Nos. 19-1155 and 19-1156

In the Supreme Court of the United States

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL,
PETITIONER

v.

MING DAI

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL,
PETITIONER

v.

CESAR ALCARAZ-ENRIQUEZ

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

REPLY BRIEF FOR THE PETITIONER

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
COLLEEN E. ROH SINZDAK
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
DAWN S. CONRAD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

Miscellaneous:

In the Supreme Court of the United States

No. 19-1155

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL, PETITIONER

v.

MING DAI

No. 19-1156

ROBERT M. WILKINSON, ACTING ATTORNEY GENERAL, PETITIONER

v.

CESAR ALCARAZ-ENRIQUEZ

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

REPLY BRIEF FOR THE PETITIONER

Under a straightforward application of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Ninth Circuit's decisions in these cases should be reversed. The immigration judges (IJs) who heard respondents' testimony concluded that it was insufficient to satisfy respondents' burden of proof. The Board of Immigration Appeals (Board) affirmed on the same basis. The question for the court of appeals therefore should have been simply whether a "reasonable adjudi-

cator" would have been "compelled" to reach the opposite conclusion. 8 U.S.C. 1252(b)(4)(B). Because in both cases the agency relied on multiple aspects of the evidence that rendered the alien's testimony insufficient to meet his burden, the agency's determinations should have been upheld.

Instead, the court of appeals reversed the agency's decisions. In *Alcaraz*, the court relied on circuit precedent under which an alien's "[t]estimony must be accepted as true in the absence of an explicit adverse credibility finding." *Alcaraz* Pet. App. 3a (quoting *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004)). And in *Dai*, the court cited *Kalubi* and other cases that had endorsed a presumption of truth, and the panel applied a presumption of truth in substance. See *Dai* Pet. App. 11a, 13a; Gov't Br. 26. Respondents now concede that the circuit precedent requiring a presumption of truth is wrong, but argue that the decisions below rested on alternative rationales. That contention is incorrect, and the alternative rationales respondents propose are no more compatible with the INA than the Ninth Circuit rule they are intended to replace.

Respondent Dai contends (Br. 39) that, rather than presuming Dai's testimony was true, the court of appeals merely disregarded evidence that Dai lied on the ground that such evidence is irrelevant in the absence of an adverse credibility finding. As Judge Callahan stated in her dissent from denial of rehearing en banc below, however, that approach "ignores the common sense reality that triers of fact may—and frequently do—decide factual issues against a party without affirmatively finding that party not credible." *Dai* Pet. App. 136a. Where the IJ and the Board offer a reasonable explanation for why testimony is unpersuasive, the

INA does not authorize a court to set that conclusion aside merely because the evidence underlying the persuasiveness determination could have supported the more drastic (but ultimately unnecessary) determination that the testimony was not even credible—*i.e.*, not even capable of being believed.

Respondent Alcaraz, for his part, relies (Br. 18-19, 43-44) on the unsupported proposition that the court of appeals rejected the agency's determination in his case because the Board provided an inadequate justification for its refusal to accept his testimony as true. Even if the court's decision could be understood to fault the agency for failing to provide a sufficient explanation for its decision to credit a probation report over Alcaraz's self-serving testimony, nothing in the INA authorizes that level of opinion-writing superintendence by the courts of appeals.

Both respondents also defend the proposition that, while a reviewing court need not apply a presumption of truth in the absence of an express adverse credibility finding, it must at least apply a presumption of credibility. That proposition, too, is mistaken. The Board must apply a rebuttable presumption of credibility when the IJ has not made an "explicit[]" "adverse credibility determination." 8 U.S.C. 1158(b)(1)(B)(iii). But nothing in the statute requires the Board to make an express finding when it determines that the presumption has been overcome, and nothing requires a court to apply a presumption of credibility in the absence of such an express finding by the Board. Accordingly, a court is free to conclude that the Board did not find the alien's testimony credible, even where the Board's decision does not contain an explicit adverse credibility determination. That proposition, however, is largely irrelevant to

these cases because the agency rejected Dai's testimony on the ground that it was not sufficiently persuasive, and it found that Alcaraz's testimony was outweighed by the probation report, as well as the nature of his conviction, the elements of his crime, and the sentence imposed. The court of appeals therefore had no need to consider credibility at all.

Because respondents have identified no basis on which the court of appeals should have set aside the Board's decisions in either of these cases, there is no need for this Court to reach the second question presented in *Dai*, concerning the court of appeals' additional error in declaring Dai affirmatively eligible for asylum rather than remanding to the agency. If the Court does reach that question, however, Dai offers no sound defense of the court of appeals' approach. The Board understood itself to be free to affirm the IJ's decision without expressly addressing whether the presumption of credibility had been overcome. The government believes the Board was correct, but if this Court were to hold otherwise, the Board should be given the opportunity to address the implications of such a holding in the first instance. The Board should also be given a chance to address any change in country conditions that might have occurred in the nearly six years since it issued its decision.

I. A COURT OF APPEALS MAY NOT PRESUME THAT TESTIMONY IS CREDIBLE AND TRUE BASED SOLELY ON THE ABSENCE OF AN EXPLICIT ADVERSE CREDIBILITY DETERMINATION

A. A Court May Not Presume That An Applicant's Testimony Is True Based On The Absence Of An Express Adverse Credibility Finding

When an alien in removal proceedings asserts that he is eligible for asylum or withholding of removal, the INA places the burden of proof on the alien to establish the facts necessary to demonstrate his eligibility. 8 U.S.C. 1158(b)(1)(B)(ii) (asylum); see 8 U.S.C. 1229a(c)(4)(B), 1231(b)(3)(C) (providing similarly for withholding of removal). The alien's testimony "may be sufficient to sustain [that] burden," but only if the IJ is "satisfie[d]" that the testimony is, among other things, "credible." 8 U.S.C. 1158(b)(1)(B)(ii) (asylum); see 8 U.S.C. 1229a(c)(4)(B). Accordingly, if an IJ makes an "adverse credibility determination" with respect to an alien's testimony, that testimony cannot be used to satisfy the alien's burden of proof. 8 U.S.C. 1158(b)(1)(B)(ii)-(iii).

At the same time, the absence of an "adverse credibility determination" does not mean that the alien has necessarily satisfied his burden, even where his testimony contains "specific facts sufficient to demonstrate" asylum eligibility. 8 U.S.C. 1158(b)(1)(B)(ii)-(iii). Rather, the INA provides that even where testimony is "credible," it must also be "persuasive"—and even then it only "*may* be sufficient to sustain the applicant's burden." 8 U.S.C. 1158(b)(1)(B)(ii) (emphasis added). The INA further specifies that, in assessing whether an alien's testimony provides a basis to grant relief, the IJ

may "weigh the credible testimony along with other evidence of record" and may require the alien to provide evidence to corroborate "otherwise credible testimony." *Ibid.* By recognizing that "credible testimony" may not be "persuasive," and by specifying methods for testing the veracity of "otherwise credible testimony," the statute makes clear that "credible" does not mean "true." Instead, it means that the testimony is "[c]apable of being believed." *The American Heritage Dictionary of the English Language* 438 (3d ed. 1996). As a result, an IJ may decline to make an "adverse credibility determination" and yet ultimately conclude that the alien's testimony is unpersuasive or false.

Respondents readily concede that "it is possible to deem testimony credible but nonetheless deny its veracity." *Alcaraz* Br. 37; see *Dai* Br. 48 (observing that testimony deemed "credible" is "of course, not necessarily true") (emphasis omitted). While that concession is sensible in light of the plain text of the statute, it is fatal to respondents' defense of the decisions below. The Ninth Circuit in *Alcaraz* expressly relied on a presumption of truth, and in *Dai* it applied the same flawed presumption in substance. The judgments below should therefore be reversed.

B. The Court Of Appeals Improperly Presumed That Respondents' Testimony Was True

Respondents assert that, although courts may not apply a presumption of truth based on the absence of an adverse credibility determination, reversal is not required because the judgments in their cases did not turn on any such presumption. Both respondents are mistaken.

1. In Dai's case, the Ninth Circuit explicitly predicated its decision on circuit precedent that had applied

a presumption of truth, although the panel described those cases as applying a presumption of credibility. *Dai* Pet. App. 13a-14a. Dai acknowledges that the cited decisions applied a presumption of truth, but suggests that "citing a case does not incorporate every statement within it." *Dai* Br. 38. That can be so in the abstract, but here the court cited to a specific footnote in *Hu* v. *Holder*, 652 F.3d 1011 (9th Cir. 2011), and stated that "*Hu* controls here." *Dai* Pet. App. 14a (citing *Hu*, 652 F.3d at 1013 n.1). The relevant footnote explains that, "[b]ecause the [Board] did not make an explicit adverse credibility finding, we assume that the facts in Hu's testimony and asylum application are true." *Hu*, 652 F.3d at 1013 n.1 (citing *Ernesto Navas* v. *INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000)).

Dai nonetheless contends that the court below eschewed the presumption of truth in its own analysis because it described Dai's testimony "as *credible*, not true," *Dai* Br. 37. The decision, however, makes clear that the court treated those terms as essentially synonyms, and Dai's attempt to defend the court's decision on other grounds cannot withstand scrutiny.

a. From the outset, the court of appeals treated Dai's testimony as not merely credible, but true. Thus, in setting out the background of the case, the court explained that it was drawing its "factual summary * * * primarily from Dai's testimony" because "neither the IJ nor the BIA made an adverse credibility finding." *Dai* Pet. App. 2a n.1. The court then relied on the "fact[s]"

drawn from Dai's testimony to reject the Board's determination that Dai's testimony was not persuasive. *Ibid.*; see *id.* at 20a-24a.[1]

The court presumed, for example, that Dai was truthful in testifying to a fear that he would be persecuted upon his return to China, and therefore found it unreasonable for the Board to have rejected the persuasiveness of Dai's testimony based on the fact that Dai cited economic opportunities when the asylum officer asked for the "real story" behind his travel to the United States. *Dai* Pet. App. 23a, 44a. The court reasoned that the Board should have recognized that it was permissible for Dai to seek refuge in the United States because of *both* persecution and economic opportunities, *id.* at 23a-24a, ignoring that Dai's statement with respect to the "real story" undermined the veracity—and therefore the persuasiveness—of his assertion that he sought to remain in the United States because of persecution.

---

[1] Dai argues (Br. 1, 14-15) that his testimony is corroborated by hospital records, but he never advanced that argument—or even referenced the hospital records—in his briefing before the Board or the court of appeals. Instead, he relied exclusively on his testimony to establish the facts. *Dai* Administrative Record (A.R.) 9; *Dai* C.A. Br. 4-7. That may be because, during the removal hearing, the government questioned Dai about the hospital records and determined that Dai did not have a letter from the hospital or other evidence authenticating the records. A.R. 138-139. Moreover, Dai explained that the documents were "booklets" that a patient is given at the hospital and that the patient then gives to the doctor. *Ibid.* The government asked what "would stop someone from hand-writing something in a booklet, or typing something in a booklet, on their own." A.R. 139. Dai's only response was that he did not "know how * * * they do that" but that he "personally [had] never done that." *Ibid.*

The same approach led the court to reject the Board's reliance on the fact that Dai's family voluntarily returned to China. Based on Dai's testimony regarding his family's alleged persecution, the court concluded that the experiences of Dai and his wife were "not so similar as to" foreclose the possibility that she could safely return and he could not. *Dai* Pet. App. 21a. By simply accepting the truth of Dai's account, the court ignored that his family's voluntary return to China without him undermined his claim regarding the persecution both he and his wife had experienced.

Perhaps the clearest demonstration of the court's conflation of the terms "credible" and "true" comes from its rejection of the Board's reliance on evidence that Dai was "not being truthful" in his account of his family's travel. *Dai* Pet. App. 22a. The court determined that it was inappropriate for the Board to consider Dai's lack of truthfulness on this issue because the evidence was relevant only to Dai's credibility, and "[c]redibility concerns that do not justify an adverse credibility finding cannot be smuggled into the persuasiveness inquiry." *Id.* at 22a-23a. The court thus elevated the absence of an express adverse credibility determination by the agency into a requirement that Dai's testimony be deemed true.

b. Dai asserts (Br. 39) that, in refusing to consider evidence regarding the truthfulness of his testimony absent an express adverse credibility finding, the court was not imposing a presumption of truth but instead recognizing that some evidence "is *only* relevant to credibility." He appears to argue that, where evidence casts doubt on an alien's "*overall*" truthfulness, *Dai* Br. 44, the agency must either make an adverse credibility

determination or ignore that evidence altogether. That argument is doubly flawed.

To begin, it is not clear this argument helps Dai. In this case, the agency's persuasiveness analysis relied on evidence that undermined particular pieces of Dai's testimony. The fact that he told an asylum officer he wished to live in the United States for economic reasons undermined the persuasiveness of his testimony that he wanted to remain to avoid persecution; the fact that his wife and child voluntarily returned to China without Dai undermined the persuasiveness of his testimony about the persecution his family allegedly experienced there; and the fact that Dai lied about his family's travel further undermined his account of that persecution by suggesting that Dai himself recognized that his family's voluntary return to China was inconsistent with the persecution he had described.

More broadly, a determination of credibility means only that the IJ or Board has found that the alien's testimony is *capable* of being believed, not that it is persuasive or true. Accordingly, nothing in the INA precludes the agency from considering evidence undermining an alien's overall truthfulness as part of its persuasiveness analysis, and nothing requires a reviewing court to dismiss such evidence merely because the agency could have used it to support an adverse credibility determination. Rather, the INA directs that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). That statutory substantial-evidence standard requires the court to consider whether the agency's persuasiveness finding "is supported by substantial evidence on the *record as a whole*." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*,

522 U.S. 359, 366 (1998) (emphasis added). A court is therefore precluded from rejecting record evidence that supports the agency's persuasiveness finding on the basis that it is also relevant to the alien's credibility.

Further, the "common sense reality" is that "triers of fact may—and frequently do—decide factual issues against a party without affirmatively finding that party not credible." *Dai* Pet. App. 136a (Callahan, J., dissenting from denial of rehearing en banc). Nor is it surprising that IJs and the Board often rest their decisions on a determination that the alien's testimony is not persuasive as to essential facts (*i.e.*, that the agency does not find those facts to be true) rather than a determination that the testimony is not credible (*i.e.*, that it was not even capable of being believed). As Dai himself recognizes (Br. 30), an adverse credibility determination is more "drastic," and the agency may be reluctant or find it unnecessary to make such determinations in circumstances where a dispositive persuasiveness finding is sufficient to resolve the particular case. Alternatively, the IJ or Board may accept the truth of some aspects of an alien's testimony but not others, and therefore be unwilling to make a global adverse credibility determination. See *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U.S. 459, 467 (1968) (recognizing that an agency adjudicator may "credit part of [a] witness' testimony without accepting it all"). But in no event does the agency's decision to stop short of an adverse credibility determination limit its ability to consider evidence with respect to persuasiveness.

2. Alcaraz similarly fails in his attempt to demonstrate that the court of appeals did not rely on a presumption of truth in his case. Indeed, he faces a particularly uphill battle because the court declared that, in

the absence of an adverse credibility finding, "the court must assume that the petitioner's factual contentions are true." *Alcaraz* Pet. App. 2a (brackets and citation omitted). Alcaraz acknowledges (Br. 46) that the court should not have invoked such a rule, but he maintains that the mistake was immaterial because the court did not fault the agency for failing to presume that Alcaraz's testimony was true, but rather faulted the agency for crediting the probation report instead of Alcaraz's testimony "without adequate (or any) justification." There are multiple problems with this argument.

First, Alcaraz mischaracterizes the court of appeals' decision. The relevant portion of the decision simply articulates the presumption of truth and then states that the agency "erred" when it credited the probation report "over Alcaraz's testimony without making an explicit adverse credibility finding." *Alcaraz* Pet. App. 3a. The court did not suggest that the failure to accept Alcaraz's testimony as true might have been excused if the agency had provided a more fulsome justification.

Second, Alcaraz points to nothing in the INA that authorizes a court of appeals to set aside factual findings based on the court's view that the agency failed to offer an adequate explanation as to why it chose to credit one source over another. Again, the INA provides that the court must treat an agency's fact-finding as "conclusive" so long as the factual determination is one that a "reasonable adjudicator" could make based on the administrative record. 8 U.S.C. 1252(b)(4)(B).

Third, Alcaraz seeks to rely on lower court decisions that have applied a "'specific, cogent reasons'" requirement in reviewing factual findings made by an IJ or the Board in removal proceedings, despite the lack of statutory authority for such a requirement. *Alcaraz* Br. 27

(quoting *Singh* v. *Gonzales*, 495 F.3d 553, 557 (8th Cir. 2007) (Colloton, J.)). But the courts that have articulated this standard have explained that it is "'exceedingly narrow,'" requiring no more than that the agency's findings have sufficient "'clarity as to be understandable'" and be "convincing enough that a reasonable adjudicator would not be compelled to reach the contrary conclusion." *Singh*, 495 F.3d at 557-558 (citations omitted).

Even if it is permissible for a court to impose a "specific, cogent reasons" requirement, the administrative decisions in Alcaraz's case would readily satisfy it. The IJ's oral opinion described the probation report's violent account of Alcaraz's prior conviction for domestic violence, as well as Alcaraz's competing testimony that he was convicted because he "hit [his girlfriend] in the face" after she hit their daughter. *Alcaraz* Pet. App. 12a-14a. The IJ then explained that it found that Alcaraz was convicted of "a particularly serious crime" because the "nature of the conviction, domestic violence, is serious," and because the "elements of the crime"—including "willful infliction" and "corporal injury [that] results in a traumatic condition"—are also "in and of themselves" "serious." *Id.* at 14a-15a. The IJ further observed that the sentencing court found the crime "serious" by sentencing Alcaraz to "two years." And the IJ explained that the probation report detailed, among other things, "previous threats, substance abuse" and "respondent's minimization of his actions." *Ibid.* The Board, in turn, found that the IJ properly "considered all evidence of record," "including weighing and comparing [Alcaraz's] testimony at the hearing and the probation officer's report." *Id.* at 8a. The Board concluded

that "respondent did not satisfy his burden of establishing that his conviction for corporal injury * * * was not for a particularly serious crime." *Ibid.*

The Board's and IJ's findings are plainly of sufficient "clarity as to be understandable." *Singh*, 495 F.3d at 557-558 (citation omitted). The IJ relied on multiple aspects of the evidence establishing that Alcaraz's crime was particularly serious, and—as the Board found—it properly "weigh[ed]" Alcaraz's testimony against the probation report. *Alcaraz* Pet. App. 8a. That analysis readily comports with the INA, which provides that the agency "may weigh the credible testimony along with other evidence of record." 8 U.S.C. 1158(b)(1)(B)(ii).

Finally, to the extent that Alcaraz's repeated references to a requirement that the agency's analysis be "clear" or "[c]learly [e]xpressed" are intended to suggest a more demanding standard, he is incorrect. *Alcaraz* Br. 18 (emphasis omitted); see, *e.g.*, *id.* at 19, 27, 35. An agency satisfies the reasoned-decisionmaking requirement of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, so long as "the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) (citation omitted).

C. A Court May Not Presume That An Applicant's Testimony Is Credible Merely Because The Board Failed To Make An Express Adverse Credibility Finding

Both respondents also assert that, while a court of appeals need not presume that testimony is true in the absence of an express adverse credibility determination, it must at least presume the testimony is credible. That argument is both incorrect and largely irrelevant to this case.

1. Respondents start from two uncontroversial premises. First, they observe that, under the INA, "if no adverse credibility determination is explicitly made" by the IJ, the "applicant or witness shall have a rebuttable presumption of credibility" in proceedings before the Board. 8 U.S.C. 1158(b)(1)(B)(iii); see *Dai* Br. 29; *Alcaraz* Br. 25-26. Second, they note that, under basic principles of administrative law, a court may "uphold an agency's decision 'only on the grounds that the agency invoked when it took the action.'" *Alcaraz* Br. 24 (quoting *Michigan* v. *Environmental Prot. Agency*, 576 U.S. 743, 758 (2015)). Putting these two propositions together, they reason that "where neither the [IJ] nor the [Board] explicitly found that an applicant testified noncredibly, a reviewing court must presume that the applicant's testimony was credible." *Ibid.*; see *Dai* Br. 33.

The difficulty, however, is that nothing in the INA requires the Board to make an express adverse credibility determination, and nothing requires the court to apply a rebuttable presumption in the absence of an express adverse credibility determination from the Board. The plain text of the statute instead provides that "[t]here is no presumption of credibility," except with respect to the Board's review of an IJ's decision. 8 U.S.C. 1158(b)(1)(B)(iii). Accordingly, a court is free to conclude that, while neither the IJ nor the Board made an express adverse credibility finding, the Board's reasoning demonstrates that it found the presumption of credibility arising from the IJ's omission of an express credibility determination had been overcome. The court could then uphold the Board's determination on the ground that the alien was not credible without contravening the statute or the basic principle

that a court may uphold the agency's determination only on the grounds on which the agency relied.[2]

For example, if Dai were somehow correct that certain evidence is relevant to credibility but somehow not to persuasiveness, but see pp. 9-11, *supra*, a court might reasonably conclude that the Board's decision to discuss and rely on that evidence demonstrated that the Board had found the presumption of credibility overcome. Or the Board could find no need to address whether the alien's testimony was credible—*i.e.*, capable of being believed—and could instead conclude that the alien's testimony was otherwise insufficiently persuasive to carry his burden. So long as a "reasonable adjudicator" would not be "compelled" to reach the contrary result, the court would be required to accept that determination. 8 U.S.C. 1252(b)(4)(B).

2. Respondents assert that the government has misread the statute because, in stating that "[t]here is no presumption of credibility" in Section 1158(b)(1)(B)(iii), Congress meant only that the IJ shall not apply any presumption. *Dai* Br. 34-36 (citation omitted); *Alcaraz* Br. 30-33. They rely principally on where the "no presumption" rule appears in the statute and the objects of the surrounding sentences and provisions. See, *e.g.*, *Dai* Br. 35; *Alcaraz* Br. 31-32. As we have explained (Gov't Br. 29-31), however, those considerations are insufficient to overcome the plain, broad meaning of the phrase "[t]here is no presumption of credibility."

---

[2] Dai and Alcaraz therefore mischaracterize the government's position when they assert that it would permit the court to decide credibility "de novo," *Dai* Br. 36, or to uphold the Board based on a credibility determination the agency could have, but did not, make, *Alcaraz* Br. 27-28.

Moreover, even if respondents are correct that Section 1158(b)(1)(B)(iii) does not prohibit the courts of appeals from applying a presumption of credibility, it does not affirmatively *require* the courts to apply one. "[R]eviewing courts are generally not free to impose" additional procedural requirements on an agency. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). Applying a presumption of credibility would impermissibly force the Board to make an explicit finding about credibility that the statute does not require. It would also contravene Congress's direction to treat reasonable agency fact-finding as "conclusive," 8 U.S.C. 1252(b)(4)(B), a statutory mandate that does not turn on whether the finding in question is explicitly articulated or instead evident from the IJ's and Board's overall analysis.

3. In any event, respondents' arguments on this score are largely beside the point. In order to uphold the Board's decisions in these cases, the court of appeals did not need to decide whether respondents were credible. The court was merely required to evaluate whether a "reasonable adjudicator" would be "compelled" to conclude that the Board erred in finding Dai's testimony unpersuasive, and in determining that Alcaraz's testimony was outweighed by other evidence in the record. 8 U.S.C. 1252(b)(4)(B). Under a straightforward application of the statutory substantial-evidence standard, the Board's decisions should have been upheld. See Gov't Br. 22-26.[3]

---

[3] Alcaraz suggests that the government's position is inconsistent with a past case in which the government "'urge[d]'" a lower court that it "should apply the very rule that respondents propose"—*i.e.*, that a presumption of credibility applies in the courts of appeals.

II. AT MINIMUM, THE *DAI* COURT ERRED IN REFUSING TO REMAND THE CASE TO THE AGENCY FOR FURTHER CONSIDERATION

It is a basic principle of administrative law that, when a reviewing court determines that "the record before the agency does not support the agency action," then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); see *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) (per curiam); cf. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940) ("The Court of Appeals laid bare [the Commission's] error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it."). By the same token, where the court confronts a "'changed circumstances' issue" that the agency "has not yet considered," a court should generally remand to allow the agency to address the issue in the first instance. *Ventura*, 537 U.S. at 16-17.

In *Dai*, the court of appeals found that the Board's asylum and withholding of removal determinations were "not supported by substantial evidence," *Dai* Pet. App. 19a, and the Board has not yet had an opportunity to address whether changed circumstances in China affect Dai's eligibility for relief and protection, Gov't Br. 37-38. Accordingly, even if this Court holds that the

---

Alcaraz Br. 36 (quoting *Haider* v. *Holder*, 595 F.3d 276, 282 & n.4 (6th Cir. 2010)) (brackets in original). There is no inconsistency: the government argued there that the court of appeals should deny relief without regard to any question of credibility, and thus that the most efficient path was to "assume that the applicant was credible in order to review the actual grounds for the ruling," rather than remand for a credibility determination that was, in the government's view, irrelevant. *Haider*, 595 F.3d at 282. The government advocates the same approach here.

findings by the IJ and the Board were insufficient to support the denial of relief and protection, the case should be remanded to the agency. None of Dai's arguments to the contrary is persuasive.

A. Dai first asserts (Br. 46) that the court of appeals was not required to remand after rejecting the Board's determination because the agency had "already decided" the eligibility question. But under *Florida Power & Light*, an invalidation of an agency's determination typically warrants a remand because—after detecting an error—the reviewing court is "not generally empowered to conduct a *de novo* inquiry into the matter being reviewed." 470 U.S. at 744. The court of appeals ignored that command: It first conducted a de novo analysis of the details of Dai's testimony to assess whether the "harm" he described rose to the "level of persecution," *Dai* Pet. App. 17a-18a, and then examined the record as a whole to assess whether anything "undermine[d] the persuasiveness" of the presumptively-credible testimony, *id.* at 19a. In other words, the court "determin[ed] the facts and decid[ed] whether the facts as found f[e]ll within [the] statutory term[s]," tasks that are entrusted to the agency "in the first instance." *Gonzales* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam).

Dai also suggests (Br. 47-48) that remand to the agency is not required because the agency's eligibility determination was primarily based on Dai's credibility and "the agency has *already* adjudicated credibility *in Dai's favor*." In fact, neither the IJ nor the Board made any explicit findings regarding credibility, and—before the Ninth Circuit's decision—the import of that omission was unclear even to the parties. In their court of

appeals briefing, neither Dai nor the government focused their arguments on the potential applicability of a presumption of credibility. See *Dai* Pet. App. 72a-73a (Trott, J., dissenting), 126a-127a & n.2 (Callahan, J., dissenting from denial of rehearing en banc).[4] The court of appeals went beyond that briefing, *id.* at 127a, and found that the agency's failure to make an express adverse credibility finding warranted the application of a presumption of credibility, *id.* at 16a. If that were so, the proper course was then to remand to permit the Board (and if necessary the IJ on further remand) to examine the record further in light of the court's legal ruling, determine whether additional explanation or evidence was necessary, or clarify whether the agency—like the parties—had overlooked the significance of omitting an express adverse credibility determination.

---

[4] Indeed, in Dai's notice of appeal to the Board, he stated that the IJ *had* made an "adverse credibility finding" based on the "finding that respondent's wife had been to the United States but * * * did not apply for asylum," and Dai argued that the finding was erroneous. A.R. 29. In his subsequent brief before the Board, he shifted his argument, asserting that the IJ "did not make an explicit adverse credibility finding" and that the IJ had not otherwise offered a sufficient justification for finding that Dai had not met his burden of proof. A.R. 13. Even then, Dai did not assert that a presumption of credibility should apply in the absence of an express adverse determination, nor did he reference the presumption at all, citing instead to precedents regarding when the Board may overrule an IJ's adverse credibility determination. See A.R. 10-12. It was not until Dai's brief before the Ninth Circuit that he suggested, in a single sentence without citation, that "[n]either the IJ nor the [Board] made an adverse credibility finding, so [Dai's] testimony regarding his persecution in China should be treated as credible." *Dai* C.A. Br. 13.

Dai contends (Br. 48) that a remand to allow the agency to clarify or otherwise address issues of credibility and persuasiveness would be contrary to the "statutory presumption," which "gives the agency one chance to evaluate credibility." But nothing in the INA provides that the agency has only "one chance" to evaluate credibility, even if the reviewing court finds an error in the agency's analysis. Such a bar would be contrary to the ordinary remand rule and the broader relationship between court and agency on judicial review. Moreover, because the rebuttable presumption of credibility applies only to the Board, see pp. 15-17, *supra*, it cannot prevent the court of appeals from remanding to permit the Board to clarify or expand upon its credibility analysis. Nor does the mandate to apply a rebuttable presumption foreclose the Board's ability to remand to the IJ where—for example—it is unclear whether the IJ made an adverse finding. Dai suggests (Br. 48) that a rule prohibiting a remand would make sense because credibility determinations are "uniquely dependent on observing the witness." But that is immaterial to the extent the agency merely clarifies its prior determination, and the relevance of witness observations does not preclude the agency even from altering its credibility finding or examining additional evidence.

B. Dai further contends (Br. 49) that the potential change in country conditions does not warrant a remand because the government did not raise the issue until its en banc petition. But the government filed its court of appeals brief in 2015, and the changes in China's family-planning policies relevant to any determination of eligibility did not occur until 2016. See Gov't Br. 38. The petition for rehearing, which was filed in 2018, was therefore the government's first opportunity to raise

the changed conditions. Further, the government generally has no reason to put forward evidence regarding country conditions where the IJ determines that the alien has not met his burden to establish his allegations of persecution. See 8 C.F.R. 1208.13(b)(1)(ii) (the government has the burden of establishing a change in country conditions "[i]n cases in which an applicant has demonstrated past persecution").

Dai also errs in asserting (Br. 49) that "any change in country conditions after the agency adjudication" is "irrelevant." *Ventura* established the contrary when it directed the court of appeals to remand a case to the agency so that the agency could, among other things, consider new evidence of changed country conditions. 537 U.S. at 16-18. Dai dismisses *Ventura*, asserting (Br. 50) that it was only permissible for the agency to consider new evidence in that case because a remand was otherwise necessary. But a remand is otherwise required in this case too, see pp. 19-21, *supra*. Even if it were not, Dai offers no plausible reason why he should be definitively treated as eligible for asylum and entitled to withholding of removal where the agency has not even had an opportunity to decide whether such relief and protection would be appropriate in light of current country conditions.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
COLLEEN E. ROH SINZDAK
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
DAWN S. CONRAD
Attorneys

FEBRUARY 2021