SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT M. WILKINSON, ACTING   )

ATTORNEY GENERAL,   )

       Petitioner,   )

         v.   ) No. 19-1155

MING DAI,   )

       Respondent.   )

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ROBERT M. WILKINSON, ACTING   )

ATTORNEY GENERAL,   )

       Petitioner,   )

         v.   ) No. 19-1156

CESAR ALCARAZ-ENRIQUEZ,   )

       Respondent.   )

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Pages: 1 through 101

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17   Washington, D.C.

18   Tuesday, February 23, 2021

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20   The above-entitled matter came on for

21   oral argument before the Supreme Court of the

22   United States at 10:00 a.m.

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 1    APPEARANCES:

 2    COLLEEN R. SINZDAK, Assistant to the Solicitor

 3         General, Department of Justice, Washington, D.C.;

 4         on behalf of the Petitioner.

 5    NEAL K. KATYAL, ESQUIRE, Washington, D.C.;

 6         on behalf of the Respondent in 19-1156.

 7    DAVID J. ZIMMER, ESQUIRE, Boston, Massachusetts;

 8         on behalf of the Respondent in 19-1155.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:00 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 19-1155, Wilkinson

5   versus Dai, and the consolidated case.

6   Ms. Sinzdak.

7   ORAL ARGUMENT OF COLLEEN R. SINZDAK

8   ON BEHALF OF THE PETITIONER

9   MS. SINZDAK: Mr. Chief Justice, and

10   may it please the Court:

11   Under the plain text of the INA, an

12   alien has the burden of establishing eligibility

13   for asylum and withholding of removal. An alien

14   may sometimes meet that burden through his

15   credible testimony but only when, among other

16   things, the testimony is persuasive and

17   outweighs other evidence of record.

18   Accordingly, it is now common ground

19   that the absence of an adverse credibility

20   determination does not entitle an alien to a

21   presumption of truth. Rather, a reviewing court

22   should consider whether the agency's

23   noncredibility-related reasoning is supported by

24   substantial evidence.

25   These now undisputed principles

1   demonstrate that the Ninth Circuit erred.   In

2   Dai, the agency pointed to ample evidence

3   undermining the persuasiveness of Dai's

4   testimony regarding his family's persecution,

5   including undisputed evidence of his wife's

6   voluntary return to China.

7   The Ninth Circuit rejected the

8   agency's reasoning because it concluded that the

9   absence of an adverse credibility determination

10   entitled a reviewing court to disregard some

11   record evidence and to treat the alien's

12   allegations of persecution as fact.

13   Similarly, in Alcaraz, the court of

14   appeals expressly relied on the erroneous

15   principle that the absence of an adverse

16   credibility determination permits a presumption

17   of truth, and it applied that presumption to

18   justify ignoring the ample evidence underlying

19   the agency's determination that Alcaraz

20   committed a particularly serious crime when he

21   willfully inflicted corporal injury on the

22   17-year-old mother of his child.

23   The Ninth Circuit therefore subverted

24   the statutory scheme that Congress created.

25   Rather than placing the burden on the alien, the

1   court presumed the truth of the alien's

2   testimony, and rather than deferring to the

3   agency's reasonable fact-finding, it supplanted

4   the agency's judgment with its own.

5   Accordingly, the court of appeals' decisions

6   cannot stand.

7   CHIEF JUSTICE ROBERTS: Counsel, the

8   -- the -- the BIA has to apply the rebuttable

9   presumption of credibility, right?

10   MS. SINZDAK: That's correct.

11   CHIEF JUSTICE ROBERTS: Okay. So then

12   the court of appeals, in conducting the

13   substantial evidence review, should, it seems to

14   me, do that through the lens of that presumption

15   or take that presumption into account in

16   concluding whether the evidence is substantial.

17   Why -- why isn't that true?

18   MS. SINZDAK: If the agency did not

19   address credibility at all, either explicitly or

20   the Board can implicitly address it, then the

21   reviewing court shouldn't address credibility

22   either, so it doesn't need to concern itself

23   with the presumption that the Board would have

24   had to apply because it should just be

25   evaluating whether the noncredibility-related

1   reasoning is supported by substantial evidence.

2   So the presumption doesn't enter the picture at

3   all.

4   CHIEF JUSTICE ROBERTS: Well, then you

5   said explicitly or implicitly. If it's

6   implicitly, I think that raises the Chenery

7   objection that your friends on the other side

8   have stressed quite a bit, and I'd like you to

9   talk about it because, you know, there was one

10   stray cite to Chenery in your opening brief, and

11   then you had I would say the bulk of the

12   argument on the other side in both of the briefs

13   or at least a big chunk of it, and it wasn't

14   cited at all in your reply belief.

15   So I'd like to give you a chance to

16   respond to their Chenery argument, which is that

17   you rely on saying there can be an implicit

18   finding, and yet, under Chenery, we'd like to

19   make sure that that's something the agency

20   relied on, and I don't think we can be sure of

21   that if they didn't say anything about it.

22   MS. SINZDAK: Well, absolutely. We --

23   we completely embrace Chenery, and as I believe

24   we stated in our reply belief, we agree that the

25   agency's path needs to be clearly discerned.

1   That's what Chenery requires.

2   But, if the agency's path -- if the

3   Board's path can be clearly discerned, and it's

4   clear that the Board was relying on credibility

5   for denying eligibility, then the Board -- the

6   Court is entitled to take that into

7   consideration. It doesn't have to look for

8   magic words.

9   But we think that's largely irrelevant

10   here because we aren't arguing that the Board --

11   the Board or the IJ relied on credibility.

12   We're arguing that the Board relied -- the Board

13   and the IJ relied on noncredibility-related

14   reasoning, that reasoning, that the IJ didn't

15   find the -- Dai's testimony sufficiently

16   persuasive, that the IJ pointed to a number of

17   pieces of evidence in Alcaraz's case that

18   demonstrated that he had committed a

19   particularly serious crime, even if perhaps his

20   cred -- his -- his -- his testimony could have

21   been deemed credible.

22   So, again, we just think that -- that

23   this -- this argument about Chenery, we don't

24   disagree with Chenery, we don't disagree that

25   the -- the Court, of course, has to review the

1   grounds that the agency decided the case on, but

2   we think that in this case, that means that the

3   Court should have reviewed

4   noncredibility-related grounds.

5   CHIEF JUSTICE ROBERTS: Well, how much

6   of an -- an explanation is required for you to

7   conclude that this was an implicit determination

8   that the alien was not credible? It's --

9   MS. SINZDAK: As this Court --

10   CHIEF JUSTICE ROBERTS: -- it's not

11   enough, I take it, that they just have, oh,

12   here's some credible evidence on the other side

13   and we're going to follow that. Is that enough?

14   MS. SINZDAK: To determine that the

15   agency based it -- its rejection of asylum on

16   credibility, no. We think that, as this Court

17   said in Encino Motorcar -- Motorcars, the

18   pathway has to be clearly discerned.

19   CHIEF JUSTICE ROBERTS: Thank -- thank

20   you.

21   MS. SINZDAK: But, again, we don't

22   think the alien -- that the agency relied on

23   credibility here, so we don't think that you

24   have to read the Board decision to rely on

25   credibility, that you have to consider whether

1   it's implicit or explicit. We just don't think

2   they were looking -- that the -- the agency was

3   looking at credibility at all.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel.

6   Justice Thomas.

7   JUSTICE THOMAS: Thank you, Mr. Chief

8   Justice.

9   Counsel, would you take a few minutes

10   to walk through the evidence or the findings

11   that you thought in these two cases was either

12   persuasive and/or undermined the credibility of

13   the Respondents?

14   MS. SINZDAK: Sure. And just to be

15   clear, it's our position that the -- the Board

16   did not rely on credibility, that it would, in

17   fact, be acceptable to say, even assuming that

18   this, for the purposes of analysis, that the

19   testimony in both cases was credible, there were

20   other noncredibility-related reasoning --

21   reasons that were sufficient to deny

22   eligibility.

23   And so, in Dai, we think that the

24   agency pointed out that even though Dai said

25   that his wife had been persecuted along with him

1   in China, there was evidence demonstrating that

2   his wife had voluntarily returned to China just

3   about two weeks after they -- they -- his family

4   came. So that evidence that his wife

5   voluntarily returned undermines the

6   persuasiveness of his testimony about his

7   family's persecution.

8   And then Dai was not forthcoming about

9   the fact that his wife and child had returned,

10   and he admitted before the IJ that he wasn't

11   forthcoming because he was worried about

12   admitting that his wife and child had

13   voluntarily returned, demonstrating that he was

14   aware that there was something not quite right

15   about saying, oh, we're fleeing persecution, I

16   want to bring my wife and child to safety, when

17   his wife and child had voluntarily returned.

18   And then, third, when the asylum

19   officer asked Dai for the real story behind his

20   travel to the United States, he said to make a

21   better life for his child and to -- because he

22   didn't have a job.

23   He did not reference the persecution.

24   And I think the fact that he said the real

25   story, he recounted the real story without

1   referencing persecution at all, that too

2   undermines the persuasiveness of his testimony

3   that he wanted to stay -- he needed to stay in

4   the United States because of persecution.

5   So I think, in Dai, there are three

6   pieces of very strong evidence that undermines

7   the persuasiveness of the alien's testimony,

8   even if you assume for the purposes of analysis,

9   for the limited purposes of analysis, that Dai

10   testified credibly.

11   In Alcaraz --

12   JUSTICE THOMAS: Judge Trott seems to

13   think that there isn't much difference, it's not

14   worth even making a distinction between

15   credibility and persuasiveness.

16   What do you think of that?

17   MS. SINZDAK: I -- I don't think

18   that's quite right because I think that

19   credibility is a baseline. So credible

20   testimony must be just capable of being

21   believed.

22   And I think that persuasiveness is a

23   higher bar. To be persuasive, you have to have

24   the power to persuade. I think we can all

25   imagine scenarios where someone might be

1   credible but not persuasive. A lawyer might be

2   credible in his arguments but not persuasive.

3   My six-year-old son might be credible when he

4   tells me he didn't eat the cookies, but I may

5   not ultimately find that persuasive if I find

6   crumbs all over his room.

7   So I think there is a distinction

8   between the two terms.

9   JUSTICE THOMAS: Well, it -- it would

10   seem to me that if you saw the crumbs, it would

11   undermine credibility.

12   MS. SINZDAK: Well, I think that if

13   you think of credible as just capable of being

14   believed, I can imagine explanations for the

15   crumbs. I can imagine perhaps that the crumbs

16   are there because his sister was framing him,

17   but I don't ultimately find his account

18   persuasive. So maybe it's capable of being

19   believed, but it doesn't have the power to

20   persuade.

21   JUSTICE THOMAS: Well, it would seem

22   as though, if the crumbs were on his -- around

23   his mouth, you would think that that wasn't

24   quite credible, so it seems that the existence

25   of the crumbs could be both, go to credibility

1   and to persuasiveness.

2   MS. SINZDAK: Absolutely. And we

3   think that evidence often will go to both things

4   and that Congress acknowledged as much because

5   it said that the same considerations go into the

6   credibility analysis that then -- and then --

7   so, like, consistency with outside evidence is

8   something you can consider in the credibility

9   analysis under 1158(b)(1)(B)(iii), but then

10   1158(b)(1)(B)(ii) says you should weigh credible

11   evidence against evidence of record.

12   So things like consistency can go into

13   both -- both -- both categories.

14   JUSTICE THOMAS: Thank you.

15   CHIEF JUSTICE ROBERTS: Justice

16   Breyer.

17   JUSTICE BREYER: Well, I -- I -- my

18   question here is -- reflects my concern with the

19   legal mind. The legal mind loves to make

20   distinctions, but sometimes that should be

21   resisted.

22   So we have a simple rule that treats

23   pretty much all agency cases roughly alike --

24   sometimes there are exceptions -- that what a

25   court of appeals does with a factual matter or

1   some matter like this really is look for

2   substantial evidence, end of matter.

3   So, if, in fact, there's a finding

4   he's credible, then you take that finding and

5   you say is there, with that finding, substantial

6   evidence. And if it's the opposite, you say the

7   opposite, is there substantial evidence. And if

8   the judge doesn't say, Congress tells us what to

9   do.

10   Presume that he's telling the truth,

11   but the presumption is rebuttable, so if nobody

12   says anything, you look at it and you simply

13   say, assuming it was rebutted, we assume that

14   the judge found it was rebutted, and is there

15   substantial evidence? Period. With the

16   assumption that it was rebutted.

17   And that could include, there isn't

18   enough evidence to show it was rebutted. That

19   will just be part of the matter. But what we

20   tell the court of appeals is review substantial

21   evidence, follow the statute as I said, end

22   of -- end of case.

23   MS. SINZDAK: Absolutely. But the

24   statute does not say to presume that the alien

25   is telling the truth. It doesn't even tell the

1   Board to presume that the alien is telling the

2   truth.

3   JUSTICE BREYER: Doesn't it say,

4   though -- doesn't it say presumption of

5   credibility?

6   MS. SINZDAK: Absolutely it says

7   credibility, but it's now common ground among

8   all of the parties that credible is not the same

9   as truth.

10   JUSTICE BREYER: Well, it may be

11   common ground on all of the parties, but it

12   isn't common ground with me, because I would be

13   quite worried about introducing into

14   administrative law, with thousands of agency

15   decisions, some kind of distinction between

16   credible and truthful. I haven't seen that in

17   administrative law cases, but even were it

18   there, I would be afraid of getting everybody

19   mixed up.

20   MS. SINZDAK: I think that Congress

21   introduced a distinction in the text of the REAL

22   ID Act because the REAL ID Act says the

23   testimony must be not merely credible but also

24   persuasive. The REAL ID Act also says that a

25   judge is entitled to weigh credible evidence

 1   alongside other evidence. And it says that a

 2   judge may ask for --

 3   JUSTICE BREYER: No, that's not --

 4   MS. SINZDAK: -- corroboration of

 5   otherwise credible evidence. That doesn't make

 6   sense if "credible" means true --

 7   JUSTICE BREYER: Why?

 8   MS. SINZDAK: -- because -- well,

 9   because, if the testimony is true -- if the

10   testimony -- if credible testimony has to be

11   accepted as true, it's not clear why you would

12   ever need corroboration. If credible evidence

13   has to be accepted as true, then --

14   JUSTICE BREYER: Well, it depends on

15   what it is. What he says is, my wife told me

16   that she wanted to see her dying mother in

17   China. And now it's credible or not?

18   MS. SINZDAK: I -- I -- I'm -- I'm --

19   I'm not --

20   JUSTICE BREYER: The judge says it's

21   credible. Now what?

22   MS. SINZDAK: If the judge says that

23   it's credible, he then has to determine whether

24   that's persuasive. So is there other -- other

25   evidence that suggests --

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1               JUSTICE BREYER:  Holding it
2    persuasive, that's true.  That's true.
3               MS. SINZDAK:  So, if there's other
4    evidence that suggests --
5               JUSTICE BREYER:  But I don't get the
6    between distinguish -- my point I don't get
7    right now is the distinction between credible
8    and true.
9               MS. SINZDAK:  Well, I --
10              JUSTICE BREYER:  See, my wife told me
11   her mother was dying in China and that's why she
12   went back, she said.  Okay?  That's the
13   testimony.  And you say it's credible.
14              Now how could it not be true if it's
15   credible?
16              MS. SINZDAK:  Well, I think the -- the
17   easiest way to understand this for me is to
18   think about a scenario where a credible witness
19   says that the light was red and three credible
20   witnesses say that the light was green.  You may
21   decide that, in fact, the light was green.  That
22   doesn't mean the first witness didn't credibly
23   testify that the light was red.
24              JUSTICE BREYER:  That's true because
25   what I have --
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         1   MS. SINZDAK: It does mean that it

         2   wasn't true.

         3   JUSTICE BREYER: -- that testimony

         4   means I think the light was red. I saw it as

         5   red. And some other people could see it as

         6   blue. It depends on the issue in the case.

         7   Let's start working this through the court of --

         8   there are millions of issues that can come up

         9   with substantial evidence.

        10   MS. SINZDAK: I -- I think that --

        11   JUSTICE BREYER: Do you see what's

        12   worrying me? I'm worrying about this Court

        13   writing some kind of opinion and saying

        14   "credible" is different than "true," and before

        15   you know it, who knows what will happen.

        16   MS. SINZDAK: I -- I --

        17   JUSTICE BREYER: So I think we stay to

        18   substantial evidence, period, and we get as

        19   close to that as we can, reading into it the

        20   part -- well, it may be too long to explain in a

        21   question, but I've made -- I've made my point.

        22   MS. SINZDAK: Yes, I think that the

        23   Court could say that with -- by the -- according

        24   to the plain text of the INA, Congress did not

        25   consider "credible" to be synonymous with

1   "true." And I think that --

2   CHIEF JUSTICE ROBERTS: Thank you,

3   counsel.

4   Justice Alito.

5   JUSTICE ALITO: Well, I think you have

6   an argument. The Ninth Circuit said in both

7   cases, as I read their opinions, that the -- the

8   BIA must explicitly say that the alien's

9   testimony is not credible or else there is a

10   presumption of credibility. I think that's

11   incorrect as to the BIA as a matter of law.

12   But, beyond that, I will be truthful.

13   I -- I found the way that you have briefed this

14   case to be extraordinarily baffling. "Credible"

15   means capable of being believed, worthy of

16   belief. It doesn't mean that the testimony is

17   accurate. A person -- it may turn out that it's

18   inaccurate. But this distinction that you are

19   drawing between "credibility" and

20   "persuasiveness" is -- I -- I -- I think it's

21   extraordinarily confusing and invalid.

22   If at the end of the day you conclude

23   that your son really did eat the cookies, he was

24   not credible, what he said was not worthy of

25   belief. To -- to say, well, he was worthy of

1   belief, but in the end, I don't believe him,

2   that escapes me. But maybe you can explain it

3   to me.

4   MS. SINZDAK: I think that a problem

5   here is that we often, in common parlance, use

6   the term "credible" to -- to mean that -- that

7   we believe it. I think it -- it is often to --

8   it is common to just say, you know, yes, I found

9   him credible, I believed what he said.

10   It's just that we know from the very

11   particular text of the INA -- of the INA that

12   that isn't what Congress had in mind, that in

13   the INA what Congress meant was credibility is a

14   baseline, it is just capable of being believed,

15   not that the judge actually thinks that it's

16   true, not that the judge actually believes it,

17   but just that the judge can believe -- can --

18   can recognize that someone could -- that it's

19   capable of being true. That's the baseline.

20   And -- and the -- the -- the INA

21   itself makes it clear that "credibility" and

22   "persuasiveness" are different because it uses

23   both terms. So, first, it says the -- the

24   testimony definitely has to be credible, and

25   then it has to be more than just credible. It

 1   also has to be persuasive. It has to have the

 2   power to persuade.

 3   So I think that if you look at the

 4   text of the INA, it draws the very distinction

 5   that we are relying on.

 6   JUSTICE ALITO: Now, if I don't agree

 7   with you about that distinction, does that mean

 8   you lose these cases?

 9   MS. SINZDAK: No, it does not,

10   because, again, we think that what these cases

11   ultimately come down to is that you -- that you

12   have to analyze whether there is substantial

13   evidence underlying the reasoning that the Board

14   put forward.

15   And, here, we think that -- just

16   setting aside the entire debate about what

17   "credibility" means and -- and -- and -- and --

18   and whether something should be deemed --

19   whether evidence should be deemed responsive to

20   credibility or persuasiveness, what is very

21   clear here is that the agency pointed to

22   multiple pieces of evidence in both cases that

23   demonstrated that the alien could not meet his

24   burden of proof. And that's --

25   JUSTICE ALITO: What should we make of

1   --

2   MS. SINZDAK: -- all that we can --

3   JUSTICE ALITO: -- before my time

4   expires, one last question, what should we make

5   of the hospital records? Are they something

6   that we should not consider at all?

7   MS. SINZDAK: You should not consider

8   it. The alien did not raise the -- the hospital

9   records in his briefing before the Board, and,

10   under 1252, administrative exhaustion is

11   required. It's a prerequisite for judicial

12   review.

13   JUSTICE ALITO: Thank you.

14   CHIEF JUSTICE ROBERTS: Justice

15   Sotomayor.

16   JUSTICE SOTOMAYOR: Could you clarify

17   that last point? The medical records were

18   before the IJ, correct?

19   MS. SINZDAK: They were before the IJ,

20   and before the IJ, the government elicited

21   testimony from Dai to the extent that he had not

22   done anything to authenticate the letter -- the

23   -- the medical records and that when the

24   government asked how -- what would prevent

25   someone from just writing in information into

1   the records themselves, he said that he didn't

2   know, but he hadn't done that.

3   So I think the government was clearly

4   suggesting that -- that there were some

5   authenticity problems with -- with the evidence.

6   And then, when the IJ rejected the asylum

7   request --

8   JUSTICE SOTOMAYOR: Counsel, can I --

9   I'm going to stop you there because I don't want

10   you eating up my time, okay? I -- I am very

11   confused, and if I'm confused, I -- I think the

12   rest of the world is confused and so are my

13   colleagues to some extent.

14   Evidence can be credible but not

15   adequate to meet a burden. People can say

16   certain things and you can still say, yes, I

17   believe he encountered the police. Yes, I

18   believe they did something to him. But, no, I

19   don't think it rises to the level of

20   persecution.

21   That's a form of a lack of

22   persuasiveness. There are situations in which

23   people can be credible about one aspect of

24   something but not another. This is a perfect

25   case.

1   Dai may have been credible about the

2   persecution of his wife and the fact that they

3   were forced to abort a child but incredible as

4   to why he left China and whether it was based on

5   the fear of persecution or not. That his wife

6   went back, all the things you mentioned could be

7   viewed that way. There are any dozen reasons.

8   Are we responsible for figuring out

9   what the BIA meant? If it doesn't make an

10   adverse credibility finding, which wasn't made

11   here, and it's not clear what the basis of their

12   decision was, aren't simple administrative law

13   principles at play, and shouldn't we just remand

14   to say what is it that you found incredible?

15   MS. SINZDAK: No. First of all,

16   the -- the -- the INA -- the text of the INA

17   says -- and I'm not going to talk about

18   persuasiveness because I -- I think that, you

19   know, that's a little bit of a red herring. It

20   says that the judge -- the IJ has to weigh

21   credible evidence along with other evidence of

22   record.

23   So, here, I -- I think that it is a

24   very familiar situation in which, even assuming

25   the IJ found the testimony of Dai credible and

1   found the testimony of Alcaraz credible, he then

2   had to weigh that against the other evidence in

3   the record. And if other evidence in the record

4   suggested that, in fact, Dai had not been

5   persecuted, then it was -- then Dai had not met

6   his burden.

7   And, here, the IJ pointed to three

8   pieces of evidence that suggested that Dai just

9   hadn't met his burden, even assuming that the

10   testimony was credible.

11   And in Alcaraz, the IJ said --

12   JUSTICE SOTOMAYOR: Counsel, before

13   you go on with Alcaraz, there, the BIA did

14   remand, and the issue was whether or not the --

15   and the -- and the Ninth Circuit found that they

16   couldn't rely on the probation report,

17   presumably, because the BIA will have to decide

18   whether or not that witness was available for

19   cross-examination or not.

20   But I'm not sure why we granted cert

21   in Alcaraz because the Ninth Circuit did what

22   you're asking, it remanded there.

23   MS. SINZDAK: No, we aren't asking for

24   a remand. What we're saying is that the Court

25   should apply the substantial evidence standard,

1   and because there was substantial evidence in

2   Alcaraz, even if you ignore the credible -- the

3   probation report, the IJ pointed to the fact

4   that it was a domestic violence offense. She

5   pointed to the fact that the elements involved

6   the willful infliction of corporal injury

7   resulting in trauma and the fact that he had

8   been sentenced to two years, which indicated

9   that the sentencer thought that he had committed

10   a very -- a particularly serious crime.

11   So I think you could just look at that

12   and say that obviously meets these very, very

13   generous substantial evidence standards set out

14   in Section 1252.

15   CHIEF JUSTICE ROBERTS: Justice Kagan.

16   JUSTICE KAGAN: Ms. Sinzdak, you said

17   that the Board had not relied on credibility

18   reasoning in these cases. That's -- that's your

19   principal submission. And you said instead

20   there were these three pieces of evidence in

21   Dai, there was the probation report on Alcaraz.

22   But, as you listed those pieces of

23   evidence, they all seemed to me to go to

24   credibility. So let's just take the Dai case,

25   and one of the pieces of evidence that you cited

1   was, you know, he started stammering when he

2   talked about his wife's return and he was very

3   hesitant to tell the truth and he looked

4   uncomfortable and that that is classic demeanor

5   evidence going to somebody's credibility.

6   And similarly, the other pieces of

7   evidence, I mean, they all go to whether or not

8   he's telling the truth, which, you know,

9   honestly, join me up to Justice Alito, that --

10   that if the evidence is related to whether he's

11   being honest in his testimony, then it goes to

12   credibility.

13   So how are all of those pieces of

14   evidence not essentially related to credibility?

15   MS. SINZDAK: First of all, I -- I --

16   I think that, just to be clear, it was also --

17   it wasn't just demeanor evidence. And, in fact,

18   I'm not sure I did refer to demeanor evidence

19   with respect to Dai not being forthright.

20   JUSTICE KAGAN: If -- if you would

21   just answer the main -- main question, Ms.

22   Sinzdak.

23   MS. SINZDAK: Absolutely. So there is

24   an overlap certainly between credibility and

25   persuasiveness. Obviously, testimony isn't

1   going to be persuasive if it is not credible, if

2   it isn't even capable of being believed.

3   But a -- it is -- it is within the

4   IJ's power to say, look, I think there were

5   inconsistencies in his testimony, but I still

6   think that he is capable of being believed, so

7   I'm not going to say you get an adverse

8   credibility determination.

9   JUSTICE KAGAN: In -- in the end, Ms.

10   Sinzdak, did the Board believe that Mr. Dai was

11   lying?

12   MS. SINZDAK: I don't think the Board

13   said that he was lying. What it said is there's

14   other evidence that suggests ultimately that the

15   facts haven't been established here.

16   JUSTICE KAGAN: Well, how would the

17   facts not be established if he was telling the

18   truth?

19   MS. SINZDAK: He could believe that he

20   was telling the truth. He could very much

21   believe that -- that -- that all of these things

22   happened as they were, as -- as -- as he says,

23   but, you know, just as somebody could believe

24   that the light was red, but, ultimately, there

25   are facts that strongly suggest that isn't --

1   that isn't what happened. The light was green.

2   JUSTICE KAGAN: Well, so the --

3   MS. SINZDAK: You're --

4   JUSTICE KAGAN: -- the -- the question

5   in the Dai case is all about whether he got beat

6   up because of his opposition to the, you know,

7   so-called family planning policies of China,

8   and, if he did get beat up for that reason, then

9   he has a well-founded fear of persecution under

10   the regulations. And are you saying that the

11   Board said that he was mistaken as to whether he

12   got beat up?

13   MS. SINZDAK: I am saying that the

14   Board did not think he had submitted sufficient

15   evidence to meet his burden of proof.

16   JUSTICE KAGAN: I know, but how did

17   the Board reach that determination unless the

18   Board decided that he was lying?

19   MS. SINZDAK: It looked at other

20   testimony of his, and, remember, there's no

21   adverse credibility determination, so it's

22   looking at all of his testimony. And it said

23   that he had also credibly testified that the

24   real story behind his travel to the United

25   States was that he wanted a better life for his

1   daughter, and --

2   JUSTICE KAGAN: Well, then that

3   suggests that his other testimony was a lie, was

4   false, and that is inconsistent with a

5   presumption of credibility.

6   There's no extraneous evidence in this

7   case at all. It all relies on whether Dai is

8   telling the truth or not. And there's a

9   presumption that kicks in, and you're saying,

10   well, we -- you're -- you're not grounding your

11   argument on whether that presumption was

12   overturned by the Board. Instead, you're saying

13   that the Board presumed he was credible and then

14   did something else. But there's nothing else to

15   be done in the Dai case.

16   MS. SINZDAK: If the --

17   JUSTICE KAGAN: He told a story. It's

18   an honest, true story, or it's not.

19   MS. SINZDAK: If the Court thinks that

20   all of the evidence that the agency pointed to

21   is only relevant to credibility, then I think it

22   would -- and -- and has to meet -- would --

23   would necessarily dictate that the Board didn't

24   and the agency and the IJ didn't think he was

25   telling the truth, then I think the only mistake

 1   that was made here was that they didn't use the

 2   word "credibility."

 3   JUSTICE KAGAN: Thank you --

 4   MS. SINZDAK: And --

 5   JUSTICE KAGAN: -- Ms. Sinzdak.

 6   CHIEF JUSTICE ROBERTS: Justice

 7   Gorsuch.

 8   JUSTICE GORSUCH: Good morning, Ms.

 9   Sinzdak. I'd like to explore a slightly

10   different point, and -- and that is where does

11   this presumption apply. In the government's

12   opening brief, it took the position that it

13   applies only in appeals to the BIA and not in

14   court.

15   The reply brief didn't appear to me to

16   press that point with the vigor of the opening

17   brief, and I'm just curious what -- what -- what

18   the government's position is now.

19   MS. SINZDAK: The government's

20   position remains that the presumption applies

21   before the Board and not before the court.

22   As we explained in our reply brief, we

23   don't think that we need to get bogged down in

24   that because, here, we just don't think that

25   credibility is the issue. But we continue to --

1   to believe that the -- the -- the clear language

2   of the statute makes the presumption applicable

3   before the Board.

4   JUSTICE GORSUCH: Okay. Let's suppose

5   you're right about that just for the moment.

6   What -- what difference does that make if a

7   court of -- of -- you know, a court of appeals

8   has to review for substantial evidence and

9   reasonableness. Doesn't it have to also inquire

10   as to whether the Board reasonably treated the

11   presumption?

12   MS. SINZDAK: Yes, and if -- if

13   credibility became an issue, which, again, we

14   think that the court should have reviewed the

15   noncredibility-related grounds that the -- that

16   the -- the Board relied on, but, if credibility

17   became an issue, yes, it would have to say, we

18   think the Board implicitly found that the --

19   that Dai was not credible, and we think there

20   was sufficient evidence that the presumption of

21   credibility was overcome.

22   And, here, I -- I think, frankly,

23   there is because --

24   JUSTICE GORSUCH: I -- I -- I -- let

25   me just stop you there. I'm sorry, but you say

1   implicitly, and I -- I guess I'm wondering how a

2   court could decide that the Board acted

3   reasonably based on an implicit credibility

4   determination when the statute seems to require

5   the Board to make an explicit one.

6   MS. SINZDAK: I don't think the

7   statute requires the Board to make an explicit

8   credibility determination. The only thing the

9   statute says in that regard is that, if the

10   fact-finder or if -- if it had not made an

11   explicit adverse credibility determination, the

12   Board should apply the presumption. It doesn't

13   then say --

14   JUSTICE GORSUCH: Right.

15   MS. SINZDAK: -- and the Board must --

16   JUSTICE GORSUCH: Okay. So -- so we

17   don't have an explicit finding from the IJ. Why

18   wouldn't it be unreasonable, therefore, for the

19   Board to -- let's just assume for the moment it

20   did -- implicitly reject the credibility of

21   the -- of -- of the witness?

22   MS. SINZDAK: I think you have to look

23   at this against the backdrop of what the

24   circuits have considered an explicit adverse

25   credibility finding in -- insofar as -- as the

1   Ninth Circuit in the majority opinion explained,

2   you know, they haven't even credited things

3   where the Board -- the -- the Board has said

4   that, you know, he didn't seem quite credible.

5   JUSTICE GORSUCH: Okay. But let --

6   let -- let -- just -- just let's -- let's --

7   let's assume it's implicit, as -- as your

8   answer -- first answer seemed to suggest.

9   Could -- could the Board reasonably

10   affirm an IJ based on implicit credibility

11   determinations, or would that be something a

12   court of appeals would have to reverse in light

13   of the statute?

14   MS. SINZDAK: If it found the

15   presumption overcome, it could certainly affirm

16   an IJ based on an implicit credibility

17   determination because, again, the statute

18   doesn't apply an irrebuttable presumption. It

19   applies a rebuttable presumption.

20   So, if the Board looked at the IJ and

21   said, you cited three major pieces of evidence

22   that show that Dai was not credible, you seem to

23   have forgotten to say -- to make an adverse

24   credibility determination, that would, of

25   course, be acceptable.

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1              JUSTICE GORSUCH:  How about -- I -- I
2    certainly understand the reluctance of
3    immigration judges and trial judges everywhere
4    to make adverse credibility determinations
5    expressly.  It's -- it's an uncomfortable task.
6              But what -- what -- on the other hand,
7    what's so difficult about requiring the
8    government to do just that?  I mean, if you
9    point to, as Judge Collins did, you know, eight
10   different problems with Dai's testimony, for
11   example, the probation report in the other case,
12   it surely wouldn't require much more than a few
13   words to -- to -- to make express what -- what's
14   implicit.
15             MS. SINZDAK:  Well, I think it would
16   be going beyond what Congress stated because
17   Congress in 1252 said that the courts have to
18   uphold agency determinations unless the -- any
19   reasonable fact-finder would be compelled to
20   reach the opposite conclusion.
21             So I think it would be flouting
22   Congress's plain text to -- to require something
23   that Congress did not.
24             JUSTICE GORSUCH:  Thank you.
25             CHIEF JUSTICE ROBERTS:  Justice
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1   Kavanaugh.

2   JUSTICE KAVANAUGH: Thank you, Chief

3   Justice.

4   Good morning, Ms. Sinzdak. On the

5   statutory language, if I could start there and

6   pick up on Justice Gorsuch's questioning, it

7   says if no adverse credibility determination is

8   explicitly made -- and you said that's by the

9   IJ -- the applicant or witness shall have a

10   rebuttable presumption of credibility on appeal.

11   And I just want to know what work the

12   presumption does and -- on -- on appeal. In

13   other words, I would think the presumption does

14   work when there's no other evidence at all,

15   other than the testimony of the applicant, and

16   there hasn't been an adverse credibility

17   determination. Then there's -- then you have

18   that presumption of credibility on appeal, and,

19   presumably, that will sustain the burden. But

20   you can tell me if that's wrong.

21   If there's any other evidence,

22   however, then the presumption, I guess, drops

23   out or the case becomes like any other case. Is

24   that right? Is that your argument, or how do

25   you think about that?

 1   MS. SINZDAK: I mean, I'm -- I'm --

 2   I'm certainly willing to go with that, but I

 3   think -- I think that also --

 4   JUSTICE KAVANAUGH: But why is that

 5   wrong? You don't think that's right. What's --

 6   what's wrong with what I said there?

 7   MS. SINZDAK: Well, I -- I think that

 8   if the IJ has not made an explicit adverse

 9   credibility determination, then the -- the court

10   needs to -- sorry, then the Board needs to

11   determine whether the presumption has been

12   overcome. And I think that could occur in cases

13   where there is other evidence.

14   And the way I think about it is if,

15   for example, the IJ said, I'm not going to

16   address credibility, I'm going to -- but I think

17   that, you know, the -- the -- the testimony is

18   not persuasive or I think other evidence

19   demonstrates this isn't correct, it could say

20   any number of those things, and the -- the Board

21   could evaluate it and say, well, we don't accept

22   the grounds that the IJ relied on, but we

23   think -- you know, but we -- we think he's

24   probably not particularly credible. And I

25   think, there, the presumption would kick in and

1   say no, you can't make that finding. You

2   actually need to either determine whether the

3   presumption has been overcome or remand to the

4   IJ to make an -- a credibility determination.

5   JUSTICE KAVANAUGH: What -- what's the

6   point of this provision, do you think?

7   MS. SINZDAK: I think exactly what I

8   just said. I think it prevents the Board from

9   just assuming that the alien was not credible.

10   I think that if you look at the concurrence in

11   S-M-J-, which is the Board decision referred to

12   in the -- the legislative history of the REAL ID

13   Act, one of -- there was a concurrence there

14   that was very concerned that adjudicators might

15   just assume aliens are lying because -- because

16   they're seeking asylum, because it's to their

17   benefit. And I think the presumption ensures

18   that the Board doesn't make that -- that -- that

19   -- that -- that negative inference, that it

20   actually has to point to some evidence to rebut

21   the presumption of credibility.

22   JUSTICE KAVANAUGH: Then, on the

23   terminology, there's a lot of confusion

24   obviously inherent in these terms, but I -- I

25   would think the way you would approach it when

1   -- with a witness's testimony is you would ask,

2   is the witness lying, first, about whether the

3   light was red or green, for example. The

4   witness knows it was red but testifies it was

5   green. So the witness is lying. That's the

6   first inquiry, is the witness lying?

7   Then the second inquiry would be, even

8   if the witness is not lying, is the witness

9   mistaken or wrong? You know, they truly believe

10   the light was red, but, in fact, the light was

11   green, the other evidence shows.

12   Now that's how I usually think about

13   it, and I'm curious how you think that fits into

14   the term "credibility." In other words, is the

15   witness lying? Even if not, is the witness

16   mistaken?

17   MS. SINZDAK: Yes, I think that that's

18   a good way. I would just give you the terms of

19   the statute. So I think the first question is,

20   is the witness credible? Is he even capable of

21   being believed, or is it just obvious that he's

22   lying?

23   And the next question is, well, is the

24   witness persuasive? Is there a possibility

25   that, for whatever reason, he's mistaken? Even

1   if he's capable of being believed, the testimony

2   just hasn't -- doesn't have the power to

3   persuade me that the light actually was, you

4   know, green.

5   JUSTICE KAVANAUGH: And won't a finder

6   of fact often say, I'm not quite sure if they're

7   lying, but I still don't think they're correct?

8   They're -- they're mistaken about the -- the

9   light being red or green. I'm not quite sure

10   they're lying, but they are mistaken given the

11   other evidence in the record.

12   MS. SINZDAK: Absolutely, and, again,

13   you know, you just have to think about the

14   scenario where you have two credible witnesses

15   that are testifying to conflicting facts. You

16   can say both those witnesses are credible, but I

17   think only one of what they're saying -- only

18   one of the witnesses is -- is telling the truth.

19   And I think that's --

20   CHIEF JUSTICE ROBERTS: Justice

21   Barrett.

22   MS. SINZDAK: -- a familiar exercise.

23   JUSTICE BARRETT: Good morning, Ms.

24   Sinzdak. I -- I have to say join me up with

25   Justices Alito and Kagan. I'm baffled by the

         1   distinction that you're drawing between

         2   "credibility" and "persuasiveness." And it's

         3   not actually consistent with the way that I've

         4   seen cases come up for review in the court of

         5   appeals from IJs who make adverse credibility

         6   determinations.

         7   The ones I've seen, you know, they've

         8   essentially been equivalent to saying that the

         9   witness is lying. This -- this fine distinction

        10   between "believable" and "believed" just seems,

        11   you know, nitpicking to me. As Justice

        12   Kavanaugh was saying, it seems to me more like

        13   "credibility" refers to are they lying, and then

        14   "persuasiveness," as Justice Kavanaugh was

        15   suggesting, points to other reasons why you

        16   might not believe them.

        17   So I could -- you know, thinking about

        18   your example with the child and the crumbs, I

        19   was thinking as you talked about an example

        20   about my child. I come home and find the child

        21   hysterically crying, and she said someone was

        22   beating at the door, I think somebody was trying

        23   to break into her house -- our house. And I can

        24   believe her. I don't think she's lying. But

        25   then my neighbor says, yeah, you know, I -- I

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 1    saw it was the UPS man.
 2              So I would not find her story
 3    persuasive, not because of credibility but
 4    because there was other evidence that showed she
 5    was not, in fact, in danger.  It was the UPS
 6    deliveryman.  So I don't think that -- you --
 7    you seem to be leaning heavily on the fact that
 8    the statute uses both the words "credibility"
 9    and "persuasiveness," and I just don't see it.
10              So I want to ask you what's wrong with
11    seeing it this way:  that the IJ makes a
12    determination about credibility, and that has to
13    be express, and when it gets up to the Board,
14    there are two ways in which the Board might have
15    to confront this presumption.  Either the IJ
16    actually found the alien incredible and the
17    Board disagrees, in which case it has to
18    confront the presumption and explain why it
19    thinks the evidence rebuts that presumption of
20    credibility, or the IJ might not have done a
21    good enough job in making an adverse credibility
22    determination explicit, as the statute requires,
23    and then, still, the Board has to presume
24    credibility and then explain why it thinks the
25    presumption is rebutted.
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1   If the Board offers such an

2   explanation, once it gets up to the court of

3   appeals, the court of appeals isn't applying any

4   kind of presumption. The court of appeals is

5   just reviewing it for substantial evidence and

6   seeing if the Board's explanation -- and the

7   Board has to show that it understood what

8   presumption should be there -- whether the

9   Board's explanation was rational and substantial

10   evidence supported its determination that the

11   alien was not telling the truth.

12   Is that an okay way to think about it,

13   and how is that different from your way?

14   MS. SINZDAK: I -- I -- I don't think

15   it's -- it's obviously a little bit different

16   from the way that we think about it because we

17   think it is coherent and, in fact, what the

18   statute dictates, that an alien's testimony can

19   be credible but not ultimately persuasive. But

20   I also don't want to resist it too much because

21   I think we may just come out the same way.

22   The key thing here is that under 1252,

23   the -- a court -- a reviewing court should not

24   overturn an agency's findings that are supported

25   by substantial evidence. And what 1252 does not

1   say is: And they have to have appropriately

2   labeled that evidence as going to credibility or

3   persuasiveness or sufficiency or something else.

4   It just says you have to look and, as long as

5   any reasonable fact-finder could say that there

6   is evidence in the record that supports the

7   agency's determination, it has to be affirmed.

8   So, if you think that what happened

9   here is the agency -- the IJ and the Board

10   should have said the word "credible" and didn't,

11   then I still think that leads to upholding the

12   agency's determination. I mean, this Court has

13   said that judicial review is not a ping-pong

14   game. We don't just bat back and forth --

15   JUSTICE BARRETT: Counsel, let me --

16   MS. SINZDAK: -- so that the agency --

17   JUSTICE BARRETT: -- let me just

18   interrupt a bit --

19   MS. SINZDAK: -- can use it for --

20   JUSTICE BARRETT: -- sneak in one more

21   question. Is it your position that IJs

22   actually, on the ground, proceed in the way that

23   you're suggesting, drawing this distinction

24   between someone could believe you, but I don't,

25   and just using "credibility" in the way that

1   Justices Alito and Kagan and I have been using

2   it, just as it means truth?

3   MS. SINZDAK: I think there's a basic

4   problem because the REAL ID Act only came into

5   existence in 2005. And before that, there was a

6   focus on credibility alone. And the REAL ID Act

7   introduced the fact that the -- the IJ has to be

8   satisfied that it's not just credible testimony

9   but also persuasive.

10   I'm not sure on the ground that IJs

11   have fully accounted for that change in the law,

12   but that doesn't mean that it's not the law.

13   JUSTICE BARRETT: Thank you.

14   CHIEF JUSTICE ROBERTS: A minute to

15   wrap up, Ms. Sinzdak.

16   MS. SINZDAK: Sure. I mean, in the

17   end, I think that what we're seeing here is

18   there's general agreement that there was plenty

19   of evidence in both cases -- indeed, one might

20   say substantial evidence in both cases --

21   demonstrating that the I -- that -- that the

22   alien was not eligible for asylum or withholding

23   of removal. And the only question here is

24   whether the evidence should have been labeled as

25   to persuade -- as persuasive or credible or some

1   other way.

2   I think the statute makes very clear

3   that it is within the IJ's right to say that

4   testimony is credible but not persuasive. The

5   IJ, after all, has to be satisfied that the

6   testimony is persuasive.

7   But even if you doubt that, under

8   1252, the agency's determination has to be

9   upheld so long as any reasonable fact-finder

10   would not be compelled to reach the contrary

11   conclusion.

12   Thank you.

13   CHIEF JUSTICE ROBERTS: Thank you,

14   counsel.

15   Mr. Katyal.

16   ORAL ARGUMENT OF NEAL K. KATYAL

17   ON BEHALF OF THE RESPONDENT IN 19-1156

18   MR. KATYAL: Thank you, Mr. Chief

19   Justice, and may it please the Court:

20   The government petition for certiorari

21   claimed courts should not enforce the

22   presumption of credibility when reviewing Board

23   decisions, but now, as they said to Justice

24   Gorsuch, they accept that this presumption does

25   apply in federal court.

1   So all we are left with is a purely

2   fact-bound issue of whether, in this specific

3   case, once the presumption is applied, the Board

4   had substantial evidence that a particularly

5   serious crime was committed.

6   I'm not sure that this question alone

7   would be cert-worthy, but, in any event, the

8   answer to that is easy because the Board

9   provided no reasoned explanation for rejecting

10   Alcaraz's testimony, which the government admits

11   had to be presumed credible.

12   The government made a remarkable

13   concession that for the legal standard that

14   Encino Motorcars requires that "the pathway must

15   be clearly discerned," to use Ms. Sinzdak's

16   words.

17   Here, that's impossible to discern.

18   As the court of appeals found, the Board's

19   decision was based on "a probation report which

20   directly contradicts Alcaraz's testimony." If

21   that court were to ask why did the Board believe

22   one account and not the other, it would have to

23   guess, was it based on a reason at odds with the

24   record, arbitrary, or something else?

25   Did the immigration judge overlook the

1   only eyewitness account from the mom, which is

2   curiously never mentioned by the -- by the IJ or

3   by the Board? Did he misunderstand Alcaraz's no

4   contest plea? Did he think Alcaraz agreed with

5   the probation office report even though that

6   report was written months after the plea?

7   If this Court is to endorse the

8   application of the government's rule today, it

9   set a new basement level standard for the

10   quantum of reasoning an agency must offer to

11   support its factual findings, one that would

12   radiate far beyond immigration throughout the

13   administrative state.

14   This Court should decline that

15   invitation and affirm.

16   CHIEF JUSTICE ROBERTS: Mr. Katyal,

17   just to be -- be clear sort of starting out

18   here, the question presented is whether a court

19   of appeals may conclusively presume that an

20   asylum -- asylum applicant's testimony is

21   credible and true if there's no explicit

22   adversary -- adverse credibility determination.

23   And -- and your answer to that is no,

24   the court of appeals cannot conclusively presume

25   that the applicant's testimony is credible and

1   true. Is that right?

2   MR. KATYAL: Yes, to a point, Your

3   Honor. As our brief in opposition said, it is

4   to presume the testimony is credible, but there

5   is sometimes a distinction with truth, and, you

6   know, I think Justices Alito and Kagan are

7   getting at the fact that there's a massive

8   overlap here, and we don't push that point too

9   much.

10   But to the -- there is at least some

11   distinction, and so those words, true, are the

12   part in which we would disagree with -- that

13   we -- that we find a problem.

14   CHIEF JUSTICE ROBERTS: And I also

15   understand your position to be that there are no

16   magic words here. The -- the BIA does not

17   specifically have to find that we think --

18   doesn't have to have an explicit adverse

19   credibility determination. Is that right?

20   MR. KATYAL: There are no magic words

21   to create that express adverse credibility

22   determination. There is to be one in order to

23   have a rebuttable presumption. And once there

24   is that rebuttable presumption, Mr. Chief

25   Justice, we do think it makes the persuasiveness

1   inquiry very hard because of cases -- cases like

2   Greenwich Collieries which say that an agency

3   can't "stand mute and disbelieve credible

4   evidence."

5   CHIEF JUSTICE ROBERTS: Right. So --

6   so what it comes down to in -- in your view is

7   simply how much of an explanation BIA is

8   required to provide before the court of appeals

9   can say that it implicitly made an adverse

10   credibility determination?

11   MR. KATYAL: I -- I think that's

12   largely right. So our point is, as the case

13   comes to the Board, there was a rebuttable

14   presumption of credibility. The Board then had

15   two options.

16   One -- and I think they were laid out

17   by Justice Barrett. One is to say, I rebut

18   that, it's actually not credible. The other is

19   to make a persuasiveness finding and to say, you

20   know, I believe it -- you know, it's capable of

21   being believed, but the evidence is overweighed

22   -- outweighed. There is --

23   CHIEF JUSTICE ROBERTS: Thank --

24   MR. KATYAL: -- no magic words.

25   CHIEF JUSTICE ROBERTS: -- thank you,

1   counsel.

2   Justice Thomas.

3   JUSTICE THOMAS: Yes, Mr. Katyal, the

4   -- I'm a bit confused. The -- you say that

5   there's no magic word requirement. But what if

6   there is just the -- the -- the Board makes a

7   choice or the IJ makes a choice between two sets

8   of evidence? Isn't it implicit that it found

9   one more credible than the other?

10   MR. KATYAL: Justice Thomas, we don't

11   think that you can just implicitly rely on a

12   persuasiveness calculation, particularly when

13   the evidence is presumed credible. I think

14   that's what I'm getting at with Greenwich

15   Collieries, which is cited at page 39 of our

16   brief.

17   And, indeed, Congress has this whole

18   thing in the REAL ID Act about credibility,

19   about the need to make express adverse

20   credibility findings. It would make hash of the

21   statute, make hash of Congress's work to accept,

22   I think, what the government is saying here,

23   which is, hey, as long as you've got something

24   that might implicitly be read one way, that's

25   enough.

1   I mean, that's not what this Court

2   ever expect -- accepts in the administrative law

3   context. You wouldn't accept it for the SEC or

4   the EPA, and I certainly don't think you should

5   accept it here.

6   JUSTICE THOMAS: But is -- is your

7   argument the argument that the Ninth Circuit

8   used?

9   MR. KATYAL: Our argument -- we read

10   the Ninth Circuit differently than the

11   government. We read it to basically be saying

12   there was a presumption of credibility that came

13   into the Board and the Board then had to explain

14   why it accepted one contrary view as opposed to

15   another. They're diametrically opposed.

16   And the IJ's opinion is like a bad

17   lawsuit exam, Justice Thomas. It lays out the

18   facts on both sides, but it never applies them

19   to explain how it resolved this case. And that

20   would be bad in general, but particularly when

21   there's a presumption of credibility coming in,

22   and Greenwich Collieries says you can't as an

23   agency just disbelieve that credible evidence.

24   That's where the agency fell down.

25   JUSTICE THOMAS: Thank you.

         1   CHIEF JUSTICE ROBERTS: Justice

         2   Breyer.

         3   JUSTICE BREYER: Good morning. I -- I

         4   think you and every -- everyone seems to agree

         5   with this: The Ninth Circuit's wrong when they

         6   say that you, even though where there's no

         7   finding, you assume that the person is credible.

         8   That isn't what the statute said.

         9   It says where there's no -- no -- no

        10   finding, you presume, not assume. And so the

        11   question is, did the -- did -- did -- is that

        12   what the agency did? Did it presume it? No.

        13   Well, maybe, because they might have assumed

        14   that the presumption was rebutted.

        15   So we have a question on appeal. They

        16   didn't write whether it was rebutted or not.

        17   But that's true of district court judges: When

        18   they make a lot of findings that are appealed,

        19   they don't always have to write. It could be

        20   the situation. It could be implicit from the

        21   record that they assumed that it was rebutted.

        22   Lower courts or the agency thought the

        23   presumption was rebutted. Now you don't have to

        24   write about everything on -- an agency doesn't

        25   have to and a district judge doesn't have to.

1   So how do we deal with that?

2   MR. KATYAL: I think, Justice Breyer,

3   we deal with it by recognizing first that

4   Congress in Section 1252 expressly enabled

5   judicial review of agencies and used the

6   substantial evidence standard.

7   JUSTICE BREYER: Yeah.

8   MR. KATYAL: The government even

9   admits that that's the standard.

10   JUSTICE BREYER: Right.

11   MR. KATYAL: And then, as part of that

12   standard, as T-Mobile says, you know, "courts

13   cannot exercise their duty of substantial

14   evidence review unless they're advised of the

15   considerations underlying the action under

16   review."

17   And the problem is, in this case, and

18   this is, you know, a representative case, as our

19   brief in opposition says, you know, they haven't

20   actually told you how they resolved the problem.

21   JUSTICE BREYER: They haven't --

22   MR. KATYAL: And --

23   JUSTICE BREYER: -- but do you think

24   they have to write an opinion where district

25   judges all the time are making rulings where

1   they don't write opinions, and suddenly an

2   administrative law judge has to write an opinion

3   on this matter, on every matter?

4   MR. KATYAL: I think --

5   JUSTICE BREYER: Is this different

6   from any other matter?

7   MR. KATYAL: I think, in all agency

8   review contexts, as opposed to district court

9   circumstances, yes, there has to be a reasoned

10   explanation.

11   JUSTICE BREYER: Of everything?

12   MR. KATYAL: But that's not --

13   JUSTICE BREYER: Why should that be?

14   MR. KATYAL: -- detailed in --

15   JUSTICE BREYER: Why should that be?

16   I haven't -- I mean, why should a -- why could

17   you not infer from the situation what the IJ

18   thinks, whereas we do infer from the situation

19   what a district judge thinks?

20   MR. KATYAL: Because, Justice Breyer,

21   for seven decades, the Chenery rule has required

22   more and said it's not rational basis, that

23   there's a worry about agency decisionmaking, and

24   all -- it's not -- it's not some extreme --

25   extreme standard, as, you know, Judge -- then

 1   Judge Gorsuch's opinion in Lin Yan said. You

 2   know, it's pretty easy to meet the standard,

 3   you've just got to say something, or Judge

 4   Colloton's opinion in Singh. So this is not --

 5   JUSTICE BREYER: I have a question --

 6   CHIEF JUSTICE ROBERTS: Justice Alito.

 7   JUSTICE ALITO: I don't know that I

 8   have very much to add here. The -- the Ninth

 9   Circuit said, and I'm quoting from the opinion

10   in your case, "We have repeatedly held that

11   where the BIA does not make an explicit adverse

12   credibility finding, the court must assume that

13   the petitioner's factual contentions are true."

14   I understand you now to acknowledge

15   that that was an inaccurate statement of the

16   law. Isn't that right?

17   MR. KATYAL: That's correct, as our

18   brief in opposition says. Yes, Justice Alito.

19   We --

20   JUSTICE ALITO: Okay. So the -- the

21   BIA can implicitly find that the presumption was

22   rebutted. And then the question does seem to

23   come down to whether it is permissible to read

24   the BIA's opinion as sufficiently stating that

25   they -- that the -- that the Board found that --

1   that the -- the requirements for asylum were not

2   met, whether they provided a sufficient

3   explanation. They don't have to do it

4   explicitly, but they have to provide an

5   explanation.

6   That's -- that's the question, right?

7   MR. KATYAL: So -- so, Justice Alito,

8   that question is different than the first one

9   you asked me because you're saying could it be

10   done implicitly. And I think seven decades of

11   administrative law provide a reasoned -- require

12   a reasoned explanation. I could imagine it

13   could be done implicitly. They don't have to

14   say and -- come out and say, you know, exactly

15   all of their handiwork, but they have to show

16   enough to explain what they did.

17   And as I said in my opening, here, you

18   just don't know that. Like, for example,

19   there's only one eyewitness to this whole

20   account. It's nowhere mentioned in the IJ

21   report or in the Board's decision.

22   JUSTICE ALITO: Well, the -- the Board

23   could say -- could do this, could it not? The

24   alien testified to this, there were other

25   witnesses that testified to this, another

1   witness testified to this. Without going

2   through each witness and saying we believe A, we

3   -- we disbelieve B, we believe C, they simply

4   say these are the facts that we -- that we --

5   that we find. That would be sufficient,

6   wouldn't it?

7   MR. KATYAL: Well, Justice Alito, I'm

8   not sure that that is the reasoned explanation

9   that is required. I mean, you don't even have

10   that here, but I think that isn't that -- I

11   think just to lay out the facts and then just

12   say we decide on one.

13   I mean, Congress created judicial

14   review in 1252 for a reason. It's got to be

15   meaningful. And it's not meaningful if a

16   litigant like Alcaraz can't even, you know, make

17   heads or tails of what the decision actually

18   said. And, you know, we've heard many different

19   versions of what we think the IJ and the Board

20   did or the government thinks it did. That makes

21   it impossible to appeal. And, remember, these

22   are --

23   CHIEF JUSTICE ROBERTS: Justice

24   Sotomayor.

25   MR. KATYAL: -- associated with

1   counsel.

2   JUSTICE SOTOMAYOR: Mr. Katyal, I have

3   a basic problem in this case starting from where

4   Justice -- Justice Alito did, which is you've

5   admitted the Ninth Circuit applied the wrong

6   presumption. It seems to me that then the only

7   thing that happens is a remand to see exactly

8   what they intended or didn't intend.

9   I do have a problem in this case

10   believing that this ruling was on anything other

11   than credibility, i.e., they -- that the IJ and

12   the BI -- and the BIA didn't believe your client

13   with respect to the nature of the assault. Am I

14   correct in that assumption?

15   MR. KATYAL: I don't think so. So,

16   first of all, Justice -- Justice Sotomayor, we

17   don't think that the Ninth Circuit actually held

18   what the government says. Our point is, if you

19   read it that way, then, yes, it's got some stray

20   extraneous language. But, remember, here, the

21   Ninth Circuit remanded this case to the agency

22   because of hearsay. And if Alcaraz's test --

23   JUSTICE SOTOMAYOR: Well, answer --

24   answer, please, the question I asked most

25   directly, which is, can the BIA's decision be

1   upheld if it found this person credible as to

2   his explanation as to -- as to what happened?

3   MR. KATYAL: If -- if it found

4   Alcaraz's testimony credible and -- then I don't

5   think it's possible because the story he -- that

6   -- Alcaraz's version of events, which is

7   diametrically opposed to the probation office

8   report, is he did it to protect his daughter,

9   and there's only one incident of violence, one

10   punch to the face, and that alone wouldn't be

11   the "particularly serious crime" necessary to

12   make someone ineligible for relief from -- from

13   removal.

14   JUSTICE SOTOMAYOR: So I think that

15   goes to the basic question. Without a adverse

16   credibility finding or a statement that he is --

17   they did not believe or didn't credit his

18   explanation, then, without that finding, you

19   can't uphold their judgment. Is that your

20   argument?

21   MR. KATYAL: Our -- well, I think you

22   could either do it on credibility or on

23   persuasiveness. Again, it wouldn't, as Justice

24   -- as Justice Gorsuch said, require any sort of

25   magic words or an onerous burden, but you'd have

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1        to, in substance, either rebut the presumption
2        of credibility or show that the evidence wasn't
3        persuasive.  It's got two options.  The agency's
4        gotten --
5                 JUSTICE SOTOMAYOR:  All right.  Thank
6        you, counsel.
7                 MR. KATYAL:  -- it done in two stages.
8                 CHIEF JUSTICE ROBERTS:  Justice Kagan.
9                 JUSTICE KAGAN:  Mr. Katyal, this seems
10       like a -- this -- this is a pretty simple case,
11       right?  There's -- there's basically two pieces
12       of evidence in it.  Mr. Alcaraz says this was
13       nothing, I -- I -- I just -- I didn't really
14       seriously beat my -- my girlfriend, and I was
15       trying to protect my daughter.  And then, on the
16       other hand, you have a probation report.
17                So it comes up to the Board, and
18       because there was no finding, it comes with a
19       presumption of credibility, but the Board is now
20       looking at the probation report and saying, you
21       know, generally, we believe probation reports
22       rather than convicted criminals with incentives
23       to lie, and that's exactly what we're doing
24       here.  We're going to believe the probation
25       report that this was an extremely serious crime.
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1   So isn't the surrounding

2   circumstances, and then you look at this case,

3   and, basically, it just comes back -- down to do

4   you believe Mr. Alcaraz or do you believe the

5   probation report, doesn't it -- isn't it just

6   clear that the Board believed the probation

7   report rather than Mr. Alcaraz? And, if that's

8   so, isn't it clear that, essentially, the Board

9   decided to rebut the presumption?

10   MR. KATYAL: Justice Kagan, the

11   government doesn't even make that argument, and

12   I think as your hypothetical demonstrates why,

13   because there is no language anywhere in there

14   that we don't believe criminals or anything like

15   that, or we tend to believe probation officers

16   or the like.

17   Indeed, had that language been in

18   there, that would enable precisely the kind of

19   meaningful judicial review Congress put in 1252.

20   As it stands, we have to guess whether those are

21   the rationales, something else that the

22   government has offered are the rationales, and

23   the like. That's the problem. And, again --

24   JUSTICE KAGAN: But aren't you just

25   asking, like -- I mean, it seems as though

1   you're just asking for one more sentence, which

2   is -- or even half of a sentence: We believe

3   the probation report rather than Mr. Alcaraz

4   because .... And what would that "because" look

5   like and -- and -- and why is it necessary?

6   MR. KATYAL: The "because" could be

7   any of the reasons that Judges Colloton and

8   Gorsuch did in Singh and Lin Yan. So they could

9   say, you know, we didn't find that person

10   credible on the stand. There was an agitated

11   demeanor. There were inconsistencies in the

12   testimony. They admitted, you know, filing

13   false documents. Those are all the kinds of

14   rationales that are given in case after case.

15   The problem here is there's nothing,

16   and if you accept nothing here, it's going to be

17   the rule not just in immigration cases but in

18   other cases, I mean, and we --

19   JUSTICE KAGAN: Thank you, Mr. Katyal.

20   CHIEF JUSTICE ROBERTS: Justice

21   Gorsuch.

22   JUSTICE GORSUCH: Good morning,

23   Mr. Katyal. I'd like to pick up where Justice

24   Kagan left off. I'm -- I'm struggling to

25   identify any other ground on which the BIA could

1   possibly have acted other than it -- it believed

2   the probation report rather than your client.

3   And if that's the case and no magic words are

4   required, what's -- what's left?

5   MR. KATYAL: So, Justice Gorsuch, it's

6   not rational basis review; it's substantial

7   evidence review, so we're to look to what the

8   agency actually said. And let me give you two

9   possibilities that would answer this. One is,

10   did the IJ and the Board just overlook the only

11   eyewitness account, which is from the mom? It's

12   just nowhere by the I -- in the IJ or in the

13   Board's report.

14   And, remember, this is an IJ judge

15   who's a bit worrisome. I mean, he blew off the

16   entire statute requiring cross-examination.

17   It's an express statute by Congress. So, you

18   know, if he could ignore that, he could ignore,

19   you know, the fact that there was the mom's

20   testimony.

21   And then the other way of thinking

22   about it, just a second example is, you know,

23   Alcaraz's no contest plea was made three months

24   before the probation office report was written,

25   and there's a lot of reliance on what that

1   report said. Indeed, we just heard Justice

2   Kagan talking about that. But Alcaraz never

3   agreed to any of that because his plea preceded

4   that by three months. We have no idea whether

5   the IJ understood that or the Board understood

6   that.

7   And, indeed, before the Board, we

8   actually gave them a chance to correct their

9   mistakes and to say, you know, provide that

10   specific cogent reasoned explanation that, Judge

11   -- Justice Gorsuch, you called for in Lin Yan.

12   The Board filed -- excuse me, ICE filed a

13   one-page answer before the Board, and the Board,

14   of course, did nothing. Zero plus zero is still

15   zero.

16   JUSTICE GORSUCH: Thank you.

17   CHIEF JUSTICE ROBERTS: Justice

18   Kavanaugh.

19   JUSTICE KAVANAUGH: Thank you, Chief

20   Justice.

21   Good morning, Mr. Katyal. On the

22   statutory language, I'll repeat a question I

23   asked your colleague. It says, the applicant or

24   witness shall have a rebuttable presumption of

25   credibility on appeal if no adverse credibility

1   determination is explicitly made.

2   I think the purpose of that was that

3   if the only real testimony in the record is from

4   the applicant that -- and the IJ did not say, I

5   think the applicant is lying or make an adverse

6   credibility determination, it would not be open

7   to the BIA to -- to do that.

8   But, by -- and this is what I want you

9   to focus on -- by using the phrase "rebuttable

10   presumption" -- I think Justice Kagan was

11   talking about this and Justice Gorsuch -- if

12   other evidence comes in, it's not just the

13   applicant's testimony and you have nothing else,

14   other testimony comes in, then that you just do

15   normal substantial evidence review as the

16   reviewing court.

17   And if the BIA has explained, we think

18   the other evidence is inconsistent with the

19   applicant's testimony and -- and the other

20   evidence is more persuasive or we choose to

21   believe that other evidence, then that rebuts

22   the presumption.

23   MR. KATYAL: Justice Kavanaugh, we,

24   you know, agree that the Board absolutely could

25   rebut the presumption. The problem here is the

 1   Board expressly "adopted and affirmed the IJ's

 2   findings," which didn't have that credibility

 3   determination.

 4   And so the Board never discussed

 5   credibility or gave any reason to find Alcaraz

 6   noncredible. You know, nothing like what

 7   Justice Kagan was getting at about how we don't

 8   believe criminals or we believe probation office

 9   reports or any of that.

10   JUSTICE KAVANAUGH: Just put aside

11   this case, and I understand why you're focused

12   on this case. Is that how you think the

13   statutory provision operates?

14   MR. KATYAL: We do think that the

15   Board absolutely can rebut the presumption.

16   They've got to do so with some work. And, you

17   know, a circuit court sitting on 1252 review

18   would look for a reasoned explanation, so it's

19   got to explain what they're doing and have some

20   reason behind it, just as in any administrative

21   law context. That's all. It's not an onerous

22   standard. It's just one that the government

23   can't meet here.

24   JUSTICE KAVANAUGH: That's helpful.

25   Thank you, Mr. Katyal.

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 1              CHIEF JUSTICE ROBERTS:  Justice

 2    Barrett.

 3              JUSTICE BARRETT:  Good morning, Mr.

 4    Katyal.  You said -- I -- I just want to be sure

 5    that I understand the ways in which your

 6    position is distinct from the government.

 7              So it seems like you don't quite buy

 8    the government's argument that "credibility"

 9    simply means is this person capable of being

10    believed rather than I believe them, but I did

11    hear you earlier say something about something

12    can be credible and not persuasive on the

13    grounds that you don't believe the person.

14              So can you just tell me what you mean

15    by "credible," how you understand it?

16              MR. KATYAL:  So we read "credible" as

17    capable of being believed and sometimes, and

18    rarely, there will be a difference between

19    "credibility" and "persuasiveness."  You know,

20    for example, if someone says, you know, I'm

21    worried if I go to Mexico that I'm going to be

22    beaten up, and the judge doesn't think he's

23    lying, thinks it's genuine but, as a result of

24    country testimony by the State Department and

25    others, just thinks that's not right, you know,
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 1   those are the types of circumstances.

 2   Here, as I was saying to the Chief

 3   Justice, when a case comes in with a presumption

 4   of credibility, Greenwich Collieries says, you

 5   know, that really heightens the burden on the

 6   agency --

 7   JUSTICE BARRETT: But -- but --

 8   MR. KATYAL: -- to explain the line.

 9   JUSTICE BARRETT: -- Mr. Katyal, in

10   the example you gave, I think actually then you

11   and I might be interpreting it the same way,

12   because that's kind of like my child and the UPS

13   man example. On that example, it's not that the

14   person was lying. It's just that they're

15   mistaken based on other outside evidence. So,

16   there, you're right, they may be credible but

17   not be persuasive.

18   But that's consistent with credibility

19   referring to the truth or falsity of the

20   testimony, is the person lying or not, right?

21   MR. KATYAL: It is consistent. The

22   one point I'd make, though, Justice Barrett, is

23   when you're answering that second question about

24   whether other evidence outweighs or disproves

25   it, it's got to be a reasoned explanation. The

 1   agency just has to explain what it's doing

 2   clearly and provide some reason for it. That's

 3   not --

 4   JUSTICE BARRETT: But the presumption

 5   --

 6   MR. KATYAL: -- that's what doesn't

 7   happen.

 8   JUSTICE BARRETT: -- wouldn't apply

 9   then before the Board, right, because, in that

10   instance, it's not that the Board -- or I guess

11   would it? Because it's not the Board is saying,

12   you know, that there would be a presumption that

13   the person wasn't lying, right?

14   MR. KATYAL: So, Justice Barrett, this

15   isn't a presumption in -- in the air. It's a

16   presumption about credibility. And so, when

17   Congress uses those words, it picks up

18   preexisting cases like Greenwich Collieries,

19   which say that you can't disbelieve credible

20   evidence. Now -- and so -- without -- without a

21   reasoned explanation.

22   So we don't doubt that the agency

23   could provide that reasoned explanation, and,

24   indeed, they almost always do. As the amici

25   briefs say, IJs are trained to do that. They

1   just didn't do it here, and it would be very

2   dangerous for you to accept on this record this

3   application of the government --

4   JUSTICE BARRETT: Thank you, Mr.

5   Katyal. My time's up.

6   CHIEF JUSTICE ROBERTS: A minute to

7   wrap up, Mr. Katyal.

8   MR. KATYAL: Thank you. My central

9   point, as I was saying to Justice Breyer, is

10   that this is a standard agency case. The agency

11   had one job and it fell down on it.

12   Justice Breyer was worried about this

13   being too burdensome. But this isn't hard to

14   meet. Indeed, it's how immigration judges have

15   operated for decades, as I was just saying to

16   Justice Barrett. It requires no magic words,

17   just a reasoned explanation, which this Court in

18   Judulang has already unanimously said applies.

19   And, Justice Alito, you had suggested

20   that the record here was enough. And if you

21   were sitting as a rational basis court, I think

22   you could find something to justify what the

23   agency did, but that's not the test.

24   Here, as the Ninth Circuit said, there

25   were two contradictory accounts. The agency

1   just had to explain why it believed one of them.

2   And the agency always has two bites to do so at

3   the IJ and Board stages. Here, the IJ wrote a

4   detailed opinion except in the one place where

5   it mattered, its reasoning. It tells us

6   everything else but that. And you wouldn't

7   accept this reasoning or lack thereof if this

8   were the SEC or EPA. You shouldn't accept it

9   here.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel.

12   Mr. Zimmer.

13   ORAL ARGUMENT OF DAVID J. ZIMMER

14   ON BEHALF OF THE RESPONDENT IN 19-1155

15   MR. ZIMMER: Thank you, Mr. Chief

16   Justice.

17   The parties have no real dispute, as

18   this argument shows, as to the legal question on

19   which this Court granted certiorari. And at

20   least in Mr. Dai's case, the court of appeals

21   applied the precise legal framework that all

22   parties accept.

23   The court did not presume Dai's

24   credible testimony to be true but held that the

25   record compelled the conclusion that Dai's

1   testimony, if credible, was persuasive.

2   That case-specific conclusion was

3   plainly correct. Mr. Dai's eligibility for

4   asylum and his entitlement to withholding turned

5   entirely on whether he was, in fact, persecuted

6   based on his resistance to the Chinese

7   government's forced abortion of his child.

8   Mr. Dai testified in great detail

9   about that persecution and submitted significant

10   evidence corroborating his testimony.

11   The government agrees that the agency

12   here made no adverse credibility finding; in

13   other words, the agency did not conclude that

14   Dai lied. And there is simply no evidence in

15   the record that would support a conclusion that

16   Dai was not lying but was nevertheless somehow

17   mistaken about the severe persecution inflicted

18   on him. This Court should therefore affirm.

19   CHIEF JUSTICE ROBERTS: Counsel,

20   first, did Mr. Katyal say anything with which

21   you disagree?

22   MR. ZIMMER: No, I -- I -- I -- I -- I

23   don't think he said anything that I -- that I

24   disagree with.

25   CHIEF JUSTICE ROBERTS: Okay. On --

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 1      on the remand question --
 2              MR. ZIMMER:  Yes.
 3              CHIEF JUSTICE ROBERTS:  -- it -- it
 4      seems to me that the bottom line is that, in
 5      that respect, you are insisting on magic words.
 6      In other words, the -- the -- the -- the court
 7      of appeals was all right not sending it back
 8      because there was an absence of those words in
 9      the BIA decision.  Is that -- is that wrong?
10              MR. ZIMMER:  I think it is wrong.
11      I -- I -- I guess I'm not sure what magic words
12      we would be requiring.  I think that -- that --
13      that, ultimately, the way that the -- the
14      statutory presumption works is sort of as a gap
15      filler as to credibility when the -- in the face
16      of administrative silence.
17              And so where, as here, the agency sort
18      of accepts -- the agency accepts the testimony
19      as credible and moves on to persuasiveness, then
20      it's -- it is under the statute taking the
21      testimony as credible and there's nothing left
22      to do as to credibility.
23              I don't -- does that -- I think that
24      gets at the question you were -- you were
25      asking, but I don't think that there's anything
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1   specific the agency would have to say. It just

2   has to follow what the government agrees is a --

3   a clearly discernible path as to finding the

4   presumption rebutted.

5   CHIEF JUSTICE ROBERTS: Thank you,

6   counsel.

7   Justice Thomas.

8   JUSTICE THOMAS: Thank you, Mr. Chief

9   Justice.

10   Counsel, the -- like Judge Trott

11   below, I have difficulty with the distinction

12   between "persuasive" and "credible," and it just

13   seems like a false dichotomy to me.

14   But the -- can something be -- can you

15   have two points of view, both of which seem

16   credible, but yet one is not persuasive?

17   MR. ZIMMER: Sure. I mean, I think

18   this gets at -- at Justice Barrett's example

19   of the -- of the UPS delivery person where you

20   can have -- you can have two narratives that are

21   both credible but one of which turns out to just

22   be incorrect based on other evidence of record,

23   that somebody can be credible and yet mistaken.

24   And I -- and I think that's sort of

25   where the distinction between "credibility" and

1   "persuasiveness" comes up, that -- that,

2   ultimately, somebody can be testifying honestly,

3   in other words, not perjuring themselves, not

4   lying, but ultimately just be wrong. And I

5   think that's really the key distinction that the

6   statute is drawing in recognizing that you can

7   have credible testimony but nevertheless sort of

8   just be -- be wrong.

9   JUSTICE THOMAS: Do you think that --

10   in this case, in your case, there's quite a bit

11   of evidence that seems to undermine both

12   Respondent's credibility and -- or at least

13   go -- could go to credibility and to

14   persuasiveness. What magic -- what words are

15   missing in -- in this opinion, the IJ opinion,

16   to your way of thinking?

17   MR. ZIMMER: Well, I -- I guess it's

18   not so much magic words. I mean, the IJ -- the

19   IJ never -- it's very clear in this case that

20   the IJ did not find Mr. Dai to be not credible.

21   In other words, it never concluded that -- that

22   he was lying. And -- and if you look at page

23   164a of the Petition Appendix, the Board said

24   this explicitly, that the -- that the IJ had not

25   made any adverse credibility finding. And the

1   Board adopted and affirmed that decision.

2   So I think that to the extent the

3   evidence goes to credibility, and -- and we

4   think that it very clearly does only go to

5   credibility, well, the IJ never made neither --

6   the IJ or the Board never made an adverse

7   credibility finding.

8   As to persuasiveness, I -- I actually

9   strongly disagree that any of the evidence that

10   the -- that the government relies on and the

11   agency relies on does, in fact, go to

12   persuasiveness. You know, the government

13   primarily notes the fact that Qin, Dai's wife,

14   and their daughter went back to China. But they

15   were in a completely different situation than

16   Dai was in the sense that they faced very low

17   risk of at least any sort of persecution in the

18   short term and had very strong reasons to go

19   back, whereas Dai faced a very real risk of --

20   of persecution in the short term -- the police

21   had, in fact, come looking for him in -- in the

22   few months after Qin and his daughter returned

23   to China -- and had very little reason to return

24   immediately because he had been fired from his

25   job after resisting the forced abortion of his

1   child. And so --

2   CHIEF JUSTICE ROBERTS: Justice

3   Breyer.

4   MR. ZIMMER: -- Qin and their daughter

5   were -- go ahead. Sorry.

6   CHIEF JUSTICE ROBERTS: Justice

7   Breyer.

8   JUSTICE BREYER: Yes, can -- two

9   things: One, as I read the Ninth Circuit, I

10   thought there's language there that says

11   something like the following: Where there's no

12   adverse credibility determination in the agency,

13   a reviewing court of appeals must assume that

14   the statement was credible. That couldn't be

15   right because, after all, the agency is told

16   that, if there is no adverse credibility

17   requirement, there is a presumption, and so,

18   agency, you can say the presumption is rebutted.

19   Am I right about what the Ninth

20   Circuit is saying or not?

21   MR. ZIMMER: I -- I think you are

22   right about what the Ninth Circuit is saying.

23   JUSTICE BREYER: Well, then that's not

24   right. That isn't right because you could -- it

25   would be weird to have an agency which says we

 1   can write down the words, in this situation, we

 2   find the presumption of credibility rebutted

 3   because, with the most convincing reasons ever.

 4   And the -- they would have to accept that in a

 5   court of appeals, or you're going to get -- it's

 6   not going to make sense. All right. That's my

 7   first problem.

 8   MR. ZIMMER: Right.

 9   JUSTICE BREYER: I think we have to

10   say that. But the more serious problem which I

11   really don't understand thoroughly and I'm

12   trying to work out is what happens. No adverse

13   credibility determination. Now there is a

14   presumption. The IJ and the agency think it's

15   a -- possibly think it was -- it -- it was

16   rebutted, that presumption. Now do they have to

17   write those words, "we find it rebutted," or are

18   they implicit? Can a reviewing court ever find

19   them implicit? And, if so, when? What words

20   would you write in an opinion? If you believe

21   the latter, you don't want to give them too much

22   power to disregard what an applicant for refugee

23   status says, but you do not want them to have to

24   write magic words in every case.

25   So what -- what would you do? What

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1       words would you use for -- to tell the reviewing
2       court be careful about this, where they don't
3       make an explicit finding that it was rebutted,
4       that the presumption was rebutted, no explicit
5       finding?
6                   MR. ZIMMER:  Well, I think --
7                   JUSTICE BREYER:  You could say what?
8       Go ahead.
9                   MR. ZIMMER:  The agency has to give
10      the reasons that it's denying the application.
11      I don't think there's any dispute about that.
12      And so, if the reason is that it's finding the
13      presumption of credibility rebutted, well, then
14      it does have to say that.  And I don't think it
15      has to be -- you know, I'm not sure -- I -- I
16      think the easiest way to do that is to just say
17      it up front, but everyone agrees, the government
18      agrees, that it has to be clearly discernible
19      from the opinion in some way.  And -- and I
20      think that if the agency finds -- if the Board
21      finds the presumption rebutted, well, then,
22      obviously, that's a finding that's entitled to
23      deference --
24                  JUSTICE BREYER:  All right.  But now
25      --
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1   MR. ZIMMER: -- by the court of

2   appeals.

3   JUSTICE BREYER: -- you used the word

4   -- you used --

5   CHIEF JUSTICE ROBERTS: Justice --

6   Justice -- Justice Alito.

7   JUSTICE BREYER: All right.

8   JUSTICE ALITO: Well, I -- I thought I

9   was agreeing with you, but now the last thing

10   you said gives me pause. The Ninth Circuit -- I

11   -- I read its opinion as saying -- here as

12   saying exactly what it said very succinctly in

13   the other case, that unless the BIA makes an

14   explicit finding that the applicant is not

15   credible, it must be presumed that the applicant

16   was credible. That, I think, is a -- an

17   incorrect statement of the law. And do you

18   disagree that that is -- that that's the -- the

19   rule that the Ninth Circuit applied in this

20   case?

21   MR. ZIMMER: I do think it's correct,

22   but I don't -- I disagree that it's not -- I

23   mean, I do think that that is what the Ninth

24   Circuit applied. Again, I want to be clear that

25   they did not presume that the testimony was

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 1    necessarily true in the sense of being accurate,

 2    but I think that what they were saying was that

 3    if -- if the agency is silent as to credibility,

 4    then that is effectively a determination that

 5    the -- the testimony was credible.  And I think

 6    that's the work that the rebuttable presumption

 7    does.

 8              JUSTICE ALITO:  There's a difference

 9    -- maybe there's a difference between silence

10    and -- and -- and a requirement of -- as an

11    explicit statement.  Must they make an explicit

12    statement?  Are they under the same obligation

13    as the IJ?

14              MR. ZIMMER:  Oh, no, not -- no, no.  I

15    mean, there's -- because there's no similar

16    statutory requirement.  I think they have to say

17    something that makes it clear that that's what

18    the basis for their decision -- for their

19    decision is, but we're not -- you know, we're

20    not arguing that the same explicitness

21    requirement that is -- that is explicitly by the

22    statute applied to the IJ applies to the Board.

23              JUSTICE ALITO:  Can the BIA's decision

24    be read in this way:  Dai had the burden of

25    showing that he was unwilling to return to -- to
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1   China because of fear of persecution, and we do

2   not believe that he had that fear; he did not

3   establish that he actually is unwilling to

4   return to China based on the -- the fact that he

5   was less than truthful in -- or less than

6   forthright in his explanation of -- of his

7   family's travels and his own plans?

8   MR. ZIMMER: No, I don't -- I don't

9   think so. And -- and the reason is that what

10   you described is very clearly an adverse

11   credibility finding, and if you look at page

12   164a of the Petition Appendix, which is the

13   BIA's decision, the Board made very clear that

14   it was not resting its decision on an adverse

15   credibility finding. So I -- I don't think that

16   that's a way that you could read the Board's

17   decision.

18   CHIEF JUSTICE ROBERTS: Justice

19   Sotomayor.

20   JUSTICE SOTOMAYOR: If that's not the

21   way we can read the Board's decision, but it's a

22   permissible conclusion, was the -- why wasn't

23   the Ninth Circuit wrong in not remanding this

24   case?

25   MR. ZIMMER: Right. So -- and I think

1   that really comes down to the presumption in the

2   statute because the way that the presumption

3   works, where you have the IJ silent as to

4   credibility and the case then goes up to the

5   Board, where this presumption of credibility

6   applies, and the Board is effectively also

7   silent, doesn't find the presumption rebutted,

8   then I think that's the end of the matter. And

9   I think that's treated under the statutory

10   framework as accepting the testimony as

11   credible. And so then there's no -- no basis on

12   which the court of appeals needs to basically

13   remand to give the agency another shot to

14   re-adjudicate credibility.

15   JUSTICE SOTOMAYOR: Well, the IJ here

16   did find explicitly that Dai's explanation for

17   his wife's return to China are inadequate and to

18   outweigh that they returned, not because of

19   persecution, and then he says Dai failed to

20   prove his burden. The BIA affirmed that Dai had

21   lied to the asylum officer because the truth

22   would be perceived as inconsistent with his

23   claims of past and fear -- and fear of future

24   persecution.

25   That, to me, suggests the conclusion

1   that Justice Alito suggested. So, if that is

2   possible given what they did say, why isn't an

3   automatic remand appropriate?

4   MR. ZIMMER: Well, look, I think, to

5   be clear, if -- if -- if -- I think if the

6   agency was sort of keeping open the -- the

7   remand -- you know, keeping open the credibility

8   issue as something it wasn't addressing, then

9   maybe a remand would be appropriate, but I think

10   if you look at page 164a of the -- of the

11   Petition Appendix --

12   JUSTICE SOTOMAYOR: But, counsel, they

13   said -- both the IJ and the BIA said he lied

14   about something.

15   MR. ZIMMER: Well, I guess just to be

16   clear, he --

17   JUSTICE SOTOMAYOR: So they didn't

18   believe him about something. So why shouldn't

19   we figure out what that meant?

20   MR. ZIMMER: Right. I mean, so -- so,

21   to be clear, Dai -- Dai never actually lied. I

22   mean -- and they never accused him of lying. He

23   was -- they -- he sort of was reluctant to

24   disclose this information. When he was sort of

25   asked point-blank whether they had come to the

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 1      United States, he was -- he was up-front about

 2      it.  There's no dispute that --

 3                JUSTICE SOTOMAYOR:  All right.  Thank

 4      you, counsel.

 5                CHIEF JUSTICE ROBERTS:  Justice Kagan.

 6                JUSTICE KAGAN:  Mr. Zimmer, I want to

 7      work off the understanding of law that you

 8      started with, which is the same as the one

 9      Justice Barrett was using, which is that this

10      presumption of credibility, what it says is that

11      in the absence of a finding we are going to take

12      the -- the testimony of the applicant as -- as

13      honest, as truthful.  The applicant didn't

14      perjure himself.

15                But then there are -- there is

16      extraneous evidence that could come in to show

17      that the applicant was wrong.  And -- and -- and

18      that distinction actually makes all the sense in

19      the world in a statute like this, which is about

20      a well-grounded fear of persecution, that the

21      applicant can testify as to his fear and all the

22      things underlying it.

23                But then there can be other evidence

24      which shows that that fear is not well grounded,

25      notwithstanding the truthfulness of what the
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 1   applicant said.

 2   So let's take that as the sort of

 3   premise of what the statute does. Dai, it seems

 4   to me, could have lost in two ways in -- in that

 5   world. One is if we understand the Board to

 6   have rejected the -- the -- the -- the

 7   presumption of credibility. In other words,

 8   they have decided that, in fact, Dai was lying

 9   when he said that this was the reason that he

10   wanted asylum.

11   And the second is, no, they accepted

12   that he was telling the truth, but there is

13   extraneous evidence indicating that he's wrong

14   as to his fear of going back to China.

15   So if you could comment on either of

16   those two ways of saying that Dai was wrong and

17   why you think neither of those is supportable.

18   MR. ZIMMER: Right. So I certainly

19   agree with -- with all of that. And as to the

20   -- the first one, sort of the idea that he was

21   lying, I point the Court again to page 164a,

22   where the Board made very clear that it was not

23   resting its -- that the IJ had not rested its

24   decision on and that it was not resting its

25   decision on an adverse credibility finding.

1   So the agency just didn't find that he

2   was lying. And so I just -- I don't think

3   that's a basis on which the -- the court of

4   appeals could have affirmed and -- or could have

5   -- could have denied a petition for review.

6   As to whether or not he was somehow

7   testifying truthfully but -- but mistaken,

8   again, I don't think that there's anything in

9   the record that would support that in the sense

10   that everything pointed basically the same way.

11   Dai gave very detailed testimony about the

12   persecution he suffered. He submitted

13   corroborating evidence in the form of hospital

14   records that showed his injuries and his wife's

15   abortion, and he showed country conditions

16   evidence that was extremely -- extremely

17   probative.

18   JUSTICE KAGAN: Thank you, Mr. Zimmer.

19   CHIEF JUSTICE ROBERTS: Justice

20   Gorsuch.

21   JUSTICE GORSUCH: Good morning, Mr.

22   Zimmer. The BIA, as I -- I read it, said that

23   -- that your client failed to meet his burden

24   because his wife and daughter returned to China.

25   That -- that is the ground on which it rests.

          1   Why isn't that sufficient? I mean,

          2   maybe -- maybe you -- you'd argue that that's

          3   not sufficient evidence or something like that.

          4   But --

          5   MR. ZIMMER: Right.

          6   JUSTICE GORSUCH: -- for purposes of

          7   our discussion here, why -- why wouldn't that be

          8   enough to overcome credible testimony by Mr. Dai

          9   about his --

         10   MR. ZIMMER: Well --

         11   JUSTICE GORSUCH: -- well-founded

         12   fears?

         13   MR. ZIMMER: Sure. And I think --

         14   JUSTICE GORSUCH: Is the testimony

         15   credible, it's like the light is green versus

         16   red. Mr. Dai thinks it's green, but there's

         17   other evidence in the form of his wife and

         18   daughter's behavior that suggests it's red.

         19   MR. ZIMMER: Right. So -- and I think

         20   the answer just goes to the -- as the court of

         21   appeals explains, the very, very significant

         22   differences in situations that he was in versus

         23   his wife and daughter. And his -- his wife and

         24   daughter --

         25   JUSTICE GORSUCH: Perhaps. Perhaps.

1   And that would go to whether there's substantial

2   evidence in the record, I suppose.

3   MR. ZIMMER: Right.

4   JUSTICE GORSUCH: But it wouldn't go

5   to anything having to do with the credibility

6   determination issue before us, would it?

7   MR. ZIMMER: No, I -- I -- well, I

8   mean, I -- I -- I think probably not. I mean, I

9   -- I don't think it -- there's certainly nothing

10   about that that contradicts his story or

11   suggests that he was lying.

12   JUSTICE GORSUCH: Right. Okay. Thank

13   you.

14   CHIEF JUSTICE ROBERTS: Justice

15   Kavanaugh.

16   JUSTICE KAVANAUGH: Thank you.

17   Good morning, Mr. Zimmer. Just to

18   make sure, you -- you agree with the distinction

19   between is the witness lying, and then the

20   second question, regardless of whether the

21   witness might be lying, is the witness,

22   nonetheless, mistaken, and you agree that

23   credibility in the statute only goes to the

24   first of those two questions, is that correct?

25   MR. ZIMMER: That's correct.

1   JUSTICE KAVANAUGH: Okay. And then

2   going to page 164a, the BIA does say that the

3   Respondent's family voluntarily returning and

4   his not being truthful about it is detrimental

5   to his claim and is significant to his burden of

6   proof. What do you say to that sentence?

7   MR. ZIMMER: Well, again, I -- I mean,

8   so, first of all, I just disagree with it as a

9   factual matter. But sort of I think that if you

10   look -- if you look at the --

11   JUSTICE KAVANAUGH: But just to

12   interrupt, isn't that the Board saying I guess

13   the first of Justice Kagan's two options in how

14   she posited it?

15   MR. ZIMMER: Well, I think it might --

16   it -- it -- it possibly could be read that way

17   except that if you look at 164a, the Board goes

18   on to say that the -- the immigration judge need

19   not have made an explicit adverse credibility

20   finding. So I think that -- I -- I think that

21   --

22   JUSTICE KAVANAUGH: The very next --

23   MR. ZIMMER: -- that the way that the

24   Board --

25   JUSTICE KAVANAUGH: -- the very next

1   sentence says that the Respondent "not being

2   truthful" about it "is detrimental to his

3   claim," which sounds like is the witness lying,

4   or credibility is, to use the statutory term.

5   MR. ZIMMER: Well, truthful, but that

6   was truthful not as to the fundamental facts on

7   which he was basing his asylum claim. This is

8   -- this is based on his lack of forthrightness

9   about telling -- telling the agency that his

10   wife and daughter had come with him and gone

11   back to China.

12   But I don't think that that could be

13   read as an adverse credibility finding as to the

14   testimony about his, you know, being detained

15   and beaten and deprived of food and water and

16   sleep and --

17   JUSTICE KAVANAUGH: The last --

18   MR. ZIMMER: -- you know, the police

19   --

20   JUSTICE KAVANAUGH: -- last legal

21   question: the rebuttable presumption, do you

22   think the Board can find the presumption

23   rebutted just on the face of the applicant's

24   testimony without any external evidence? Do you

25   understand the question?

            1   MR. ZIMMER: Yes, I -- I do. I think

            2   it would probably be an unusual case, but I -- I

            3   don't think there's anything that statutorily

            4   precludes that.

            5   JUSTICE KAVANAUGH: Thank you, Mr.

            6   Zimmer.

            7   CHIEF JUSTICE ROBERTS: Justice

            8   Barrett.

            9   JUSTICE BARRETT: Good morning, Mr.

           10   Zimmer. So I have a question about Justice

           11   Kagan's two ways to understand what the Board

           12   has done: one, that Mr. Dai was lying, or the

           13   other, that he was telling the truth, but

           14   external circumstances show that he was

           15   mistaken.

           16   And my question is about the standard

           17   of review that the Board would apply in

           18   reviewing the IJ's explanation. So, in the

           19   first scenario, the lying, we all agree that

           20   there would be a rebuttable presumption that he

           21   was actually telling the truth, right?

           22   MR. ZIMMER: Yes.

           23   JUSTICE BARRETT: If credibility -- if

           24   there's no express adverse credibility

           25   determination, the Board has to apply this

1   presumption, right?

2   MR. ZIMMER: Yes.

3   JUSTICE BARRETT: So is that better or

4   worse? In the second, let's assume that what

5   the Board wants to conclude is that, in fact,

6   it's reviewing what it thinks is the IJ's

7   determination that he might be telling the

8   truth, but he's wrong because of external

9   reasons.

10   MR. ZIMMER: Yeah.

11   JUSTICE BARRETT: What's the standard

12   of review there?

13   MR. ZIMMER: I think that would be --

14   under the agency regulations, that would be

15   clear error review. If you look at what I think

16   is 8 CFR 1003.1(d), I believe that would be

17   clear error review.

18   JUSTICE BARRETT: Okay. And my other

19   question is a factual one. Justice Sotomayor

20   asked the government about the hospital records.

21   Do you want to --

22   MR. ZIMMER: Yeah.

23   JUSTICE BARRETT: -- explain what

24   significance they have here?

25   MR. ZIMMER: Yeah, absolutely. I

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1       think they have great significance.  I mean,

2       these were introduced -- this was not a huge

3       administrative record.  There were only a few

4       exhibits.  This was one of the -- some of the

5       key exhibits that Dai introduced.

6              And -- and I think that if you look at

7       page 101 of the Joint Appendix, I mean, the

8       government tried to impeach Dai about the

9       hospital records, but all it could get out of

10      him was his testimony that you can only get them

11      if you're admitted to the hospital and that he

12      had never written in one of them in his life.

13             And the idea that they would somehow

14      be not evidence that -- that -- that is -- that

15      is relevant and that could be considered by this

16      court makes little sense.

17             And the same with this exhaustion

18      argument.  I mean, there's no --

19             JUSTICE BARRETT:  Let me just ask you

20      one other question about the hospital records.

21             MR. ZIMMER:  Yeah.

22             JUSTICE BARRETT:  Did the IJ say they

23      were not going to be -- that he was not going to

24      consider them because of the authenticity

25      questions that the government posed?
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1           MR. ZIMMER:  No, the agency said

2    nothing about them.  And, in fact, the agency

3    simply ignored them, which I think is actually

4    quite mind-boggling given how probative they are

5    to Dai's burden of proof.

6           JUSTICE BARRETT:  Thank you, Mr.

7    Zimmer.

8           CHIEF JUSTICE ROBERTS:  A minute to

9    wrap up, Mr. Zimmer.

10           MR. ZIMMER:  Thank you, Mr. Chief

11    Justice.  I just want to emphasize in conclusion

12    that -- that really the government's argument

13    depends almost entirely on the idea that Dai

14    could somehow be credible and yet have been

15    lying.

16           And that just makes no sense for many

17    of the reasons that -- that we've already

18    discussed in -- in -- in great detail.  The --

19    the ultimate distinction under the statute is

20    that there's a preliminary inquiry into

21    credibility, which is really just a question as

22    to whether or not the -- the agency believes

23    that the person was honest, whether they were

24    submitting a fraudulent claim or whether they

25    were testifying honestly.
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1   The way in which that differs from

2 persuasiveness only comes into play if you can

3 have external evidence that shows that you can

4 have honest testimony that is somehow mistaken.

5 And there is simply none of that here.

6   Dai gave extremely detailed testimony

7 about the abuse the Chinese government inflicted

8 on him for his resistance to their forced

9 abortion of his child. He testified that the

10 police are looking for him in China. And he

11 testified about the continuing threats he faces.

12 There is simply nothing that undermines that,

13 and the agency never found that that testimony

14 was noncredible. And we therefore would urge

15 this Court to affirm.

16   CHIEF JUSTICE ROBERTS: Thank you,

17 counsel.

18   Rebuttal, Ms. Sinzdak.

19   REBUTTAL ARGUMENT OF COLLEEN R. SINZDAK

20   ON BEHALF OF THE PETITIONER

21   MS. SINZDAK: Thank you. I think it's

22 important to look at the history here. Before

23 the REAL ID Act, the Ninth Circuit would often

24 reverse the Board by parsing its decision and

25 trying to see if it had specifically said that

 1   the alien was not credible. And even if the

 2   alien -- if the -- if the Board said things like

 3   the alien was not entirely credible, that wasn't

 4   enough. The Board -- the -- the Ninth Circuit

 5   would say you didn't make an explicit adverse

 6   credibility determination and so we're going to

 7   presume that everything in the alien's testimony

 8   was fact.

 9   And so Congress passed the REAL ID

10   Act, and in the REAL ID Act, it made clear that

11   what the Ninth Circuit had been doing was not

12   appropriate, and it did that in part by making

13   clear that even credible testimony isn't

14   sufficient to establish the facts. A

15   fact-finder that is not satisfied that testimony

16   is credible, persuasive, and contains

17   sufficiently detailed information to satisfy the

18   requirements can reject the testimony.

19   So the mere absence of an explicit

20   adverse credibility determination is not enough

21   to dictate that the testimony of the alien has

22   to be accepted as fact.

23   And the -- I think that at this point,

24   everyone has acknowledged that the Ninth Circuit

25   has continued to apply its pre-REAL ID Act rule.

1   And for that reason, the decisions below have to

2   be reversed. And, in -- in fact, looking at

3   1252, the only question that the Ninth Circuit

4   should have been asking is whether any

5   reasonable fact-finder would have been compelled

6   to reject the agency's conclusion.

7   And I think a realistic examination of

8   the evidence in both of these cases, even in

9   light of the rebuttable presumption of the

10   credibility before the Board, makes very clear

11   that a reasonable fact-finder could deny relief

12   in both cases.

13   In Alcaraz, we had the testimony of

14   the -- of the alien, and -- and -- and the IJ

15   dutifully summarized the alien's account, and

16   then it pointed to multiple pieces of evidence

17   demonstrating that the alien had committed a

18   particular -- a particularly serious crime, even

19   setting aside the probation report. It pointed

20   out that he was convict -- convicted of a

21   domestic violence offense, that the domestic

22   violence offense involved as its elements the

23   willful infliction of corporal injury resulting

24   in trauma, and that he was sentenced to two

25   years.

1   If you look at Dai, the Board pointed

2 to multiple pieces of evidence that demonstrated

3 that what Dai was saying just wasn't true,

4 however you want to categorize that. And it

5 wasn't true because his wife had returned to

6 China voluntarily just two weeks later. It

7 wasn't true because he said the real story was

8 that he had come to the United States for -- to

9 get a better life for his daughter and to get a

10 job.

11   And I think, if you just look at that

12 evidence and apply Section 1252, it's very clear

13 that the agency decisions here have to be

14 affirmed.

15   CHIEF JUSTICE ROBERTS: Thank you,

16 counsel. The cases are submitted.

17   (Whereupon, at 11:35 a.m., the cases

18 were submitted.)

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15 **64**:2 **67**:21 **68**:8,8 **69**:10,13 **80**:
20 **84**:2 **86**:18 **95**:16
believed [17] **12**:21 **13**:14,19 **20**:
15 **21**:9,14 **29**:2,6 **40**:21 **41**:1 **42**:
10 **51**:21 **63**:6 **65**:1 **69**:10,17 **73**:1
believes [2] **21**:16 **97**:22
believing [1] **60**:10
below [2] **76**:11 **100**:1
benefit [1] **39**:17
better [4] **11**:21 **30**:25 **95**:3 **101**:9
between [16] **12**:14 **13**:8 **16**:15 **18**:
6,7 **20**:19 **28**:24 **42**:1,10 **45**:24 **52**:
7 **69**:18 **76**:12,25 **83**:9 **91**:19
beyond [3] **20**:12 **36**:16 **49**:12
BI [1] **60**:12
BIA [21] **6**:8 **20**:8,11 **25**:9 **26**:13,17
32:13 **50**:16 **51**:7 **57**:11,21 **60**:12
64:25 **67**:7,17 **75**:9 **82**:13 **85**:20
86:13 **89**:22 **92**:2
BIA's [4] **57**:24 **60**:25 **83**:23 **84**:13
big [1] **7**:13
bit [7] **7**:8 **25**:19 **44**:15 **45**:18 **52**:4
65:15 **77**:10
bites [1] **73**:2
blew [1] **65**:15
blue [1] **19**:6
Board [104] **6**:20,23 **8**:4,5,10,11,12,
12 **9**:24 **10**:15 **16**:1 **22**:13 **23**:9 **27**:
17 **29**:10,12 **30**:11,14,17,18 **31**:12,
13,23 **32**:21 **33**:3,10,16,18 **34**:2,5,
7,12,15,19 **35**:3,3,9,20 **38**:10,20
39:8,11,18 **43**:13,14,17,23 **44**:1,7
45:9 **47**:22 **48**:3,8,21 **49**:3 **51**:13,
14 **52**:6 **53**:13,13 **57**:25 **58**:22 **59**:
19 **62**:17,19 **63**:6,8 **65**:10 **66**:5,7,
12,13,13 **67**:24 **68**:1,4,15 **71**:9,10,
11 **73**:3 **77**:23 **78**:1,6 **81**:20 **83**:22
84:13 **85**:5,6 **88**:5,22 **92**:12,17,24
93:22 **94**:11,17,25 **95**:5 **98**:24 **99**:
2,4 **100**:10 **101**:1
Board's [8] **8**:3 **44**:6,9 **48**:18 **58**:21
65:13 **84**:16,21
bogged [1] **32**:23
Boston [1] **2**:7
both [21] **7**:12 **10**:19 **13**:25 **14**:3,13,
13,13 **20**:6 **21**:23 **22**:22 **41**:16 **43**:
8 **46**:19,20 **53**:18 **76**:15,21 **77**:11
86:13 **100**:8,12
bottom [1] **75**:4
break [1] **42**:23
Breyer [39] **14**:16,17 **16**:3,10 **17**:3,
7,14,20 **18**:1,5,10,24 **19**:3,11,17
54:2,3 **55**:2,7,10,21,23 **56**:5,11,13,
15,20 **57**:5 **72**:9,12 **79**:3,7,8,23 **80**:
9 **81**:7,24 **82**:3,7
brief [9] **7**:10 **32**:12,15,17,22 **50**:3
52:16 **55**:19 **57**:18
briefed [1] **20**:13
briefing [1] **23**:9
briefs [2] **7**:12 **71**:25
bring [1] **11**:16
bulk [1] **7**:11
burden [16] **4**:12,14 **5**:25 **22**:24 **24**:
15 **26**:6,9 **30**:15 **37**:19 **61**:25 **70**:5

83:24 **85**:20 **89**:23 **92**:5 **97**:5
burdensome [1] **72**:13
buy [1] **69**:7

C

calculation [1] **52**:12
called [1] **66**:11
came [4] **1**:20 **11**:4 **46**:4 **53**:12
cannot [3] **6**:6 **49**:24 **55**:13
capable [13] **12**:20 **13**:13,18 **20**:15
21:14,19 **29**:2,6 **40**:20 **41**:1 **51**:20
69:9,17
careful [1] **81**:2
Case [45] **4**:4,5 **8**:17 **9**:1,2 **15**:22
19:6 **20**:14 **24**:25 **27**:24 **30**:5 **31**:7,
15 **36**:11 **37**:23,23 **43**:17 **48**:3 **51**:
12 **53**:19 **55**:17,18 **57**:10 **60**:3,9,
21 **62**:10 **63**:2 **64**:14,14 **65**:3 **68**:
11,12 **70**:3 **72**:10 **73**:20 **77**:10,10,
19 **80**:24 **82**:13,20 **84**:24 **85**:4 **94**:
2
case-specific [1] **74**:2
cases [22] **10**:11,19 **14**:23 **16**:17
20:7 **22**:8,10,22 **27**:18 **38**:12 **42**:4
46:19,20 **51**:1,1 **64**:17,18 **71**:18
100:8,12 **101**:16,17
categories [1] **14**:13
categorize [1] **101**:4
central [1] **72**:8
cert [1] **26**:20
cert-worthy [1] **48**:7
certain [1] **24**:16
certainly [7] **28**:24 **35**:15 **36**:2 **38**:
2 **53**:4 **88**:18 **91**:9
certiorari [2] **47**:20 **73**:19
CESAR [1] **1**:14
CFR [1] **95**:16
chance [2] **7**:15 **66**:8
change [1] **46**:11
Chenery [9] **7**:6,10,16,18,23 **8**:1,
23,24 **56**:21
CHIEF [56] **4**:3,9 **6**:7,11 **7**:4 **9**:5,10,
19 **10**:4,7 **14**:15 **20**:2 **23**:14 **27**:15
32:6 **36**:25 **37**:2 **41**:20 **46**:14 **47**:
13,18 **49**:16 **50**:14,24 **51**:5,23,25
54:1 **57**:6 **59**:23 **62**:8 **64**:20 **66**:17,
19 **69**:1 **70**:2 **72**:6 **73**:10,15 **74**:19,
25 **75**:3 **76**:5,8 **79**:2,6 **82**:5 **84**:18
87:5 **89**:19 **91**:14 **94**:7 **97**:8,10 **98**:
16 **101**:15
child [14] **5**:22 **11**:9,12,16,17,21 **25**:
3 **42**:18,20,20 **70**:12 **74**:7 **79**:1 **98**:
9
China [17] **5**:6 **11**:1,2 **17**:17 **18**:11
25:4 **30**:7 **78**:14,23 **84**:1,4 **85**:17
88:14 **89**:24 **93**:11 **98**:10 **101**:6
Chinese [2] **74**:6 **98**:7
choice [2] **52**:7,7
choose [1] **67**:20
chunk [1] **7**:13
Circuit [27] **5**:1,7,23 **20**:6 **26**:15,21
35:1 **53**:7,10 **57**:9 **60**:5,17,21 **68**:
17 **72**:24 **79**:9,20,22 **82**:10,19,24
84:23 **98**:23 **99**:4,11,24 **100**:3

Circuit's [1] **54**:5
circuits [1] **34**:24
circumstances [4] **56**:9 **63**:2 **70**:1
94:14
cite [1] **7**:10
cited [4] **7**:14 **27**:25 **35**:21 **52**:15
claim [4] **92**:5 **93**:3,7 **97**:24
claimed [1] **47**:21
claims [1] **85**:23
clarify [1] **23**:16
classic [1] **28**:4
clear [26] **8**:4 **10**:15 **17**:11 **21**:21 **22**:
21 **25**:11 **28**:16 **33**:1 **47**:2 **49**:17
63:6,8 **77**:19 **82**:24 **83**:17 **84**:13
86:5,16,21 **88**:22 **95**:15,17 **99**:10,
13 **100**:10 **101**:12
clearly [10] **7**:25 **8**:3 **9**:18 **24**:3 **48**:
15 **71**:9 **76**:3 **78**:4 **81**:18 **84**:10
client [3] **60**:12 **65**:2 **89**:23
close [1] **19**:19
cogent [1] **66**:10
coherent [1] **44**:17
colleague [1] **66**:23
colleagues [1] **24**:13
COLLEEN [5] **2**:2 **3**:3,12 **4**:7 **98**:
19
Collieries [5] **51**:2 **52**:15 **53**:22 **70**:
4 **71**:18
Collins [1] **36**:9
Colloton [1] **64**:7
Colloton's [1] **57**:4
come [12] **19**:8 **22**:11 **42**:4,20 **44**:
21 **57**:23 **58**:14 **78**:21 **86**:25 **87**:16
93:10 **101**:8
comes [11] **51**:6,13 **62**:17,18 **63**:3
67:12,14 **70**:3 **77**:1 **85**:1 **98**:2
coming [1] **53**:21
comment [1] **88**:15
committed [5] **5**:20 **8**:18 **27**:9 **48**:
5 **100**:17
common [6] **4**:18 **16**:7,11,12 **21**:5,
8
compelled [4] **36**:19 **47**:10 **73**:25
100:5
completely [2] **7**:23 **78**:15
concern [2] **6**:22 **14**:18
concerned [1] **39**:14
concession [1] **48**:13
conclude [4] **9**:7 **20**:22 **74**:13 **95**:5
concluded [2] **5**:8 **77**:21
concluding [1] **6**:16
conclusion [9] **36**:20 **47**:11 **73**:25
74:2,15 **84**:22 **85**:25 **97**:11 **100**:6
conclusively [2] **49**:19,24
concurrence [2] **39**:10,13
conditions [1] **89**:15
conducting [1] **6**:12
conflicting [1] **41**:15
confront [2] **43**:15,18
confused [4] **24**:11,11,12 **52**:4
confusing [1] **20**:21
confusion [1] **39**:23
Congress [17] **5**:24 **14**:4 **15**:8 **16**:
20 **19**:24 **21**:12,13 **36**:16,17,23 **52**:

17 **55**:4 **59**:13 **63**:19 **65**:17 **71**:17
99:9
Congress's [2] **36**:22 **52**:21
consider [7] **4**:22 **9**:25 **14**:8 **19**:25
23:6,7 **96**:24
consideration [1] **8**:7
considerations [2] **14**:5 **55**:15
considered [2] **34**:24 **96**:15
consistency [2] **14**:7,12
consistent [3] **42**:3 **70**:18,21
consolidated [1] **4**:5
contains [1] **99**:16
contentions [1] **57**:13
contest [2] **49**:4 **65**:23
context [2] **53**:3 **68**:21
contexts [1] **56**:8
continue [1] **32**:25
continued [1] **99**:25
continuing [1] **98**:11
contradictory [1] **72**:25
contradicts [2] **48**:20 **91**:10
contrary [2] **47**:10 **53**:14
convict [1] **100**:20
convicted [2] **62**:22 **100**:20
convincing [1] **80**:3
cookies [2] **13**:4 **20**:23
corporal [3] **5**:21 **27**:6 **100**:23
correct [11] **6**:10 **23**:18 **38**:19 **41**:7
57:17 **60**:14 **66**:8 **73**:3 **82**:21 **91**:
24,25
corroborating [2] **74**:10 **89**:13
corroboration [2] **17**:4,12
couldn't [2] **26**:16 **79**:14
Counsel [19] **6**:7 **10**:5,9 **20**:3 **24**:8
26:12 **45**:15 **47**:14 **52**:1 **60**:1 **62**:6
73:11 **74**:19 **76**:6,10 **86**:12 **87**:4
98:17 **101**:16
country [2] **69**:24 **89**:15
course [3] **8**:25 **35**:25 **66**:14
COURT [70] **1**:1,21 **4**:10,21 **5**:10,
13 **6**:1,5,12,21 **8**:6,25 **9**:3,9,16 **14**:
25 **15**:20 **19**:7,12,23 **26**:24 **31**:19
32:14,21 **33**:7,7,14 **34**:2 **35**:12 **38**:
9 **42**:4 **44**:2,3,4,23,23 **45**:12 **47**:19,
25 **48**:18,21 **49**:7,14,18,24 **51**:8
53:1 **54**:17 **56**:8 **57**:12 **67**:16 **68**:
17 **72**:17,21 **73**:19,20,23 **74**:18 **75**:
6 **79**:13 **80**:5,18 **81**:2 **82**:1 **85**:12
88:21 **89**:3 **90**:20 **96**:16 **98**:15
courts [4] **36**:17 **47**:21 **54**:22 **55**:
12
create [1] **50**:21
created [2] **5**:24 **59**:13
cred [1] **8**:20
credibility [136] **4**:19 **5**:9,16 **6**:9,19,
21 **8**:4,11 **9**:16,23,25 **10**:3,12,16
12:15,19 **13**:11,25 **14**:6,8 **16**:5,7
20:10,19 **21**:13,21 **22**:17,20 **25**:10
27:17,24 **28**:5,12,14,24 **29**:8 **30**:
21 **31**:5,21 **32**:2,25 **33**:13,16,21
34:3,8,11,20,25 **35**:10,16,24 **36**:4
37:7,10,16,18 **38**:9,16 **39**:4,21 **40**:
14 **42**:2,5,13 **43**:3,8,12,20,21,24
45:2,25 **46**:6 **47**:22 **49**:22 **50**:19,

21 **51**:10,14 **52**:18,20 **53**:12,21 **57**:
12 **60**:11 **61**:16,22 **62**:2,19 **66**:25,
25 **67**:6 **68**:2,5 **69**:8,19 **70**:4,18 **71**:
16 **74**:12 **75**:15,22 **76**:25 **77**:12,13,
25 **78**:3,5,7 **79**:12,16 **80**:2,13 **81**:
13 **83**:3 **84**:11,15 **85**:4,5,14 **86**:7
87:10 **88**:7,25 **91**:5,23 **92**:19 **93**:4,
13 **94**:23,24 **97**:21 **99**:6,20 **100**:10
credible [101] **4**:15 **8**:21 **9**:8,12 **10**:
19 **12**:19 **13**:1,2,3,13,24 **14**:10 **15**:
4 **16**:8,16,23,25 **17**:5,6,10,12,17,
21,23 **18**:7,13,15,18,19 **19**:14,25
20:9,14,24 **21**:6,9,24,25 **24**:14,23
25:1,21,25 **26**:1,10 **27**:2 **29**:1 **31**:
13 **33**:19 **35**:4,22 **38**:24 **39**:9 **40**:
20 **41**:14,16 **44**:19 **45**:10 **46**:8,25
47:4 **48**:11 **49**:21,25 **50**:4 **51**:3,18
52:9,13 **53**:23 **54**:7 **61**:1,4 **64**:10
69:12,15,16 **70**:16 **71**:19 **73**:24 **74**:
1 **75**:19,21 **76**:12,16,21,23 **77**:7,20
79:14 **82**:15,16 **83**:5 **85**:11 **90**:8,
15 **97**:14 **99**:1,3,13,16
credibly [3] **12**:10 **18**:22 **30**:23
credit [1] **61**:17
credited [1] **35**:2
crime [7] **5**:20 **8**:19 **27**:10 **48**:5 **61**:
11 **62**:25 **100**:18
criminals [3] **62**:22 **63**:14 **68**:8
cross-examination [2] **26**:19 **65**:
16
crumbs [7] **13**:6,10,15,15,22,25 **42**:
18
crying [1] **42**:21
curious [2] **32**:17 **40**:13
curiously [1] **49**:2

D

D.C [3] **1**:17 **2**:3,5
DAI [48] **1**:7 **4**:5 **5**:2 **10**:23,24 **11**:8,
19 **12**:5,9 **23**:21 **25**:1,25 **26**:4,5,8
27:21,24 **28**:19 **29**:10 **30**:5 **31**:7,
15 **33**:19 **35**:22 **74**:8,14,16 **77**:20
78:16,19 **83**:24 **85**:19,20 **86**:21,21
88:3,8,16 **89**:11 **90**:8,16 **94**:12 **96**:
5,8 **97**:13 **98**:6 **101**:1,3
Dai's [10] **5**:3 **8**:15 **36**:10 **73**:20,23,
25 **74**:3 **78**:13 **85**:16 **97**:5
danger [1] **43**:5
dangerous [1] **72**:2
daughter [11] **31**:1 **61**:8 **62**:15 **78**:
14,22 **79**:4 **89**:24 **90**:23,24 **93**:10
101:9
daughter's [1] **90**:18
DAVID [3] **2**:7 **3**:9 **73**:13
day [1] **20**:22
deal [2] **55**:1,3
debate [1] **22**:16
decades [3] **56**:21 **58**:10 **72**:15
decide [4] **18**:21 **26**:17 **34**:2 **59**:12
decided [4] **9**:1 **30**:18 **63**:9 **88**:8
decision [19] **9**:24 **25**:12 **39**:11 **48**:
19 **58**:21 **59**:17 **60**:25 **75**:9 **78**:1
83:18,19,23 **84**:13,14,17,21 **88**:24,
25 **98**:24

decisionmaking [1] **56**:23
decisions [5] **6**:5 **16**:15 **47**:23 **100**:
1 **101**:13
decline [1] **49**:14
deemed [3] **8**:21 **22**:18,19
deference [1] **81**:23
deferring [1] **6**:2
definitely [1] **21**:24
delivery [1] **76**:19
deliveryman [1] **43**:6
demeanor [4] **28**:4,17,18 **64**:11
demonstrate [1] **5**:1
demonstrated [3] **8**:18 **22**:23 **101**:
2
demonstrates [2] **38**:19 **63**:12
demonstrating [4] **11**:1,13 **46**:21
100:17
denied [1] **89**:5
deny [2] **10**:21 **100**:11
denying [2] **8**:5 **81**:10
Department [2] **2**:3 **69**:24
depends [3] **17**:14 **19**:6 **97**:13
deprived [1] **93**:15
described [1] **84**:10
detail [2] **74**:8 **97**:18
detailed [5] **56**:14 **73**:4 **89**:11 **98**:6
99:17
detained [1] **93**:14
determination [38] **4**:20 **5**:9,16,19
9:7 **29**:8 **30**:17,21 **34**:4,8,11 **35**:17,
24 **37**:7,17 **38**:9 **39**:4 **43**:12,22 **44**:
10 **45**:7,12 **47**:8 **49**:22 **50**:19,22
51:10 **67**:1,6 **68**:3 **79**:12 **80**:13 **83**:
4 **91**:6 **94**:25 **95**:7 **99**:6,20
determinations [4] **35**:11 **36**:4,18
42:6
determine [4] **9**:14 **17**:23 **38**:11
39:2
detrimental [2] **92**:4 **93**:2
diametrically [2] **53**:15 **61**:7
dichotomy [1] **76**:13
dictate [2] **31**:23 **99**:21
dictates [1] **44**:18
difference [5] **12**:13 **33**:6 **69**:18
83:8,9
differences [1] **90**:22
different [10] **19**:14 **21**:22 **32**:10
36:10 **44**:13,15 **56**:5 **58**:8 **59**:18
78:15
differently [1] **53**:10
differs [1] **98**:1
difficult [1] **36**:7
difficulty [1] **76**:11
directly [2] **48**:20 **60**:25
disagree [9] **8**:24,24 **50**:12 **74**:21,
24 **78**:9 **82**:18,22 **92**:8
disagrees [1] **43**:17
disbelieve [4] **51**:3 **53**:23 **59**:3 **71**:
19
discern [1] **48**:17
discerned [4] **7**:25 **8**:3 **9**:18 **48**:15
discernible [2] **76**:3 **81**:18
disclose [1] **86**:24
discussed [2] **68**:4 **97**:18

discussion [1] **90**:7
disproves [1] **70**:24
dispute [3] **73**:17 **81**:11 **87**:2
disregard [2] **5**:10 **80**:22
distinct [1] **69**:6
distinction [19] **12**:14 **13**:7 **16**:15,
21 **18**:7 **20**:18 **22**:4,7 **42**:1,9 **45**:23
50:5,11 **76**:11,25 **77**:5 **87**:18 **91**:
18 **97**:19
distinctions [1] **14**:20
distinguish [1] **18**:6
district [5] **54**:17,25 **55**:24 **56**:8,19
documents [1] **64**:13
doing [4] **62**:23 **68**:19 **71**:1 **99**:11
domestic [3] **27**:4 **100**:21,21
done [8] **23**:22 **24**:2 **31**:15 **43**:20
58:10,13 **62**:7 **94**:12
door [1] **42**:22
doubt [2] **47**:7 **71**:22
down [9] **22**:11 **32**:23 **51**:6 **53**:24
57:23 **63**:3 **72**:11 **80**:1 **85**:1
dozen [1] **25**:7
drawing [4] **20**:19 **42**:1 **45**:23 **77**:6
draws [1] **22**:4
drops [1] **37**:22
dutifully [1] **100**:15
duty [1] **55**:13
dying [2] **17**:16 **18**:11

E

each [1] **59**:2
earlier [1] **69**:11
easiest [2] **18**:17 **81**:16
easy [2] **48**:8 **57**:2
eat [2] **13**:4 **20**:23
eating [1] **24**:10
effectively [2] **83**:4 **85**:6
eight [1] **36**:9
either [8] **6**:19,22 **10**:11 **39**:2 **43**:15
61:22 **62**:1 **88**:15
elements [2] **27**:5 **100**:22
elicited [1] **23**:20
eligibility [4] **4**:12 **8**:5 **10**:22 **74**:3
eligible [1] **46**:22
embrace [1] **7**:23
emphasize [1] **97**:11
enable [1] **63**:18
enabled [1] **55**:4
Encino [2] **9**:17 **48**:14
encountered [1] **24**:17
end [8] **15**:2,21,22 **20**:22 **21**:1 **29**:9
46:17 **85**:8
endorse [1] **49**:7
enforce [1] **47**:21
enough [10] **9**:11,13 **15**:18 **43**:21
52:25 **58**:16 **72**:20 **90**:8 **99**:4,20
ensures [1] **39**:17
enter [1] **7**:2
entire [2] **22**:16 **65**:16
entirely [3] **74**:5 **97**:13 **99**:3
entitle [1] **4**:20
entitled [4] **5**:10 **8**:6 **16**:25 **81**:22
entitlement [1] **74**:4
EPA [2] **53**:4 **73**:8

equivalent [1] **42**:8
erred [1] **5**:1
erroneous [1] **5**:14
error [2] **95**:15,17
escapes [1] **21**:2
ESQ [4] **3**:3,6,9,12
ESQUIRE [2] **2**:5,7
essentially [3] **28**:14 **42**:8 **63**:8
establish [2] **84**:3 **99**:14
established [2] **29**:15,17
establishing [1] **4**:12
evaluate [1] **38**:21
evaluating [1] **6**:25
even [28] **8**:19 **10**:17,24 **12**:8,14 **15**:
25 **16**:17 **25**:24 **26**:9 **27**:2 **29**:2 **35**:
2 **40**:7,15,20,25 **47**:7 **49**:5 **54**:6 **55**:
8 **59**:9,16 **63**:11 **64**:2 **99**:1,13 **100**:
8,18
event [1] **48**:7
events [1] **61**:6
everybody [1] **16**:18
everyone [3] **54**:4 **81**:17 **99**:24
everything [5] **54**:24 **56**:11 **73**:6
89:10 **99**:7
everywhere [1] **36**:3
evidence [119] **4**:17,24 **5**:2,5,11,18
6:13,16 **7**:1 **8**:17 **9**:12 **10**:10 **11**:1,
4 **12**:6 **14**:3,7,11,11 **15**:2,6,7,15,18,
21 **16**:25 **17**:1,5,12,25 **18**:4 **19**:9,
18 **22**:13,19,22 **24**:5,14 **25**:21,21
26:2,3,8,25 **27**:1,13,20,23,25 **28**:5,
7,10,14,17,18 **29**:14 **30**:15 **31**:6,20
33:8,20 **35**:21 **37**:14,21 **38**:13,18
39:20 **40**:11 **41**:11 **43**:4,19 **44**:5,
10,25 **45**:2,6 **46**:19,20,24 **48**:4 **51**:
4,21 **52**:8,13 **53**:23 **55**:6,14 **62**:2,
12 **65**:7 **67**:12,15,18,20,21 **70**:15,
24 **71**:20 **74**:10,14 **76**:22 **77**:11 **78**:
3,9 **87**:16,23 **88**:13 **89**:13,16 **90**:3,
17 **91**:2 **93**:24 **96**:14 **98**:3 **100**:8,
16 **101**:2,12
exactly [5] **39**:7 **58**:14 **60**:7 **62**:23
82:12
exam [1] **53**:17
examination [1] **100**:7
example [12] **36**:11 **38**:15 **40**:3 **42**:
18,19 **58**:18 **65**:22 **69**:20 **70**:10,13,
13 **76**:18
except [2] **73**:4 **92**:17
exceptions [1] **14**:24
excuse [1] **66**:12
exercise [2] **41**:22 **55**:13
exhaustion [2] **23**:10 **96**:17
exhibits [2] **96**:4,5
existence [2] **13**:24 **46**:5
expect [1] **53**:2
expires [1] **23**:4
explain [12] **19**:20 **21**:2 **43**:18,24
53:13,19 **58**:16 **68**:19 **70**:8 **71**:1
73:1 **95**:23
explained [3] **32**:22 **35**:1 **67**:17
explains [1] **90**:21
explanation [22] **9**:6 **44**:2,6,9 **48**:9
51:7 **56**:10 **58**:3,5,12 **59**:8 **61**:2,18

66:10 68:18 70:25 71:21,23 72:17 84:6 85:16 94:18
explanations [1] 13:14
explicit [19] 10:1 34:5,7,11,17,24 38:8 43:22 49:21 50:18 57:11 81: 3,4 82:14 83:11,11 92:19 99:5,19
explicitly [9] 6:19 7:5 20:8 37:8 58:4 67:1 77:24 83:21 85:16
explicitness [1] 83:20
explore [1] 32:9
express [6] 36:13 43:13 50:21 52: 19 65:17 94:24
expressly [4] 5:14 36:5 55:4 68:1
extent [3] 23:21 24:13 78:2
external [4] 93:24 94:14 95:8 98:3
extraneous [4] 31:6 60:20 87:16 88:13
extraordinarily [2] 20:14,21
extreme [2] 56:24,25
extremely [4] 62:25 89:16,16 98:6
eyewitness [3] 49:1 58:19 65:11

F

face [3] 61:10 75:15 93:23
faced [2] 78:16,19
faces [1] 98:11
fact [31] 5:12 10:17 11:9,24 15:3 18:21 25:2 26:4 27:3,5,7 28:17 40: 10 41:6 43:5,7 44:17 46:7 50:7 65: 5 97:2 99:8,22 100:2
fact-bound [1] 48:2
fact-finder [7] 34:10 36:19 45:5 47:9 99:15 100:5,11
fact-finding [1] 6:3
facts [9] 29:15,17,25 41:15 53:18 59:4,11 93:6 99:14
factual [5] 14:25 49:11 57:13 92:9 95:19
failed [2] 85:19 89:23
false [3] 31:4 64:13 76:13
falsity [1] 70:19
familiar [2] 25:24 41:22
family [3] 11:3 30:7 92:3
family's [3] 5:4 11:7 84:7
far [1] 49:12
fear [10] 25:5 30:9 84:1,2 85:23,23 87:20,21,24 88:14
fears [1] 90:12
February [1] 1:18
federal [1] 47:25
fell [2] 53:24 72:11
few [4] 10:9 36:12 78:22 96:3
figure [1] 86:19
figuring [1] 25:8
filed [2] 66:12,12
filing [1] 64:12
filler [1] 75:15
find [21] 8:15 13:5,5,17 42:20 43:2 50:13,17 57:21 59:5 64:9 68:5 72: 22 77:20 80:2,17,18 85:7,16 89:1 93:22
finder [1] 41:5
finding [30] 7:18 15:3,4,5 25:10 34:

17,25 39:1 51:19 54:7,10 57:12 61:16,18 62:18 74:12 76:3 77:25 78:7 81:3,5,12,22 82:14 84:11,15 87:11 88:25 92:20 93:13
findings [6] 10:10 44:24 49:11 52: 20 54:18 68:2
finds [2] 81:20,21
fine [1] 42:9
fired [1] 78:24
first [18] 18:22 21:23 25:15 28:15 35:8 40:2,6,19 55:3 58:8 60:16 74: 20 80:7 88:20 91:24 92:8,13 94: 19
fits [1] 40:13
fleeing [1] 11:15
flouting [1] 36:21
focus [2] 46:6 67:9
focused [1] 68:11
follow [3] 9:13 15:21 76:2
following [1] 79:11
food [1] 93:15
forced [4] 25:3 74:7 78:25 98:8
forgotten [1] 35:23
form [3] 24:21 89:13 90:17
forth [1] 45:14
forthcoming [2] 11:8,11
forthright [2] 28:19 84:6
forthrightness [1] 93:8
forward [1] 22:14
found [16] 15:14 20:13 21:8 25:14, 25 26:1,15 33:18 35:14 43:16 48: 18 52:8 57:25 61:1,3 98:13
framework [2] 73:21 85:10
framing [1] 13:16
frankly [1] 33:22
fraudulent [1] 97:24
friends [1] 7:7
front [1] 81:17
fully [1] 46:11
fundamental [1] 93:6
future [1] 85:23

G

game [1] 45:14
gap [1] 75:14
gave [5] 66:8 68:5 70:10 89:11 98: 6
GENERAL [5] 1:4,11 2:3 46:18 53: 20
generally [1] 62:21
generous [1] 27:13
genuine [1] 69:23
gets [4] 43:13 44:2 75:24 76:18
getting [4] 16:18 50:7 52:14 68:7
girlfriend [1] 62:14
give [6] 7:15 40:18 65:8 80:21 81: 9 85:13
given [4] 41:10 64:14 86:2 97:4
gives [1] 82:10
Gorsuch [26] 32:7,8 33:4,24 34:14, 16 35:5 36:1,24 47:24 61:24 64:8, 21,22 65:5 66:11,16 67:11 89:20, 21 90:6,11,14,25 91:4,12
Gorsuch's [2] 37:6 57:1

got [10] 30:5,12 52:23 57:3 59:14 60:19 62:3 68:16,19 70:25
gotten [1] 62:4
government [26] 23:20,24 24:3 36:8 47:20 48:10,12 52:22 53:11 55:8 59:20 60:18 63:11,22 68:22 69:6 72:3 74:11 76:2 78:10,12 81: 17 95:20 96:8,25 98:7
government's [7] 32:11,18,19 49: 8 69:8 74:7 97:12
granted [2] 26:20 73:19
great [3] 74:8 96:1 97:18
green [10] 18:20,21 30:1 40:3,5,11 41:4,9 90:15,16
Greenwich [5] 51:2 52:14 53:22 70:4 71:18
ground [8] 4:18 16:7,11,12 45:22 46:10 64:25 89:25
grounded [1] 87:24
grounding [1] 31:10
grounds [5] 9:1,4 33:15 38:22 69: 13
guess [9] 34:1 37:22 48:23 63:20 71:10 75:11 77:17 86:15 92:12

H

half [1] 64:2
hand [2] 36:6 62:16
handiwork [1] 58:15
happen [2] 19:15 71:7
happened [4] 29:22 30:1 45:8 61: 2
happens [2] 60:7 80:12
hard [2] 51:1 72:13
hash [2] 52:20,21
heads [1] 59:17
hear [2] 4:3 69:11
heard [2] 59:18 66:1
hearsay [1] 60:22
heavily [1] 43:7
heightens [1] 70:5
held [3] 57:10 60:17 73:24
helpful [1] 68:24
herring [1] 25:19
hesitant [1] 28:3
higher [1] 12:23
himself [1] 87:14
history [2] 39:12 98:22
Holding [1] 18:1
home [1] 42:20
honest [5] 28:11 31:18 87:13 97: 23 98:4
honestly [3] 28:9 77:2 97:25
Honor [1] 50:3
hospital [7] 23:5,8 89:13 95:20 96: 9,11,20
house [2] 42:23,23
however [2] 37:22 101:4
huge [1] 96:2
hypothetical [1] 63:12
hysterically [1] 42:21

I

i.e [1] 60:11

ICE [1] 66:12
ID [11] 16:22,22,24 39:12 46:4,6 52: 18 98:23 99:9,10,25
idea [4] 66:4 88:20 96:13 97:13
identify [1] 64:25
ignore [3] 27:2 65:18,18
ignored [1] 97:3
ignoring [1] 5:18
IJ [59] 8:11,13,14,16 11:10 23:18, 19,20 24:6 25:20,25 26:7,11 27:3 31:24 34:17 35:10,16,20 37:9 38: 8,15,22 39:4 43:11,15,20 45:9 46: 7 47:5 49:2 52:7 56:17 58:20 59: 19 60:11 65:10,12,14 66:5 67:4 73:3,3 77:15,18,19,20,24 78:5,6 80:14 83:13,22 85:3,15 86:13 88: 23 96:22 100:14
IJ's [6] 29:4 47:3 53:16 68:1 94:18 95:6
IJs [5] 42:5 45:21 46:10 71:25
imagine [4] 12:25 13:14,15 58:12
immediately [1] 78:24
immigration [6] 36:3 48:25 49:12 64:17 72:14 92:18
impeach [1] 96:8
implicit [12] 7:17 9:7 10:1 34:3 35: 7,10,16 36:14 52:8 54:20 80:18, 19
implicitly [12] 6:20 7:5,6 33:18 34: 1,20 51:9 52:11,24 57:21 58:10, 13
important [1] 98:22
impossible [2] 48:17 59:21
INA [9] 4:11 19:24 21:11,11,13,20 22:4 25:16,16
inaccurate [2] 20:18 57:15
inadequate [1] 85:17
incentives [1] 62:22
incident [1] 61:9
include [1] 15:17
including [1] 5:5
inconsistencies [2] 29:5 64:11
inconsistent [3] 31:4 67:18 85:22
incorrect [3] 20:11 76:22 82:17
incredible [3] 25:3,14 43:16
indeed [7] 46:19 52:17 63:17 66:1, 7 71:24 72:14
indicated [1] 27:8
indicating [1] 88:13
ineligible [1] 61:12
infer [2] 56:17,18
inference [1] 39:19
inflicted [3] 5:21 74:17 98:7
infliction [2] 27:6 100:23
information [3] 23:25 86:24 99:17
inherent [1] 39:24
injuries [1] 89:14
injury [3] 5:21 27:6 100:23
inquire [1] 33:9
inquiry [4] 40:6,7 51:1 97:20
insisting [1] 75:5
insofar [1] 34:25
instance [1] 71:10
instead [2] 27:19 31:12

intend [1] **60**:8
intended [1] **60**:8
interpreting [1] **70**:11
interrupt [2] **45**:18 **92**:12
introduced [4] **16**:21 **46**:7 **96**:2,5
introducing [1] **16**:13
invalid [1] **20**:21
invitation [1] **49**:15
involved [2] **27**:5 **100**:22
irrebuttable [1] **35**:18
irrelevant [1] **8**:9
isn't [25] **6**:17 **12**:13 **15**:17 **16**:12 **21**:12 **28**:25 **29**:2,25 **30**:1 **38**:19 **44**:3 **52**:8 **54**:8 **57**:16 **59**:10 **63**:1,5, 8 **71**:15 **72**:13 **79**:24 **86**:2 **90**:1 **92**: 12 **99**:13
issue [8] **19**:6 **26**:14 **32**:25 **33**:13, 17 **48**:2 **86**:8 **91**:6
issues [1] **19**:8
itself [2] **6**:22 **21**:21

J

job [5] **11**:22 **43**:21 **72**:11 **78**:25 **101**:10
join [2] **28**:9 **41**:24
Joint [1] **96**:7
Judge [24] **12**:12 **15**:8,14 **16**:25 **17**: 2,20,22 **21**:15,16,17 **25**:20 **36**:9 **48**:25 **54**:25 **56**:2,19,25 **57**:1,3 **65**: 14 **66**:10 **69**:22 **76**:10 **92**:18
judges [6] **36**:3,3 **54**:17 **55**:25 **64**:7 **72**:14
judgment [2] **6**:4 **61**:19
judicial [5] **23**:11 **45**:13 **55**:5 **59**:13 **63**:19
Judulang [1] **72**:18
Justice [257] **2**:3 **4**:3,9 **6**:7,11 **7**:4 **9**:5,10,19 **10**:4,6,7,8 **12**:12 **13**:9, 21 **14**:14,15,15,17 **16**:3,10 **17**:3,7, 14,20 **18**:1,5,10,24 **19**:3,11,17 **20**: 2,4,5 **22**:6,25 **23**:3,13,14,14,16 **24**: 8 **26**:12 **27**:15,15,16 **28**:9,20 **29**:9, 16 **30**:2,4,16 **31**:2,17 **32**:3,5,6,6,8 **33**:4,24 **34**:14,16 **35**:5 **36**:1,24,25, 25 **37**:2,3,6 **38**:4 **39**:5,22 **41**:5,20, 20,23 **42**:11,14 **45**:15,17,20 **46**:13, 14 **47**:13,19,23 **49**:16 **50**:14,25 **51**: 5,17,23,25 **52**:2,3,10 **53**:6,17,25 **54**:1,1,3 **55**:2,7,10,21,23 **56**:5,11, 13,15,20 **57**:5,6,6,7,18,20 **58**:7,22 **59**:7,23,23 **60**:2,4,4,16,16,23 **61**: 14,23,24 **62**:5,8,8,9 **63**:10,24 **64**: 19,20,20,22,23 **65**:5 **66**:1,11,16,17, 17,19,20 **67**:10,11,23 **68**:7,10,24 **69**:1,1,3 **70**:3,7,9,22 **71**:4,8,14 **72**: 4,6,9,12,16,19 **73**:10,16 **74**:19,25 **75**:3 **76**:5,7,8,9,18 **77**:9 **79**:2,2,6,6, 8,23 **80**:9 **81**:7,24 **82**:3,5,5,6,6,7,8 **83**:8,23 **84**:18,18,20 **85**:15 **86**:1, 12,17 **87**:3,5,5,6,9 **89**:18,19,19,21 **90**:6,11,14,25 **91**:4,12,14,14,16 **92**: 1,11,13,22,25 **93**:17,20 **94**:5,7,7,9, 10,23 **95**:3,11,18,19,23 **96**:19,22 **97**:6,8,11 **98**:16 **101**:15

Justices [3] **41**:25 **46**:1 **50**:6
justify [2] **5**:18 **72**:22

K

Kagan [27] **27**:15,16 **28**:20 **29**:9,16 **30**:2,4,16 **31**:2,17 **32**:3,5 **41**:25 **46**: 1 **50**:6 **62**:8,9 **63**:10,24 **64**:19,24 **66**:2 **67**:10 **68**:7 **87**:5,6 **89**:18
Kagan's [2] **92**:13 **94**:11
KATYAL [52] **2**:5 **3**:6 **47**:15,16,18 **49**:16 **50**:2,20 **51**:11,24 **52**:3,10 **53**:9 **55**:2,8,11,22 **56**:4,7,12,14,20 **57**:17 **58**:7 **59**:7,25 **60**:2,15 **61**:3, 21 **62**:7,9 **63**:10 **64**:6,19,23 **65**:5 **66**:21 **67**:23 **68**:14,25 **69**:4,16 **70**: 8,9,21 **71**:6,14 **72**:5,7,8 **74**:20
Kavanaugh [22] **37**:1,2 **38**:4 **39**:5, 22 **41**:5 **42**:12,14 **66**:18,19 **67**:23 **68**:10,24 **91**:15,16 **92**:1,11,22,25 **93**:17,20 **94**:5
keeping [2] **86**:6,7
key [3] **44**:22 **77**:5 **96**:5
kick [1] **38**:25
kicks [1] **31**:9
kind [5] **16**:15 **19**:13 **44**:4 **63**:18 **70**: 12
kinds [1] **64**:13
knows [2] **19**:15 **40**:4

L

labeled [2] **45**:2 **46**:24
lack [3] **24**:21 **73**:7 **93**:8
laid [1] **51**:16
language [7] **33**:1 **37**:5 **60**:20 **63**: 13,17 **66**:22 **79**:10
largely [2] **8**:9 **51**:12
last [5] **23**:4,17 **82**:9 **93**:17,20
later [1] **101**:6
latter [1] **80**:21
law [13] **16**:14,17 **20**:11 **25**:12 **46**: 11,12 **53**:2 **56**:2 **57**:16 **58**:11 **68**: 21 **82**:17 **87**:7
lawsuit [1] **53**:17
lawyer [1] **13**:1
lay [1] **59**:11
lays [1] **53**:17
leads [1] **45**:11
leaning [1] **43**:7
least [5] **7**:13 **50**:10 **73**:20 **77**:12 **78**:17
left [5] **25**:4 **48**:1 **64**:24 **65**:4 **75**:21
legal [6] **14**:19,19 **48**:13 **73**:18,21 **93**:20
legislative [1] **39**:12
lens [1] **6**:14
less [2] **84**:5,5
letter [1] **23**:22
level [2] **24**:19 **49**:9
lie [2] **31**:3 **62**:23
lied [4] **74**:14 **85**:21 **86**:13,21
life [4] **11**:21 **30**:25 **96**:12 **101**:9
light [15] **18**:19,20,21,23 **19**:4 **29**: 24 **30**:1 **35**:12 **40**:3,10,10 **41**:3,9 **90**:15 **100**:9

limited [1] **12**:9
Lin [3] **57**:1 **64**:8 **66**:11
line [2] **70**:8 **75**:4
listed [1] **27**:22
litigant [1] **59**:16
little [4] **25**:19 **44**:15 **78**:23 **96**:16
long [4] **19**:20 **45**:4 **47**:9 **52**:23
look [25] **8**:7 **15**:1,12 **22**:3 **27**:11 **29**: 4 **34**:22 **39**:10 **45**:4 **63**:2 **64**:4 **65**:7 **68**:18 **77**:22 **84**:11 **86**:4,10 **92**:10, 10,17 **95**:15 **96**:6 **98**:22 **101**:1,11
looked [3] **28**:3 **30**:19 **35**:20
looking [7] **10**:2,3 **30**:22 **62**:20 **78**: 21 **98**:10 **100**:2
lose [1] **22**:8
lost [1] **88**:4
lot [3] **39**:23 **54**:18 **65**:25
loves [1] **14**:19
low [1] **78**:16
Lower [1] **54**:22
lying [34] **29**:11,13 **30**:18 **39**:15 **40**: 2,5,6,8,15,22 **41**:7,10 **42**:9,13,24 **67**:5 **69**:23 **70**:14,20 **71**:13 **74**:16 **77**:4,22 **86**:22 **88**:8,21 **89**:2 **91**:11, 19,21 **93**:3 **94**:12,19 **97**:15

M

made [19] **19**:21,21 **25**:10 **32**:1 **34**: 10 **37**:8 **38**:8 **48**:12 **51**:9 **65**:23 **67**: 1 **74**:12 **77**:25 **78**:5,6 **84**:13 **88**:22 **92**:19 **99**:10
magic [13] **8**:8 **50**:16,20 **51**:24 **52**:5 **61**:25 **65**:3 **72**:16 **75**:5,11 **77**:14, 18 **80**:24
main [2] **28**:21,21
major [1] **35**:21
majority [1] **35**:1
man [2] **43**:1 **70**:13
many [2] **59**:18 **97**:16
Massachusetts [1] **2**:7
massive [1] **50**:7
matter [11] **1**:20 **14**:25 **15**:1,2,19 **20**:11 **56**:3,3,6 **85**:8 **92**:9
mattered [1] **73**:5
mean [32] **18**:22 **19**:1 **20**:16 **21**:6 **22**:7 **28**:7 **36**:8 **38**:1 **45**:12 **46**:12, 16 **53**:1 **56**:16 **59**:9,13 **63**:25 **64**: 18 **65**:15 **69**:14 **76**:17 **77**:18 **82**:23 **83**:15 **86**:20,22 **90**:1 **91**:8,8 **92**:7 **96**:1,7,18
meaningful [3] **59**:15,15 **63**:19
means [7] **9**:2 **17**:6 **19**:4 **20**:15 **22**: 17 **46**:2 **69**:9
meant [3] **21**:13 **25**:9 **86**:19
medical [2] **23**:17,23
meet [9] **4**:14 **22**:23 **24**:15 **30**:15 **31**:22 **57**:2 **68**:23 **72**:14 **89**:23
meets [1] **27**:12
mentioned [3] **25**:6 **49**:2 **58**:20
mere [1] **99**:19
merely [1] **16**:23
met [3] **26**:5,9 **58**:2
Mexico [1] **69**:21
might [14] **12**:25 **13**:1,3 **39**:14 **42**:

16 **43**:14,20 **46**:19 **52**:24 **54**:13 **70**: 11 **91**:21 **92**:15 **95**:7
millions [1] **19**:8
mind [3] **14**:19,19 **21**:12
mind-boggling [1] **97**:4
MING [1] **1**:7
minute [3] **46**:14 **72**:6 **97**:8
minutes [1] **10**:9
missing [1] **77**:15
mistake [1] **31**:25
mistaken [13] **30**:11 **40**:9,16,25 **41**: 8,10 **70**:15 **74**:17 **76**:23 **89**:7 **91**: 22 **94**:15 **98**:4
mistakes [1] **66**:9
misunderstand [1] **49**:3
mixed [1] **16**:19
mom [2] **49**:1 **65**:11
mom's [1] **65**:19
moment [2] **33**:5 **34**:19
months [4] **49**:6 **65**:23 **66**:4 **78**:22
morning [11] **4**:4 **32**:8 **37**:4 **41**:23 **54**:3 **64**:22 **66**:21 **69**:3 **89**:21 **91**: 17 **94**:9
most [2] **60**:24 **80**:3
mother [3] **5**:22 **17**:16 **18**:11
Motorcar [1] **9**:17
Motorcars [2] **9**:17 **48**:14
mouth [1] **13**:23
moves [1] **75**:19
Ms [72] **4**:6,9 **6**:10,18 **7**:22 **9**:9,14, 21 **10**:14 **12**:17 **13**:12 **14**:2 **15**:23 **16**:6,20 **17**:4,8,18,22 **18**:3,9,16 **19**: 1,10,16,22 **21**:4 **22**:9 **23**:2,7,19 **25**: 15 **26**:23 **27**:16 **28**:15,21,23 **29**:9, 12,19 **30**:3,13,19 **31**:16,19 **32**:4,5, 8,19 **33**:12 **34**:6,15,22 **35**:14 **36**: 15 **37**:4 **38**:1,7 **39**:7 **40**:17 **41**:12, 22,23 **44**:14 **45**:16,19 **46**:3,15,16 **48**:15 **98**:18,21
much [12] **9**:5 **12**:13 **14**:4,23 **29**:20 **36**:12 **44**:20 **50**:9 **51**:7 **57**:8 **77**:18 **80**:21
multiple [3] **22**:22 **100**:16 **101**:2
must [10] **12**:20 **16**:23 **20**:8 **34**:15 **48**:14 **49**:10 **57**:12 **79**:13 **82**:15 **83**: 11
mute [1] **51**:3

N

narratives [1] **76**:20
nature [1] **60**:13
NEAL [3] **2**:5 **3**:6 **47**:16
necessarily [2] **31**:23 **83**:1
necessary [2] **61**:11 **64**:5
need [6] **6**:22 **17**:12 **32**:23 **39**:2 **52**: 19 **92**:18
needed [1] **12**:3
needs [4] **7**:25 **38**:10,10 **85**:12
negative [1] **39**:19
neighbor [1] **42**:25
neither [2] **78**:5 **88**:17
never [12] **49**:2 **53**:18 **66**:2 **68**:4 **77**: 19,21 **78**:5,6 **86**:21,22 **96**:12 **98**: 13

nevertheless [2] **74**:16 **77**:7
new [1] **49**:9
next [3] **40**:23 **92**:22,25
Ninth [27] **5**:1,7,23 **20**:6 **26**:15,21 **35**:1 **53**:7,10 **54**:5 **57**:8 **60**:5,17,21 **72**:24 **79**:9,19,22 **82**:10,19,23 **84**:23 **98**:23 **99**:4,11,24 **100**:3
nitpicking [1] **42**:11
nobody [1] **15**:11
noncredibility-related [6] **4**:23 **6**:25 **8**:13 **9**:4 **10**:20 **33**:15
noncredible [2] **68**:6 **98**:14
none [1] **98**:5
nonetheless [1] **91**:22
normal [1] **67**:15
notes [1] **78**:13
nothing [11] **31**:14 **62**:13 **64**:15,16 **66**:14 **67**:13 **68**:6 **75**:21 **91**:9 **97**:2 **98**:12
notwithstanding [1] **87**:25
nowhere [2] **58**:20 **65**:12
number [2] **8**:16 **38**:20

O

objection [1] **7**:7
obligation [1] **83**:12
obvious [1] **40**:21
obviously [5] **27**:12 **28**:25 **39**:24 **44**:15 **81**:22
occur [1] **38**:12
odds [1] **48**:23
offense [3] **27**:4 **100**:21,22
offer [1] **49**:10
offered [1] **63**:22
offers [1] **44**:1
office [4] **49**:5 **61**:7 **65**:24 **68**:8
officer [2] **11**:19 **85**:21
officers [1] **63**:15
often [5] **14**:3 **21**:5,7 **41**:6 **98**:23
Okay [12] **6**:11 **18**:12 **24**:10 **33**:4 **34**:16 **35**:5 **44**:12 **57**:20 **74**:25 **91**:12 **92**:1 **95**:18
once [3] **44**:2 **48**:3 **50**:23
one [41] **7**:9 **23**:4 **24**:23 **27**:25 **34**:5 **39**:13 **41**:17,18 **45**:20 **46**:19 **48**:22 **49**:11 **50**:22 **51**:16,17 **52**:9,24 **53**:14 **58**:8,19 **59**:12 **61**:9,9 **64**:1 **65**:9 **68**:22 **70**:22 **72**:11 **73**:1,4 **76**:16,21 **79**:9 **87**:8 **88**:5,20 **94**:12 **95**:19 **96**:4,12,20
one-page [1] **66**:13
onerous [2] **61**:25 **68**:21
ones [1] **42**:7
only [21] **4**:15 **31**:21,25 **32**:13 **34**:8 **41**:17,17 **46**:4,23 **49**:1 **58**:19 **60**:6 **61**:9 **65**:10 **67**:3 **78**:4 **91**:23 **96**:3,10 **98**:2 **100**:3
open [3] **67**:6 **86**:6,7
opening [4] **7**:10 **32**:12,16 **58**:17
operated [1] **72**:15
operates [1] **68**:13
opinion [15] **19**:13 **35**:1 **53**:16 **55**:24 **56**:2 **57**:1,4,9,24 **73**:4 **77**:15,15 **80**:20 **81**:19 **82**:11

opinions [2] **20**:7 **56**:1
opposed [4] **53**:14,15 **56**:8 **61**:7
opposite [3] **15**:6,7 **36**:20
opposition [4] **30**:6 **50**:3 **55**:19 **57**:18
options [3] **51**:15 **62**:3 **92**:13
oral [7] **1**:21 **3**:2,5,8 **4**:7 **47**:16 **73**:13
order [1] **50**:22
other [63] **4**:15,17 **7**:7,12 **9**:12 **10**:20 **17**:1,24,24 **18**:3 **19**:5 **25**:21 **26**:2,3 **28**:6 **29**:14 **30**:19 **31**:3 **36**:6,11 **37**:13,14,15,21,23 **38**:13,18 **40**:11,14 **41**:11 **42**:15 **43**:4 **47**:1 **48**:22 **51**:18 **52**:9 **56**:6 **58**:24 **60**:10 **62**:16 **64**:18,25 **65**:1,21 **67**:12,14,18,19,21 **70**:15,24 **74**:13 **75**:6 **76**:22 **77**:3,21 **82**:13 **87**:23 **88**:7 **90**:17 **94**:13 **95**:18 **96**:20
others [1] **69**:25
otherwise [1] **17**:5
out [16] **10**:24 **20**:17 **25**:8 **27**:13 **37**:23 **44**:21 **49**:17 **51**:16 **53**:17 **58**:14 **59**:11 **76**:21 **80**:12 **86**:19 **96**:9 **100**:20
outside [2] **14**:7 **70**:15
outweigh [1] **85**:18
outweighed [1] **51**:22
outweighs [2] **4**:17 **70**:24
over [1] **13**:6
overcome [5] **33**:21 **35**:15 **38**:12 **39**:3 **90**:8
overlap [2] **28**:24 **50**:8
overlook [2] **48**:25 **65**:10
overturn [1] **44**:24
overturned [1] **31**:12
overweighed [1] **51**:21
own [2] **6**:4 **84**:7

P

PAGE [8] **3**:2 **52**:15 **77**:22 **84**:11 **86**:10 **88**:21 **92**:2 **96**:7
parlance [1] **21**:5
parsing [1] **98**:24
part [5] **15**:19 **19**:20 **50**:12 **55**:11 **99**:12
particular [2] **21**:11 **100**:18
particularly [9] **5**:20 **8**:19 **27**:10 **38**:24 **48**:4 **52**:12 **53**:20 **61**:11 **100**:18
parties [4] **16**:8,11 **73**:17,22
passed [1] **99**:9
past [1] **85**:23
path [4] **7**:25 **8**:2,3 **76**:3
pathway [2] **9**:18 **48**:14
pause [1] **82**:10
people [3] **19**:5 **24**:15,23
perceived [1] **85**:22
perfect [1] **24**:24
perhaps [4] **8**:19 **13**:15 **90**:25,25
Period [2] **15**:15 **19**:18
perjure [1] **87**:14
perjuring [1] **77**:3
permissible [2] **57**:23 **84**:22

permits [1] **5**:16
persecuted [3] **10**:25 **26**:5 **74**:5
persecution [20] **5**:4,12 **11**:7,15,23 **12**:1,4 **24**:20 **25**:2,5 **30**:9 **74**:9,17 **78**:17,20 **84**:1 **85**:19,24 **87**:20 **89**:12
person [11] **20**:17 **54**:7 **61**:1 **64**:9 **69**:9,13 **70**:14,20 **71**:13 **76**:19 **97**:23
persuade [5] **12**:24 **13**:20 **22**:2 **41**:3 **46**:25
persuasive [29] **4**:16 **8**:16 **10**:12 **12**:23 **13**:1,2,5,18 **16**:24 **17**:24 **18**:2 **22**:1 **29**:1 **38**:18 **40**:24 **43**:3 **44**:19 **46**:9,25 **47**:4,6 **62**:3 **67**:20 **69**:12 **70**:17 **74**:1 **76**:12,16 **99**:16
persuasiveness [28] **5**:3 **11**:6 **12**:2,7,15,22 **14**:1 **20**:20 **21**:22 **22**:20 **24**:22 **25**:18 **28**:25 **42**:2,14 **43**:9 **45**:3 **50**:25 **51**:19 **52**:12 **61**:23 **69**:19 **75**:19 **77**:1,14 **78**:8,12 **98**:2
petition [5] **47**:20 **77**:23 **84**:12 **86**:11 **89**:5
Petitioner [7] **1**:5,12 **2**:4 **3**:4,13 **4**:8 **98**:20
petitioner's [1] **57**:13
phrase [1] **67**:9
pick [2] **37**:6 **64**:23
picks [1] **71**:17
picture [1] **7**:2
pieces [13] **8**:17 **12**:6 **22**:22 **26**:8 **27**:20,22,25 **28**:6,13 **35**:21 **62**:11 **100**:16 **101**:2
ping-pong [1] **45**:13
place [1] **73**:4
placing [1] **5**:25
plain [3] **4**:11 **19**:24 **36**:22
plainly [1] **74**:3
planning [1] **30**:7
plans [1] **84**:7
play [2] **25**:13 **98**:2
plea [4] **49**:4,6 **65**:23 **66**:3
please [3] **4**:10 **47**:19 **60**:24
plenty [1] **46**:18
plus [1] **66**:14
point [16] **18**:6 **19**:21 **23**:17 **32**:10,16 **36**:9 **39**:6,20 **50**:2,8 **51**:12 **60**:18 **70**:22 **72**:9 **88**:21 **99**:23
point-blank [1] **86**:25
pointed [12] **5**:2 **8**:16 **10**:24 **22**:21 **26**:7 **27**:3,5 **31**:20 **89**:10 **100**:16,19 **101**:1
points [2] **42**:15 **76**:15
police [4] **24**:17 **78**:20 **93**:18 **98**:10
policies [1] **30**:7
posed [1] **96**:25
posited [1] **92**:14
position [7] **10**:15 **32**:12,18,20 **45**:21 **50**:15 **69**:6
possibilities [1] **65**:9
possibility [1] **40**:24
possible [2] **61**:5 **86**:2
possibly [3] **65**:1 **80**:15 **92**:16
power [6] **12**:24 **13**:19 **22**:2 **29**:4

41:2 **80**:22
pre-REAL [1] **99**:25
preceded [1] **66**:3
precise [1] **73**:21
precisely [1] **63**:18
precludes [1] **94**:4
preexisting [1] **71**:18
preliminary [1] **97**:20
premise [1] **88**:3
prerequisite [1] **23**:11
presented [1] **49**:18
press [1] **32**:16
presumably [2] **26**:17 **37**:19
Presume [12] **15**:10,24 **16**:1 **43**:23 **49**:19,24 **50**:4 **54**:10,12 **73**:23 **82**:25 **99**:7
presumed [5] **6**:1 **31**:13 **48**:11 **52**:13 **82**:15
presumption [86] **4**:21 **5**:16,17 **6**:9,14,15,23 **7**:2 **15**:11 **16**:4 **20**:10 **31**:5,9,11 **32**:11,20 **33**:2,11,20 **34**:12 **35**:15,18,19 **37**:10,12,13,18,22 **38**:11,25 **39**:3,17,21 **43**:15,18,19,25 **44**:4,8 **47**:22,24 **48**:3 **50**:23,24 **51**:14 **53**:12,21 **54**:14,23 **57**:21 **60**:6 **62**:1,19 **63**:9 **66**:24 **67**:10,22,25 **68**:15 **70**:3 **71**:4,12,15,16 **75**:14 **76**:4 **79**:17,18 **80**:2,14,16 **81**:4,13,21 **83**:6 **85**:1,2,5,7 **87**:10 **88**:7 **93**:21,22 **94**:20 **95**:1 **100**:9
pretty [3] **14**:23 **57**:2 **62**:10
prevent [1] **23**:24
prevents [1] **39**:8
primarily [1] **78**:13
principal [1] **27**:19
principle [1] **5**:15
principles [2] **4**:25 **25**:13
probably [3] **38**:24 **91**:8 **94**:2
probation [19] **26**:16 **27**:3,21 **36**:11 **48**:19 **49**:5 **61**:7 **62**:16,20,21,24 **63**:5,6,15 **64**:3 **65**:2,24 **68**:8 **100**:19
probative [2] **89**:17 **97**:4
problem [12] **21**:4 **46**:4 **50**:13 **55**:17,20 **60**:3,9 **63**:23 **64**:15 **67**:25 **80**:7,10
problems [2] **24**:5 **36**:10
proceed [1] **45**:22
proof [4] **22**:24 **30**:15 **92**:6 **97**:5
protect [2] **61**:8 **62**:15
prove [1] **85**:20
provide [6] **51**:8 **58**:4,11 **66**:9 **71**:2,23
provided [2] **48**:9 **58**:2
provision [2] **39**:6 **68**:13
punch [1] **61**:10
purely [1] **48**:1
purpose [1] **67**:2
purposes [4] **10**:18 **12**:8,9 **90**:6
push [1] **50**:8
put [3] **22**:14 **63**:19 **68**:10

Q

Qin [3] **78**:13,22 **79**:4

quantum [1] **49**:10
question [33] **14**:18 **19**:21 **23**:4 **28**: 21 **30**:4 **40**:19,23 **45**:21 **46**:23 **48**: 6 **49**:18 **54**:11,15 **57**:5,22 **58**:6,8 **60**:24 **61**:15 **66**:22 **70**:23 **73**:18 **75**: 1,24 **91**:20 **93**:21,25 **94**:10,16 **95**: 19 **96**:20 **97**:21 **100**:3
questioning [1] **37**:6
questions [2] **91**:24 **96**:25
quite [11] **7**:8 **11**:14 **12**:18 **13**:24 **16**:13 **35**:4 **41**:6,9 **69**:7 **77**:10 **97**:4
quoting [1] **57**:9

R

radiate [1] **49**:12
raise [1] **23**:8
raises [1] **7**:6
rarely [1] **69**:18
Rather [8] **4**:21 **5**:25 **6**:2 **62**:22 **63**: 7 **64**:3 **65**:2 **69**:10
rational [4] **44**:9 **56**:22 **65**:6 **72**:21
rationales [3] **63**:21,22 **64**:14
re-adjudicate [1] **85**:14
reach [3] **30**:17 **36**:20 **47**:10
read [16] **9**:24 **20**:7 **52**:24 **53**:9,11 **57**:23 **60**:19 **69**:16 **79**:9 **82**:11 **83**: 24 **84**:16,21 **89**:22 **92**:16 **93**:13
reading [1] **19**:19
real [18] **11**:19,24,25 **16**:21,22,24 **30**:24 **39**:12 **46**:4,6 **52**:18 **67**:3 **73**: 17 **78**:19 **98**:23 **99**:9,10 **101**:7
realistic [1] **100**:7
really [9] **15**:1 **20**:23 **62**:13 **70**:5 **77**: 5 **80**:11 **85**:1 **97**:12,21
reason [12] **30**:8 **40**:25 **48**:23 **59**: 14 **68**:5,20 **71**:2 **78**:23 **81**:12 **84**:9 **88**:9 **100**:1
reasonable [6] **6**:3 **36**:19 **45**:5 **47**: 9 **100**:5,11
reasonableness [1] **33**:9
reasonably [3] **33**:10 **34**:3 **35**:9
reasoned [11] **48**:9 **56**:9 **58**:11,12 **59**:8 **66**:10 **68**:18 **70**:25 **71**:21,23 **72**:17
reasoning [11] **4**:23 **5**:8 **7**:1 **8**:14, 14 **10**:20 **22**:13 **27**:18 **49**:10 **73**:5, 7
reasons [9] **10**:21 **25**:7 **42**:15 **64**:7 **78**:18 **80**:3 **81**:10 **95**:9 **97**:17
rebut [6] **39**:20 **51**:17 **62**:1 **63**:9 **67**: 25 **68**:15
rebuts [2] **43**:19 **67**:21
rebuttable [13] **6**:8 **15**:11 **35**:19 **37**: 10 **50**:23,24 **51**:13 **66**:24 **67**:9 **83**: 6 **93**:21 **94**:20 **100**:9
REBUTTAL [3] **3**:11 **98**:18,19
rebutted [21] **15**:13,14,16,18 **43**:25 **54**:14,16,21,23 **57**:22 **76**:4 **79**:18 **80**:2,16,17 **81**:3,4,13,21 **85**:7 **93**: 23
recognize [1] **21**:18
recognizing [2] **55**:3 **77**:6
record [19] **4**:17 **5**:11 **14**:11 **25**:22 **26**:3,3 **41**:11 **45**:6 **48**:24 **54**:21 **67**:

3 **72**:2,20 **73**:25 **74**:15 **76**:22 **89**:9 **91**:2 **96**:3
records [9] **23**:5,9,17,23 **24**:1 **89**: 14 **95**:20 **96**:9,20
recounted [1] **11**:25
red [12] **18**:19,23 **19**:4,5 **25**:19 **29**: 24 **40**:3,4,10 **41**:9 **90**:16,18
refer [1] **28**:18
reference [1] **11**:23
referencing [1] **12**:1
referred [1] **39**:11
referring [1] **70**:19
refers [1] **42**:13
reflects [1] **14**:18
refugee [1] **80**:22
regard [1] **34**:9
regarding [1] **5**:4
regardless [1] **91**:20
regulations [2] **30**:10 **95**:14
reject [3] **34**:20 **99**:18 **100**:6
rejected [3] **5**:7 **24**:6 **88**:6
rejecting [1] **48**:9
rejection [1] **9**:15
related [2] **28**:10,14
relevant [2] **31**:21 **96**:15
reliance [1] **65**:25
relied [9] **5**:14 **7**:20 **8**:11,12,13 **9**: 22 **27**:17 **33**:16 **38**:22
relief [2] **61**:12 **100**:11
relies [3] **31**:7 **78**:10,11
reluctance [1] **36**:2
reluctant [1] **86**:23
rely [5] **7**:17 **9**:24 **10**:16 **26**:16 **52**: 11
relying [2] **8**:4 **22**:5
remains [1] **32**:20
remand [10] **25**:13 **26**:14,24 **39**:3 **60**:7 **75**:1 **85**:13 **86**:3,7,9
remanded [2] **26**:22 **60**:21
remanding [1] **84**:23
remarkable [1] **48**:12
remember [4] **30**:20 **59**:21 **60**:20 **65**:14
removal [3] **4**:13 **46**:23 **61**:13
repeat [1] **66**:22
repeatedly [1] **57**:10
reply [4] **7**:14,24 **32**:15,22
report [20] **26**:16 **27**:3,21 **36**:11 **48**: 19 **49**:5,6 **58**:21 **61**:8 **62**:16,20,25 **63**:5,7 **64**:3 **65**:2,13,24 **66**:1 **100**: 19
reports [2] **62**:21 **68**:9
representative [1] **55**:18
request [1] **24**:7
require [5] **34**:4 **36**:12,22 **58**:11 **61**: 24
required [6] **9**:6 **23**:11 **51**:8 **56**:21 **59**:9 **65**:4
requirement [5] **52**:5 **79**:17 **83**:10, 16,21
requirements [2] **58**:1 **99**:18
requires [5] **8**:1 **34**:7 **43**:22 **48**:14 **72**:16
requiring [3] **36**:7 **65**:16 **75**:12

resist [1] **44**:20
resistance [2] **74**:6 **98**:8
resisted [1] **14**:21
resisting [1] **78**:25
resolved [2] **53**:19 **55**:20
respect [3] **28**:19 **60**:13 **75**:5
respond [1] **7**:16
Respondent [9] **1**:8,15 **2**:6,8 **3**:7, 10 **47**:17 **73**:14 **93**:1
Respondent's [2] **77**:12 **92**:3
Respondents [1] **10**:13
responsible [1] **25**:8
responsive [1] **22**:19
rest [1] **24**:12
rested [1] **88**:23
resting [3] **84**:14 **88**:23,24
rests [1] **89**:25
result [1] **69**:23
resulting [2] **27**:7 **100**:23
return [6] **5**:6 **28**:2 **78**:23 **83**:25 **84**: 4 **85**:17
returned [9] **11**:2,5,9,13,17 **78**:22 **85**:18 **89**:24 **101**:5
returning [1] **92**:3
reverse [2] **35**:12 **98**:24
reversed [1] **100**:2
review [22] **6**:13 **8**:25 **15**:20 **23**:12 **33**:8 **42**:4 **45**:13 **55**:5,14,16 **56**:8 **59**:14 **63**:19 **65**:6,7 **67**:15 **68**:17 **89**:5 **94**:17 **95**:12,15,17
reviewed [2] **9**:3 **33**:14
reviewing [12] **4**:21 **5**:10 **6**:21 **44**:5, 23 **47**:22 **67**:16 **79**:13 **80**:18 **81**:1 **94**:18 **95**:6
rises [1] **24**:19
risk [2] **78**:17,19
ROBERT [2] **1**:3,10
ROBERTS [46] **4**:3 **6**:7,11 **7**:4 **9**:5, 10,19 **10**:4 **14**:15 **20**:2 **23**:14 **27**: 15 **32**:6 **36**:25 **41**:20 **46**:14 **47**:13 **49**:16 **50**:14 **51**:5,23,25 **54**:1 **57**:6 **59**:23 **62**:8 **64**:20 **66**:17 **69**:1 **72**:6 **73**:10 **74**:19,25 **75**:3 **76**:5 **79**:2,6 **82**:5 **84**:18 **87**:5 **89**:19 **91**:14 **94**:7 **97**:8 **98**:16 **101**:15
room [1] **13**:6
roughly [1] **14**:23
rule [6] **14**:22 **49**:8 **56**:21 **64**:17 **82**: 19 **99**:25
ruling [1] **60**:10
rulings [1] **55**:25

S

S-M-J [1] **39**:11
safety [1] **11**:16
same [9] **14**:5 **16**:8 **44**:21 **70**:11 **83**: 12,20 **87**:8 **89**:10 **96**:17
satisfied [3] **46**:8 **47**:5 **99**:15
satisfy [1] **99**:17
saw [3] **13**:10 **19**:4 **43**:1
saying [28] **7**:17 **11**:15 **19**:13 **26**:24 **30**:10,13 **31**:9,12 **41**:17 **42**:8,12 **52**:22 **53**:11 **58**:9 **59**:2 **62**:20 **70**:2 **71**:11 **72**:9,15 **79**:20,22 **82**:11,12

83:2 **88**:16 **92**:12 **101**:3
says [34] **14**:10 **15**:12 **16**:6,22,24 **17**:1,15,20,22 **18**:19 **21**:23 **25**:17, 20 **29**:22 **34**:9 **37**:7 **42**:25 **45**:4 **53**: 22 **54**:9 **55**:12,19 **57**:18 **60**:18 **62**: 12 **66**:23 **69**:20 **70**:4 **79**:10,25 **80**: 23 **85**:19 **87**:10 **93**:1
scenario [3] **18**:18 **41**:14 **94**:19
scenarios [1] **12**:25
scheme [1] **5**:24
SEC [2] **53**:3 **73**:8
second [6] **40**:7 **65**:22 **70**:23 **88**:11 **91**:20 **95**:4
Section [3] **27**:14 **55**:4 **101**:12
see [7] **17**:16 **18**:10 **19**:5,11 **43**:9 **60**:7 **98**:25
seeing [3] **43**:11 **44**:6 **46**:17
seeking [1] **39**:16
seem [7] **13**:10,21 **35**:4,22 **43**:7 **57**: 22 **76**:15
seemed [2] **27**:23 **35**:8
seems [15] **6**:13 **12**:12 **13**:24 **34**:4 **42**:10,12 **54**:4 **60**:6 **62**:9 **63**:25 **69**: 7 **75**:4 **76**:13 **77**:11 **88**:3
seen [3] **16**:16 **42**:4,7
sending [1] **75**:7
sense [8] **17**:6 **78**:16 **80**:6 **83**:1 **87**: 18 **89**:9 **96**:16 **97**:16
sentence [4] **64**:1,2 **92**:6 **93**:1
sentenced [2] **27**:8 **100**:24
sentencer [1] **27**:9
serious [8] **5**:20 **8**:19 **27**:10 **48**:5 **61**:11 **62**:25 **80**:10 **100**:18
seriously [1] **62**:14
set [2] **27**:13 **49**:9
sets [1] **52**:7
setting [2] **22**:16 **100**:19
seven [2] **56**:21 **58**:10
severe [1] **74**:17
shall [2] **37**:9 **66**:24
she's [1] **42**:24
short [2] **78**:18,20
shot [1] **85**:13
shouldn't [4] **6**:21 **25**:13 **73**:8 **86**: 18
show [7] **15**:18 **35**:22 **44**:7 **58**:15 **62**:2 **87**:16 **94**:14
showed [3] **43**:4 **89**:14,15
showing [1] **83**:25
shows [4] **40**:11 **73**:18 **87**:24 **98**:3
side [3] **7**:7,12 **9**:12
sides [1] **53**:18
significance [2] **95**:24 **96**:1
significant [3] **74**:9 **90**:21 **92**:5
silence [2] **75**:16 **83**:9
silent [3] **83**:3 **85**:3,7
similar [1] **83**:15
Similarly [2] **5**:13 **28**:6
simple [3] **14**:22 **25**:12 **62**:10
simply [8] **15**:12 **51**:7 **59**:3 **69**:9 **74**: 14 **97**:13 **98**:5,12
Singh [2] **57**:4 **64**:8
SINZDAK [76] **2**:2 **3**:3,12 **4**:6,7,9 **6**: 10,18 **7**:22 **9**:9,14,21 **10**:14 **12**:17

13:12 **14**:2 **15**:23 **16**:6,20 **17**:4,8,
18,22 **18**:3,9,16 **19**:1,10,16,22 **21**:
4 **22**:9 **23**:2,7,19 **25**:15 **26**:23 **27**:
16 **28**:15,22,23 **29**:10,12,19 **30**:3,
13,19 **31**:16,19 **32**:4,5,9,19 **33**:12
34:6,15,22 **35**:14 **36**:15 **37**:4 **38**:1,
7 **39**:7 **40**:17 **41**:12,22,24 **44**:14
45:16,19 **46**:3,15,16 **98**:18,19,21
Sinzdak's [1] **48**:15
sister [1] **13**:16
sitting [2] **68**:17 **72**:21
situation [6] **25**:24 **54**:20 **56**:17,18
78:15 **80**:1
situations [2] **24**:22 **90**:22
six-year-old [1] **13**:3
sleep [1] **93**:16
slightly [1] **32**:9
sneak [1] **45**:20
so-called [1] **30**:7
Solicitor [1] **2**:2
somebody [4] **29**:23 **42**:22 **76**:23
77:2
somebody's [1] **28**:5
somehow [5] **74**:16 **89**:6 **96**:13 **97**:
14 **98**:4
someone [7] **12**:25 **21**:18 **23**:25
42:21 **45**:24 **61**:12 **69**:20
sometimes [5] **4**:14 **14**:20,24 **50**:5
69:17
son [2] **13**:3 **20**:23
sorry [3] **33**:25 **38**:10 **79**:5
sort [13] **49**:17 **61**:24 **75**:14,17 **76**:
24 **77**:7 **78**:17 **86**:6,23,24 **88**:2,20
92:9
Sotomayor [17] **23**:15,16 **24**:8 **26**:
12 **59**:24 **60**:2,16,23 **61**:14 **62**:5
84:19,20 **85**:15 **86**:12,17 **87**:3 **95**:
19
sounds [1] **93**:3
specific [3] **48**:2 **66**:10 **76**:1
specifically [2] **50**:17 **98**:25
stages [2] **62**:7 **73**:3
stammering [1] **28**:1
stand [3] **6**:6 **51**:3 **64**:10
standard [12] **26**:25 **48**:13 **49**:9 **55**:
6,9,12 **56**:25 **57**:2 **68**:22 **72**:10 **94**:
16 **95**:11
standards [1] **27**:13
stands [1] **63**:20
start [2] **19**:7 **37**:5
started [2] **28**:1 **87**:8
starting [2] **49**:17 **60**:3
state [2] **49**:13 **69**:24
stated [2] **7**:24 **36**:16
statement [6] **57**:15 **61**:16 **79**:14
82:17 **83**:11,12
STATES [7] **1**:1,22 **11**:20 **12**:4 **30**:
25 **87**:1 **101**:8
stating [1] **57**:24
status [1] **80**:23
statute [25] **15**:21,24 **33**:2 **34**:4,7,9
35:13,17 **40**:19 **43**:8,22 **44**:18 **47**:
2 **52**:21 **54**:8 **65**:16,17 **75**:20 **77**:6
83:22 **85**:2 **87**:19 **88**:3 **91**:23 **97**:

19
statutorily [1] **94**:3
statutory [8] **5**:24 **37**:5 **66**:22 **68**:
13 **75**:14 **83**:16 **85**:9 **93**:4
stay [3] **12**:3,3 **19**:17
still [6] **24**:16 **29**:5 **41**:7 **43**:23 **45**:
11 **66**:14
stop [2] **24**:9 **33**:25
story [10] **11**:19,25,25 **30**:24 **31**:17,
18 **43**:2 **61**:5 **91**:10 **101**:7
stray [2] **7**:10 **60**:19
stressed [1] **7**:8
strong [2] **12**:6 **78**:18
strongly [2] **29**:25 **78**:9
struggling [1] **64**:24
submission [1] **27**:19
submitted [5] **30**:14 **74**:9 **89**:12
101:16,18
submitting [1] **97**:24
substance [1] **62**:1
substantial [26] **4**:24 **6**:13,16 **7**:1
15:2,5,7,15,20 **19**:9,18 **22**:12 **26**:
25 **27**:1,13 **33**:8 **44**:5,9,25 **46**:20
48:4 **55**:6,13 **65**:6 **67**:15 **91**:1
subverted [1] **5**:23
succinctly [1] **82**:12
suddenly [1] **56**:1
suffered [1] **89**:12
sufficiency [1] **45**:3
sufficient [8] **10**:21 **30**:14 **33**:20
58:2 **59**:5 **90**:1,3 **99**:14
sufficiently [3] **8**:15 **57**:24 **99**:17
suggest [2] **29**:25 **35**:8
suggested [4] **26**:4,8 **72**:19 **86**:1
suggesting [3] **24**:4 **42**:15 **45**:23
suggests [7] **17**:25 **18**:4 **29**:14 **31**:
3 **85**:25 **90**:18 **91**:11
summarized [1] **100**:15
supplanted [1] **6**:3
support [3] **49**:11 **74**:15 **89**:9
supportable [1] **88**:17
supported [4] **4**:23 **7**:1 **44**:10,24
supports [1] **45**:6
suppose [2] **33**:4 **91**:2
SUPREME [2] **1**:1,21
surely [1] **36**:12
surrounding [1] **63**:1
sustain [1] **37**:19
synonymous [1] **19**:25

T

T-Mobile [1] **55**:12
tails [1] **59**:17
talked [2] **28**:2 **42**:19
task [1] **36**:5
tells [3] **13**:4 **15**:8 **73**:5
tend [1] **63**:15
term [5] **21**:6 **40**:14 **78**:18,20 **93**:4
terminology [1] **39**:23
terms [4] **13**:8 **21**:23 **39**:24 **40**:18
test [2] **60**:22 **72**:23
testified [8] **12**:10 **30**:23 **58**:24,25
59:1 **74**:8 **98**:9,11
testifies [1] **40**:4

testify [2] **18**:23 **87**:21
testifying [4] **41**:15 **77**:2 **89**:7 **97**:
25
testimony [78] **4**:15,16 **5**:4 **6**:2 **8**:
15,20 **10**:19 **11**:6 **12**:2,7,20 **16**:23
17:9,10,10 **18**:13 **19**:3 **20**:9,16 **21**:
24 **23**:21 **25**:25 **26**:1,10 **28**:11,25
29:5 **30**:20,22 **31**:3 **36**:10 **37**:15
38:17 **40**:1 **41**:1 **44**:18 **46**:8 **47**:4,6
48:10,20 **49**:20,25 **50**:4 **61**:4 **64**:
12 **65**:20 **67**:3,13,14,19 **69**:24 **70**:
20 **73**:24 **74**:1,10 **75**:18,21 **77**:7
82:25 **83**:5 **85**:10 **87**:12 **89**:11 **90**:
8,14 **93**:14,24 **96**:10 **98**:4,6,13 **99**:
7,13,15,18,21 **100**:13
text [7] **4**:11 **16**:21 **19**:24 **21**:11 **22**:
4 **25**:16 **36**:22
themselves [2] **24**:1 **77**:3
there's [46] **15**:3 **18**:3 **29**:13 **30**:20
31:6,8,14 **37**:14,17,21 **39**:23 **46**:3,
18 **49**:21 **50**:7 **52**:5 **53**:21 **54**:6,9
56:23 **58**:19 **61**:9 **62**:11,11 **64**:15
65:25 **75**:21,25 **77**:10 **79**:10,11 **81**:
11 **83**:8,9,15,15 **85**:11 **87**:2 **89**:8
90:16 **91**:1,9 **94**:3,24 **96**:18 **97**:20
therefore [4] **5**:23 **34**:18 **74**:18 **98**:
14
thereof [1] **73**:7
they've [2] **42**:7 **68**:16
thinking [4] **42**:17,19 **65**:21 **77**:16
thinks [11] **21**:15 **31**:19 **43**:19,24
56:18,19 **59**:20 **69**:23,25 **90**:16 **95**:
6
third [1] **11**:18
Thomas [15] **10**:6,7 **12**:12 **13**:9,21
14:14 **52**:2,3,10 **53**:6,17,25 **76**:7,8
77:9
thoroughly [1] **80**:11
though [7] **10**:24 **13**:22 **16**:4 **49**:5
54:6 **63**:25 **70**:22
thousands [1] **16**:14
threats [1] **98**:11
three [7] **12**:5 **18**:19 **26**:7 **27**:20 **35**:
21 **65**:23 **66**:4
throughout [1] **49**:12
time's [1] **72**:5
today [1] **49**:8
took [1] **32**:12
trained [1] **71**:25
trauma [2] **27**:7 **100**:24
travel [2] **11**:20 **30**:24
travels [1] **84**:7
treat [1] **5**:11
treated [2] **33**:10 **85**:9
treats [1] **14**:22
trial [1] **36**:3
tried [1] **96**:8
Trott [2] **12**:12 **76**:10
true [26] **6**:17 **17**:6,9,11,13 **18**:2,2,8,
14,24 **19**:2,14 **20**:1 **21**:16,19 **31**:
18 **49**:21 **50**:1,11 **54**:17 **57**:13 **73**:
24 **83**:1 **101**:3,5,7
truly [1] **40**:9
truth [23] **4**:21 **5**:17 **6**:1 **15**:10,25

16:2,9 **28**:3,8 **29**:18,20 **31**:8,25 **41**:
18 **44**:11 **46**:2 **50**:5 **70**:19 **85**:21
88:12 **94**:13,21 **95**:8
truthful [8] **16**:16 **20**:12 **84**:5 **87**:13
92:4 **93**:2,5,6
truthfully [1] **89**:7
truthfulness [1] **87**:25
trying [4] **42**:22 **62**:15 **80**:12 **98**:25
Tuesday [1] **1**:18
turn [1] **20**:17
turned [1] **74**:4
turns [1] **76**:21
two [24] **10**:11 **11**:3 **13**:8 **27**:8 **41**:
14 **43**:14 **51**:15 **52**:7 **62**:3,7,11 **65**:
8 **72**:25 **73**:2 **76**:15,20 **79**:8 **88**:4,
16 **91**:24 **92**:13 **94**:11 **100**:24 **101**:
6
types [1] **70**:1

U

ultimate [1] **97**:19
ultimately [9] **13**:5,17 **22**:11 **29**:14,
24 **44**:19 **75**:13 **77**:2,4
unanimously [1] **72**:18
uncomfortable [2] **28**:4 **36**:5
Under [13] **4**:11 **7**:18 **14**:9 **23**:10
30:9 **44**:22 **47**:7 **55**:15 **75**:20 **83**:
12 **85**:9 **95**:14 **97**:19
underlying [4] **5**:18 **22**:13 **55**:15
87:22
undermine [2] **13**:11 **77**:11
undermined [1] **10**:12
undermines [4] **11**:5 **12**:2,6 **98**:12
undermining [1] **5**:3
understand [11] **18**:17 **36**:2 **50**:15
57:14 **68**:11 **69**:5,15 **80**:11 **88**:5
93:25 **94**:11
understanding [1] **87**:7
understood [3] **44**:7 **66**:5,5
undisputed [2] **4**:25 **5**:5
UNITED [7] **1**:1,22 **11**:20 **12**:4 **30**:
24 **87**:1 **101**:8
unless [4] **30**:17 **36**:18 **55**:14 **82**:
13
unreasonable [1] **34**:18
unusual [1] **94**:2
unwilling [2] **83**:25 **84**:3
up [23] **16**:19 **19**:8 **24**:10 **28**:9 **30**:6,
8,12 **37**:6 **41**:24 **42**:4 **43**:13 **44**:2
46:15 **62**:17 **64**:23 **69**:22 **71**:17 **72**:
5,7 **77**:1 **81**:17 **85**:4 **97**:9
up-front [1] **87**:1
upheld [2] **47**:9 **61**:1
uphold [2] **36**:18 **61**:19
upholding [1] **45**:11
UPS [4] **43**:1,5 **70**:12 **76**:19
urge [1] **98**:14
uses [3] **21**:22 **43**:8 **71**:17
using [4] **45**:25 **46**:1 **67**:9 **87**:9

V

version [1] **61**:6
versions [1] **59**:19
versus [3] **4**:5 **90**:15,22

view [3] **51**:6 **53**:14 **76**:15
viewed [1] **25**:7
vigor [1] **32**:16
violence [4] **27**:4 **61**:9 **100**:21,22
voluntarily [6] **11**:2,5,13,17 **92**:3
 101:6
voluntary [1] **5**:6

W

walk [1] **10**:10
wanted [4] **12**:3 **17**:16 **30**:25 **88**:10
wants [1] **95**:5
Washington [3] **1**:17 **2**:3,5
water [1] **93**:15
way [31] **18**:17 **20**:13 **25**:7 **38**:14 **39**:
 25 **40**:18 **42**:3 **43**:11 **44**:12,13,16,
 21 **45**:22,25 **47**:1 **52**:24 **60**:19 **65**:
 21 **70**:11 **75**:13 **77**:16 **81**:16,19 **83**:
 24 **84**:16,21 **85**:2 **89**:10 **92**:16,23
 98:1
ways [5] **43**:14 **69**:5 **88**:4,16 **94**:11
weeks [2] **11**:3 **101**:6
weigh [4] **14**:10 **16**:25 **25**:20 **26**:2
weird [1] **79**:25
well-founded [2] **30**:9 **90**:11
well-grounded [1] **87**:20
whatever [1] **40**:25
whereas [2] **56**:18 **78**:19
Whereupon [1] **101**:17
whether [40] **4**:22 **6**:16,25 **9**:25 **17**:
 23 **22**:12,18,19 **25**:4 **26**:14,18 **28**:
 7,10 **30**:5,11 **31**:7,11 **33**:10 **38**:11
 39:2 **40**:2 **44**:8 **46**:24 **48**:2 **49**:18
 54:16 **57**:23 **58**:2 **63**:20 **66**:4 **70**:
 24 **74**:5 **86**:25 **89**:6 **91**:1,20 **97**:22,
 23,24 **100**:4
who's [1] **65**:15
whole [2] **52**:17 **58**:19
wife [18] **10**:25 **11**:2,4,9,12,16,17
 17:15 **18**:10 **25**:2,5 **78**:13 **89**:24
 90:17,23,23 **93**:10 **101**:5
wife's [4] **5**:5 **28**:2 **85**:17 **89**:14
WILKINSON [3] **1**:3,10 **4**:4
will [8] **4**:3 **14**:3 **15**:19 **19**:15 **20**:12
 26:17 **37**:19 **69**:18
willful [2] **27**:6 **100**:23
willfully [1] **5**:21
willing [1] **38**:2
withholding [3] **4**:13 **46**:22 **74**:4
within [2] **29**:3 **47**:3
without [7] **11**:25 **59**:1 **61**:15,18
 71:20,20 **93**:24
witness [23] **18**:18,22 **26**:18 **34**:21
 37:9 **40**:2,4,5,6,8,8,15,15,20,24 **42**:
 9 **59**:1,2 **66**:24 **91**:19,21,21 **93**:3
witness's [1] **40**:1
witnesses [5] **18**:20 **41**:14,16,18
 58:25
wondering [1] **34**:1
word [4] **32**:2 **45**:10 **52**:5 **82**:3
words [29] **8**:8 **36**:13 **37**:13 **40**:14
 43:8 **48**:16 **50**:11,16,20 **51**:24 **61**:
 25 **65**:3 **71**:17 **72**:16 **74**:13 **75**:5,6,
 8,11 **77**:3,14,18,21 **80**:1,17,19,24

 81:1 **88**:7
work [7] **37**:11,14 **52**:21 **68**:16 **80**:
 12 **83**:6 **87**:7
working [1] **19**:7
works [2] **75**:14 **85**:3
world [3] **24**:12 **87**:19 **88**:5
worried [4] **11**:11 **16**:13 **69**:21 **72**:
 12
worrisome [1] **65**:15
worry [1] **56**:23
worrying [2] **19**:12,12
worse [1] **95**:4
worth [1] **12**:14
worthy [3] **20**:15,24,25
wrap [3] **46**:15 **72**:7 **97**:9
write [10] **54**:16,19,24 **55**:24 **56**:1,2
 80:1,17,20,24
writing [2] **19**:13 **23**:25
written [3] **49**:6 **65**:24 **96**:12
wrote [1] **73**:3

Y

Yan [3] **57**:1 **64**:8 **66**:11
years [2] **27**:8 **100**:25

Z

Zero [3] **66**:14,14,15
ZIMMER [54] **2**:7 **3**:9 **73**:12,13,15
 74:22 **75**:2,10 **76**:17 **77**:17 **79**:4,
 21 **80**:8 **81**:6,9 **82**:1,21 **83**:14 **84**:8,
 25 **86**:4,15,20 **87**:6 **88**:18 **89**:18,
 22 **90**:5,10,13,19 **91**:3,7,17,25 **92**:
 7,15,23 **93**:5,18 **94**:1,6,10,22 **95**:2,
 10,13,22,25 **96**:21 **97**:1,7,9,10