No. 19-1155

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

MING DAI

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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In the decision below, the Ninth Circuit "revive[d] the congressionally disapproved 'deemed true' rule," "flout[ing] Congress's purpose in enacting the REAL ID Act" and parting with "every other circuit to address the issue." Pet. App. 131a, 133a, 135a (Callahan, J., dissenting from denial of rehearing en banc). In doing so, the court perpetuated what Judge Trott called "a long history of ignoring Congress and the Supreme Court" in this area. *Id.* at 111a (statement respecting the denial of rehearing en banc). As 12 judges recognized at the rehearing stage, "the significant damage [the Ninth Circuit] has done to the Act and to Congress' attempt to stop [the court of appeals] from substituting [its] judgment for the Board's are matters that must be corrected." *Id.* at 122a.

Respondent contends that review is unwarranted because the panel majority did not state that it was pre-

suming truthfulness. But as the dissenting judges below explained, that is what the panel majority did in substance, perpetuating prior cases that made the presumption more explicit. After all, the panel majority could not have affirmatively declared respondent eligible for asylum and entitled to withholding of removal merely by stating that his testimony was *credible*; to achieve that result, it had to treat the testimony as *true*.

With the decision below understood in that proper light, respondent's remaining arguments against review largely disappear. Respondent acknowledges three other circuits have rejected a presumption of truthfulness. And Congress—far from directing courts to accept an alien's testimony as truthful despite aspects that undermine its force unless the Board of Immigration Appeals (Board) persuades the courts otherwise—has provided that courts must defer to the Board's ultimate determination that the alien has not proven his eligibility for relief "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). That statutory standard should have been dispositive here, requiring the court of appeals to uphold the Board's decision.

A. The Ninth Circuit's Decision Is Incorrect

1. Respondent insists the panel majority never explicitly said his testimony was "true" or "truthful." See, *e.g.*, Br. in Opp. 2-3, 10, 14-16. But while the panel majority did not use those words, it plainly held that respondent's testimony must be accepted as true, not just credible.

The panel majority explained that it was applying the same "rule" the Ninth Circuit had applied in pre-REAL ID Act decisions and then re-affirmed "in a post-REAL ID opinion" that "controls here." Pet. App. 14a;

see *id.* at 13a-14a (discussing *Hu* v. *Holder*, 652 F.3d 1011, 1013 n.1 (9th Cir. 2011); *Kalubi* v. *Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *Navas* v. *INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000)). Although the panel majority cited those cases for what it called a presumption of credibility, they all hold that unless the Board makes "an explicit adverse credibility finding, we assume that the facts in [the alien's testimony] are *true*." *Hu*, 652 F.3d at 1013 n.1 (emphasis added); see *Kalubi*, 364 F.3d at 1137 ("Testimony must be accepted as *true* in the absence of an explicit adverse credibility finding.") (emphasis added); *Navas*, 217 F.3d at 652 n.3 (Absent "an explicit adverse credibility finding, we must assume that the applicant's factual contentions are *true*.") (emphasis added).

Having cited "control[ling]" circuit precedent that required that an alien's testimony be assumed or accepted as true, Pet. App. 14a, the panel majority did just that. As in *Hu*, see 652 F.3d at 1013 n.1, the panel majority treated respondent's testimony as definitive for purposes of its "factual summary"—setting respondent's account forth not just as what he testified but as what actually happened. Pet. App. 2a n.1; see *id.* at 2a-5a. The panel majority then took its "decisive step in reviving [the Ninth Circuit's] old 'deemed true' rule": it required that absent an explicit adverse credibility finding, "any evidence that would cast doubt on the applicant's credibility must be ignored when considering the *persuasiveness* of the applicant's claim." *Id.* at 132a (Callahan, J., dissenting from denial of rehearing) (citation omitted); see *id.* at 22a-23a (majority opinion). While the Board had found respondent's testimony unpersuasive based on its determination that respondent

was not "truthful" about facts he knew "would be perceived as inconsistent with [his] claims of past and feared future persecution," *id.* at 163a-164a, the panel majority held that the Board was foreclosed from relying on that lack of "truthful[ness]" unless it made a blanket adverse credibility finding, *id.* at 22a-23a. Because the Board had not done so, the panel majority held that the Board could not "smuggle[]" its targeted concerns about the truth of respondent's testimony "into the persuasiveness inquiry" as a basis for disbelieving his account. *Ibid.* Instead, it was "compel[led]" to accept respondent's testimony as sufficient to "satisf[y] his burden of proof." *Id.* at 24a.

Finally, the disposition ordered by the panel majority further shows it was presuming "the facts in [the alien's testimony] are true," *Hu*, 652 F.3d at 1013 n.1. If the panel majority had simply deemed respondent's testimony "*credible*" in the sense of being "'*capable* of being believed,'" Br. in Opp. 16 (quoting Pet. 20), then the Board or Immigration Judge (IJ) would have been free on remand to decide (again) whether they, in fact, believed respondent's testimony. But instead, the panel majority itself declared respondent eligible for asylum and entitled to withholding of removal—relief available only if his testimony actually established the truth. See Pet. App. 131a n.4 (Callahan, J., dissenting from denial of rehearing) ("Credibility alone doesn't make a person * * * eligible for asylum."). Thus, as Judge Callahan put it, the panel majority "transform[ed] the lack of an express adverse credibility ruling into an affirmative conclusion that the applicant's proffered reason for seeking asylum is *true*." *Id.* at 133a.

Respondent suggests (Br. in Opp. 16) that the Ninth Circuit's prior decisions in *Aden* v. *Holder*, 589 F.3d

1040 (2009), and *Singh* v. *Holder*, 753 F.3d 826 (2014), would have precluded the panel majority from applying a presumption of truthfulness. But the Ninth Circuit has applied a presumption of truthfulness repeatedly—apparently disregarding or finding inapplicable the language to which respondents point in *Aden* and *Singh*, which arose in different circumstances. See, *e.g.*, *Gonzalez-Caraveo* v. *Sessions*, 882 F.3d 885, 894 (2018) ("Because there was no adverse credibility finding, we assume Petitioners' factual assertions are true[.]"); *Pagayon* v. *Holder*, 675 F.3d 1182, 1187 (2011) (per curiam) (assuming factual assertions are "true"); *Cole* v. *Holder*, 659 F.3d 762, 770 (2011) ("true"); *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 679 (2010) ("true"); *Alcaraz-Enriquez* v. *Sessions*, 727 Fed. Appx. 260, 261 (2018) ("true"), petition for cert. pending, No. 19-1156 (filed Mar. 20, 2020); *Khachatryan* v. *Holder*, 489 Fed. Appx. 207, 207 (2012) ("true"); *Kaur* v. *Holder*, 478 Fed. Appx. 439, 439 (2012) ("true"). And here, the panel majority did the same thing in two steps: after holding that respondent's testimony must be deemed credible because the IJ did not make an explicit adverse credibility finding, it further held that the Board could not rely on aspects of respondent's testimony that it found not to be truthful in finding his testimony insufficiently persuasive to carry his burden of proof.

The court of appeals could have course-corrected in en banc proceedings below—and the dissenters urged it to do so. See, *e.g.*, Pet. App. 135a (Callahan, J.). But a majority of the active judges on the Ninth Circuit refused to overturn the panel's ruling, *Aden* and *Singh* notwithstanding. Accordingly, if the court of appeals' approach is to be corrected, it will have to be by this Court.

2. Respondent contends (Br. in Opp. 21-26) that no correction is needed because the decision below is consistent with the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and broader administrative law principles, and is appropriate on the facts here. Each of those contentions is incorrect.

a. Respondent acknowledges the INA's broad statement that "[t]here is no presumption of credibility," 8 U.S.C. 1158(b)(1)(B)(iii), subject to a single express exception that respondent concedes is inapplicable here. See Br. in Opp. 21-23. But respondent maintains that "read in context," that declaratory text "applies to the IJ" only. *Id.* at 22 (emphasis omitted). Courts, in his view, are exempt from Congress's "no presumption" command.

This attempt to overcome the statutory text fails. Where Congress intended instructions in Section 1158(b) to apply only to an IJ, it said so expressly. See 8 U.S.C. 1158(b)(1)(B)(ii) ("In determining whether the applicant has met the applicant's burden, *the trier of fact* may weigh the credible testimony along with other evidence of record.") (emphasis added); 8 U.S.C. 1158(b)(1)(B)(iii) ("[A] trier of fact may base a credibility determination on [certain specified criteria]."). That Congress omitted a comparable limitation in its instruction that "[t]here is no presumption of credibility" indicates that this instruction applies more broadly, just as it is phrased. *Ibid.*

b. Respondent seems to suggest (Br. in Opp. 21) that the presumption is necessary because the only alternative would be for "an appellate court [to] make its own adverse credibility determination in deciding a petition for review," which, he continues, would be incompatible with the "principle of administrative law that a court

cannot base a decision on reasoning on which the agency did not rely." But that presents a false choice.

The proper approach is not for courts to make credibility findings of their own, presumption-based or otherwise. Instead, it is for courts simply to respect the limited scope of judicial review under the INA, which forbids courts to set aside Board determinations "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). Where the IJ and Board determine that problems with an alien's testimony render it insufficiently persuasive to carry his burden of proof, courts can reject that determination only if no "reasonable adjudicator" could have reached it. *Ibid.* Courts cannot circumvent that limitation by erecting a legal presumption that the testimony is credible, and then require that it be presumed to be true by excluding consideration of any aspects of the testimony that undermine its persuasiveness.

c. This case illustrates well the problems with the Ninth Circuit's approach. The IJ did not find that respondent's "demeanor" or any "inherent [im]plausibility of [his] account" rendered respondent categorically incredible. 8 U.S.C. 1158(b)(1)(B)(iii). Instead, the IJ focused on narrower problems that led the IJ to find respondent's testimony unpersuasive as to facts material to his burden of proof. See Pet. App. 175a-176a. Specifically, the IJ "d[id] not find that the respondent's explanations for [his wife's] return to China while he remained here are adequate." *Id.* at 175a. Respondent's claim was that he "allegedly fled [China] following his wife's and his own persecution"; but if that were really the *true* reason they had left the country, the IJ concluded, respondent's wife would have needed more

"substantial" "reasons" for returning than the ones respondent offered. *Ibid.*; see *id.* at 174a (expressing skepticism about "the alleged forced abortion inflicted upon his wife"). Especially given respondent's "lack of forthrightness" about those facts, the IJ found "respondent has failed to meet his burden." *Id.* at 173a, 176a.

The Board amplified the IJ's key findings, explaining that respondent "failed to disclose" his wife's voluntary return because he recognized that fact "would be perceived as inconsistent with his claims of past and feared future persecution." Pet. App. 163a. Both "respondent's family voluntarily returning and his not being truthful about it" undermined respondent's attempt to carry his burden of proving he had previously faced persecution and feared he would face it again if returned. *Id.* at 164a.

Those determinations reflected a "reasonable" interpretation of the record, to which the court of appeals was required to defer. 8 U.S.C. 1252(b)(4)(B). Instead, the panel majority applied a presumption of credibility—and then of truthfulness—to respondent's testimony, declared that the Board's contrary determinations had to give way to the court's rigid framework, and as a result refused to "remand to the agency for additional investigation or explanation." *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (citation omitted). That result is wrong, and does "significant damage * * * to the Act and to Congress' attempt to stop [the Ninth Circuit] from substituting [its] judgment for the Board's." Pet. App. 122a (statement of Trott, J., respecting the denial of rehearing en banc).

B. The Ninth Circuit's Decision Warrants This Court's Review

1. Respondent contends (Br. in Opp. 20) that the decision below does not warrant review because "there is no clear, meaningful disagreement between the Ninth Circuit's decision in this case and the decision of any other court of appeals." But that contention depends on his assertion that the panel majority's decision does not erect a presumption of truthfulness. That assertion is incorrect. See pp. 2-5, *supra*. And understood correctly, the decision below directly conflicts with decisions of the First, Eighth, and Tenth Circuits. See Pet. 24-26.

Respondent concedes (Br. in Opp. 18-19) that the Eighth Circuit, in *Doe* v. *Holder*, 651 F.3d 824 (2011), rejected any presumption that "testimony must be accepted as true" absent an express adverse credibility finding, *id.* at 830. Respondent likewise concedes (Br. in Opp. 19) that the Tenth Circuit rejected a presumption of truthfulness in *Gutierrez-Orozco* v. *Lynch*, 810 F.3d 1243 (2016). So too with the First Circuit in *Kho* v. *Keisler*, 505 F.3d 50 (2007). See Br. in Opp. 20. As Judge Callahan recognized below, the panel majority's decision here thus "squarely conflicts with" those cases. Pet. App. 135a (dissenting from denial of rehearing).

2. Respondent also disputes (Br. in Opp. 26) the importance of the decision here, observing that it "has only been cited a handful of times in the Ninth Circuit." That ignores what is actually at stake. The Ninth Circuit has repeatedly (if inconsistently) invoked a presumption of truthfulness over more than a decade, see p. 5, *supra* (collecting examples), and the Ninth Circuit's decision here erects such a presumption as well.

What makes the decision here important is not adoption of a new, citation-generating rule, but rather the fact that the full court of appeals took a long look at the problems with its precedent and the panel majority's decision—and made clear it was unwilling to correct them.

The Ninth Circuit's approach has significant ramifications. "Fraudulent asylum claims can [already] be difficult to detect," especially given the volume of such claims the agency must consider. *Department of Homeland Sec.* v. *Thuraissigiam*, No. 19-161, 2020 WL 3454809, at *5 (June 25, 2020). Requiring over-burdened IJs to make "'gratuitous'" express credibility findings—in cases where IJs determine that even if the alien's testimony is facially *credible*, they have reasons to conclude that the testimony, or specific aspects of it, are not true—threatens to produce "far-reaching" effects in that context. Pet. App. 137a-138a (Callahan, J., dissenting from denial of rehearing) (citation omitted). "By essentially forcing IJs to make an express adverse credibility finding whenever they do not accept an applicant's proffered reasons as the whole truth, the panel's holding calls into question virtually every IJ decision denying a claim for asylum that lacks an explicit adverse credibility finding." *Id.* at 137a.

3. Finally, respondent contends (Br. in Opp. 31) that review is unwarranted on the second question presented because the decision below is consistent with other cases where courts have "decline[d] to remand issues to the Board that the Board has already addressed." This argument, too, is misplaced.

The cases respondent identifies (Br. in Opp. 31-33) confirm, rather than refute, that it is generally inappropriate for courts to overrule the agency's treatment of

an alien's testimony without remanding to let the agency consider the record afresh. Indeed, in *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17 (2007), the en banc First Circuit corrected a panel decision that had erred in the same way as the panel here by definitively resolving a disputed record question rather than remanding to the Board for a "fresh look." *Id.* at 25; see *id.* at 20, 22. The en banc court explained that unless the record is so unambiguous that remand "would be an idle and useless formality," remand is the appropriate relief. *Id.* at 22 (citation omitted).

The other cases respondent cites are generally in keeping with that rule. In *Ghebremedhin* v. *Ashcroft*, 392 F.3d 241 (7th Cir. 2004), the "record evidence" was "undisputed," and the government "concede[d]" the alien was "statutorily eligible for asylum," so there was no chance the Board might reach a different result. *Id.* at 243. Likewise, in *Alvarez Lagos* v. *Barr*, 927 F.3d 236 (4th Cir. 2019), the "unchallenged," "undisputed record evidence compel[led] the conclusion" that there was a nexus between the alien's persecution and protected status, and the government conceded that the Board's contrary conclusion was flawed. *Id.* at 249, 252. And in *Yusupov* v. *Attorney Gen. of the U.S.*, 650 F.3d 968 (2011), the Third Circuit held simply that remand was unnecessary "where application of the correct legal principles to the record could lead only to [one] conclusion." *Id.* at 993 (citation omitted).

Here, by contrast, the record is open to multiple interpretations; one could believe respondent, or not. Accordingly, even if the IJ and Board had not adequately explained the reasons they disbelieved his story about "having allegedly fled [China] following his wife's and

his own persecution," Pet. App. 175a, the only appropriate disposition would have been a "remand to the agency for additional investigation or explanation." *Ventura*, 537 U.S. at 16. The panel majority's refusal to take that course warrants this Court's review and correction.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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JULY 2020