Nos. 19-1155 and 19-1156

IN THE

# Supreme Court of the United States

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER
v.
MING DAI

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER
v.
CESAR ALCARAZ-ENRIQUEZ

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

## BRIEF FOR *AMICI CURIAE* THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF RESPONDENTS


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Regulations**



**Other Authorities**

## INTERESTS OF *AMICI*[1]

The American Immigration Lawyers Association (AILA) is a national organization comprised of more than 15,000 lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of justice pertaining to immigration, nationality, and naturalization; to promote reforms in the laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in representative capacity in nationality and immigration matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court, often on a *pro bono* basis. In this capacity, many of AILA's constituent lawyer-members represent foreign nationals who could be significantly affected by this case.

The National Immigrant Justice Center (NIJC) is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,500 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 12,000 individuals annually. This experience informs NIJC's

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

advocacy, litigation, and educational initiatives as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of *pro bono* attorneys who regularly represent immigrants.

## SUMMARY OF ARGUMENT

*Amici* agree with Respondents that the federal appellate courts have a statutory mandate to treat the testimony of asylum seekers as credible where neither an immigration judge nor the Board of Immigration Appeals (BIA) has made an explicit adverse credibility determination. This requirement arises from the text of the REAL ID Act, taken in conjunction with the pre-existing standard of review. *See* 8 U.S.C. § 1158(b)(1)(B)(iii); 8 U.S.C. § 1252(b)(4)(B).

*Amici* write separately to describe the concerns animating the REAL ID Act's provision on credibility and to explain the importance of this provision for the federal appellate courts. By adding this provision, Congress filled a gap in the Immigration and Nationality Act (INA) and addressed an issue that had repeatedly vexed the circuit courts. The government's interpretation would reinstate the disordered approach to review of asylum petitions that the REAL ID Act was designed to resolve.

The REAL ID Act sought to address a significant problem in the administration of immigration cases. Before the passage of the REAL ID Act in 2005, the federal appellate courts faced an overwhelming increase in their immigration dockets due to new

regulations streamlining the BIA review process. During this period, the courts repeatedly encountered cases where the immigration judges and the BIA had failed to make clear credibility findings despite seeming skeptical of the testimony of asylum seekers. These failures frustrated review by the circuit courts because, as one court put it, "[l]acking a BIA finding as to [petitioner's] credibility . . . we have no way of reviewing the Board's actual reasoning." *El-Sheikh* v. *Ashcroft*, 388 F.3d 643, 648 (8th Cir. 2004) (quotation marks and citation omitted). Yet, faced with this problem, the courts of appeals did *not* adopt the approach now urged by the government. They did not scour the record in search of ways to justify shoddy analysis by the immigration judges or the BIA. Instead, some circuits simply remanded with instructions to the BIA to make explicit determinations on credibility, while even more circuits — including the Ninth — reviewed petitions with a presumption of credibility.

The REAL ID Act endorsed rather than abrogated the practice of presuming credibility. The Act provides that "[t]here is no presumption of credibility," but "if no adverse credibility determination is explicitly made," then "the applicant or witness shall have a rebuttable presumption of credibility on appeal."[2] This provision established a

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[2] 8 U.S.C. § 1158(b)(1)(B)(iii) codifies this standard with respect to asylum seekers. The REAL ID Act also established the same standard in the context of withholding of removal — a form of relief related to asylum but with various differences, including a higher standard of proof. *See* 8 U.S.C. § 1229a(c)(4)(C), § 1231(b)(3)(C). While *amici* focus in this brief on the more prevalent context of asylum petitions, the same analysis would apply to petitions for withholding of removal.

presumption of credibility before the BIA where the immigration judge failed to make an explicit finding otherwise. Although this provision made no mention of further review, its effect was to establish a presumption that, unless rebutted, would carry forward as a finding of fact for purposes of substantial evidence review by the federal appellate courts. *See* 8 U.S.C. § 1252(b)(4)(B) (establishing this standard of review). In other words, and as indicated by contemporary evidence, the REAL ID Act had the effect of codifying the (already widespread) practice whereby appellate courts presumed asylum seekers' credibility when neither the immigration judges nor the BIA made express adverse credibility determinations.

The government's reading threatens to dismantle the properly functioning system of administrative review that the REAL ID Act has helped to establish. The government offers a contorted reading of the statute that would treat the phrase "[t]here is no presumption of credibility" as applicable not only to the immigration judges but also to the federal appellate courts. This interpretation wreaks havoc on ordinary principles of administrative review because it places federal appellate courts in the same posture as immigration judges. It ignores the language preceding this phrase, which makes clear that the phrase is directed to the "trier of fact." *See* 8 U.S.C. § 1158(b)(1)(B)(iii). And it would unduly complicate judicial review of asylum decisions — exactly the *opposite* of what Congress intended. This Court should reject this approach in favor of the straightforward and sensible interpretation urged by Respondents.

## ARGUMENT

### I. IN THE YEARS PRECEDING THE REAL ID ACT, THE FEDERAL APPELLATE COURTS STRUGGLED TO REVIEW ASYLUM DECISIONS THAT LACKED CREDIBILITY FINDINGS

In the years immediately prior to the REAL ID Act, asylum adjudications were plagued by case backlogs, a glut of petitions before federal appellate courts, and problematic decisions by immigration judges that resulted in unprecedented remand rates following judicial review. Among other challenges, the federal appellate courts found themselves "left in the dark" in the absence of "clean determinations of credibility" by immigration judges or the BIA. *Iao* v. *Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005). In response to this difficulty, courts uniformly refused to adopt the approach now urged by the government – *i.e.*, to scour the record for some basis on which it would have been "possible" for the BIA to reach the outcome it did. *See* Pet. Br. 22. (quotation marks and citation omitted). Instead, in cases where credibility was crucial, the courts either presumed credibility or remanded for the BIA to address the issue.

#### A. The Federal Appellate Courts Reviewed a Flood of Problematic Asylum Denials after the "Streamlining" of the BIA Review Process in 2002

Beginning around 2002, the federal appellate courts saw massive increases in their immigration dockets. Testifying before the Senate Judiciary Committee several years later, Chief Judge John

Walker of the Second Circuit recalled how "[w]hat we thought was a one-time bubble" as the BIA cleared its backlog instead "turned into a steady flow of cases" at "the rate of about 2,500 cases per year" in his circuit. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2006) [hereinafter "*Senate Hearing*"] (testimony of John M. Walker, Jr., C.J., United States Court of Appeals for the Second Circuit). "[M]ost of these" cases, he observed, "raise asylum issues." *Id.*

This increase followed regulatory changes to the BIA's case management process. In reforms resulting in a final rule published in 2002, the Department of Justice "streamlined" BIA review through a series of structural changes. *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54878 (Aug. 26, 2002). These reforms emphasized that the BIA was to act "as an appellate body" and "not to serve as a second-tier trier of fact." *Id.* at 54880; *see also* 8 CFR § 1003.1(d)(1) (2020). The rule authorized BIA decisions by a single Board member, replacing adjudication by three-member panels; it approved the use of "affirmance[s] without opinion," whereby the BIA could uphold an immigration judge's decision with a one-sentence summary order; and it removed the power of the BIA to engage in *de novo* review of an immigration judge's findings of fact, including "findings as to the credibility of testimony," except to determine whether such findings were clearly erroneous. *Id.* at 54879–81, 54902.

In his testimony, Chief Judge Walker attributed much of his circuit's rising case load to these "streamlining decisions," remarking that "the Court of Appeals becomes the first effective review of the

immigration judge's decision." *Senate Hearing* at 16 (testimony of Walker, C.J.). He noted that his circuit had a "higher [than] expected number of cases being remanded" to the BIA. *Senate Hearing* at 5 (testimony of Walker, C.J.). Chief Judge Walker's critical assessment found common refrain among circuit court judges who, amidst the explosion in their immigration dockets, were unsettled at the poor quality of asylum decisions under their review. Judges expressed "extreme discomfiture" with the approach of certain immigration judges to factfinding. *Abdulrahman* v. *Ashcroft*, 330 F.3d 587, 600 (3d Cir. 2003) (Becker, J., in a concurring opinion joined by Judges Scirica and Shadur). Judge Richard Posner described "a pattern of serious misapplications by the board and the immigration judges of elementary principles of adjudication" in asylum cases. *Niam* v. *Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (internal citations omitted).[3]

Few issues loomed larger for the circuit courts than those related to credibility. Determinations regarding credibility are "findings of fact" for purposes of the substantial evidence standard of review. *See* 8 U.S.C. § 1252(b)(4)(B) (providing that

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[3] Judge Posner later calculated that the Seventh Circuit reversed the BIA in whole or in part in a "staggering" forty percent of the 136 petitions for review of BIA decisions on the merits that it heard between September 2004 and September 2005. *Benslimane* v. *Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) ("This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.").

"administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"); *see also* 8 C.F.R. § 1003.1(d)(3)(i) (2020) (providing that "findings as to the credibility of testimony" constitute "[f]acts determined by the immigration judge"). Because credibility determinations are often dispositive in asylum cases, numerous cases that reached the federal appellate courts after the BIA streamlining involved matters of credibility. *Senate Hearing* at 22 (testimony of Walker, C.J.); *see also* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 585, 608–09 (2013) ("Credibility determinations, in connection with the related factual findings, play a decisive role in many asylum cases.").

Many of these cases addressed whether explicit adverse credibility determinations by immigration judges were supported by substantial evidence. Contrary to the government's present suggestion that substantial evidence review in immigration cases is equivalent to the reasonable jury standard, *see* Pet. Br. 22, the federal appellate courts held the immigration judges and the BIA to the usual rule that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted [be] clearly disclosed and adequately sustained." *SEC* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943). The circuit courts required the immigration judges or the BIA to put forth "specific, cogent reason[s]" for adverse credibility determinations, *see, e.g., Elzour* v. *Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004) (Ebel, J.), although they were not necessarily uniform as to what kinds of

reasons satisfied this standard.[4] This practice promoted deference to the agency's process of decision-making; the circuit courts made clear that "our review is confined to the reasoning given by the IJ" or the BIA "and we will not independently search the record for alternative bases to affirm." *Id.* (citing *Chenery Corp.,* 318 U.S. at 95). When the circuit courts found that the immigration judge or BIA based an adverse credibility determination on insufficient grounds, they remanded rather than impermissibly "undertak[ing the] task" of "reconsider[ing] and reweigh[ing] the facts" in light of a determination that upsets "the balancing of facts and evidence." *Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 534 (3d Cir. 2004) (Alito, J.).

Other cases raised a different issue with respect to credibility – namely, how were the federal appellate courts to review agency decisions that failed to make credibility findings in the first place?

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[4] For other cases requiring "specific, cogent reason[s]" for adverse credibility findings, *see, e.g.*, *Gailius* v. *INS*, 147 F.3d 34, 47 (1st Cir. 1998); *Zhang* v. *INS,* 386 F.3d 66, 74 (2d Cir. 2004); *Dia* v. *Ashcroft*, 353 F.3d 228, 249 (3d Cir. 2003); *Zhang* v. *Gonzales*, 432 F.3d 339, 344 (5th Cir. 2005); *Kllokoqi* v. *Gonzales*, 439 F.3d 336, 341 (7th Cir. 2005); *Aden* v. *Ashcroft*, 396 F.3d 966, 968 (8th Cir. 2005); *Shire* v. *Ashcroft*, 388 F.3d 1288, 1295 (9th Cir. 2004); *Elzour* v. *Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004); *Forgue* v. *Att'y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005).

### B. Where There Were No Credibility Findings by the Immigration Judges or the BIA, the Federal Appellate Courts Either Presumed Credibility or Remanded for Credibility Determinations

The federal appellate courts found it exceptionally challenging to review decisions in which the immigration judges and the BIA had failed to make credibility findings. As Judge James Loken of the Eighth Circuit posed the problem: "[l]acking a BIA finding as to [petitioner's] credibility . . . we have no way of reviewing the Board's actual reasoning." *El-Sheikh*, 388 F.3d at 648 (internal quotation and citation omitted). For "[w]hen an immigration judge says not that he believes the asylum seeker or he disbelieves her but instead that she hasn't carried her burden of proof . . . the reviewing court is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason." *Iao*, 400 F.3d at 534.

The government argues that the absence of credibility determinations by the immigration judges and the BIA poses no problem for the federal appellate courts — *i.e.*, that the courts can elide the issue simply by applying the substantial evidence standard. *See* Pet. Br. at 20–25. This assertion mischaracterizes the substantial evidence standard and disregards the years of frustration the federal appellate courts experienced prior to the REAL ID Act. As to the substantial evidence standard, the government overlooks the fundamental requirement that "the grounds upon which the administrative agency acted be clearly disclosed and adequately

sustained." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Chenery Corp.*, 318 U.S. at 94); *see also id.* at 2578 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.") (Thomas, J., concurring in part and dissenting in part) (quoting *Chenery Corp.*, 318 U.S. at 87).

The federal appellate courts understood what the government apparently does not: *there is no good way to review an agency's "findings of fact" when the agency has not actually made findings of fact.* In the absence of findings of fact from the immigration judges or the BIA as to credibility, the reviewing courts faced a "yawning void." *Niam*, 354 F.3d at 658. They could not identify the reasoning underlying asylum denials in cases where the applicant's testimony, if believed, would justify a grant of asylum.

Faced with such situations, the circuit courts had some variation in how they responded, but they were uniform in declining to affirm the petitions for review where credibility was a material issue. One approach widely adopted by the circuit courts was to presume credibility in the absence of any adverse credibility finding by the BIA or the immigration judge. The Ninth Circuit followed this method, and cases from four other circuits did the same, although sometimes speaking in terms of truth rather than credibility.[5]

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[5] *See, e.g., Lusingo* v. *Gonzales*, 420 F.3d 193, 197 n.5 (3d Cir. 2005) ("There was no finding of adverse credibility by the IJ with respect to [the asylum seeker's] testimony at the removal hearing. Accordingly, we presume its veracity."); *Yan Dan Li* v. *Gonzales*, 222 F. App'x 318, 322 (4th Cir. 2007) (similar); *Emelkin* v. *Ashcroft*, 97 F. App'x 27, 29 (6th Cir. 2004) (similar); *Mejia* v. *Att'y Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) (similar).

*See* Alcaraz-Enriquez Resp. Br. 37–38 (describing how the circuit courts sometimes used "credibility" and "truth" interchangeably before the REAL ID Act). In *Navas* v. *INS*, for example, the court assumed that the asylum-seeker's testimony was accurate "given the absence of an adverse credibility finding by the BIA." 217 F.3d 646, 657 (9th Cir. 2000). The asylum seeker had testified that his aunt had been murdered, his mother beaten, and he himself threatened because of his connection to a party opposed to the government, but the BIA had found that these experiences did not amount to political persecution. *Id.* at 652–54. Concluding that the BIA erred in failing to find persecution due at least in part to political opinion, the court granted the petition for review. *Id.* at 661, 663. Indeed, in this particular case the court found that the asylum-seeker's entitlement to relief was so clear as to establish statutory entitlement to asylum, and it remanded for the exercise of the Attorney General's discretion. *Id.* at 662–63.

Another approach taken by circuit courts in the absence of credibility findings below was to remand with an explicit demand for such findings in cases where the issue could be determinative. The Tenth Circuit and several others employed this approach.[6]

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[6] *See Diallo* v. *Ashcroft*, 381 F.3d 687, 700–01 (7th Cir. 2004) (holding that remand was necessary because the immigration judge made no adverse credibility determination but also continuously questioned the asylum seeker's credibility); *see also Ci Pan* v. *Att'y Gen.*, 449 F.3d 408, 412 (2d Cir. 2006) (similar). The Eighth Circuit sometimes remanded for credibility determinations and sometimes reviewed with an assumption of credibility. *Compare El-Sheikh*, 388 F.3d at 648 (remanding when the BIA failed to make a credibility finding), *with Yang* v.

As the Tenth Circuit explained, "[w]here doubts have been raised as to the credibility of the applicant by either the Immigration Judge or the BIA, but the BIA makes no finding with regard to credibility, courts have held that the proper procedure is to remand to the BIA for a credibility determination." *Krastev* v. *INS*, 292 F.3d 1268, 1279 (2002). The court observed that "[i]f immigration judges and the Board evaluate credibility in each case, remand will not be necessary and further delays in the processing of asylum claims can be avoided." *Id.* (internal quotation and citation omitted). These courts refused to "engage in an independent evaluation of the cold record or ask [themselves] whether, if [they] were sitting as fact-finders in the first instance, [they] would credit or discredit an applicant's testimony." *Ci Pan* v. *Att'y Gen.*, 449 F.3d 408, 411 (2d Cir. 2006) (quotation and citation marks omitted).

Some decisions drew from both approaches. In *Li* v. *Attorney General*, for example, the Third Circuit reviewed the BIA's denial of asylum to a Chinese citizen whose claim for persecution rested on two claims: that he would be beaten if he and his wife had another child and that he had lost his job because of the birth of this child. 400 F.3d 157, 160 (2005) (Becker, J.). The BIA had not addressed credibility, although it had assumed it for purposes of analyzing whether the claims rose to the level of persecution. *See id.* at 161. In reviewing the case, the Third Circuit emphasized that "where the BIA makes no findings on the credibility issue, we must proceed as if [petitioner's] testimony were credible" and then

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*Gonzales*, 413 F.3d 757, 759–60 (8th Cir. 2005) (appearing to assume credibility of testimony when neither the immigration judge nor the BIA made an adverse credibility finding).

"determine whether the BIA's decision is supported by substantial evidence." *Id.* at 163 (internal quotation and citation omitted). By assuming credibility, the court could cleanly determine whether or not the substantial evidence standard was satisfied. The court granted the petition for review and remanded for the BIA to address credibility, concluding — under facts considerably less compelling than those presented by Mr. Dai — that the asylum-seeker had adequately established persecution if his testimony were credible. *Id.* at 170.

Only the First Circuit had case law even modestly at odds with these various approaches. At the certiorari stage, the government cited *Kho* v. *Keisler* in claiming that the federal appellate courts could review petitions on the merits without addressing credibility. *Barr* v. *Dai* Pet. for Cert. 24, (citing 505 F.3d 50, 56 (1st Cir. 2007) (applying the law as it predated the REAL ID Act in upholding a BIA determination)). But *Kho* itself recognized that a reviewing court could remand "[i]f, in the absence of a credibility finding by the Immigration Judge, a reviewing court determines that such a finding is necessary for effective review of the case." 505 F.3d at 56. Indeed, the First Circuit did exactly this in a pre-REAL ID Act case in which it concluded that the petitioner's claim of asylum as a Coptic Christian turned on the credibility of his testimony. As Judge Sandra Lynch explained,

> the IJ's decision *cannot be upheld on credibility grounds because here too the IJ has not made any finding*. It may be that the IJ believed [the petitioner] not to be credible, which was the conclusion of the initial interviewing officer. If so, the IJ neither made

> such a finding, nor explained the basis in evidence for such a finding, both of which are basic errors. [T]he IJ *must*, if he or she chooses to reject [petitioner's] testimony as lacking credibility, offer a specific, cogent reason for [the IJ's] disbelief. While we defer to the IJ on credibility questions, that deference is expressly conditioned on support in the record, as evidenced by specific findings.

*El Moraghy* v. *Ashcroft*, 331 F.3d 195, 205 (1st Cir. 2003) (alterations in original) (emphasis added) (quotations and citations omitted). The First Circuit, like the rest of the circuits, recognized the difficulty of reviewing immigration judge and BIA decisions where they had failed to make credibility determinations.

In short, leading up to the enactment of the REAL ID Act, the circuit courts grappled with how to conduct review in the absence of clear credibility determinations at the administrative level. Without such determinations, in cases where credibility was material, the "grounds upon which the administrative agency acted" were *not* "clearly disclosed and adequately sustained" and thus failed to satisfy review for substantial evidence. *See Chenery Corp.*, 318 U.S. at 94. The practice employed by a plurality of circuits of presuming credibility provided a workable solution to this dilemma — one which Congress would cement into a statutory mandate.

## II. BY ESTABLISHING A PRESUMPTION OF CREDIBILITY ON APPEAL IN THE ABSENCE OF ADVERSE CREDIBILITY DETERMINATIONS, THE REAL ID ACT RESOLVED THE PROBLEM PREVIOUSLY FACED BY THE FEDERAL APPELLATE COURTS

The REAL ID Act clarified the roles of immigration judges, the BIA, and the federal appellate courts regarding credibility determinations. Read in conjunction with the substantial evidence standard, it addressed the problem created when the immigration judges fail to make credibility findings. After the REAL ID Act, circuit courts had a statutory mandate to presume credibility where neither the immigration judges nor the BIA made explicit credibility findings.

As initially drafted, the relevant subsection of the REAL ID Act sought only to define the scope of discretion that the immigration judges possess to make credibility determinations. In particular, Congress specified that the immigration judges may take minor inconsistencies in testimony into account in making adverse credibility findings, thus resolving a matter of some variation among the circuit courts.[7]

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[7] *Compare Gao* v. *Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (noting inconsistencies must go to the "heart of the asylum claim" to justify an adverse credibility finding) (citation omitted), *with Li* v. *Att'y Gen.*, 194 F. App'x 886, 887 (11th Cir. 2006) ("While some circuits have required the adverse credibility finding to go to the heart of the asylum claim, we have never adopted that test.") (citations omitted). The REAL ID Act also provided in an adjacent provision that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if . . . the applicant's testimony

To this end, the enacted law contained the following language:

> (iii) CREDIBILITY DETERMINATION.—Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on [various enumerated factors and considerations] without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

REAL ID Act, Pub. L. No. 109-13 § 101, 119 Stat. 231, 303 (2005), *codified at* 8 U.S.C. § 1158(b)(1)(B)(iii).

When first introduced, the bill made no mention of a presumption of credibility. H.R. 418, 109th Congress (as introduced to House, Jan. 26, 2005). Later versions of the bill added an additional sentence to the end: "There is no presumption of credibility." H.R. 1268, 109th Congress (as engrossed in House, March 16, 2005). Then, during reconciliation shortly before the Act's passage, the conference committee added a clause to this sentence stating that credibility should be presumed on appeal unless an adverse credibility determination is made. *See* H. Rep. No. 109-72, at 73–74 (2005) (Conf. Rep.). Combined, the crucial language reads:

> 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.

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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) (providing further guidance about the role of corroborating evidence).

REAL ID Act, § 101, 119 Stat. at 303 (2005), *codified at* 8 U.S.C. § 1158(b)(1)(B)(iii).

This sentence plainly provides that where an immigration judge fails to make an "explicit[] . . . adverse credibility determination," credibility is presumed on appeal unless rebutted. 8 U.S.C. § 1158(b)(1)(B)(iii); *see also* H. Rep. No. 109-72, at 168 (reiterating this statutory language without further explanation). It is common ground among the parties to this case that "on appeal" means "before the BIA." Pet. Br. 10; Dai Resp. Br. 35 n. 5; Alcaraz-Enriquez Resp. Br. 36 n. 5. But what happens on a petition for review if the immigration judge has not made an explicit credibility finding *and* the BIA has not found the presumption of credibility rebutted?

*Amici* agree with Respondents that the simplest, best, and indeed *only* plausible conclusion is that the federal appellate court must also treat the applicant's testimony as credible. This follows naturally from the substantial evidence standard of review. If the BIA finds the presumption of credibility rebutted on appeal, then its own adverse credibility determination becomes a finding reviewable under the substantial evidence standard. *See* 8 U.S.C. § 1252(b)(4)(B) (providing that findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). If the BIA *does not* find the presumption of credibility rebutted on appeal, then the "presumption ripens into a holding," *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 659 (2001). This is the nature of presumptions. *See* 21B Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5126 (2d ed. 2020 update) ("Congress creates presumptions and appellate courts use them as a tool to control

administrative factfinding" and appellate courts generally "have assumed that presumptions apply to proceedings after the verdict."). Once the presumption, unrebutted, has ripened into a determination, it too becomes a finding reviewable under the substantial evidence standard. *See* 8 U.S.C. § 1252(b)(4)(B).

By including this sentence in the REAL ID Act, Congress provided an elegant and efficient solution to the problem that previously had vexed the federal appellate courts. Now, instead of being "left in the dark" where the immigration judges and the BIA declined to make credibility findings, *Iao*, 400 F.3d at 534, the courts have a mandate to treat credibility as established. This in turn creates valuable incentives for the immigration judges, the BIA, and the government. Immigration judges now know that they need to be "explicit" about "adverse credibility determination[s]." 8 U.S.C. § 1158(b)(1)(B)(iii); *see also* Webster's Third New International Dictionary 801 (1961) (defining "explicit" as "being without vagueness [or] ambiguity: leaving nothing implied"). The BIA now knows that, even within its streamlined review, where the immigration judge has failed to assess credibility, it should itself address credibility in situations where it views credibility as relevant and it considers that a finding of credibility would have been clearly erroneous. And the government — which, unlike many asylum-seekers, is reliably represented by counsel in immigration proceedings — knows that it should ask for explicit adverse credibility determinations from the immigration judges and the BIA if it believes such determinations to be warranted.

This Court need look no further to conclude that the federal appellate courts must presume that asylum seekers are credible where neither the immigration judge nor the BIA have found otherwise. To the extent this Court considers extrinsic evidence of congressional intent, however, the limited information available further supports the applicability of the presumption at the federal appellate level. A report written by the Congressional Research Service at the time of the REAL ID Act's passage indicated that the purpose of the new sentence was "to adopt Ninth Circuit precedent that presumes credibility on appeal where neither the immigration judge nor the BIA has made an explicit adverse credibility finding." Michael John Garcia, et al., Cong. Research Serv., RL32754, Immigration: Analysis of the Major Provisions of H.R. 418, The REAL ID Act of 2005 at 7–8 (May 25, 2005). This is yet another indication that, in adding the key sentence to the REAL ID Act, Congress sought to resolve an existing problem rather than to enhance it.

## III. THE GOVERNMENT'S PROPOSED APPROACH WOULD UNRAVEL CONGRESS'S CAREFULLY CALIBRATED SCHEME AND REINSTATE THE DIFFICULTIES FACED BY FEDERAL APPELLATE COURTS PRIOR TO THE REAL ID ACT

The government urges this Court to conclude that the presumption of credibility applies only before the BIA and that a "general rule" of no presumption applies to the circuit courts. Pet. Br. 18. This approach is grounded in an implausible reading of the REAL ID Act — one that would treat Congress as having aggravated rather than addressed the

challenges that federal appellate courts face in reviewing immigration decisions.

### A. The Approach Urged by the Government Disregards Core Principles of Statutory Interpretation

The government argues that where an immigration judge fails to make an explicit adverse credibility finding, only the BIA and not the federal appellate courts should presume credibility. This approach conflicts with principles governing review of agency action. It ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 320 (2014) (citation omitted).

The government treats 8 U.S.C. § 1158(b)(1)(B)(iii) as a means of abrogating the ordinary standard of judicial review set forth in the INA. This approach runs contrary to the review process established in the INA — and indeed to principles of judicial review of agency decisions more generally. The federal appellate courts do not directly review the decisions of the immigration judges, but rather of the BIA. The immigration judges' decisions are before the federal appellate courts only insofar as these decisions are taken to be adopted by the BIA on its review. Yet instead of having the federal appellate courts review the BIA's decision under the usual standard of review set forth in 8 U.S.C. § 1252(b)(4)(B), the government claims that the federal appellate courts should put themselves in the same posture as an immigration judge and find that there is no presumption of

credibility. Pet. Br. 18. Absent clear and unambiguous statutory intention, this interpretation is unreasonable. Indeed, holding as much would be a massive sea change, given that this Court has "[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action." *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999).

The government rests this extraordinary proposition on a strained reading of 8 U.S.C. § 1158(b)(1)(B)(iii). After a lengthy sentence stating how a "trier of fact" is to evaluate credibility, the provision adds that "[t]here is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1158(b)(1)(B)(iii). The government claims that the phrase "'[t]here is no presumption of credibility" establishes a "general rule" applicable to the federal appellate courts from which the BIA is exempted. Pet. Br. 28–29.

This interpretation entirely disregards this Court's instruction that a reviewing court "should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning — or ambiguity — of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (alteration in original) (quotation marks and citations omitted). Here, *every piece of context surrounding this phrase indicates that it applies only to the immigration judges.* The phrase occurs in a statutory subsection previously devoted to how a "trier of fact" is to address credibility. 8 U.S.C. § 1158(b)(1)(B)(iii). The phrase occurs in a sentence that assumes there will be further review "on

appeal" — but only the immigration judges (and not the federal appellate courts) are subject to further "appeal." And the phrase occurs in a statutory provision that does not address the standard of review applied by the federal appellate courts. *See* 8 U.S.C. § 1158.[8] Rather than read the phrase out of context and in a way that disrupts the normal functioning of administrative review, this Court should read the statute "naturally in the present context." *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015).

The government's interpretation is also anomalous in light of the regulatory backdrop against which the REAL ID Act was passed. By affording substantial deference to the role of immigration judges as the primary triers of fact, the REAL ID Act built upon the Justice Department's efforts to establish a regulatory structure in which "[t]he Board shall function as an appellate body." 8 C.F.R. § 1003.1(d)(3)(1). This explicit structural aim to privilege immigration judges as near-exclusive fact-finders required the BIA to limit its review of fact determinations under the "clearly erroneous"

[8] Had Congress wished to carve out this bizarre exception to the ordinary standard of review, it could have easily done so by amending the statutory provision 8 U.S.C. § 1252(b)(4), which addresses the standard of review by the federal appellate courts. Indeed, the REAL ID Act made exactly such a change with respect to a different issue — the treatment of corroborating evidence of an asylum-seeker's testimony. The REAL ID Act *both* amended § 1158 to give guidance to immigration judges as to when corroborating evidence should be provided *and* amended § 1252 to specify a particular standard of review that federal appellate courts should use with respect to this issue. *See* REAL ID Act § 101, 119 Stat. at 303, 304–05 (adding amendments on this issue that are codified at 8 U.S.C. § 1158(b)(1)(B)(ii) and 8 U.S.C. § 1252(b)(4)(D)).

standard. *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54878 (Aug. 26, 2002). The Department of Justice found that clear error review provided for "an effective, reasonable, and efficient standard for appellate administrative review of factual determinations by immigration judges." *Id.* at 54890. Through the REAL ID Act, Congress similarly endorsed the primacy of immigration judges as fact-finders. *See* H. Rep. No. 109-72, at 167-68 (noting that "[c]ourts have recognized the expertise that [i]mmigration [j]udges bring to" credibility determinations and emphasizing the significance of demeanor with respect to these determinations). It is all the more implausible, then, that Congress would draw such an unmistakable structural distinction between fact-finders and appellate reviewers at the administrative level, and yet simultaneously seek to undercut that distinction at the federal appellate level.

### B. This Erroneous Approach Would Deprive the Federal Appellate Courts of the Useful Bright-Line Rule that Congress Established

The approach proposed by the government not only runs counter to core principles of statutory interpretation, but also invites more complexity and uncertainty to federal appellate review of immigration cases. The REAL ID Act introduced a much-needed framework for determining and reviewing credibility determinations — particularly in the wake of surging federal appellate court dockets.

The government's approach would return federal appellate courts to the untenable task of reviewing administrative asylum decisions that lack clear findings of credibility without a workable structure for conducting their review. If the courts were now mandated to stand in the same position as the trier of fact and review testimony without any presumption of credibility, then how would they resolve cases in which credibility could determine the outcome? In such situations, the decisions of the immigration judges and the BIA cannot be said to be adequately reasoned because they do not grapple with issues that are potentially outcome-determinative. Contrary to the government's suggestion, *see* Pet. Br. 22, the federal appellate courts cannot be called upon to invent justifications for affirmance that the agency did not clearly give. *Chenery Corp.,* 318 U.S. at 94–95. And if a court were to remand for clarification on credibility, all agree that the presumption of credibility would apply to the BIA, potentially triggering still more back-and-forth between the agency and the federal appellate courts. In short, the government's interpretation of the statute suggests that Congress has placed the federal appellate courts back in the "yawning void," *Niam*, 354 F.3d at 658, and blocked all the exits.

The government's reading also reduces the incentives for the administrative agency to make clear credibility determinations. Soon after the Department of Justice's BIA procedural reforms in 2002, the Board noted that by restricting its scope of review, the "regulatory change adds significant force to the Immigration Judge's decision and, concomitantly, makes it increasingly important for the Immigration Judge to make *clear* and *complete*

findings of fact that are supported by the record and in compliance with controlling law." *In re S-H-, et al.*, 23 I&N Dec. 462 (BIA 2002) (emphasis added). If "[t]here is no presumption of credibility" on petitions for review to the federal appellate courts, then the immigration judges are left with diminished incentive to follow Congress's instruction to be "explicit" when they find applicants to be non-credible. 8 U.S.C. § 1158(b)(1)(B)(iii). The government's approach would permit the immigration judges to make vague and muddled determinations while leaving it to the federal appellate courts to hunt through the record for unprovided justifications to affirm. Pet. Br. 28–29. Similarly, under the government's approach, the BIA will know that as long as it is silent on the issue of credibility, the federal appellate courts will not review its treatment of credibility at all. This in turn incentivizes the BIA to give only the most "streamlined" and cursory review to cases in which credibility is material — even though these are often the most difficult cases. Such an approach is "as unsupportable as it is counterintuitive." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003).

### C. The Pending Cases Illustrate Why the Government's Approach Is Wrong

The flaws in the government's position are amply illustrated by the pending cases. As in many pre-2005 cases, the immigration judges who reviewed Respondents' applications implied that they believed some elements of the applicants' narratives and disbelieved others. But they ultimately neglected to make a final call regarding the "totality of the circumstances," as the revised statute advised them

to do. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). Given this posture, the circuit court correctly presumed credibility, concluded that the determinations below were unsustainable, and granted the petitions for review.

In Ming Dai's case, neither the immigration judge nor the BIA grappled with Mr. Dai's testimony and related evidence regarding his brutal abuse by Chinese officials after his wife became pregnant and the couple sought — unsuccessfully — to preserve the pregnancy. The immigration judge made no explicit adverse credibility finding, instead simply expressing that Mr. Dai's "explanation for [his wife's] return to China while he remained here" was not "adequate." *Barr* v. *Dai* Pet. for Cert. 175a. On review, the BIA similarly made a conclusory statement that Dai "did not meet his burden of proof." *Id.* at 164a.

Under the approach proposed by the government, we return once again to "the reviewing court [being] left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason." *Iao*, 400 F.3d at 534. In the absence of a presumption of credibility, substantial evidence review is impossible because the lack of a credibility finding renders the "grounds upon which the administrative agency acted" neither "clearly disclosed" nor "adequately sustained," in contravention of *Chenery Corp.,* 318 U.S. at 94.[9]

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[9] Although *amici* do not address the second question presented in *Dai*, they note that *INS* v. *Ventura* — on which the government relies as to that question — emphasizes the applicability of administrative law principles to the review of BIA decisions, including principles set forth in *Chenery*. 537 U.S.

The same problem arises in the case of Cesar Alcaraz-Enriquez. The immigration judge was confronted with two factual records of a violent offense: Mr. Alcaraz-Enriquez's testimony and a probation officer's report. *See Barr* v. *Alcaraz-Enriquez* Pet. for Cert. 8a. And while the BIA was correct that the immigration judge was not "required to adopt the respondent's version of events over other plausible alternatives," *id.*, the immigration judge made no explicit adverse credibility finding with respect to Mr. Alcaraz-Enriquez and nowhere explained why he appeared to credit the contents of the report over Mr. Alcaraz-Enriquez's testimony despite finding him credible in other respects. *Compare id.* at 12a–15a *with id.* at 20a (finding petitioner "credible as far as testifying to the harm he suffered"). Under the approach proposed by the government, the Ninth Circuit would be forced to produce its own reasoning based on the record and speculate how the immigration judge "would have viewed evidence she did not analyze." *Cao He Lin* v. *U.S. Dep't of Just.*, 428 F.3d 391, 400 (2d Cir. 2005).

In seeking reversal in these two cases, the government asks this Court to prioritize the litigating convenience of the executive branch over the mandate that Congress established to aid federal appellate adjudication. In both cases, the government had full

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12, 16 (2002) (per curiam) (quoting *Chenery Corp.*, 318 U.S. at 88). Yet, with respect to the first question presented, the government in effect asks this Court to diverge from *Chenery*'s principles and reinstate the decisions below based on reasoning that the BIA did not offer. The Court should decline the invitation, and should reaffirm the basic holding of *Chenery* that "a judicial judgment cannot be made to do service for an administrative judgment." *Chenery Corp.*, 318 U.S. at 88; *see Ventura*, 537 U.S. at 16.

opportunity to request explicit adverse credibility determinations from the immigration judges at the initial hearings and, in the absence of such findings, to argue to the BIA that it should overcome the presumption of credibility. The government does not appear to have done so. Instead of honoring the REAL ID Act's statutory text, which specifies that an "adverse credibility determination [be] explicitly made," 8 U.S.C. § 1158(b)(1)(B)(iii), the government would deny the law's purpose and place the federal appellate courts in an untenable position.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the court of appeals regarding credibility determinations.

Respectfully submitted,

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