Nos. 19-1155 & 19-1156

IN THE

Supreme Court of the United States

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,

v.

MING DAI,

Respondent.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
Petitioner,

v.

CESAR ALCARAZ-ENRIQUEZ,

Respondent.

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

BRIEF OF THIRTY-FIVE FORMER IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are thirty-five former immigration judges and members of the Board of Immigration Appeals ("BIA" or "Board").[2]

Amici curiae have dedicated their careers to the immigration court system and to upholding the immigration laws of the United States. Each is intimately familiar with the functioning of immigration courts and is invested in improving the fairness and efficiency of the United States immigration scheme. *Amici curiae*'s extensive experience adjudicating immigration cases provides a unique perspective on the mechanics and practicalities of immigration proceedings.

SUMMARY OF ARGUMENT

Congress, through the REAL ID Act, has recognized that immigration judges ("IJs") are uniquely positioned to assess the credibility of applicants for relief from removal. As the only adjudicators able to observe directly a witness's presentation of testimony, and to gauge a witness's tone and demeanor, IJs are directed by statute to make credibility determinations explicit, specific, and cogent. The common question presented in these cases asks how a court of appeals—far removed from any first-person observation of the witness—must treat that witness's testimony when the IJ has not made an explicit adverse credibility

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[1] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The appendix provides a complete list of signatories.

finding. The REAL ID Act, fundamental principles of administrative law, and basic logic dictate the answer: the court of appeals must, as the court in *Ming Dai* held, "treat [the] petitioner's testimony as credible." *Ming Dai v. Sessions*, 884 F.3d 858, 863 (9th Cir. 2018).[3]

1. The government sought certiorari on the legal question of how a court of appeals is to treat a witness's credibility when the agency has not made an explicit adverse credibility determination. Yet its opening brief hardly mentions this issue. Instead, the government attempts to reframe the question presented as an issue of insufficient judicial deference to the agency's ultimate denial of relief. That is not only contrary to the government's own statement of the issues, it is not true to the statutory framework that governs this case.

The REAL ID Act provides that an applicant's testimony may satisfy his or her burden of proof if it is (i) credible, (ii) persuasive, and (iii) sufficient. *See* 8 U.S.C. § 1158(b)(1)(B)(ii). The first step of the IJ's inquiry is to identify, using the factors codified in the REAL ID Act, the *credible* testimony with which other evidence may be weighed. *See id.*; § 1158(b)(1)(B)(iii); H.R. Rep. No. 109-72, at 165 (2005) (Conf. Rep.). If the "trier of fact"—that is, the IJ—determines that testimony is *not* credible, the IJ must say so "explicitly" and provide a specific and cogent explanation for

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[3] *Amici* address herein the first question presented in *Ming Dai,* which raises the same legal issue as that presented in *Alcaraz-Enriquez.* Because *Ming Dai* is the lead case and was published as a precedential decision, *amici* focus primarily on *Ming Dai* while referring, as appropriate, to analogous issues presented in *Alcaraz-Enriquez*.

that determination. 8 U.S.C. § 1158(b)(1)(B)(ii), (iii); *infra* 8 n.4.

In *Ming Dai*, the IJ did not make an explicit adverse credibility determination, yet still determined that Ming Dai had "failed to meet his burden," on grounds that were either irrelevant or contrary to controlling precedent. 884 F.3d at 865. The BIA affirmed, without regard to the invalidity of the IJ's reasoning and the statutory *presumption* of credibility afforded to applicants under the REAL ID Act. *See* 8 U.S.C. § 1158(b)(1)(B)(iii); *see also* Resp. Br. in *Alcaraz-Enriquez* 10–13.

The government would have this Court ignore the agency's failure to adhere to the dictates of the REAL ID Act and collapse the statutorily prescribed analyses of credibility, persuasiveness, and sufficiency into one general finding wrapped up in the disposition, to which courts of appeals must defer. That is not the law, and the government's attempt to refashion its own petition belies the weakness of its position on the actual question presented.

2. As to the question presented, the court below correctly held that, in the absence of an explicit adverse credibility determination by the agency, the court must deem the testimony credible. By the plain terms of the REAL ID Act, if an IJ does not make an explicit adverse credibility determination, the testimony is afforded a "rebuttable presumption of credibility on appeal" to the BIA. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). Where, as here, that presumption is unrebutted—that is, the testimony is deemed credible—then the court of appeals must defer to that agency determination of credibility.

Affirming the Court of Appeals will further the REAL ID Act's directive that IJs make explicit credibility determinations, facilitate an efficient system of appellate review, and hold IJs to their task of reasoned and specific decision-making—something inculcated into IJs when they train to take the bench, and that most IJs already do as a matter of course. The government's alternative position would sanction lax and imprecise agency fact-finding and hinder appellate review. Without a system that mandates explicit credibility determinations, applicants may find themselves appealing decisions on indeterminate grounds. The BIA and courts of appeals—which lack the authority or capacity to make their own credibility determinations—would likewise be forced to guess at what IJs were thinking, and on what grounds their decisions relied. This cannot be the system that the REAL ID Act intended.

3. Lacking an answer to the core issue—and devoting barely three pages to the actual question presented—the government resorts to a strawman and argues that the court below held that a court of appeals must deem testimony both credible *and true*. *See* Pet. Br. 18–19, I.C, I.D.2. *Ming Dai* did not hold any such thing, nor is there any dispute that credibility is not the same thing as truth. Unlike the agency in this case, the panel majority took the REAL ID Act's dictates seriously and separately analyzed credibility, persuasiveness, and sufficiency. The court held, unremarkably, that in the absence of any adverse credibility determination by the IJ, evidence that did not contradict Ming Dai's testimony could not be smuggled into the "persuasiveness" inquiry in the guise of raising credibility concerns—when in fact those concerns did not justify making an adverse cred-

ibility determination. And in accordance with controlling precedent, Ming Dai's testimony about his *wife and daughter's* travels could not as a matter of law defeat the uncontradicted testimony about *his own* persecution. The agency's decision otherwise was invalid, and the court properly reversed—without deeming Ming Dai's testimony as *true*, only *credible*. *See Ming Dai*, 884 F.3d at 870; *see also* Resp. Br. in *Alcaraz-Enriquez* 37–46.

The Court of Appeals did nothing to erase the line between credibility and truth, and its holdings will not open the door to unmeritorious claims, as the government seems to suggest. What the Court of Appeals did do is maintain fidelity to the REAL ID Act and facilitate a system of specific, reasoned agency adjudication in accordance with the statute.

ARGUMENT

I. THE GOVERNMENT'S ATTEMPT TO REFRAME THE QUESTION PRESENTED AS A GENERIC ISSUE OF INSUFFICIENT DEFERENCE IS INACCURATE AND CONTRARY TO THE REAL ID ACT'S REQUIREMENTS.

The weakness of the government's position in this case is revealed by its attempt to divert the Court from the first question presented: whether a court of appeals may presume that an asylum applicant's testimony is credible in the absence of an explicit adverse credibility determination by the agency. Rather than address this question, the government's primary argument misstates the issue as the Court of Appeals' failure to "adhere" to the Immigration and Nationality Act's ("INA") substantial-evidence standard of review. Pet. Br. 18. In other words, the government's brief reframes this case as simple error correction, arguing

that the Ninth Circuit supplanted the agency's "assess[ment] [of] the evidence" with its own, thus failing to give proper deference to the agency's otherwise "reasonable" interpretation of the record. *Id.* at 17–18, 20–24.

That is not what this case is about. Indeed, the recasting is inconsistent with the government's own issue statement and does not make sense under the statutory framework at issue.

The INA authorizes IJs to grant asylum to 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)(A), 1158(b)(1)(A). Under the REAL ID Act, passed in 2005, an applicant's testimony alone is sufficient to establish eligibility for asylum if the "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).

Thus, as the court in *Ming Dai* noted below, the REAL ID Act establishes "three requirements under the Act for meeting the burden of proof": the testimony must be (i) credible, (ii) persuasive, and (iii) sufficient. 884 F.3d at 867. The IJ's ultimate determination of whether an applicant has met his or her burden—considering credibility, persuasiveness, and sufficiency—must be supported by substantial evidence. *See* 8 U.S.C. § 1252(b)(4)(B).

By statute, the first step in this analysis calls for the IJ to make a credibility determination. The REAL ID Act specifically provides that in determining whether the applicant has met his burden, "the trier

of fact may weigh the *credible testimony* along with other evidence of record." 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). And where the IJ determines that "otherwise *credible testimony*" should be corroborated by other evidence, the applicant must provide such evidence unless he or she does not have it and cannot reasonably obtain it. *Id.* (emphasis added). Consequently, the IJ's factual analysis must begin with identifying the credible testimony which *additional* evidence can contextualize.

In passing the REAL ID Act, Congress "codif[ied] standards for determining the credibility of applicant testimony." H.R. Rep. No. 109-72, at 165 (2005) (Conf. Rep.). The factors Congress identified in the REAL ID Act underscore the IJ's record-making function—no other body in the system is as well-positioned to engage with the original evidentiary material. The REAL ID Act directs the IJ to determine credibility by considering, in particular, "the totality of the circumstances, and all relevant factors," such as the applicant's "demeanor, candor, or responsiveness," "the inherent plausibility" of his or her account, "the consistency" between written and oral statements, and "the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements." § 1158(b)(1)(B)(iii). Congress further directed that an adverse credibility determination must be "explicitly made," *id.*, and the trier of fact is to "describe those factors that form the basis of the trier's opinion," H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.). Accordingly, courts of appeals are in agreement

that any adverse credibility determination must be supported with "specific and cogent" reasons.[4]

Here, the IJ's decision does not contain an explicit credibility determination. He did not find that Ming Dai was not credible, he did not require corroborating evidence, and he did not recount any facts that contradicted Ming Dai's testimony regarding his wife's forced abortion or the abuse inflicted on him by Chinese officials. Had the IJ determined that Ming Dai was *not* credible, the REAL ID Act obligated him to make that finding *explicit* and to support it with "specific and cogent" reasons, including a "descri[ption of] those factors that form the basis of [his] opinion." H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.). He did not make such findings, but nevertheless determined that Ming Dai had ultimately "failed to meet his burden," on grounds that were irrelevant as a matter of law to Ming Dai's claim (such as circumstances around his *wife and child's* return to China). *Ming Dai*, 884 F.3d at 865, 871–72. The BIA adopted and affirmed this conclusion, also without regard to the absence of any adverse credibility determination, and without regard to the presumption of credibility afforded to Ming Dai under the REAL ID Act. *Id.* at 871; *see also* Resp. Br. in *Alcaraz-Enriquez* 42.

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[4] *See, e.g.*, *Jabri v. Holder*, 675 F.3d 20, 24 (1st Cir. 2012); *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 166 (2d Cir. 2008); *Shaomei Dong v. Att'y Gen. U.S.*, 450 F. App'x 204, 209 (3d Cir. 2011); *Qing Lin v. Holder*, 500 F. App'x 241, 243 (4th Cir. 2012); *Roach v. Lynch*, 632 F. App'x 192, 196 (5th Cir. 2015); *Pagoada-Galeas v. Lynch*, 659 F. App'x 849, 856–57 (6th Cir. 2016); *Cojocari v. Sessions*, 863 F.3d 616, 621 (7th Cir. 2017); *Hussein v. Holder*, 326 F. App'x 401, 401 (8th Cir. 2009); *Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010); *Adam v. Lynch*, 609 F. App'x 536, 539 (10th Cir. 2015); *Carrizo v. U.S. Att'y Gen.*, 652 F.3d 1326, 1332 (11th Cir. 2011).

Contrary to the government's contention, the court below did not reverse the BIA because it viewed the evidence differently from the agency. Rather, the court below correctly held that in the absence of an explicit adverse credibility finding, the REAL ID Act required it to treat Ming Dai's testimony as credible. From that starting point, it correctly determined that the items the IJ and BIA used to evaluate the persuasiveness and sufficiency of that uncontradicted evidence could not, as a matter of law, validly serve as a basis to deny Ming Dai relief. *Ming Dai*, 884 F.3d at 867–70; *see also* Resp. Br. in *Alcaraz-Enriquez* 40–45.

The issue before the Court thus concerns how courts of appeals should treat petitions for review where (as here) the IJ has not made an explicit credibility finding. The government's lead argument does not even mention this question. Pet. Br. 20–25. Rather, the government attempts to recast this case as one about insufficient deference to the agency's "reasonable view[] of the record." *See id.* at 20–24, 26. The government's position collapses the separate but interlocking analyses of credibility, persuasiveness, and sufficiency into one undifferentiated finding, and would require courts of appeals to defer to that. *See id.* That reading is not faithful to the letter and intent of the REAL ID Act, as *amici* explain below.

II. In The Absence Of An IJ's Explicit Adverse Credibility Finding, The Court Of Appeals Should Deem An Asylum Applicant's Testimony Credible.

As the REAL ID Act makes clear, if an IJ believes an applicant is not credible, the IJ must find so explicitly and must also state specific reasons why. Absent such an explicit adverse credibility finding, "the applicant or witness shall have a rebuttable presumption

of credibility on appeal." *See* 8 U.S.C. § 1158(b)(1)(B)(iii). Where, as here, that mandated presumption is triggered—that is, the testimony is by statute deemed credible before the BIA—then logic and basic administrative law principles dictate that a court of appeals must defer to that agency-level presumption unless it has been adequately rebutted by the government.

Upholding this scheme by affirming the Court of Appeals would further the REAL ID Act's directive that an IJ making an adverse credibility determination must do so *explicitly*, with specific and cogent support. It will also facilitate an efficient and fair system of review. IJs, who preside over assembly of the factual record, are uniquely positioned within this scheme to determine credibility on the basis of the REAL ID Act's stated factors; by contrast, neither the BIA nor any court of appeals, assessing a cold record, has the competence to weigh the REAL ID Act's factors. If the only factfinder among these three levels of adjudication that is statutorily empowered and structurally positioned to make credibility determinations does *not* make an *explicit* adverse credibility finding, applicants may find themselves, on appellate review, taking aim at an unclear target. Similarly, the BIA's and courts of appeals' work may be stymied and plagued by guesswork. Holding, as the court did below, that in the absence of an explicit agency determination of adverse credibility, courts of appeals must deem the testimony credible can not only help avoid such pitfalls, it is the only sensible option for a court limited to reviewing the reasoning articulated by the agency. Contrary to the REAL ID Act's requirements and objectives, the government's position would sanction imprecise fact-finding.

A. A Presumption Of Credibility Before The Courts Of Appeals Is Consistent With, And Fosters, The Institutional Role Of Immigration Judges.

The ruling below recognizes and encourages a fundamental tenet of asylum adjudications: the IJ should make credibility determinations explicit.

The REAL ID Act squarely directs the IJ as the "trier of fact" to determine credibility. 8 U.S.C. § 1158(b)(1)(B)(iii). As discussed above, this credibility determination is the starting point of any asylum or withholding of removal analysis. *See supra* 6. And, as noted, Congress expected that adverse credibility findings would be "explicitly made," *id.*, and supported by an explanation of "those factors that form the basis of the trier's opinion," H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.). Without that "specific and cogent" support, *supra* 8 n.4, the credibility determination is subject to reversal, and absent any explicit adverse credibility determination, credibility will be *presumed* before the BIA. 8 U.S.C. § 1158(b)(1)(B)(iii).

The "trier of fact's" credibility determination—that is, the IJ's credibility determination—undergirds all factfinding in asylum and withholding claims. Commensurate with the importance of that determination, IJs are specifically trained—starting from before they take the bench—on how to make credibility determinations and are instructed to make those decisions explicit. Former IJ and temporary BIA member Carol King recalls that during her initial training as an IJ, she was directed to make explicit credibility determinations in her decisions, and to support them

with specific findings. Former IJ Jeffrey Chase similarly notes that IJs were trained to make an explicit credibility finding in every case. And former IJ Rebecca Jamil recalls that instructors emphasized that the IJ must state whether they find the respondent credible or not credible. In Judge Jamil's experience, which is shared amongst *amici*, credibility is often the first issue an IJ must assess, and an explicit determination one of the first holdings to be stated in their decisions.

This is particularly important in the case of *adverse* credibility determinations, which, in *amici*'s experience, can be dispositive of an application for relief. For example, if an asylum seeker has not credibly established the facts on which his or her claim is based, there is no need to consider further whether the applicant is a member of a cognizable particular social group whom a government is unwilling or unable to protect. 8 U.S.C. § 1252(b)(4)(B).[5] Indeed, an adverse credibility determination is one of the most frequently cited grounds for the denial of an asylum application. *See* Sarah Anne Filone & David DeMatteo, *Testimonial Inconsistencies, Adverse Credibility Determinations, and Asylum Adjudication in the United States*,

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[5] *See also, e.g.*, *Myftari v. Mukasey*, 302 F. App'x 401, 408 (6th Cir. 2008) ("[T]he IJ's adverse credibility finding itself . . . precluded a finding of past persecution or a well-founded fear of future persecution."); *Sivakaran v. Ashcroft*, 368 F.3d 1028, 1029 (8th Cir. 2004) ("In light of the adverse credibility determination and [the applicant's] failure to provide corroborative evidence, his asylum claim fails, regardless of the reason for the alleged persecution."); *Rizk v. Holder*, 629 F.3d 1083, 1091 (9th Cir. 2011) ("In the absence of his discredited testimony, [the applicant] cannot meet his burden of establishing past persecution or a well-founded fear of future persecution on a protected ground.").

3 Translational Issues in Psych. Sci. 202, 203–04 (2007) ("the credibility . . . of an applicant is often considered one of the most influential components of an asylum claim"); Carol Bohmer & Amy Shuman, *Political Asylum Deceptions: The Culture of Suspicion* 9 (2017) (noting that "the asylum system is intent on rooting out those whose claims are not credible"); Heather Scavone, *Queer Evidence: The Peculiar Evidentiary Burden Faced by Asylum Applicants with Cases Based on Sexual Orientation and Identity*, 5 ELON L. REV. 389, 395 (2013) (noting that IJs routinely make adverse credibility findings based on inconsistencies in an applicant's testimony).

Accordingly, in addition to the training IJs receive, the Executive Office of Immigration Review ("EOIR") also publishes guidance for IJs to help them keep abreast of nuances in the case law concerning adverse credibility findings within each circuit, including, for example, what may constitute an explicit adverse credibility finding. *See* Alexandra Fleszar, *Finding Firm Ground: Exploring the Limits of Adverse Credibility*, Immigr. L. Advisor, EOIR (Vol. 11), Mar.-Apr. 2017, https://www.justice.gov/eoir/page/file/960601/download; S. Kathleen Pepper & Fatimah A. Mateen, *Asylum Credibility and Corroborating Evidence in the Federal Courts of Appeals and in the Board of Immigration Appeals Outline* (Oct. 18, 2006) (last updated Mar. 2011), https://www.justice.gov/eoir/page/file/988201/download.

As would be expected in light of the REAL ID Act and EOIR's regular training of IJs to make explicit credibility determinations, IJs actually make those

findings routinely. Undersigned Judge Jamil, for example, notes that making explicit credibility determinations was "par for the course." Judge Shugall made a habit of issuing decisions that included adverse credibility findings in writing, rather than orally from the bench (the more common mode for ruling on asylum applications), because doing so reminded her to make the basis for the adverse credibility determination unmistakably clear.

IJs know that making substantiated, explicit credibility findings is important to efficient adjudication. Judge Burr, who served as Assistant Chief Immigration Judge in New York, would review reversals from the BIA or the Second Circuit Court of Appeals and counsel immigration judges who exhibited a pattern of issuing unsupportable decisions—monitoring, in particular, repeated failures to provide cogent reasons for adverse credibility determinations.

Simply put, the process of making adverse credibility determinations explicit is an expected part of an IJ's day-to-day role, and is a responsibility of which they are keenly aware.

The government, for its part, is well-placed to—and frequently does—request that IJs make explicit adverse credibility findings. Undersigned Judges King, Shugall, and Paul Schmidt (also a former BIA member) recall that the government would consistently make such requests in asylum cases. Judge Jamil recalls that, as a former ICE attorney, she always requested the IJ to make a credibility finding, and to make adverse credibility findings explicit.

Thus, contrary to the government's suggestion that the *Ming Dai* decision would "tie[] the hands of

IJs who are presented with conflicting evidence," *see* Pet. for Writ of Cert. at 26 (alteration in original), the vast majority of IJs routinely make explicit credibility determinations *at present*—just as the law requires and as they have been trained specifically to do. Affirming the decisions below will not create additional burdens on IJs, or alter how IJs conduct adjudications. To the contrary, doing so will support IJs who do the work, required by Congress, of making adverse credibility determinations explicit, specific, and cogent.

The government's position, on the other hand, could cause perverse incentives and skew the system away from the REAL ID Act's objectives to have IJs make explicit, substantiated credibility determinations. Under the government's proposed scheme, a lenient approach to credibility at the IJ level would give the government multiple opportunities to generate findings on appeal—before tribunals that are remote from the detailed work of making the evidentiary record. The REAL ID Act could not be clearer that credibility is an issue for IJs to determine. The decisions below buttress that statutory delegation of authority.

B. It Is For The IJ To Make Credibility Determinations Explicit, Not For The Applicant Or The BIA And Courts Of Appeals To Guess At What The IJ Intended.

An explicit credibility finding by the IJ is critical to the later review of the IJ's decision. The government dismisses this focus on explicit credibility findings as nothing more than a "magic-words requirement." Pet. for Writ of Cert. at 27. But there is nothing "magic" about stating, explicitly, that testimony is

not credible, if that is what the IJ has genuinely determined, and the REAL Act requires more than a ritual conclusory statement. Rather, it requires an *explicit* determination, supported with specific and cogent reasons, to enable appellate review. Congress allocated this function to IJs to *avoid* the kind of noncommittal, wishy-washy decision-making that the government here suggests is appropriate. If the IJ finds the applicant's testimony not credible, the IJ must say so. What the IJ cannot do is collapse credibility, persuasiveness, and sufficiency, avoid making a credibility finding altogether, deny relief, and leave it for the BIA and the courts to sort out the reasoning.

As Congress recognized, it is IJs that bring "expertise . . . to th[e] task" of making credibility determinations. H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.). The BIA and the courts of appeals cannot competently evaluate any of the nuanced factors that go into a credibility determination. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). The "IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. U.S. I.N.S.*, 386 F.3d 66, 73 (2d Cir. 2004), *overruled on other grounds by Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007). The IJ is thus in the "best position to discern . . . whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it; whether a witness who hesitated in a response was nevertheless attempting truthfully to recount what he recalled of key events or struggling to remember the lines of a carefully crafted 'script'; and whether inconsistent responses are the product of innocent error or intentional falsehood." *Id.*; *cf. Wainwright v. Witt*, 469 U.S. 412, 428 (1985) ("[D]eterminations of demeanor

and credibility . . . are peculiarly within a trial judge's province.").

Determining credibility is a fact-intensive exercise, filled with nuance and particular to the circumstances of each case and each witness. It is thus imperative that the IJ—the only official in this adjudicatory process that sees and hears the witness—make his or her credibility findings, and the supporting reasoning, explicit, and for the BIA and courts of appeals to review that finding with appropriate deference. Indeed, in *amici*'s experience, one of the IJ's goals in ensuring that credibility determinations are clear, explicit, upfront, and well-supported, is to insulate decisions on appeal.

When an IJ *fails* to make an explicit credibility finding, and instead (as here) vaguely notes some potential confusion or doubt about an applicant, that hinders appellate review. *See, e.g.*, *Diallo v. Gonzales*, 439 F.3d 764, 766 (7th Cir. 2006) ("[A] 'passing reference implying doubt' about an applicant's credibility is not an express credibility finding."); *Nakibuka v. Gonzales*, 421 F.3d 473, 479 (7th Cir. 2005) (holding that an IJ's finding that the applicant's testimony was "vague and confusing" did not amount to an adverse credibility determination); *Yan Dan Li v. Gonzales*, 222 F. App'x 318, 323 (4th Cir. 2007) (statements in an IJ's decision could "easily lead to the inference that the IJ was skeptical of [the applicant's] testimony," but holding that they did "not amount to an *explicit* adverse credibility finding").

As former BIA member Judge Schmidt recalls, such vague IJ decisions would result in BIA panels—which, of course, cannot make their own *de novo* credibility findings, *see* 8 C.F.R. § 1003.1(d)(3)(i)—having

to expend time arguing over whether the IJ made a credibility finding at all.

Ambiguous IJ decisions are also problematic for the applicant, who is entitled to know the grounds on which the government is proceeding against him and to have the opportunity to challenge them. *See United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 242–43 (1973). Without an explicit and substantiated credibility finding, an applicant would have no way of knowing that an *adverse* finding might later be extracted from the record *sub rosa* and prove dispositive on appeal. As noted by undersigned Judge King, who served as both an IJ and a temporary BIA member, if an IJ does not provide a clear credibility determination, it leaves the applicant "shadow boxing," with no finding to contest.

These problems are replicated when an ambiguous, or altogether nonexistent, credibility determination reaches the court of appeals, which is even further removed from a witness's testimony. *See Zaman v. Mukasey*, 514 F.3d 233, 237 (2d Cir. 2008) ("Our review is frustrated when it is unclear whether the agency has made an adverse credibility determination."). Like the BIA, the courts of appeals are neither equipped to assess on a cold record an applicant's "demeanor, candor, . . . responsiveness," or other statutory credibility factors, nor are they charged with doing so. 8 U.S.C. § 1158(b)(1)(B)(iii). A court of appeals' review is "limit[ed] . . . to the reasons articulated by the agency," *Zaman*, 514 F.3d at 237, and it "may not uphold a finding that the IJ failed to make explicit, and which the BIA neither adopted nor rejected," *Ndiaye v. Gonzales*, 164 F. App'x 49, 51 (2d Cir. 2006).

This Court made clear long ago that a court may not "be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). Courts of appeals thus "cannot be left to guess which parts [of an IJ's decision] reflect an unspoken adverse credibility finding and which do not. It would defeat the whole purpose of the determination in the first place." *Pratt v. Att'y Gen. U.S.*, 779 F. App'x 867, 872 (3d Cir. 2019); *see also, e.g.*, *Nken v. Holder*, 585 F.3d 818, 822 (4th Cir. 2009) ("Established precedent dictates that a court may not guess at what an agency meant to say.").

The government's approach, however, invites such guesswork at the IJ's credibility determination and the reasons for it. If there is no explicit adverse credibility determination in the record, but the government argues for such an interpretation of the decision on appeal, should the court of appeals just guess at what reasons the agency might have found to support what the government wants? Were facts found to support an adverse credibility finding? Were they in support of persuasiveness or sufficiency? What exactly is the "credible" body of evidence against which the IJ weighed other record evidence, as the REAL ID Act directs the IJ to do? How can fundamental fairness to the applicant be maintained if the precise grounds for ruling against him are muddled, and he, too, is forced to guess at how best to challenge that ruling? The government has no answer, other than to sidestep the implications of its position and urge uncritical appellate deference to the agency's denial of relief.

C. The Only Logical And Workable Result Requires A Presumption Of Credibility Before The Courts Of Appeals.

In an adjudicatory scheme that directs the IJ to make explicit, specific, and cogent adverse credibility determinations—and that prohibits the BIA and courts of appeals from making *de novo* credibility determinations—the only sensible option for a court of appeals in the absence of an explicit adverse credibility finding is precisely what the court below did here: "treat [the] petitioner's testimony as credible." *Ming Dai*, 884 F.3d at 863. Indeed, as noted above, if the IJ does not make an explicit credibility finding, the BIA is statutorily directed to accept a "rebuttable presumption of credibility" on appeal. 8 U.S.C. § 1158(b)(1)(B)(iii).

On a petition for review to a court of appeals, the court's review is limited to "[t]he grounds upon which . . . the record discloses that [the agency's] action was based." *Chenery*, 318 U.S. at 87. When the agency has *not* denied relief on grounds that the applicant's testimony was not credible, then the court, as a matter of basic administrative law, cannot enter its own credibility finding and deny relief on that basis. In other words, the court must deem the testimony credible, just as the law required the BIA to do.

The government argues that no such presumption applies at the court of appeals, but does not explain how the court of appeals *should* treat that testimony—other than to urge broad deference to the agency decision, or, as discussed above, to guess at what the agency intended. Neither path is acceptable. *Supra* 18–19.

The only path for a court of appeals is to treat the testimony as credible. And if agency adjudications are done correctly, with the IJ making explicit findings, this should not be a cause for concern because the presumption circumstance will never (or rarely) arise in a case where an IJ actually meant to enter an adverse credibility finding. The decisions below, which encourage IJs to make their adverse credibility determinations absolutely clear, will reinforce that approach to adjudication.

III. A Determination That The Applicant Is Credible Is Not The Same As A Determination That The Testimony Is True, Nor Is It Dispositive Of The Outcome.

Other than simply urging broad judicial deference, the government's core argument is not really that no presumption of credibility applies at the court of appeals—the government devotes only one small subsection of its brief to that argument, *see* Pet. Br. I.D.1, and, as noted, does not explain at all how courts should treat testimony absent that presumption.

Rather, the bulk of the government's argument asserts that the court below erred in presuming that the testimony was not only *credible* but also *true*. *See* Pet. Br. 18–19, I.C, I.D.2. This is not what the Court of Appeals held, nor is it an accurate characterization of its reasoning. *See also* Resp. Br. in *Alcaraz-Enriquez* 45–46.

As an initial matter, *amici* do not disagree with the government's position that *credibility* is not the same as *truth*. Numerous situations could arise, for example, where an applicant testifies credibly, but the objective truth of an issue, as corroborated by the "other" evidence the REAL ID Act directs the IJ to

consider, is to the contrary. *See* 8 U.S.C. § 1158(b)(1)(B)(ii); *Aden v. Holder*, 589 F.3d 1040, 1044–45 (9th Cir. 2009) ("[I]f, hypothetically, the IJ said 'you seem like an honest person, but the country report says that the Wardey clan is treated with great respect and never hindered in any way by the Darod and Hawiye clans,' he would weigh persuasiveness in light of the whole record including such evidence."). Were it otherwise, the REAL ID Act's directive that testimony must not only be credible but also persuasive and sufficient to sustain an applicant's burden for relief would not make sense—the inquiry could simply end at credibility. 8 U.S.C. § 1158(b)(1)(B)(ii); *Aden*, 589 F.3d at 1044 ("Credible testimony is not by itself enough. Otherwise the other two requirements would be mere surplusage.").

The decision in *Ming Dai* recognized this, engaging in a thorough analysis of persuasiveness and sufficiency even *after* holding that the court was "required to treat a petitioner's testimony as *credible* in the absence of [an adverse credibility finding]." *Ming Dai*, 884 F.3d at 859 (emphasis added). Had the court treated respondent's testimony as both credible *and true*, that additional analysis would not have been necessary.

Thus, contrary to the government's contention, the court of appeals did not simply believe everything Ming Dai said and thereby reject the IJ and BIA's "contrary factual determinations." Pet. Br. 27–28. Instead, the court carefully considered whether substantial evidence supported the separate but interlocking analyses of credibility, persuasiveness, and sufficiency.

As to sufficiency, the court concluded that the harm Ming Dai suffered—being beaten, arrested, detained, and deprived of food and sleep because of his attempt to oppose his wife's involuntary abortion—rose to the level of persecution. *Ming Dai*, 884 F.3d at 870. As to persuasiveness, the court concluded that the BIA's determination that Ming Dai's testimony was unpersuasive was not supported by substantial evidence—*not* because the court simply treated everything Ming Dai said as true, but because the grounds on which the agency relied to conclude that he was not persuasive were, as a matter of law, irrelevant and/or invalid. *Id.* at 870–73.

The agency's reasons for rejecting Ming Dai's testimony rested largely on the fact that his *wife and daughter* returned to China. As the court explained, controlling case law holds that a family member's voluntary return to the country of origin "can be relevant in certain narrow circumstances: when the applicant's fear of future persecution rests *solely* upon threats received by his family . . . or when the family member and the applicant are similarly situated." *Id.* at 871 (citing *Tamang v. Holder*, 598 F.3d 1083, 1094 (9th Cir. 2010) and *Sinha v. Holder*, 564 F.3d 1015, 1022 (9th Cir. 2009)). Neither of those "narrow circumstances" applied to this case—Ming Dai's claim stood independent of his wife's persecution and he was not similarly situated. *Id.* at 871–72.

Next, the court explained that Ming Dai's initial concealment of his family's travel to the United States and return to China had nothing to do with his testimony about what happened *to him*. *Id.* at 872–73. Neither the IJ nor the BIA explained how his recounting of his family's travels contradicted or even called into question a single fact he testified to about *his own*

persecution or *his own* claim. *Id.* Instead, as the court noted, the BIA's statement that Ming Dai was "not being truthful" about the irrelevant fact of his family's travels could potentially matter to his own claim only insofar as it "casts doubt" on his overall credibility—but the IJ never made such an adverse credibility finding, and the BIA nowhere suggested any basis to disregard the statutory presumption of credibility that he enjoyed on appeal. *Id.* at 872. Indeed, as the court pointed out, the BIA "never questioned the facts regarding Dai's persecution in China." *Id.* at 873. "Credibility concerns that do not justify an adverse credibility finding cannot be smuggled into the persuasiveness inquiry so as to undermine the finding of credibility [the court is] required to afford Dai's testimony." *Id.* at 872.

Finally, the court held that the IJ erred in finding Ming Dai's testimony about his past persecution unpersuasive because he testified that "My wife had a job and I didn't, and that is why I stayed here." *Id.* at 873. Again, controlling law, unchallenged by the government, precludes this reasoning: "[a] valid asylum claim is not undermined by the fact that the applicant had *additional* reasons"—such as economic opportunity—"for coming to or remaining in the United States." *Id.* (emphasis added) (citing *Li v. Holder*, 559 F.3d 1096, 1105 (9th Cir. 2009)).

None of these rationales required the court to treat Ming Dai's testimony as *true*. Nor is this a case where, as the government contends, the IJ and the Board had a "'reasonable' basis for choosing not to believe" credible testimony, "or for finding on the basis of all the evidence that the testimony is not sufficiently persuasive to establish the alien's eligibility for relief." Pet. Br. 33. As the court explained, the

bases that the agency relied on were not "reasonable," but were, rather, contrary to controlling law and/or irrelevant to Ming Dai's actual claim. *Ming Dai*, 884 F.3d at 870–73. It is not as though respondent testified credibly but the objective record disproved the persecution he suffered, or changed country conditions rendered his credible fear of future persecution no longer reasonable. Here, neither the IJ nor the Board pointed to any evidence that contradicted or was inconsistent with Ming Dai's credible testimony about the torture he experienced and his fear thereof.

Under these circumstances, the Court of Appeals was correct to deem the testimony credible, and correct in prohibiting the IJ and the BIA from smuggling credibility concerns (that the IJ did not present in support of any explicit adverse credibility finding) into the analysis of persuasiveness or sufficiency.

The government's contrary argument conjures a bogeyman: the government seems to suggest that if the decision below is affirmed, courts of appeals will start deeming applicants credible left and right, end the analysis there, and grant all manner of unmeritorious requests for relief. But as discussed above, IJs make explicit credibility determinations as a matter of course, so courts of appeals will rarely even be in the position to deem applicants credible. Moreover, as the *Ming Dai* decision and the text of the REAL ID Act make plain, a finding of credibility is a starting point, not a dispositive factor. The persuasiveness and sufficiency factors stand separate and apart from credibility, and an applicant found to be credible may still fail to meet his ultimate burden on either of the other factors. *See, e.g.*, *Ren v. Holder*, 648 F.3d 1079, 1089–94 (9th Cir. 2011) (reversing IJ's adverse credibility determination and deeming the applicant's testimony

credible, but finding that the applicant failed to supply sufficient corroborating evidence). Credible or not, asylum and withholding of removal will be denied if the applicant cannot prove, for example, membership in a cognizable particular social group, or the nexus between persecution and a protected ground. *See, e.g.*, *Silva v. Att'y Gen.*, 448 F.3d 1229, 1234 (11th Cir. 2006) (denying asylum to a political activist from Columbia who was shot at because she could not show the anonymous shooter's motives were political); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1032–33 (9th Cir. 2014) (holding that an applicant who testified credibly had failed to provide sufficient evidence that her persecutors imputed a political opinion to her). Credible applicants may also be barred from relief for having committed certain crimes, or for failing to timely seek relief. *See, e.g.*, *Audi v. Barr*, 2020 WL 7419597, at *2 (6th Cir. Dec. 18, 2020) ("While she found Audi's testimony to be credible, the IJ denied the asylum application on grounds that it was not timely filed."); *Kouljinski v. Keisler*, 505 F.3d 534, 540–43 (6th Cir. 2007) (denying asylum due to drunk driving convictions despite finding applicant credible). Requiring courts of appeals to presume an applicant credible in the absence of an adverse credibility determination would in no way alter the applicant's burden or the standard of review on those other elements of legal sufficiency.

The Court of Appeals' decisions appropriately recognize the IJ's role in making credibility determinations and encourage—consistent with congressional intent—deference to the trier of fact where appropriate. But in order for reviewing courts to ensure that standards are being applied properly, and for applicants to know what elements of the IJ's finding to challenge on appeal, IJs may not collapse the three inquiries into a general finding that the applicant failed

to carry their burden. It is not too much to hold IJs to their statutorily prescribed task of making explicit, reasoned credibility determinations, evaluating the persuasiveness of testimony along with other record evidence, and determining the sufficiency of an applicant's showing. Most IJs are properly exercising that delegated responsibility already.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decisions should be affirmed.

Respectfully submitted,

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APPENDIX

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Immigration Judge, New York, 1994-2012

Hon. Esmerelda Cabrera

Immigration Judge, New York, Newark, and Elizabeth, 1994-2005

Hon. Teofilo Chapa

Immigration Judge, Miami, 1995-2018

Hon. Jeffrey S. Chase

Immigration Judge, New York, 1995-2007

Hon. George T. Chew

Immigration Judge, New York, 1995-2017

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Immigration Judge, Los Angeles, 1990-2007

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Member, Board of Immigration Appeals, 2000-2003

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Immigration Judge, Los Angeles, 1996-2008

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Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf

Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward

Immigration Judge, San Francisco, 1997-2018

Hon. Charles Honeyman

Immigration Judge, Philadelphia and New York, 1995-2020

Hon. Rebecca Jamil

Immigration Judge, San Francisco, 2016-2018

Hon. William F. Joyce

Immigration Judge, Boston, 1996-2002

Hon. Carol King

Immigration Judge, San Francisco, 1995-2017

Hon. Elizabeth Lamb

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Hon. Margaret McManus

Immigration Judge, New York, 1991-2018

Hon. Charles Pazar

Immigration Judge, Memphis, 1998-2017

Hon. Laura Ramírez

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Hon. John Richardson
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Immigration Judge, Newark, 2008-2010

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Immigration Judge, Arlington, 2003-2016

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