App. 169a-176a. The Board "adopt[ed] and affirm[ed]" this decision. Pet. App. 163a.

The court of appeals concluded that the agency's decision was not supported by substantial evidence and granted Dai's petition for review. The court held that it could not deny the petition based on an adverse credibility finding the agency never made. Pet. App. 12a-17a. The court then recognized that the agency was free to "weigh [Dai's] credible testimony along with other evidence." Pet. App. 19a (quoting 8 U.S.C. § 1158(b)(1)(B)(ii)). But, the court concluded, no reasonable adjudicator, considering the record as a whole, could conclude that Dai failed to establish his asylum eligibility or entitlement to withholding. Pet. App. 18a-24a.

In challenging that decision, the government presented two questions for this Court's review. The first is whether a court of appeals should treat an applicant's testimony as "credible and true" absent an adverse credibility finding by the agency. Pet. for Cert. I. There is little disagreement regarding that legal question. The government barely defends its position that a court of appeals can deny a petition for review based on an adverse credibility finding the agency never made; its two-page argument misreads the statute and conflicts with basic principles of administrative law. And Dai never sought a presumption of truth, nor did the court of appeals apply one. Thus, nothing about Dai's argument or the decision

below prevents an IJ from weighing credible testimony against other evidence in precisely the way the government describes (*e.g.*, at 32-33). The court below thus committed no legal error—it correctly treated Dai's testimony as credible but *not* necessarily true.

Having convinced this Court to grant certiorari using legal bait, the government's brief switches its focus to the facts, urging this Court to consider on its own whether substantial evidence supports the agency's denial of Dai's applications for relief. This fact-bound issue is not encompassed by the questions presented and is not the type of question this Court normally answers. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981). And, in any event, the government's argument lacks merit: It ignores Dai's detailed testimony and corroboration and fails to engage with the lower court's extensive explanation of why any reasonable adjudicator would find, viewing the record as a whole, that Dai is eligible for asylum and entitled to withholding.

The government is also wrong, in answering the second question presented, that the court of appeals was required to remand. Put simply, the panel had no reason to remand because the government identified nothing for the agency to do. The statute does not permit the agency to re-adjudicate credibility on a cold record, years after the initial hearing. And the government did not argue changed country conditions before the agency *or before the panel*. The government may now regret failing to raise that issue, but the idea that the panel erred by not remanding for the agency to address an argument the government never raised makes no sense.

STATEMENT

A. The Immigration and Nationality Act gives immigration judges both the authority and the responsibility to evaluate asylum applicants' credibility.

1. This case concerns Dai's eligibility for two forms of immigration relief: asylum under 8 U.S.C. § 1158 and 8 C.F.R. § 208.13 and withholding of removal under 8 U.S.C. § 1231(b)(3).

a. A noncitizen is eligible for asylum if she qualifies as a "refugee." 8 U.S.C. § 1158(b)(1)(A). The statute defines a "refugee" as anyone who is "unable or unwilling to avail himself or herself of the protection of [his or her native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42); *see also* 8 C.F.R. § 208.13(b)(1).

In 1996, Congress amended the INA to specify that those targeted by a "coercive population control program," or persecuted based on resistance to such a program, are "refugees." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, § 601, 110 Stat. 3009, 3009-689 (IIRIRA). The statute states:

> [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.

8 U.S.C. § 1101(a)(42).

The House Judiciary Committee Report on IIRIRA explains that this provision was intended to reverse BIA precedent limiting asylum eligibility for those persecuted as part of a coercive population-control program. H.R. Rep. No. 104-469, pt. I, at 173-174 (1996) (IIRIRA House Report). The Committee characterized that precedent as "unduly restrictive" because it "precludes from protection persons who have been submitted to undeniable and grotesque violations of fundamental human rights." *Id.* at 174. The Committee specifically identified China as a perpetrator of these violations, explaining that "some women with 'unauthorized' second or third pregnancies are subjected to involuntary abortions, often late in their pregnancies," and "[b]oth men and women who have met their 'quota' for children may be forcibly sterilized." *Id.* The Committee recognized that "credibility" may be an issue in these cases, but "[a]sylum officers and immigration judges are capable of making such judgments." *Id.*

If an asylum applicant establishes that she is a refugee due to past persecution, then she is entitled to asylum unless the government proves that country conditions have changed or that the applicant could relocate to another part of her country and avoid persecution. *See* 8 C.F.R. § 208.13(b)(1)(i), (ii).

b. The substantive requirements for withholding of removal are similar to those for asylum. A noncitizen is entitled to withholding of removal if her "life or freedom would be threatened in [the country to which she would be removed] … because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

2. In the REAL ID Act, Congress set forth a framework for immigration judges to determine whether noncitizens satisfy their burden of proof for asylum and withholding claims. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3), (c), 119 Stat. 303, 303-304. The statutory standards focus on the evidence an applicant needs to satisfy her burden of proof and the immigration judge's authority and responsibility to evaluate credibility.[1]

a. In addressing the nature of an applicant's burden and the role of corroborating evidence, the statute states that an applicant's testimony alone "may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii). In conducting this inquiry, "the trier of fact may weigh the credible testimony along with other evidence of record." *Id.* If the IJ decides that the applicant "should provide evidence that corroborates otherwise credible testimony," the applicant must provide such evidence

[1] These provisions are codified in the INA section governing asylum, but also apply to withholding. 8 U.S.C. § 1231(b)(3)(C).

"unless the applicant does not have the evidence and cannot" reasonably obtain it. *Id.*

This provision was intended to codify the BIA's earlier decision in *Matter of S-M-J-*, 21 I. & N. Dec. 722 (BIA 1997). *See* H.R. Rep. No. 109-72, at 166 (2005) (Conf. Rep.). That decision recognized that, where it is "reasonable to expect corroborating evidence," a noncitizen "should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant." *S-M-J-*, 21 I. & N. Dec. at 724-725. For instance, the Board suggested that noncitizens should provide, when available, both "general corroborating evidence, from a reliable source, of persecution of persons in circumstances similar to an applicant," as well as corroboration of "facts pertaining to the specifics of an applicant's claim," like "documentation of medical treatment." *Id.* at 725-726; *see also* Conf. Rep. 166.

b. The statute separately addresses an IJ's authority and responsibility to evaluate an applicant's credibility. Most importantly, the statute recognizes the IJ's unique role in evaluating credibility:

> 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 con-

> sistency 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.

8 U.S.C. § 1158(b)(1)(B)(iii).

As the Conference Report on the REAL ID Act explained, this provision was intended to allow the agency to "assess[] the credibility of asylum applicants" in order "to identify and reject fraudulent claims." Conf. Rep. 167. The Report explained that IJs are in a unique position to identify such claims, as "[a]n immigration judge alone" can observe a witness's "tone and demeanor," including "the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." *Id.* at 167-168.

In addition to channeling credibility determinations to IJs, the statute also requires that an adverse credibility finding be "explicitly made"; if it is not, credibility must be presumed for purposes of agency proceedings going forward. After setting forth the factors that an IJ can consider in a credibility determination, the statute states that, while "[t]here is no presumption of credibility," if "no adverse credibility determination is *explicitly* made, the applicant or witness shall have a rebuttable presumption of cred-

ibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added).

This statutory presumption is consistent with other provisions identifying credibility as an independent, preliminary inquiry. The statute authorizes IJs to "weigh the credible testimony along with other evidence of record," which implies that, by the time the IJ is weighing the evidence as a whole, she has already accepted as credible any testimony that she weighs. 8 U.S.C. § 1158(b)(1)(B)(ii). It similarly authorizes IJs to request "evidence that corroborates otherwise credible testimony," indicating that IJs assess credibility *before* considering the need for corroboration. *Id.* And the statute identifies credibility as a specific inquiry IJs should make, separate and apart from analyzing persuasiveness and sufficiency, in evaluating testimony. *Id.*

The statute's instruction that an IJ "explicitly" address credibility (when it is determinative) was no accident. "Congress expect[ed] that the trier of fact will describe those factors that form the basis of the trier's opinion[,] … even where the trier of fact bases a credibility determination in part or in whole on the demeanor of the applicant." Conf. Rep. 167. And the IJ's credibility finding "must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant." *Id.*

In sum, when the IJ intends to rely on an adverse credibility determination, that reliance must be "explicit[]." Otherwise, the Board "presum[es]" credibility and, unless it finds that presumption rebutted, reviews only whether the IJ permissibly "weigh[ed] the credible testimony along with other evidence of record." 8 U.S.C. § 1158(b)(1)(B)(ii), (iii).

3. If an asylum or withholding applicant is not satisfied with the agency's final decision, she can file a "petition for review" in the courts of appeals. 8 U.S.C. § 1252(a)(5). The court of appeals reviews the agency's factual findings for substantial evidence—in other words, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* § 1252(b)(4)(B). Importantly, though, the courts of appeals review only the "administrative findings of fact," *i.e.*, the factual findings *the agency actually made*. Under longstanding principles of administrative law, appellate courts cannot go beyond the issues addressed by the agency. *E.g.*, *INS v. Ventura*, 537 U.S. 12, 16 (2002); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

B. Ming Dai seeks asylum and withholding to avoid sterilization and other persecution by Chinese family-planning authorities.

Ming Dai, a native and citizen of China, entered the United States in 2012 and filed an application for asylum shortly thereafter. J.A. 140-155. An asylum officer denied Dai's application; the government initiated removal proceedings; and Dai conceded removability and sought asylum and withholding of removal. Pet. App. 5a-6a.[2] Before the IJ, Dai provided detailed testimony and corroborating evidence.

1. Dai testified that, as of 2009, he had been married for twenty years to Li Ping Qin, and the couple lived in Shanghai. J.A. 43-44. Dai and Qin

[2] The agency also denied Dai's application for relief under the Convention Against Torture, but Dai did not challenge that decision below. Pet. App. 6a, 26a n.13.

have a daughter, who was born in 2000. J.A. 45. In April 2009, during an annual medical exam provided by her employer, Qin discovered that she was pregnant again. J.A. 47-48. Dai and Qin were "very happy" about the pregnancy. J.A. 48-49. Dai and Qin believed that, despite China's one-child policy, they would be able to keep the child if they paid a fine, which they were willing to do to avoid having the child aborted. J.A. 49.

Dai and Qin were wrong. One month after Qin discovered she was pregnant, a "family planning officer" visited Qin at work and told her that she must abort her child. J.A. 51. Two months later, on July 13, 2009, three Chinese family-planning officers and two policemen came to Qin and Dai's house at 7:30 in the morning and insisted that Qin accompany them to the hospital to terminate her pregnancy. J.A. 51-52, 56. Qin was, at that point, at least four months pregnant.[3] Qin refused to go, and Dai attempted to stop the officers from taking her against her will. J.A. 54. The officers told Dai that Qin had to have the abortion as a matter of "Chinese policy" and Dai said "you can't take my wife away." J.A. 54-55. When Dai tried to "block" the officers, the two police officers pushed him to the ground, handcuffed him, and severely beat him, causing substantial injuries. J.A. 56-57. Dai, handcuffed, watched the family-planning officers grab Qin by her arms and drag her, crying, out of their house. J.A. 57-59.

[3] Qin did not find out she was pregnant until her annual medical exam at work in April 2009, and hence must have been at least one month pregnant at that time. J.A. 47-48.

After the family-planning officers took Qin away, the policemen took Dai to the Zha Bei detention center. J.A. 59. They ordered him to confess to fighting with the police, but he refused and insisted that he had the right to protect his family. J.A. 60. The officers detained Dai for ten days. They interrogated him in the middle of the night to prevent him from sleeping, largely deprived him of food and water, and subjected him to physical abuse that led to a dislocated arm and broken ribs. J.A. 60-68. Dai characterized his treatment as "mental[] torture." J.A. 62. Dai ultimately gave in to the officers' demands that he confess to resisting arrest and fighting with the officers, and they then released him. J.A. 67-68.

Upon release, Dai went to the hospital, where he was treated for injuries to his shoulder and arm. J.A. 68-76; *see also* J.A. 156. He then returned home, where he found Qin crying. She told him she had been taken to the Guang Hua hospital in the Chang Ning district. J.A. 77. There, a doctor forced her to take off her clothes and "get on the operating table." J.A. 76. The doctor anaesthetized her, and "[w]hen she woke up, the baby was gone." J.A. 76. The doctor also had "put an IUD inside her." J.A. 76; *see also* J.A. 162-166.

Dai and Qin faced other repercussions from Qin's unauthorized pregnancy and Dai's resistance. Dai was fired from his job and Qin was demoted and her salary was reduced by thirty percent. J.A. 77-79. Qin and Dai's supervisors told them that these actions were a direct result of the events described above. J.A. 78-79. Their daughter was denied admission to her preferred school, and her teacher told

Qin that this was because Dai and Qin had violated China's family-planning policies. J.A. 79-80.

On January 27, 2012, Dai came to the United States with Qin and their daughter. Qin and their daughter returned several weeks later to care for Qin's ailing father and so their daughter could return to school. J.A. 83, 95. Qin told Dai that police officers have come looking for him at their home several times since Qin returned to China. J.A. 85. Based on what Qin has told Dai about these visits, Dai believes that if he returns to China he will be forcibly sterilized. J.A. 85, 102.

2. Dai introduced corroborating evidence of both "the specific facts sought to be relied on by the applicant" and "general country conditions." *S-M-J-*, 21 I. & N. Dec. at 724-725.

a. To corroborate the specific facts to which he testified, Dai introduced his and Qin's hospital records. J.A. 81-82; *see also S-M-J-*, 21 I. & N. Dec. at 725-726 (identifying "documentation of medical treatment" as important corroborating evidence). Dai's record shows that, on July 23, 2009, he was treated at Shanghai City Dongfang Hospital for "trauma," "ach[ing]" to his "right shoulder," and ribs that "ached when [he] coughed." J.A. 156. The record shows that he was diagnosed with a dislocated shoulder and broken ribs, and that he was prescribed an anti-inflammatory medication and rest. J.A. 156. These records corroborate Dai's testimony that, after being arrested on July 13, he spent ten days detained, after which he immediately went to the hospital. *See* pp. 12-13, *supra*. They are also consistent with his description of his injuries. *See* p. 13, *supra*.

Qin's hospital record shows that, on July 13, 2009—the same day on which Dai testified that family-planning officers took Qin for a forced abortion—Qin was a patient at the "Integrated Hospital of Guanghua Chinese Western Medicines of Changning District of Shanghai City." J.A. 158-167. Her attending doctor at that hospital prescribed "terminate the gestation," and "uterine IUD placement." J.A. 165. The doctor reported that the "[s]urgery" to abort her child had been "safe and efficient" and suggested that Qin "[r]est for 14 [d]ays." J.A. 165-166.

b. Dai also submitted evidence of "persecution of persons in [similar] circumstances." *S-M-J-*, 21 I. & N. Dec. at 725-726.

He introduced an article published in The Guardian in October 2011 (two years after the events described above), titled "China's family planning policy enforced with heavy-handed tactics." J.A. 172-174. The article reports that "[a]uthoritarian measures such as sterilisation" are still "common" in China, and that there are also reports of "forced abortions." J.A. 172. It states that some provinces give women pregnancy tests monthly, and that if they "find someone is pregnant with a second child, [they] suggest abortion." J.A. 173. Other provinces use more "sinister methods ... to reach their family planning targets." J.A. 173. One woman "died during a forced abortion on her seven-month foetus" after "10 men turned up at [her] home, forced her to go to the hospital and pressed her fingerprint to an authorisation form for the abortion." J.A. 173. A Chinese lawyer who has "represented victims of similar cases" explained that this "happens everywhere in China." J.A. 173. Instead of "punishing murderously zealous

local officials," the article explains, the government "trie[s] to silence the lawyers, activists and individuals who try to complain," including by imprisoning and assaulting them. J.A. 174.

Dai also introduced the U.S. State Department's 2011 Human Rights Report on China. J.A. 127-139. Consistent with Dai's experience, the report states that "intense pressure to meet birth limitation targets set by government regulations resulted in instances of local family-planning officials using physical coercion to meet government goals," including "the mandatory use of birth control and the abortion of unauthorized pregnancies," and, in some instances, "one parent [being] pressured to undergo sterilization." J.A. 131-132. The report also states that "[t]he one-child limit was more strictly applied in urban areas," like the area in which Dai lived, "where only couples meeting certain conditions were permitted to have a second child (e.g., if each of the would-be parents was an only child)." J.A. 133. The report further describes, consistent with Dai's testimony that he and Qin suffered professional consequences from their resistance to the forced abortion, *see* pp. 13-14, *supra*, that "[t]hose who violated the child-limit policy … faced disciplinary measures," including "job loss or demotion." J.A. 134.

3. In opposing Dai's asylum and withholding claims, the government did not directly attack Dai's testimony and corroborating evidence about what happened in July 2009: It did not introduce *any* evidence that conflicted with Dai's account or suggest that Dai had given inconsistent accounts of what had happened. Nor did the government dispute that Dai's account was plausible in light of country condi-

tions in China in 2009 or argue that country conditions in China had changed. Instead, the government introduced the notes from Dai's asylum interview—which "are contemporaneous notes, not a verbatim summary of this proceeding," J.A. 112—and cross-examined Dai based on statements attributed to him by the asylum officer.

The government primarily focused on Dai's purported reluctance to disclose that Qin and their daughter had traveled to the United States with him in January 2012 before returning to China in February. Dai admitted that, when asked at his asylum interview to identify the countries to which his wife and daughter had traveled, he had identified Taiwan, Hong Kong, and Australia, but not the United States. J.A. 90. Dai testified that he had understood the question to be asking where they had traveled other than the United States because "you guys all have those records." J.A. 91; *see also* J.A. 103. The government then asked Dai whether he had told the asylum officer that he had not disclosed their travel to the United States because he was afraid the officer would ask why his wife and daughter had gone back. J.A. 91-92; *see also* J.A. 125. Dai responded "I don't think I said that." J.A. 93. After repeated questioning from the government, however, he testified that, because he had been "extremely nervous" at his asylum interview, he could not remember exactly what he had said and that "maybe" he had told the asylum officer that he was afraid the officer would ask why his wife and daughter returned to China. J.A. 93-94.

The government also cross-examined Dai on why his wife and daughter had, in fact, returned to China while he had not. Dai testified that, at the time his

wife and daughter returned to China, Dai and his family did not know that they could apply for asylum. J.A. 102. Specifically, Qin and their daughter returned to China in February 2012 but Dai did not learn about the possibility of asylum until March 2012. J.A. 99, 116.

Moreover, Dai explained, Qin and their daughter had strong short-term reasons to return to China. Qin's father was "in poor health" and had no one to take care of him because Qin's mother had passed away. J.A. 95. Their daughter needed to return to school in China, and so accompanied her mother. J.A. 95. Dai did not initially return with them in February because he had no job in China—he had been fired in retaliation for his resistance to Qin's forced abortion—and so he wanted to stay in the United States "a bit longer" with a friend. J.A. 103. It was in this context that Dai explained, consistent with his prior testimony, that the "real story" about his family's travel to the U.S. was that Qin and his daughter had "go[ne] home first" because Qin had a job in China while he did not. J.A. 94, 125. It was only in March—after Qin and their daughter had returned to China—that Dai learned about the possibility of asylum and decided to stay in the United States and apply for asylum, hoping to then bring Qin and their daughter back to avoid future persecution by Chinese family-planning authorities. J.A. 95, 116.

The government also pressed Dai on why he had allowed Qin and his daughter to face the possibility of "forced abortions in the future" or "forced IUDs" on returning to China. As to Qin, she faced little short-term risk of a "forced abortion[]" or "forced IUD[]"

given that she was returning to China *without her husband* and, as Dai explained, the "IUD was already inserted." J.A. 95. And his daughter was "so young"—only thirteen years old—that there was little, if any, short-term risk to her of either pregnancy (let alone *multiple* pregnancies) or forced IUD insertion. J.A. 95-96.

C. The IJ and the Board do not challenge Dai's credibility, but nevertheless deny his asylum and withholding applications.

Dai's testimony and corroborating evidence, if true, satisfy the statute's requirements for asylum eligibility and withholding of removal. A person who has either "been persecuted for … resistance to a coercive population control program" or who has "a well founded fear that he or she will be forced to undergo [involuntary sterilization]" is a "refugee" entitled to asylum absent changed country conditions or the reasonable opportunity to relocate. 8 U.S.C. § 1101(a)(42). Dai testified *both* that he has been persecuted for his resistance to Qin's forced abortion *and* that he has a well-founded fear of forced sterilization should he return to China. And the only evidence in the record about country conditions in China *corroborates* that testimony. Pp. 15-16, *supra.*

The IJ nevertheless denied Dai's applications for asylum and withholding of removal. Pet. App. 165a-177a. The IJ did not find that Dai's testimony was not credible. Instead, without even *acknowledging* Dai's significant corroborating evidence, the IJ concluded that Dai "failed to meet his burden of proving eligibility for asylum." Pet. App. 169a.

The IJ identified three bases for this decision. First, the "principal" basis for the decision was that Dai had "failed to spontaneously disclose that his wife and daughter came with him and then returned to China," and that Dai was "afraid of being asked about why she went back." Pet. App. 169a-174a.

Second, the IJ relied on Qin and their daughter's return to China, on its own, as a ground to deny Dai's application. Pet. App. 174a-175a. The IJ reasoned that because Qin has "an equal, or stronger, claim to asylum than [Dai]," the IJ could not understand why Qin would have returned while Dai remained. Pet. App. 175a. The IJ ignored the independent threat to Dai of forced sterilization. And he never explained what immediate threat Qin and their daughter faced given that their daughter was only thirteen years old and Qin was returning to China without her husband and with an IUD.

Third, the IJ briefly relied on Dai's statements concerning his economic interest in remaining in the United States. Pet. App. 174a.

The Board "adopt[ed] and affirm[ed]" the IJ's decision. Pet. App. 163. The Board added only that the IJ "need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim." Pet App. 164a.

D. The court of appeals grants Dai's petition for review.

1. The court of appeals granted Dai's petition for review. It recognized that it must deny a petition if "substantial evidence" supports the agency's findings, but it held that, on the facts of this case, the

record "compels the conclusion" that Dai is eligible for asylum and entitled to withholding. Pet. App. 8a, 25a-26a.

The court first recognized that neither the IJ nor the Board had made an "explicit[]" "adverse credibility determination." Pet. App. 12a-17a; 8 U.S.C. § 1158(b)(1)(B)(iii). Thus, the court held, it had to treat Dai's testimony as credible because a court of appeals cannot "deny a petition for review on a ground [on which] the BIA itself did not base its decision." Pet. App. 15a-16a (quotation marks omitted).

The court of appeals then spent most of its opinion considering whether a reasonable adjudicator could have concluded that Dai is ineligible for asylum and not entitled to withholding *without* rejecting Dai's testimony as non-credible. Pet. App. 18a-24a. In answering that question, the court explicitly recognized that the agency "is required to 'weigh the credible testimony along with other evidence of record.'" Pet. App. 19a (quoting 8 U.S.C. § 1158(b)(1)(B)(ii)). And it acknowledged that it must accept the agency's weighing of the evidence unless it "is not supported by substantial evidence." *Id.*

The court therefore considered whether substantial evidence supports any of the three reasons the agency gave for denying Dai's applications. First, the court held Qin and their daughter's return to China did not undermine Dai's testimony because the record established that the harms he and Qin suffered, and the threats they faced, were distinct. Qin had been subject to a forced abortion and the involuntary insertion of an IUD, whereas Dai had been

beaten, jailed, and fired from his job, and risked sterilization if he returned to China. Pet. App. 20a-22a. And whereas Qin already had an IUD inserted and had no immediate risk of further forced abortion, the police had come looking for Dai several times. Pet. App. 21a. Thus, Qin and their daughter's return in no way undermines Dai's own asylum claim. Pet. App. 22a.

Second, the court held that Dai's lack of forthrightness about his family's return to China could be relevant only to his credibility, and the agency did not make any adverse credibility finding. Pet. App. 22a. As the court explained, the statute's instruction that the agency "'weigh the *credible* testimony along with *other* evidence of record'" would make no sense if the agency could make no adverse credibility finding but then find testimony unpersuasive based on other evidence that is relevant *only* to credibility. Pet. App. 22a-23a (quoting 8 U.S.C. § 1158(b)(1)(B)(ii)) (emphasis in decision below).

Third, the court rejected the agency's reliance on Dai's interest in a "good environment" for his daughter and economic opportunities in the United States. As the court explained, longstanding precedent that the government did not (and does not) challenge establishes that "[a] valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States." Pet. App. 23a-24a.

In conclusion, the court held that the record "compels the conclusion that Dai's testimony satisfies his burden of proof." Pet. App. 24a-25a. Dai's showing of past persecution entitled him to a presumption

of a well-founded fear of future persecution. Pet. App. 25a. The government had not attempted to rebut that presumption with changed country conditions or other evidence—either before the agency or the panel. Pet. App. 25a. Thus, the court held, Dai is eligible for asylum, and the court remanded to the agency to consider whether to grant asylum as a matter of discretion. Pet. App. 25a.

The court also held that Dai had established entitlement to withholding of removal, for essentially the same reasons he had established eligibility for asylum. Pet. App. 25a-26a.

2. Judge Trott dissented. He would have held that the "rebuttable presumption of credibility" that the INA applies "on appeal," *see* 8 U.S.C. § 1158(b)(1)(B)(iii), applies on a petition for review to the court of appeals—an argument with which the government *disagrees*. *See* Pet. App. 76a-78a; Gov't Br. 29. Applying a rebuttable presumption of credibility, Judge Trott would have rejected Dai's testimony as not credible. Pet. App. 84a-108a.

3. The Ninth Circuit denied the government's petition for rehearing en banc. Pet. App. 110a. Judge Collins dissented, adopting Judge Trott's argument (with which, again, the government disagrees) that the statute's "rebuttable presumption" applies in a petition for review to the court of appeals. Pet. App. 140a-150a. Judge Callahan also dissented, accusing the panel of reinstating the Ninth Circuit's pre-REAL ID Act "deemed true rule." Pet. App. 135a-136a.

SUMMARY OF ARGUMENT

I. The first question presented asks whether the court of appeals applied the correct legal framework. Because it did, and because the government's additional fact-bound arguments are both outside the questions presented and incorrect, this Court should affirm.

A. The court of appeals correctly recognized that it cannot deny a petition for review based on an adverse credibility finding the agency never made. The statute gives immigration judges significant authority to make credibility determinations. 8 U.S.C. § 1158(b)(1)(B)(iii). But it also requires that any adverse credibility finding be "explicitly made" by the IJ; if it is not, then there is a "rebuttable presumption of credibility on appeal" to the Board. *Id.* This statutory presumption is consistent with other provisions that treat credibility as a preliminary inquiry, distinct from the overall weighing of the record. *Id.* § 1158(b)(1)(B)(ii), (iii).

Both the statute and basic principles of administrative law make clear that, if the agency does not make any adverse credibility finding, then the court of appeals cannot evaluate credibility on its own. The statute limits the courts of appeals' review to the "administrative record" and the "administrative findings of fact." 8 U.S.C. § 1252(b)(4)(A), (B). It does not authorize courts of appeals to make de novo findings regarding factual issues like credibility on which the agency did not rest its decision. That is consistent with the longstanding administrative-law principle that a federal court's review of agency action is limited to

"[t]he grounds upon which … the record discloses that [the agency's] action was based." *Chenery*, 318 U.S. at 87.

That administrative-law principle has particular force here. The statute's rebuttable presumption of credibility before the Board means that administrative silence as to credibility is equivalent to accepting the noncitizen's testimony *as credible*. Moreover, the statute makes clear that credibility determinations rest uniquely on factors like "demeanor" that can only be observed by the "trier of fact," making de novo credibility determinations by the courts of appeals particularly inappropriate.

The government's only response (at 29-31) is that the statute's statement that "[t]here is no presumption of credibility," 8 U.S.C. § 1158(b)(1)(B)(iii), authorizes federal appellate courts to address credibility de novo. Read in context, however, that statement applies only to the IJ. Indeed, the government's position would lead to a nonsensical result: The courts of appeals would have *more* authority to make credibility determinations *than the Board*.

Unable to seriously contest that courts of appeals cannot conduct de novo credibility inquiries, the government spends most of its brief attacking a presumption of *truth* that Dai never sought and the court of appeals did not apply. The government identifies nothing about Dai's position or the decision below that prevents the agency from weighing credible testimony against other evidence in precisely the way the government describes (*e.g.*, at 23-33).

B. Though the government asked this Court to review a purely legal question about substantial-

evidence review in the immigration context, Pet. for Cert. I, its brief goes beyond that question and argues that, even if the court of appeals applied the correct legal framework, substantial evidence supports the agency's decision. The Court did not grant certiorari on this fact-bound argument, which is unsurprising given that this Court only "rarely" revisits an appellate court's substantial-evidence analysis. *E.g.*, *Am. Textile Mfrs. Inst.*, 452 U.S. at 523.

If this Court nevertheless conducts its own substantial-evidence review, it should reject the government's argument. The agency gave three reasons for denying Dai's applications, and none makes any sense. The agency's reliance on Qin and their daughter's return to China ignores the important differences between their circumstances and Dai's. The agency did not even try to explain how Dai's purported reluctance to disclose his wife and daughter's return was relevant to anything other than credibility, and the agency never found any part of Dai's testimony non-credible. And the agency's reliance on Dai's economic interest in coming to the United States conflicts with the established principle that such interests can coexist with a well-founded fear of future persecution.

II. The court of appeals was not required to remand to give the agency a second shot at adjudicating Dai's eligibility for asylum or entitlement to withholding because there was nothing left for the agency to do.

The government primarily argues that this Court's decisions in *Ventura* and *Gonzales v. Thomas*, 547 U.S. 183 (2006), require a remand, but that is wrong. In each of those cases, the court of

appeals decided an issue that had been presented to the agency, but that the agency had not addressed. In this case, by contrast, the court of appeals addressed only the issue the agency *did* decide; the court *refused* to address issues that had not been presented to the agency. In other words, the court did precisely what *Ventura* and *Thomas* instruct.

There would also be nothing left for the agency to do on remand. The government claims the agency could reconsider Dai's credibility, but given the IJ's silence as to credibility and the resulting presumption of credibility on appeal, the agency has already resolved credibility *in Dai's favor*—the statute understandably does not give the agency a second shot at adjudicating credibility on remand, years after hearing the relevant testimony. The government also argues that a remand is necessary to address changed country conditions, but the government waived any changed-country-conditions argument by failing to make that argument before the agency or asking the panel for a remand on that issue. The panel cannot be faulted for failing to remand for the government to raise a new argument and introduce new evidence to support it.

ARGUMENT

I. The agency's decision denying Dai's asylum and withholding applications is not supported by substantial evidence.

As petitioner's brief in opposition explained (at 24-26), the parties' dispute is far more factual than legal. The government spends most of its brief tilting at windmills, arguing for the same standard of review that the court of appeals applied and attack-

ing a presumption of *truth* that Dai has never sought and that the court of appeals did not adopt. The government spends only a few pages (at 28-31) on the parties' actual legal dispute regarding adverse credibility findings, and its argument is as illogical as it is half-hearted.

That should be the end of the matter (at least as to the first question presented). The government asked this Court to grant review only on the applicable *legal* framework; its questions presented do not encompass second-guessing the court of appeals' *application* of the substantial-evidence standard to the facts of this case. That is no surprise, as this Court has made clear that it will only review appellate courts' substantial-evidence decisions in the "rare instances" when the court of appeals "misapprehended or grossly misapplied" the legal standard. *Am. Textile Mfrs. Inst.*, 452 U.S. at 523.

In its brief, however, the government goes beyond the questions presented and urges this Court to rule that substantial evidence *did*, in fact, support the agency's decision under the correct legal framework. Even if this Court takes up the government's belated invitation to address that fact-bound issue, the government's argument is wrong.

A. In applying substantial-evidence review, a court of appeals cannot deny a petition based on an adverse credibility finding that the agency never made.

The statute makes clear, consistent with basic administrative-law principles, that a court of appeals cannot make its own adverse credibility determina-

tion. Unable to seriously contest that point, the government focuses largely on a presumption of *truth* that is not at issue.

1. The REAL ID Act places credibility determinations squarely in the hands of immigration judges. Thus, if an IJ denies an asylum application because it finds the applicant's testimony non-credible, that finding is entitled to substantial deference both by the Board and a federal appellate court. The statute requires one thing, however: Any adverse credibility finding must be "explicitly made." 8 U.S.C. § 1158(b)(1)(B)(iii). If the IJ does not make an "explicit[]" adverse credibility finding, then credibility is presumed on appeal and, if that presumption is not overcome, should be taken as a given by the federal appellate court. *Id.*

a. The provisions governing asylum proceedings in immigration court direct IJs to explicitly address credibility when it is the basis for their decision. Perhaps most obviously, the statute includes an entire provision dedicated to an IJ's "[c]redibility determination." 8 U.S.C. § 1158(b)(1)(B)(iii). It explains precisely the factors the IJ can consider in evaluating an asylum applicant's credibility, including factors like "demeanor" that can only be assessed by the IJ. *Id.*

That provision then states that "if no adverse credibility determination is *explicitly* made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." *Id.* (emphasis added). This provision could hardly be clearer: If the IJ wants to deny an asylum application based on a finding that the applicant's testimony lacks credibility, she must do so explicitly; otherwise, credibility will

be presumed going forward. Given the drastic nature of an adverse credibility finding—which requires finding that the testimony at issue is not believable at all—requiring that it be made "explicitly" makes perfect sense.

Other statutory provisions also envision a credibility analysis that is separate from the IJ's authority to weigh the evidence as a whole. The statute states, for instance, that the IJ can "weigh the credible testimony along with other evidence of record," and that IJs can request "evidence that corroborates otherwise credible testimony." 8 U.S.C. § 1158(b)(1)(B)(ii). This language presumes that credibility is a distinct inquiry, and that the IJ accepts the relevant portions of the applicant's testimony as credible *before* requesting corroboration or weighing that testimony against other record evidence. The statute's instruction that an IJ should consider *both* whether testimony is "credible" *and* whether it is "persuasive" further supports the idea that credibility is an independent, threshold inquiry the IJ should undertake. *Id.*

These provisions are consistent with the primary role that credibility plays in immigration-court proceedings: rooting out fraudulent claims. The Conference Report on the REAL ID Act, for instance, explains that the statute was intended to allow IJs to "follow commonsense standards in assessing the credibility of asylum applicants better allowing them to identify and reject fraudulent claims." Conf. Rep. 167. Similarly, "Congress anticipates that triers of fact will rely on those aspects of demeanor that are indicative of truthfulness or deception." *Id.* at 168. The IIRIRA House Report, too, explains that IJs can

use credibility determinations to identify "coached," fraudulent claims of coercive family planning measures. IIRIRA House Report 174.

Given this role, the statute understandably sets out credibility as a preliminary inquiry, distinct from the overall weighing of the evidence. If the IJ deems the applicant's testimony to be non-credible—*i.e.*, if it deems the applicant to be not believable at all—then that is the end of the matter and no further consideration is needed. But, if not, then the IJ can weigh that credible testimony against other record evidence to determine whether the applicant has persuasively established her entitlement to relief.

b. The statute makes clear that the Board plays a far more limited role in the credibility analysis. As discussed above, pp. 29-30, *supra*, the statute provides that, if "no adverse credibility determination is explicitly made" by the IJ, then "the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii).

This rule follows naturally from the nature of the credibility inquiry, which focuses on factors like "demeanor" that cannot be evaluated on a cold record. 8 U.S.C. § 1158(b)(1)(B)(iii). The idea that credibility is "presum[ed]" if not explicitly addressed also makes sense given Congress's instruction that credibility is a distinct, preliminary inquiry; if an IJ has not "explicitly" addressed credibility, but has moved on to "weigh[ing] the *credible* testimony along with *other* evidence of record," 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added), the IJ necessarily accepted the relevant testimony as credible.

c. If an asylum applicant challenges the agency's denial in a petition for review, a federal appellate court reviews the agency's factual findings for substantial evidence—in other words, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Thus, if the agency explicitly rejects testimony as non-credible, that finding is entitled to significant deference. But if the agency did *not* make an adverse credibility finding—or any other specific factual finding—then the court of appeals cannot deny the petition on that ground. The federal court's review is limited to "the administrative record" and the "administrative findings of fact"; the court cannot go beyond that record to resolve factual issues the agency never addressed. *Id.* § 1252(b)(4)(A), (B).

This follows not only from the statute's text, but also from the fundamental principle of administrative law that a federal court's review of agency action is limited to "[t]he grounds upon which … the record discloses that [the agency's] action was based." *Chenery*, 318 U.S. at 87. The court may not "supply an alternative, unstated ground to support" the agency's decision. *Gulf States Utilities Co. v. Fed. Power Comm'n*, 411 U.S. 747, 764 (1973); *see also, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Pasternack v. NTSB*, 596 F.3d 836, 839 (D.C. Cir. 2010) (Kavanaugh, J.) (where "the ALJ made no credibility determination," the court could not uphold the agency's decision based on a lack of credibility). Indeed, this Court has emphasized, *in the immigration context*, that courts of appeals should not "conduct a *de novo* inquiry into the matter being reviewed … to reach its own conclusions," but

should only review factual issues the agency actually decided. *Ventura*, 537 U.S. at 16. The courts of appeals thus cannot deny a petition for review based on an adverse credibility finding that the agency did not make.[4]

That administrative-law principle has particular force in the context of adverse credibility determinations for two reasons. First, the statute instructs that, in the absence of any explicit adverse credibility finding, the agency has accepted the testimony *as credible*. After all, if the IJ does not make an "explicit[]" adverse credibility finding, but instead moves on to "weigh[ing] the credible testimony along with other evidence of record," credibility is "presum[ed]" on appeal to the Board. 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii). So, unless the Board finds that presumption rebutted, the agency has determined that the applicant's testimony is credible. Mueller & Kirkpatrick, 1 Federal Evidence § 3:7 (4th ed. 2019) ("Unanswered presumptions require a finding of the presumed fact[.]"); *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) ("To establish a 'presumption' is to say that a finding of the predicate fact … produces a required conclusion in the absence of explanation[.]." (internal quotation marks omitted)); *cf. also Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985) ("A rebuttable presumption … requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.").

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[4] Regardless whether cases like *Chenery* could be fairly characterized as creating a "rigid, 'categorical rule,'" as the government suggests (at 28-29), those cases are settled law and are perfectly compatible with the "case-by-case" analysis required by *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).

Second, as described, pp. 8-9, 29-31, *supra*, the statute makes clear that credibility determinations rest uniquely on factors like "demeanor" that can only be observed by the "trier of fact." This Court, too, has repeatedly recognized that only the factfinder who observes witnesses' testimony "can be aware of 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 also Wainwright v. Witt*, 469 U.S. 412, 428 (1985); *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). It would be particularly bizarre if a federal appellate court, in a petition for review, could independently evaluate credibility on a "cold record[]" when the IJ had accepted the applicant's credibility and moved on to "weigh[ing]" that "credible testimony" against other evidence. 8 U.S.C. § 1158(b)(1)(B)(ii); *Walton Mfg.*, 369 U.S. at 408.

The government's only response (at 29-31) is that the statute's statement that "[t]here is no presumption of credibility" displaces all of this and authorizes federal appellate courts to address credibility de novo. That is not what the statute says, and would lead to nonsensical results.

Read in context, the provision on which the government relies applies only to proceedings before the agency, and the phrase on which the government relies applies only *to the IJ*. The statute states:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on [specified factors]. There is no presumption of credibility, however, if no adverse credibility determination is

> explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. § 1158(b)(1)(B)(iii).

This provision thus has two parts. The first part—the first sentence and the first clause of the second sentence—describes proceedings before the "trier of fact" (*i.e.*, the IJ), and makes clear that the IJ has broad latitude in adjudicating credibility and need not presume it. The second part—starting with "however"—governs proceedings "on appeal" to the Board, and establishes that, absent an "explicit[]" adverse credibility finding by the IJ, the Board should presume the applicant's credibility.[5] No part of the provision has anything to do with federal appellate courts—petitions for review in those courts are governed by section 1252(b)(4)(B) and basic principles of administrative law.

The government makes two arguments as to why the "no presumption" clause nevertheless applies to federal courts of appeals, but both lack merit. First, the government claims (at 30) that if the "no presumption" clause applied only to IJs, then "there would have been no need" to create the rebuttable presumption before the Board. But the BIA's default rule in the absence of "explicit[]" IJ factfinding is to *remand*, not presume the fact in favor of the noncitizen. *See* 8 C.F.R. § 1003.1(d)(3)(iv). The rebuttable presumption thus creates a framework unique to adverse credibility determinations and was necessary

[5] The government agrees with Dai that this rebuttable presumption does *not* apply in a petition for review in the courts of appeals. Gov't Br. 29.

regardless whether the "no presumption" clause applies only to the IJ.

Second, the government notes (at 30) that several "credibility-related provisions" apply "expressly" to IJs. To the extent the government suggests that *all* such provisions "expressly" reference the IJ, that is wrong: Most obviously, the government agrees that the phrase "if no adverse credibility determination is explicitly made" in section 1158(b)(1)(B)(iii) refers only to IJs, even though it does not say so "expressly." Moreover, the government ignores the fact that the "no presumption" clause directly follows a sentence regarding IJs' broad latitude in making adverse credibility findings that *does* expressly reference the "trier of fact." Read in context, the express reference to the "trier of fact" in the first sentence applies to the "no presumption" clause, too.

In addition to conflicting with the statute's text, the government's interpretation would lead a nonsensical result: Federal appellate courts would have *more* authority to consider credibility on their own *than the Board*. On the government's view, while the Board must apply a presumption of credibility in the absence of an "explicit[]" adverse credibility determination by the IJ, the courts of appeals could address credibility de novo.

Thus, the clause on which the government relies does not displace the ordinary limits on judicial review of agency action—neither those that come from general principles of administrative law nor those that come specifically from the INA.

2. Unable to seriously contest that the court of appeals should not undertake its own credibility de-

termination, the government spends most of its brief attacking a straw man, insisting (*e.g.*, at 26-28) that the question is whether Dai's testimony was entitled to a presumption of *truth*. That is wrong. Dai has never sought a presumption of truth—either in law or in substance—and the court of appeals did not apply one. To the extent there is any ambiguity on this question, this Court should remand for the court of appeals to clarify whether its decision depends on such a presumption.

a. The government effectively concedes that nothing in Dai's position or the decision below *explicitly* requires that, in the absence of an IJ's adverse credibility finding, a court of appeals must presume that an asylum applicant's testimony is *true*. *See* Gov't Br. 31. That is no surprise. Dai never argued for any presumption of truth, and expressly disavowed it both in opposition to the government's rehearing petition and in its brief in opposition to certiorari. *See* Br. in Opp. 13-17; Reh'g Opp. 2-3, 8-10. Dai's argument is only that, on the facts of this case, no reasonable adjudicator could find him ineligible for asylum and not entitled to withholding without finding that his testimony lacked *credibility—i.e.*, without finding that Dai's testimony was not believable at all. The agency indisputably never made such a finding.

The court of appeals agreed with Dai's substantial-evidence argument and went no further. It repeatedly explained that its decision only accepted Dai testimony as *credible*, not true. *E.g.*, Pet. App. 2a, 16a, 17a, 19a, 24a. It explicitly recognized that the agency can weigh credible testimony against other evidence. Pet. App. 19a (citing 8 U.S.C.

§ 1158(b)(1)(B)(ii)). And it focused most of its analysis not on any presumption, but on whether any reasonable adjudicator could, after weighing *all* the evidence, conclude that Dai failed to meet his burden of proof. Pet. App. 18a-24a. This lengthy substantial-evidence analysis would have been *completely unnecessary* if the court had deemed Dai's testimony to be not just credible, but also *true*.

Given this, nothing about Dai's argument (or the decision below) prevents the agency from weighing conflicting, credible evidence in the ways in which the government describes (*e.g.*, at 32-33). Even without addressing credibility, the agency is free to weigh "two competing accounts that are both presumed to be credible," or to conclude that credible testimony is nevertheless *wrong* based on any number of factors, such as faulty memory, incorrect observation, mental illness, etc. The courts of appeals must accept the way the agency weighs this evidence unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). The problem here is simply that the agency's decision is *not* one that a "reasonable adjudicator" could have reached.

b. The government's claim (at 26) that Dai's argument rests on a presumption of truth "in substance" fares no better.

The government primarily complains (at 26) that the court of appeals *cited* pre-REAL ID Act cases that applied a presumption of truth. But the court did not cite those cases *for a presumption of truth*, and citing a case does not incorporate every statement within it.

The government also claims (at 13, 26) that the court of appeals presumed truth by "holding that any evidence that would cast doubt on the alien's credibility cannot be relied upon to find the alien's testimony not to be sufficiently persuasive to carry his burden of proof." That is not right. The court of appeals never held that the agency cannot consider evidence in its persuasiveness analysis just because it is also relevant to credibility. To the contrary, the court recognized that the agency *could* rely on Qin's return to China in its persuasiveness analysis even though a family member's return can be relevant *both* to credibility *and* to persuasiveness. *See Loho v. Mukasey*, 531 F.3d 1016, 1017-1019 (9th Cir. 2008). The court's rejection of the agency's reliance on Qin's return was entirely fact-specific; it applied no categorical rule at all. Pet App. 20a-22a.

What the court actually held, as relevant to this issue, was that evidence that is *only* relevant to credibility is not relevant in "weigh[ing] *credible* testimony along with other evidence." Pet. App. 22a-23a. That legal proposition should not be controversial; indeed, it is little more than a tautology. Moreover, it is consistent with the statute's clear instruction that credibility is its own inquiry, distinct from the weighing of the record as a whole.[6] Pp. 10, 30, *supra*.

c. Unlike the decision below, the unpublished memorandum disposition in the consolidated case, *Alcaraz-Enriquez*, did state that, absent an "explicit

[6] To the extent the government disagrees with the court of appeals' conclusion that Dai's reluctance to disclose Qin and their daughter's return to China is, in fact, relevant only to credibility, the government is wrong, for the reasons discussed at pp. 43-44, *infra*.

adverse credibility finding, the court must assume that the petitioner's factual contentions are true." *Alcaraz-Enriquez* Pet. App. 2a (internal quotation marks and alterations omitted). Dai does not defend that presumption of truth and takes no position on whether it was necessary to the outcome of that case. Notably, though, the panel in *Alcaraz-Enriquez* did not cite *Dai* as support for that proposition, and no such language appears anywhere in the decision in *this* case.

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The first question the government presented in this case is whether a court of appeals should treat an asylum applicant's testimony as "credible and true" absent an adverse credibility finding by the agency. Gov't Br. I. For the reasons explained above, the answer to that question is straightforward: The court cannot rest its decision on an adverse credibility finding the agency never made, but should not treat the applicant's testimony as true; instead, it should analyze whether the agency's actual factual findings are supported by substantial evidence. Because that is precisely what the court below did, this Court should affirm.

B. To the extent this Court conducts its own substantial-evidence review, it should hold that substantial evidence does not support the agency's decision.

The government argues not only that the court of appeals applied the wrong legal framework, but also that, even if the court of appeals applied the *right* framework, substantial evidence supports the agen-

cy's decision. *See* Gov't Br. 22-24, 31-33. That fact-bound argument falls outside the questions presented. *See* Pet. for Cert. I. Moreover, this Court has made clear that it will only conduct its own substantial-evidence review in the "rare instances" when the court of appeals "misapprehended or grossly misapplied" the legal standard. *Am. Textile Mfrs. Inst.*, 452 U.S. at 523. Given that the court of appeals applied the *correct* legal standard, there is no need for this Court to delve into the case- and fact-specific analysis on which the decision below ultimately rested. *See* Pet. App. 18a-24a.

If this Court nonetheless undertakes its own substantial-evidence review, it should reject the government's argument, which ignores most of the evidence and the court's reasoning below.

1. As explained in detail above, pp. 11-16, *supra*, the record only contains one account of what happened in July 2009. Dai testified that he was beaten and detained for resistance to the Chinese government's forced abortion of his second child, and that he fears sterilization if he returns to China. The only other evidence in the record *corroborates* Dai's testimony. And the government introduced *no* evidence that either conflicted with Dai's testimony or suggested that Dai's account was inconsistent with country conditions in China in 2009.

In that way, this case is very different from the consolidated *Alcaraz-Enriquez* case, in which the record included two directly conflicting accounts of the conduct that was the basis for Alcaraz-Enriquez's criminal conviction: Alcaraz-Enriquez's immigration court testimony and his victim's statement recounted in the probation officer's report. Nothing about Dai's

position (or the decision below) prevents an IJ from weighing such conflicting evidence without making an explicit adverse credibility finding. Dai takes no position on whether the agency in *Alcaraz-Enriquez* sufficiently justified its decision to accept the victim's statement to the probation officer over Alcaraz-Enriquez's testimony.

2. Despite the absence of any evidence that conflicts with Dai's testimony and corroboration, the agency denied Dai's applications for three reasons. Not one withstands even minimal scrutiny.

a. The agency and the government rely on Qin and their daughter's return to China as a reason to reject Dai's claim for relief. But, as the court of appeals explained, that reasoning makes no sense, because Dai was not similarly situated to Qin or their daughter. Pet. App. 20a-22a. Coercive family-planning measures were not an immediate threat to Qin or their daughter. Qin, after all, was returning to China *without her husband* and with an IUD already forcibly implanted. J.A. 95. And their daughter was only thirteen years old. J.A. 95-96. On top of the lack of immediate threat, there were strong reasons for Qin and their daughter to return: Qin's father was sick and alone and their daughter needed to return to school. J.A. 95.

Dai, on the other hand, *did* face immediate persecution if he returned. The uncontroverted evidence showed that Dai had been beaten up, detained, fired from his job, and forced to confess to interfering with the police; he reasonably feared being forcibly sterilized; and the police had come looking for him several times since Qin and their daughter's return. Pp. 12-16, *supra*.

Given all of this, the family's decision to have Qin and their daughter return to China while Dai remained in the United States is perfectly consistent with Dai's well-founded fear of future persecution. The family's decision allows Dai to avoid the very *immediate* threat of sterilization or other persecution upon his return, and allows Qin to avoid the more long-term threat of another forced abortion if she and Dai are able to have another child in the future. *Cf. Lin v. Ashcroft*, 385 F.3d 748, 756 (7th Cir. 2004) (holding that the return of a Chinese asylum applicant's daughter did not undermine the applicant's well-founded fear of a forced abortion).

The agency ignored all of this—instead, it cited cases involving completely different facts in which the return of the asylum applicant herself undermined her claim. Pet. App. 20a-22a, 174a-175a. And the government merely parrots the agency's decision with even *less* reasoning. Gov't Br. 22-24. There is simply no way to view Qin and their daughter's return as undermining Dai's claim.

b. The agency also concluded that Dai had not been "forthright[]" with the asylum officer about his wife and daughter's return to China. Pet. App. 19a. As an initial matter, it is far from clear Dai actually intended to mislead the asylum officer: He testified that he had misunderstood the question and that, because he had been "extremely nervous" at the interview, he was not sure what exactly he had said. J.A. 90-94, 103.

Even assuming, though, that substantial evidence supports a finding that Dai was not initially "forthright[]," the agency never explained why this matters. Dai never disputed that Qin and their daughter

did, in fact, go back to China. To the extent Dai hesitated to disclose their return out of concern that the agency might *think* that undermined his asylum claim—a concern that turned out to be prescient—that says nothing about whether Dai himself reasonably feared returning to China. At most, it might cast doubt on Dai's *overall* credibility. The agency, however, neither made an adverse credibility finding nor identified anything *other than credibility* to which Dai's purported lack of forthrightness was relevant. *See* Pet. App. 23a.

c. The Board also seemed to rely on Dai's statements suggesting that, in addition to his desire to avoid persecution, he wanted to stay in the United States for economic reasons—for instance, his statements that he wanted a "good environment for my child" and that "[m]y wife had a job and I didn't, and that is why I stayed here." Pet. App. 19a; *see also* J.A. 94. But most, if not all, asylum applicants have *some* economic motivation for coming to and staying in the United States, and it is thus settled law that "[a] valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States." Pet. App. 23a-24a; *see also, e.g.*, *Lin*, 385 F.3d at 756 ("quickly dispens[ing]" with the agency's reliance on asylum applicant's economic motivations because those motivations were consistent with her testimony that she "feared returning to China because her pregnancy violated the one-child policy"); *Lin v. Board of Immigration Appeals*, 200 Fed. App'x 49, 52 (2d Cir. 2006) ("[A]n additional economic motive for staying in the United States is not otherwise inconsistent with an asylum application."). Unsurprisingly, then, the government does

not dispute the court of appeals' conclusion that, if Dai reasonably feared persecution if he returns to China, any additional economic motivations have no bearing on his claim.

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Ultimately, nothing in the record casts doubt on Dai's fundamental account: He was detained and assaulted by Chinese authorities on account of his resistance to his wife's forced abortion, and he reasonably fears that, if he returns, he will be further persecuted, including by forced sterilization. On this record, the only way the agency could have found that Dai failed to meet his burden of proof was to conclude that Dai's testimony was not believable *at all*, and the agency simply never made such a finding. The court of appeals thus correctly granted Dai's petition for review.

II. On the record and posture of this case, the court of appeals was not required to remand.

The government argues (at 35-38) that even if the court of appeals correctly granted the petition for review, it should have remanded to the agency. That is wrong because there is nothing left for the agency to do. Unlike in this Court's prior cases, there is no issue the government presented to the agency that the agency has not addressed. The statute reasonably gives the agency only one opportunity to address credibility. And there was no reason for the panel to remand for the agency to address changed country conditions given that the government never argued that country conditions had changed—not to the agency *and not even to the panel*.

1. The government primarily argues (at 35-37) that this Court's decisions in *Ventura* and *Thomas* require a remand. But, unlike in this case, in those cases the court of appeals had granted the petitions for review by resolving, de novo, issues the agency *had never addressed*. It was only for that reason that this Court held that the courts had erred.

In *Ventura*, the agency held that an asylum applicant had failed to show past persecution and hence did not address the government's changed-country-conditions argument. 537 U.S. at 14-15. The court of appeals held that the record compelled a finding of past persecution and then rejected the government's changed-country-conditions argument in the first instance. *Id.* at 14-16. That, this Court held, was error: The court of appeals "is not generally empowered to conduct a *de novo* inquiry into a matter being reviewed," and so when there is a factual issue the agency did not address, the agency must address that issue in the first instance. *Id.* at 16-18. *Thomas* is similar. The court of appeals granted a petition for review by concluding that an asylum applicant's family was a particular social group and that the applicant had been persecuted on account of membership in that family even though the agency had never addressed either of those issues. The court of appeals, this Court again emphasized, was "not generally empowered to conduct a *de novo* inquiry into the matter being reviewed." 547 U.S. at 186.

This case is completely different. The court below did not resolve, de novo, any issue that the agency had not already decided. Instead, the court reviewed the *precise* question the agency *had* decided—whether Dai's abuse and detention for his opposition

to his wife's forced abortion gave him a well-founded fear of future sterilization and persecution—and concluded that the record compelled the opposite conclusion than the one the agency reached. *See, e.g.*, Pet. App. 24a. The court thus did precisely what *Ventura* and *Thomas* instruct: It reviewed the agency's decision and concluded that it "exceed[ed] the leeway that the law provides." *Thomas*, 547 U.S. at 186-187.

To the extent the government suggests that *Ventura* and *Thomas* require a remand *whenever* a court of appeals grants a petition for review, that is wrong. Nowhere did either decision hold, as the government claims (at 35), that a remand is warranted every time "a court of appeals determines that the findings of the IJ or the Board are insufficient to support the denial of relief or protection."[7]

2. The government identifies two issues it says the agency should have been allowed to address on remand. It is wrong on both accounts.

a. The government primarily asks (at 36-37) that the agency be given a second shot at adjudicating

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[7] Notably, courts of appeals regularly recognize that *Ventura* and *Thomas* do not prevent appellate courts from reversing, not remanding, when the record compels a conclusion contrary to the one the agency reached. *E.g.*, *Ghebremedhin v. Aschroft*, 392 F.3d 241, 243 (7th Cir. 2004); *Alvarez Lagos v. Barr*, 927 F.3d 236, 249-252 (4th Cir. 2019); *Castenada-Castillo v. Gonzales*, 488 F.3d 17, 25 (1st Cir. 2007); *Zhao v. Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005); *Yusupov v. Att'y Gen. of the United States*, 650 F.3d 968, 993 (3d Cir. 2011); *cf. also Watson v. Geren*, 569 F.3d 115, 129 n.5 (2d Cir. 2009) (neither *Ventura* nor *Thomas* required the district court to remand question of conscientious objector status to the army review board where the board "plainly denied [the] application for conscientious objector status").

Dai's credibility. But, given the way the statute is structured, the agency has *already* adjudicated credibility *in Dai's favor*. As explained, p. 33, *supra*, when an IJ does not "explicitly" address credibility and moves on to "weigh[ing] *credible* testimony along with *other* evidence of record," credibility is "presum[ed]" on appeal to the Board. 8 U.S.C. § 1158(b)(1)(B)(ii), (iii). And "[u]nanswered presumptions require a finding of the presumed fact." 1 Federal Evidence § 3:7. Thus, when, as here, the IJ does not address credibility and the Board does not find the resulting presumption of credibility rebutted, the agency has accepted the testimony *as credible* (though, of course, not necessarily true). Requiring a remand to re-adjudicate credibility would all but nullify the statute's presumption of credibility.

The fact that the statutory presumption gives the agency one chance to evaluate credibility is consistent with the nature of the credibility inquiry. As the statute makes clear, the credibility inquiry is uniquely dependent on observing the witness *in person*. *See* pp. 8-9, 29-31, *supra*; 8 U.S.C. § 1158(b)(1)(B)(iii); Conf. Rep. 167-168. The government's suggestion that the IJ get a second chance to address credibility now—nearly *eight years* after hearing Dai's testimony—makes little sense and understandably conflicts with the way credibility determinations work under the statute.

b. The government also claims that the court of appeals should have remanded to allow the government to make a changed-country-conditions argument.

The most obvious problem with this argument is that the government waived its opportunity to argue

changed country conditions. The government bears the burden of establishing changed country conditions, 8 C.F.R. § 208.13(b)(1)(i)(A), (b)(1)(ii), and yet it never raised that argument before the agency. Nor did the government suggest to the panel at the court of appeals that changed country conditions could warrant a remand. The first time the government even *hinted* at this issue was in its petition for rehearing en banc. Even then, the government's argument was a single sentence that was not specific to changed country conditions and did not cite *anything*—most notably, it did not cite the 2016 country report on which it now heavily relies, even though the report came out more than two years before the government filed its petition. *See* Pet. for Reh'g 15. The panel cannot be faulted for failing to do something the government never asked it to do.[8]

Moreover, any change in country conditions after the agency adjudication was complete is irrelevant. The court of appeals is limited to "the administrative record on which the order of removal is based," 8 U.S.C. § 1252(b)(4)(A), and that record contains *no* evidence of changed country conditions. To the contrary, the evidence in the record suggests that country conditions had *not* changed. *See* pp. 15-16, *supra* (describing 2011 Human Rights Report and 2011 news article). If the agency should have granted asylum and withholding *at that time on that record*, then the fact that country conditions changed *later*

[8] Unsurprisingly, courts regularly decline to remand for the government to present a changed-country-conditions argument it never made before the agency. *E.g.*, *Doe v. Att'y Gen. of the United States*, 956 F.3d 135, 150-151 (3d Cir. 2020); *Zhu v. Gonzales*, 493 F.3d 588, 602 (5th Cir. 2007).

cannot strip Dai of his right to relief that the agency should have granted in his initial proceeding.

Ventura is not to the contrary because, in *Ventura*, the government had introduced changed-country-conditions evidence before the agency, but the agency had not addressed it. *See Ventura*, 537 U.S. at 13, 17. Though *Ventura* suggested that the government could introduce new evidence on remand, 537 U.S. at 18, that was because the case needed to be remanded to the agency *anyway*. Here, by contrast, the government claims the panel was required to remand *solely* to allow the government to raise a new argument and introduce new evidence to support it—and that the panel was required to do so without *any* indication that the government even intended to make that argument. That is wrong.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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