

Nos. 19-1155 and 19-1156

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IN THE  
*Supreme Court of the United States*

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,  
*Petitioner,*

v.

MING DAI,  
*Respondent.*

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,  
*Petitioner,*

v.

CESAR ALCARAZ-ENRIQUEZ,  
*Respondent.*

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

**BRIEF OF REFUGEE ADVOCACY  
ORGANIZATIONS AS *AMICI CURIAE* IN  
SUPPORT OF RESPONDENTS**

LEIGH J. JAHNIG  
JENNER & BLOCK LLP  
353 N. Clark Street  
Chicago, IL 60654  
(312) 222-9350

ZACHARY C. SCHAUF  
*Counsel of Record*  
JENNER & BLOCK LLP  
1099 New York Avenue NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
ZSchauf@jenner.com

*Counsel for Amici Curiae*

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amici* are ten organizations who advocate for greater asylum seeker protections and increased protections for immigrant victims of domestic and sexual violence, provide clinical rehabilitation services to asylum-seeking torture survivors, and represent indigent asylum claimants in various proceedings. *Amici* are well-positioned to understand and describe how asylum seekers have experienced trauma, and how that trauma affects the perception of their testimony.

The organizations that join this brief are (in alphabetical order):

1. Casa Cornelia Law Center
2. Catholic Legal Immigration Network, Inc.
3. Center for Gender and Refugee Studies
4. The Center for Victims of Torture
5. Family Violence Appellate Project
6. Harvard Immigration and Refugee Clinical Program
7. Immigrant Law Center of Minnesota

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<sup>1</sup> In accordance with Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. Pursuant to Supreme Court Rule 37.3(a), counsel of record for all parties received notice of *amici curiae*'s intent to file and all parties have consented to the filing of this brief.

8. Inviolable Initiative/Center for Transformative Action
9. National Immigrant Women’s Advocacy Project (NIWAP, Inc.)
10. Tahirih Justice Center

Given these organizations’ expertise in matters of asylum proceedings and the traumas facing asylum seekers, *amici curiae* submit that their views will be of “considerable help” to the Court. Sup. Ct. R. 37.1.

### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The Ninth Circuit correctly held that, when both the immigration judge and the Board of Immigration Appeals (“BIA”) decline to find that an asylum applicant is non-credible, appellate courts cannot—for the first time on appeal—make an adverse credibility finding themselves. Appellate courts must accept that testimony as credible. As Respondents explain, this holding accords with both the asylum statute and bedrock principles of administrative law. *Amici* write here to underscore why it is so important that appellate courts refrain from stepping into the shoes of an immigration judge and make a credibility determination in the first instance.

In asylum cases, credibility determinations are both essential and fraught. On the one side, asylum seekers are often fleeing the specter of persecution or torture, including horrors such as domestic violence, sexual abuse, and human trafficking. In U.S. immigration courts half a world away, non-testimonial evidence may be hard to come by—so the most important evidence will

often be the asylum seekers' own words about what they experienced.

On the other side, however, science teaches that traumatic experiences—which are often what trigger asylum applications in the first place—can have long-lasting effects on how survivors recount their experiences, as asylum seekers must do in asylum interviews and hearings. The survivor's demeanor may be detached, nervous, or hesitant. The survivor may have gaps in memory or may be too ashamed, or afraid, to provide a detailed account. Or the survivor's narrative may shift over time, as the survivor comes to terms with horrific experiences. An appellate judge reviewing a cold transcript, untrained in trauma, can mistake these effects for red flags that the survivor is not credible. But in fact, far from undermining credibility, these effects are consistent with suffering the kind of persecution that asylum exists to protect against.

Immigration judges are far better placed than appellate judges to evaluate an asylum seeker's testimony and place the effects of trauma into the context of the overall record. Not only do immigration judges observe an asylum seeker first hand, but during their time on the bench, they often acquire significant experience with asylum cases and the trauma that such cases often implicate. Specialized training also exists to help immigration judges understand how to account for trauma in assessing witnesses. When that training is properly administered and deployed, immigration judges can learn to recognize the difference between lay stereotypes about credibility and what credibility actually looks like when a trauma survivor testifies in an

asylum case (or indeed, any matter adjudicated by an immigration judge).

Appellate courts lack these critical tools. They have not seen the applicants, nor can they assess the tenor of the applicants' testimony in the context of the whole record. And appellate courts do not receive any training as scaffolding against mistaking trauma's artifacts for lack of credibility. If an appellate court attempts to assess an applicant's credibility when the immigration judge has not explicitly done so on the record, the court may be faced with a case in which the applicant lacks traditional indicia of credible testimony—for example, because the applicant testified inconsistently about details like dates or the number of attackers at a specific event. And on a cold record, the appellate court will be unable to reliably weigh whether such inconsistencies indicate non-credible testimony, or whether these inconsistencies are foreseeable side effects of trauma.

For these reasons, Congress allocated to appellate courts the responsibility to review adverse credibility determinations, but it placed the role of making those determinations in the first instance with immigration judges, who can draw on both their experience with asylum cases—cases often accompanied by trauma—and their ability to directly hear the testimony. That is not to say that immigration judges always get it right. Appellate courts review adverse credibility determinations under established appellate standards and sometimes properly reverse adverse credibility determinations that fail to pass muster under those standards. But just as it is important that appellate judges faithfully carry out their duty to *review*

credibility determinations, it is critical that appellate judges refrain from stepping into immigration judges' shoes by making *initial* credibility determinations on a cold record.

*Amici* thus respectfully submit that the correct approach is the one the Ninth Circuit adopted: When neither the immigration judge nor the BIA has made a non-credibility finding, reviewing courts should not do so. Instead, they should treat the applicant's testimony as credible. That does not mean the applicant will *win*—because even credible testimony may be insufficient to carry the applicant's burden to show error in the denial of asylum. But it does mean that appellate judges must stick to their assigned role and decline to make their own credibility judgments when Congress vested the responsibility for doing so elsewhere.

## ARGUMENT

### I. Credibility Appraisals Are Central To Asylum Proceedings.

The Immigration and Nationality Act (“INA”) makes asylum available to any “refugee”—that is, “any person” who is “unable or unwilling to avail himself or herself of the protection of, [his or her native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A); *see id.* § 1158(b)(1)(A). Immigration officials assess whether an applicant meets those requirements based in part on whether the testimony the applicant offers is credible.

In some cases, evidence of an applicant's experiences, other than his or her own testimony, may be unavailable. When that is so, an applicant's fate may depend substantially or entirely on whether the immigration judge finds the applicant's testimony to be credible. Such cases are not rare: Many survivors of violence—including torture, domestic violence, sexual assault, stalking, child abuse, and human trafficking—flee their homes under circumstances that make it impossible to gather documents and other corroborating evidence. In some cases, such corroborating evidence may never have existed at all (for example, persecutors may have carried out their abuse in isolation, away from potential witnesses).

In the REAL ID Act, Congress confirmed that applicants' credible testimony, standing alone, can carry their burden to establish asylum eligibility: "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration," provided that "the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.* § 1158(b)(1)(B)(ii). Congress enacted this rule to ensure that applicants would not be condemned to rejection simply because they lack access to corroborating evidence in the hands of their persecutors or people controlled by their persecutors. *See* H.R. Rep. No. 109-72, at 165 (2005) (Conf. Rep.). This rule also applies to establishing threshold eligibility for asylum and withholding of removal, and to weighing bars on eligibility for this relief. *See* 8 U.S.C. § 1229a(c)(4)(B) (withholding); *id.* § 1158(b)(2)(A)(i)-(ii) ("particularly serious crime" exception).

In every case—criminal or civil, immigration or other—credibility judgments are difficult. Indeed, over time science has shown that certain behaviors and demeanor once thought to be reliable indicators of credibility are far less so, or not at all.<sup>2</sup> What is more, some of the same “cues” previously understood as demonstrating a lack of candor—and that can result in a written record that on its face may appear contrived—are in fact scientifically established hallmarks of trauma. Appellate judges reviewing a cold record that is silent on the issue of credibility may have particular difficulty recognizing the difference and making the hard—sometimes dispositive—credibility determinations.

## **II. Credibility Determinations In Asylum Cases Are Intertwined With The Effects Of Trauma.**

As difficult as credibility judgments are in general, they are even more fraught in asylum cases. Many applicants have suffered traumas—sexual assault, domestic violence, rape, torture, colonization, war, or genocide. See Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 *Hastings Int'l & Comp. L. Rev.* 725, 726, 728 (2008); *The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers*, Office

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<sup>2</sup> See Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 *Geo. Immigr. L.J.* 367, 388 (2003) (“[H]uman beings are generally not capable of repeatedly reporting events with perfect consistency.”); see also Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 *J. Air L. & Com.* 1421, 1432-34 (2001) (noting that a witness’s confidence does not correlate with the correctness of testimony).

on Violence Against Women, U.S. Dep’t of Justice (July 30, 2014), <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>. As a result of these traumas, testimony in asylum cases may be credible—and indeed true—but may nevertheless depart from lay stereotypes about what credible testimony looks like. That is because trauma affects both what an applicant can remember or say, and how the applicant says it.

This section elaborates on those effects in three parts. Section II.A details how trauma affects memory, yielding recollections that are incomplete, inconsistent, or change over time. Section II.B discusses how trauma affects demeanor and presentation, explaining that when survivors must describe their experiences, they may appear hesitant, disjointed, or monotonous—as their brains relive (or strain against reliving) those experiences. Section II.C shows how the asylum process itself exacerbates these effects. The upshot, simply put, is that the very experiences that prompt an asylum seeker to flee his or her home—including torture, sexual violence, and persecution—leave scars that do not easily comport with lay conceptions of credibility. And sorting out these effects is even harder because they are not *uniform*.<sup>3</sup> One survivor may recount an experience of

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<sup>3</sup> U.S. Dep’t of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin., *A Treatment Improvement Protocol (TIP) Series No. 57, Trauma-Informed Care in Behavioral Health Services* 61 (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf> (“*Trauma-Informed Care*”) (noting that there are a “variety” of reactions to trauma); Heather J. Clawson et al., U.S. Dep’t of Health & Hum. Servs., *Treating the Hidden Wounds:*

torture with numbness and detachment, while another might recount a similar experience by reliving it, overwhelmed with sensory and emotional memories. Cultural differences, too, can affect how asylum seekers react to trauma.<sup>4</sup> Assessing credibility in asylum cases thus requires the utmost care.

### A. Trauma Can Manifest As Inconsistent Or Incomplete Memories.

Trauma affects survivors' memories in myriad ways, which implicate traditional indicia of both candor and consistency. *Amici* describe six such effects below.

*First*, people who have suffered trauma may have difficulty recalling specific details of their experiences. Forming memories during times of great stress—such as during a traumatic event—can “inhibit processing of and memory for *peripheral details*.” Davis & Follette,

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*Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking* 1 (2008), <https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf> (“*Treating the Hidden Wounds*”) (recent studies have identified “a complex range of post-trauma symptoms”).

<sup>4</sup> Amina Memon, *Credibility of Asylum Claims: Consistency and Accuracy of Autobiographical Memory Reports Following Trauma*, 26 *Applied Cognitive Psych.* 677, 677 (2012) (“[E]ach eyewitness has a unique reaction to a traumatic event and response to trauma is not only influenced by personality and coping style but also by language and culture.”); Jane Herlihy et al., *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, 26 *Applied Cognitive Psych.* 661, 668-69 (2012) (discussing studies about how adult trauma memories can manifest differently in collectivistic and individualistic cultures); *Thinking About Trauma in the Context of Domestic Violence: An Integrated Framework*, Nat’l Council Juv. & Fam. Ct. Judges 6 (2014) (“Culture, context, and identity can all impact a person’s experience of trauma[.]”).

*supra* note 2, at 1455-56. These problems are especially acute for victims of repeated abuse, who may remember the “gist” of the experiences, but “confuse the details of particular incidents,” such as times, dates, and “which specific actions occurred on which specific occasion.” *Id.* at 1514. Applicants may even have difficulty identifying perpetrators of abuse or torture, because they were focused on a more stressful detail, like the presence or use of a weapon. *Id.* at 1457. It is “normal” for victims of trauma and sexual assault “to not know or remember complete details.” *Sexual Assault Incident Reports: Investigative Strategies*, Int’l Ass’n of Chiefs of Police 3 (Aug. 8, 2018), <https://www.theiacp.org/resources/document/sexual-assault-incident-reports-investigative-strategies>; see J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 *Dialogues Clinical Neuroscience* 445, 448-49 (2006) (discussing trauma’s impact on memory).

Recalling dates is particularly difficult for trauma survivors. The brain is good at recalling when events occurred relative to one another, but bad at recalling discrete dates in a vacuum. See *Singh v. Gonzales*, 403 F.3d 1081, 1092 (9th Cir. 2005) (citing Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 *Int’l J. Refugee L.* 293 (2001)). Routinely, asylum applicants fail to recall accurate calendar dates—but it is widely recognized that the applicants may nevertheless be credible. “An inability to accurately recall the date when a traumatic event occurred is not particularly probative of a witness’s credibility when alleging traumatic persecution, because such traumatic persecution itself may cause the witness difficulty in

recalling details of the incident.” *Marouf v. Lynch*, 811 F.3d 174, 185 (6th Cir. 2016) (opinion of Merritt, J.); see also *Longwe v. Keisler*, 251 F. App’x 718, 720 (2d Cir. 2007) (“[T]here was nothing in the record to support the IJ’s speculation that ‘one normally doesn’t forget’ the date of such a ‘traumatic event.’”) (record cite omitted); Melanie A. Conroy, *Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 Berkeley J. Gender L. & Just. 1, 37 (2009) (“[T]he recall of exact dates of traumatic events is not a suitable marker for the truthfulness of statements.”). The same phenomenon can prevent survivors of trauma from recalling other peripheral details. See, e.g., *Morgan v. Mukasey*, 529 F.3d 1202, 1209 (9th Cir. 2008) (noting applicant’s “inability to be exact” about whether her attackers jumped out of a car or were waiting for her, was “a trivial element of her traumatic experience” and did not undermine her credibility).

*Second*, trauma survivors commonly use avoidance to try to deal with the stress and anxiety that trauma yields. See *Trauma-Informed Care*, *supra* note 3, at 73-74. Survivors may be reluctant to discuss details of their abuse because they do not want to suffer the pain of reliving their experiences. See David S. Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 *Torture* 79, 80 (2007) (“[S]urvivors most often don’t want to talk about the torture[.]”); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 *U. Pa. L. Rev.* 399, 410-11 (2019). Telling their stories in a question-and-answer format, as

in an asylum interview or hearing, can amplify the effect. Kagan, *supra* note 2, at 394.

*Third*, trauma survivors can struggle to describe linear narratives. A person being tortured may focus on sensory or emotional perceptions, such as “thoughts of dying,” “trying not to panic,” or “loved ones also in danger.” Davis & Follette, *supra* note 2, at 1459. This means that, afterwards, memories consist of “the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person’s ordinary memories a sense of logical and chronological coherence.” Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 487 (2016); *see also* Epstein & Goodman, *supra* 11, at 411 ([Traumatic memories] are encoded in the form of sensations, flashes, and images, often with little or no story.”); Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 Law & Ineq. 315, 326 (2018) (noting “the difficulty many survivors of abuse or persecution have in articulating a linear narrative that effectively summarizes their experiences”); Hannah Rogers et al., *The Importance of Looking Credible: the Impact of the Behavioural Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum Seekers*, 21 Psych., Crime & L. 139, 140 (2015) (“[D]uring acute trauma, conscious processing may be impaired as the individual goes into survival mode.”). Survivors thus may have greater

difficulty articulating linear testimony than a typical witness in another type of proceeding.

*Fourth*, asylum applicants may suffer from an “impairment of recall” as a result of the traumatic experience. Kagan, *supra* note 2, at 388 (quoting Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 Int’l J. Refugee L. 293, 298, 308 (2001)). At its most extreme, trauma survivors may suffer from “psychogenic amnesia,” or “loss of memory caused by psychological trauma.” Davis & Follette, *supra* note 2, at 1462. Loss of memory can be broad or narrow, “even as narrow as selected components of the traumatic event.” *Id.* at 1462-63. This impairment of recall can affect how a survivor recounts any event related to trauma—not just descriptions of persecution, but also facts bearing on eligibility for cancellation of removal under the Violence Against Women Act, or on the bars to withholding of removal. *See* 8 U.S.C. §§ 1229a(c)(4), 1229b(b)(2), 1231(b)(3)(B).

*Fifth*, and conversely, memories may improve over time, as the mind begins to process the traumatic experience. “Talking, disclosing events, retrieving painful memories—in summary, verbalizing experiences—sets up a process in which the individual can access the suppressed memories and feelings, gain consciousness of the origin and development of his/her current distress, and put words to previously undefined emotions.” Gangsei & Deutsch, *supra* 11, at 83. The more applicants revisit their stories—a painful process—the more they may be able to counteract the subconscious suppression of these memories. *See* Kagan, *supra* note 2,

at 389. “Thus, it is not unusual to find a victim or witness who at first is unable to fully describe what happened, but is able to later provide much richer and coherent reports.” Davis & Follette, *supra* note 2, at 1456.

A by-product of this road to recovery is that later recollections of the same events may be more detailed than earlier recollections. This process of grappling with the experience of persecution, abuse, or torture can manifest as a shifting or inconsistent narrative. Mosley, *supra* 12, at 327. “People suffering from post-traumatic stress [are] particularly likely to give inconsistent accounts the more time passed between interviews.” Kagan, *supra* note 2, at 388-89. Thus, applicants may be able to provide more details in a hearing before an immigration judge than they could provide in a written application or airport interview with an asylum officer years earlier. While decision-makers untrained in trauma may perceive these changes as showing a lack of credibility, in fact the ability to provide a more robust and detailed narrative with further distance from the traumatic event demonstrates a normal—indeed, healthy—manner of processing the unthinkable.

*Finally*, trauma can trigger shame, and with it a reluctance to testify about details, especially early in the asylum process when applicants have had less time to process the traumas. “[T]he applicant may feel shame or embarrassment in disclosing the abuse they suffered.” Mosley, *supra* 12, at 326-27; *see* Gangsei & Deutsch, *supra* 11, at 80 (“[S]urvivors frequently bear the burden of guilt and shame, which makes it too painful and humiliating to tell the outside world about the torture.”); Conroy, *supra* 11, at 38 (noting the difficulty of

disclosing shameful experiences to “authoritative government officers”). This phenomenon, too, can mean that applicants reveal certain details or events only later in the asylum process. *See* Kagan, *supra* note 2, at 389. This process can yield inconsistencies—but these sorts of inconsistencies do not indicate a lack of credibility. *See, e.g., Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 159 (3d Cir. 2005) (failure to discuss “the shameful and taboo incidents of incestuous rape” in an early screening interview did not demonstrate a non-credible inconsistency with later testimony because it was “not surprising” that the applicant would hesitate to disclose this abuse “in a strange place before a male officer”).

Trauma can thus manifest itself in many ways that contradict stereotypes about candor, consistency, and memory. But these effects, far from signaling a lack of credibility, can in fact be evidence of the very abuse that leads applicants to seek asylum in the first place.

### **B. Trauma Can Affect Demeanor.**

Trauma can also affect a survivor’s demeanor, especially when the survivor must relive or recount the trauma itself, as in an asylum interview or hearing.

*First*, some survivors of trauma may “hesitate” or “waver” when describing their experiences. Paskey, *supra* 12, at 489 (quoting Kim Lane Scheppele, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. Sch. L. Rev. 123, 126-27 (1992)). Other survivors may have “[f]ixed” or “glazed” eyes or a “[m]onotonous voice,” rather than the sustained eye contact and varied voice inflection that characterizes most speech. *Trauma-Informed Care*, *supra* note 3, at 69. “Applicants may

appear distrustful, nervous, and may sweat excessively due to trauma and internalized suspicion of government authorities.” Conroy, *supra* 11, at 34; *see* Kagan, *supra* note 2, at 396 (noting that refugees may exhibit nervousness, among other symptoms, due to their “deep physical and mental scars” from surviving torture and violence). Still other asylum seekers may appear uncertain, even with respect to central details of their story. Paskey, *supra* 12, at 484. It is normal for asylum seekers to “appear ‘uncomfortable’” when recounting their trauma. *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015).

*Second*, on the other side, trauma may also leave survivors feeling numb, or even lead them to dissociate. In order to create distance from the trauma, or as a coping mechanism, survivors may become detached, *Trauma-Informed Care*, *supra* note 3, at 69; *see* Angela E. Waldrop & Patricia A. Resick, *Coping Among Adult Female Victims of Domestic Violence*, 19 J. Fam. Violence 291, 294, 299 (2004). This numbness and dissociation can make survivors appear mechanical or unemotional even when they describe horrific experiences. *See* Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 Geo. Immigr. L.J. 155, 157-58 (2001) (describing “a sense of numbing, detachment, [and] an absence of emotional responsiveness” as “common psychological responses to torture and human rights violations”); Lustig, *supra* 7, at 726 (trauma survivors “may become emotionally numb”).

These effects can impact perceptions of credibility. Like other symptoms of trauma, detachment can “make

it difficult for people to coherently communicate what they have survived.” Kagan, *supra* note 2, at 396. Survivors may appear “ambivalent in telling their stories of abuse,” or they may try to “minimize[] the seriousness of the abuse.” Catrina Brown, *Women’s Narratives of Trauma: (Re)storying Uncertainty, Minimization, and Self-Blame*, 3 *Narrative Works* 1, 11-12, 17 (2013). Meanwhile, numbness may violate the expectations of those with less experience encountering trauma survivors—who “expect all traumas to manifest in flashbacks and arousal.” Gangsei & Deutsch, *supra* 11, at 82. Withdrawal and detachment thus “can appear suspicious to lay persons.” *Id.*; see Rogers, *supra* 12, at 150-51 (noting that decision-makers who are expecting trauma survivors to display fear may negatively perceive asylum seekers who appear numb); see also Epstein & Goodman, *supra* 11, at 419 (describing the “profound gap in understanding,” that is, “assuming a [domestic violence] survivor’s story is less plausible when it fails to meet her judicial audience’s expectations about how the world works”).

### **C. The Asylum Process Itself Sharpens Trauma’s Effects.**

The asylum process itself intensifies trauma’s effects. Merely encountering immigration officials, law enforcement, or judicial officers can amplify the stress that trauma yields—and with it, the accompanying effects on testimony.

*First*, the act of recounting trauma can itself heighten trauma’s effects. Scientists have explained that survivors, when re-describing their experiences, “commonly, . . . suffer a resurgence of psychological

distress[.]” Gangsei & Deutsch, *supra* 11, at 86. Some sufferers of post-traumatic stress “re-experience[]” the trauma when they face external triggers. Piwowarczyk, *supra* 16, at 157; *see* Mosley, *supra* 12, at 321 (“[I]ntrusion symptoms may cause survivors to have flashbacks or to ‘relive’ both the traumatic event and the emotional intensity of that event, over and over again[.]”); Paskey, *supra* 12, at 486 (“Survivors often ‘relive’ traumatic events as though they were happening in the present.”). In some cases, simply “remembering constitutes *new* trauma.” Conroy, *supra* 11, at 35 (emphasis added). Merely feeling stressed during an encounter with law enforcement can impair recall. Jim Hopper et al., *Important Things to Get Right About the “Neurobiology of Trauma” Part 3: Memory Processes*, End Violence Against Women Int’l 5-6 (Sept. 2020).

*Second*, many trauma survivors fear law enforcement, and for good reason: Their home governments may have sided with their abusers—either failing to stop the abuse or perpetrating it themselves. *Cf. Treating the Hidden Wounds*, *supra* note 3, at 3 (describing how trafficking survivors fear law enforcement). Trauma survivors may be hypersensitive to perceived threats, even if no actual threat exists. Shawn C. Marsh et al., *Preparing for a Trauma Consultation in Your Juvenile and Family Court*, Nat’l Council Juv. & Fam. Ct. Judges 10 (Apr. 3, 2015). Applicants who have fled their homes precisely because of persecution by authorities may appear nervous when they must face government officials in a new country. *See* Kagan, *supra* note 2, at 379-80; *cf. Thinking About Trauma in the Context of Domestic Violence: An Integrated Framework*, Nat’l Council Juv. & Fam. Ct. Judges 3 (2014) (describing how survivors of

domestic violence may avoid making eye contact during legal proceedings as a means of self-protection while recounting the traumatic event).

*Third*, asylum seekers who fear authority may also avoid telling the unvarnished details of their stories in early asylum interviews, such as those in airports or other points of entry. *See* Conroy, *supra* 11, at 13-14; *Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998) (“Given [the asylum seeker’s] allegations of torture and detention, he may well have been reluctant to disclose the breadth of his suffering in Sri Lanka to a government official upon arriving in the United States[.]”); *Balasubramanrim v. INS*, 143 F.3d 157, 163 (3d Cir. 1998) (“[A]n arriving alien who has suffered abuse during interrogation sessions by government officials in his home country may be reluctant to reveal such information during the first meeting with government officials in this country.”); *cf.* Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 *Law & Sexuality* 135, 140-41 (2006) (suggesting that some asylum applicants may be reluctant to reveal to authorities the very aspects of their lives that led to their persecution in their home countries). This is another reason why narratives often become more detailed as the asylum process continues. *See supra* 13-14 (explaining how improvements in memory can yield similar effects).

Again, none of these phenomena demonstrate a lack of credibility—though they can be mistaken as such. Some commentators draw an analogy to test anxiety: Students “may know the material very well, but

nevertheless, do very poorly on the test because their anxiety does not permit them to retrieve the material from memory (usually until just after they leave the testing situation and their anxiety drops).” Davis & Follette, *supra* note 2, at 1458. In just the same way, even survivors who can recall every detail of their trauma may be unable to reproduce those details when they come face to face with government officials who evoke memories of their persecutors. Nor are these effects limited to the period immediately following a traumatic event; rather, they can persist over years or even a lifetime. See *Sexual Assault Incident Reports*, *supra* 9, at 5; *Trauma-Informed Care*, *supra* note 3, at 46. “[T]he emotional effects of trauma can be persistent and devastating.” *Treating the Hidden Wounds*, *supra* note 3, at 1.

### **III. Immigration Judges Are Far Better Suited Than Appellate Judges To Assess Credibility Combined With The Effects Of Trauma.**

The difficulty of making credibility determinations in asylum cases underscores why Congress properly vested the responsibility for making those judgments in immigration judges, rather than appellate courts. Immigration judges hear live testimony. During their time on the bench, they will typically hear many asylum cases. And they can receive specialized training on how to incorporate trauma’s effects into asylum adjudications.<sup>5</sup> When the immigration judge has declined

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<sup>5</sup> To be sure, *amici* believe that immigration judges should receive more training on a number of issues that bear on asylum, including trauma and cultural sensitivity. *Amici* are also aware that the

to find an applicant’s testimony non-credible, appellate courts must not step in to make adverse credibility determinations themselves.

*Amici* can provide countless examples of asylum applicants whose testimony lacks “traditional” indicia of credibility but whose accounts of persecution are both credible and true. Immigration judges, on hearing such cases, can more easily recognize that the phenomena described above—gaps in memory, inconsistencies, and mannerisms like detachment or hesitancy—are themselves evidence of trauma, not red flags that the applicant is non-credible.

**A. Congress Properly Vested Immigration Judges, Not Appellate Courts, With The Responsibility For Making Difficult Credibility Determinations.**

In the REAL ID Act, Congress placed the responsibility of making credibility determinations on immigration judges. In the initial proceeding before an immigration judge, “[t]here is no presumption of credibility[.]” 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C). By contrast, when those decisions are reviewed by the BIA—whose judges have broad experience in asylum cases, but have not heard the particular testimony—there is a “rebuttable presumption of credibility on appeal,” if “no adverse credibility determination is explicitly made” by the

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training that immigration judges should receive may have been offered inconsistently over time. The question in this case, however, is where to vest responsibility for making credibility determinations in the first instance, *as between* immigration judges and appellate courts. That question has a clear answer.

immigration judge. 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C). Congress made no provision for permitting federal appellate judges to make their own adverse credibility determinations when neither immigration judges nor the BIA have done so.

For three key reasons, Congress chose wisely in allocating to immigration judges, rather than appellate courts, the important responsibility for making credibility determinations.

*First*, immigration judges are by far the best placed to make credibility determinations. Immigration judges directly observe asylum applicants and have the greatest ability to consider their live testimony in the context of the entire record. This 360-degree perspective allows immigration judges to assess whether applicants have testified credibly even though their testimony may, at first blush, lack stereotypical indicia of credibility (such as minor inconsistencies or omitting specific dates). Credibility determinations are too difficult and fraught—made more so by the effects of trauma—to permit appellate judges to make them in the first instance, on a cold record, when no such determination was made below.

Moreover, immigration judges can receive specialized training about immigration and asylum issues. See *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review), <https://www.justice.gov/sites/default/files/eoir/legacy/2011/05/18/EOIRtestimony05182011.pdf> (describing training provided to immigration

judges). When such training is properly designed, deployed, and applied, it can provide immigration judges with the tools to account for the difference between common *perceptions* of credible testimony and what is *actually credible* in the context of asylum cases that are replete with trauma.

*Second*, on the other side, appellate judges are particularly ill-suited to assess credibility. Across substantive areas, appellate judges are properly cautious about assessing witness credibility on a “cold record.” See, e.g., *Int’l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Hardeman*, 401 U.S. 233, 246 (1971). And in asylum cases, the need for such caution is acute. Appellate judges are generalists, and they neither receive specialized training nor possess immigration judges’ broad experience with asylum cases and their accompanying traumas.

*Third*, reserving adverse credibility determinations for immigration judges facilitates review. If an immigration judge denies an application based on a negative credibility finding, Congress’s statutory scheme encourages that judge to make that finding explicit. That explicit statement, in turn, enables the applicant to challenge the decision on appeal, by showing that the judge’s credibility determination was clearly erroneous or did not support the ultimate determination. Cf. 8 C.F.R. § 1003.1(d)(3)(i). For example, if an immigration judge finds an applicant non-credible because of apparent inconsistencies, but does not account for the well-documented effects of trauma on testimony, the applicant can argue on review that the

judge did not properly “[c]onsider[] the totality of the circumstances[.]” 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C). But if an immigration judge does not make an express credibility finding, an applicant is left to guess the basis for the decision, hamstringing the applicant’s ability to challenge it.

Appellate courts are well-suited to *reviewing* adverse credibility determinations that are made on the record. Applying normal appellate review and established appellate standards, appellate courts can weigh whether immigration judges have sufficiently justified their adverse credibility determinations and whether those determinations were error on the record before the immigration judges. But courts cannot apply appellate tools and appellate standards to review a credibility determination that the immigration judge does not *make*. And certainly, an appellate court has no business affirming based on *its own* adverse credibility determination or its *guess* about what the immigration judge believed (but did not commit to the record). The system works sensibly only if immigration judges make adverse credibility determinations expressly.

**B. Immigration Judges Have Rightfully Given Asylum To Applicants Whose Testimony May Not Comport With Traditional Indicia Of Credibility Because Of Trauma.**

Scientific research can present as abstract, but the issues *amici* address in this brief are anything but. *Amici*’s clients have suffered horrific persecution and violence, and many display trauma’s effects when telling their stories. Yet even though their stories sometimes lack “traditional” indicia of credibility, immigration

judges have recognized that these stories are both credible and true—and show that *Amici's* clients deserve asylum.

*Elbia.* Elbia,<sup>6</sup> an indigenous Guatemalan woman, sought asylum in the United States after enduring extreme physical and sexual violence at the hands of her husband. When she tried to flee, he pursued her. In the rural area where she lived, and in view of the discrimination Guatemala's indigenous people face, police would not intervene. After Elbia at last escaped to the United States, a psychologist diagnosed her with post-traumatic stress disorder. Elbia first told her story to an asylum officer in a credible fear interview. In her hearing before the immigration judge, the government attempted to undermine her credibility based on perceived inconsistencies with the credible fear interview. Elbia testified that she did not tell her full story in that interview because she was ashamed to speak about her abuse, especially to a male asylum officer. The immigration judge found Elbia credible and granted asylum.

*Ujjal.* Ujjal sought asylum because supporters of another political party had beaten him with pipes while he was distributing flyers. Ujjal's attackers threatened to kill him if he continued his political advocacy. When Ujjal testified before the immigration judge, his manner was flat, detached, and robotic; at times, Ujjal even appeared to be apathetic about his own claim. Yet despite Ujjal's mannerisms, the immigration judge

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<sup>6</sup> For the safety and privacy of *amici's* clients, all names used in this brief are pseudonyms.

recognized that his story was credible and true, and granted Ujjal asylum.

*Sandeep.* Sandeep sought asylum as a member of a Sikh political group, after members of a rival political party threatened him in an effort to force Sandeep to stop his political activities. Eventually, the rival party's thugs came to the farm where Sandeep worked. They beat Sandeep severely—so severely that he needed hospital treatment for his head wounds. But the police in his home country took no action, and Sandeep sought asylum in the United States.

When he testified before the immigration judge, Sandeep struggled with recounting details of his experience. The number of political rallies and campaign events Sandeep had attended, the date of the beating, and the number of assailants—all of these details were beyond Sandeep's recall. The immigration judge, however, recognized that these details' absence did not show that Sandeep was not credible. He granted Sandeep asylum.

*Rochelle.* Rochelle fled her native Haiti after her uncle physically assaulted and threatened her with death on multiple occasions, including by sending men to rape her, because the uncle disputed her claim to land Rochelle inherited after her mother's death. Even after Rochelle fled, her former boyfriend followed her and subjected her to continued extreme physical and sexual abuse. When she first shared her story in a credible fear interview, Rochelle did not disclose the extent of her domestic violence, and the government argued that this inconsistency with her later testimony showed Rochelle lacked credibility. The immigration judge credited

Rochelle's explanation that she had not divulged this information during her first interview because of the traumatic nature of her experiences.

These applicants all exhibited classic signs of trauma—detachment, inability to recall detail, shame, fear of authority, and inconsistent accounts. A layperson might seize on these characteristics as marks of deception. Yet in every case, the immigration judges—drawing on their experience dealing with the issues of trauma common among asylum applicants—got it right. They recognized that these characteristics did not show a lack of credibility, but instead were evidence of trauma demonstrating the effects of the very real persecution these applicants had suffered. By contrast, an appellate court that seized on inconsistencies or an inability to recall details would likely get it badly wrong. For this reason, Congress properly did not permit appellate courts to make their own adverse credibility determinations.

#### **IV. Precluding Federal Appellate Courts From Making Their Own Adverse Credibility Findings Will Not Yield Adverse Effects.**

There is nothing to the government's suggestion that, unless the Ninth Circuit is reversed, immigration judges will be impossibly burdened and swaths of undeserving applicants will gain asylum based only on non-credible testimony. *See Dai* Pet. 26-27.

*First, Amici's* experience shows that the Question Presented here—while important in the small set of cases where it arises—in fact comes up infrequently on review. Immigration judges, aware of their critical role in assessing credibility, are rarely silent on issues of

credibility. In the vast majority of cases, immigration judges exercise their responsibility and explicitly assess the applicant's credibility.

*Second*, even when appellate courts must accept that an applicant's testimony is credible, that alone does not sustain the applicant's burden. The testimony must also be "persuasive" and provide "specific facts" demonstrating the applicant's entitlement to refugee status. 8 U.S.C. § 1158(b)(1)(B)(ii). Credible testimony will sometimes meet these requirements, and sometimes it will not.

In particular, treating testimony as *credible* does not always mean that the testimony conclusively establishes the *truth* of every detail of what happened in the past. Take, for example, cases where trauma yields inconsistencies in details such as a set of dates. If the immigration judge has not made an adverse credibility determination, the appellate court must take the testimony as credible. But that does not mean that the appellate court must take those dates as *true* where, for example, documentary evidence shows those dates to be inaccurate. Sometimes, too, those details may matter to the applicant's overall burden—so that the applicant's testimony, though credible, is insufficient to carry his or her burden (or at least is insufficient to show error in the immigration judge's determination that the applicant did not carry his or her burden). Regardless of how this Court decides this case, appellate courts will continue to weigh those non-credibility issues under the standards of review that the INA provides.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to affirm the Ninth Circuit's judgments.

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Respectfully submitted,

LEIGH J. JAHNIG  
JENNER & BLOCK LLP  
353 N. Clark Street  
Chicago, IL 60654  
(312) 222-9350

ZACHARY C. SCHAUF  
*Counsel of Record*  
JENNER & BLOCK LLP  
1099 New York Avenue NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
ZSchauf@jenner.com

*Counsel for Amici Curiae*