No. 19-1156

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

CESAR ALCARAZ-ENRIQUEZ

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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In the decision below, the Ninth Circuit reversed the decision of the Board of Immigration Appeals (Board) after explaining that it "ha[s] repeatedly held that '[w]here the [Board] does not make an explicit adverse credibility finding, [the court] must assume that [the petitioner's] factual contentions are true.'" Pet. App. 2a (citation omitted). The panel acknowledged that the government's petition for rehearing en banc in *Ming Dai* v. *Sessions*, 884 F.3d 858 (9th Cir. 2018), petition for cert. pending, No. 19-1155 (filed Mar. 20, 2020), "squarely presented" a question bearing on the merits of this case. Pet. App. 5a. Because the en banc court of appeals had denied the government's petition in *Ming Dai*, however, the panel denied rehearing in this case as well. *Ibid.*

The government has petitioned for certiorari in *Ming Dai*, arguing that the decision in that case warrants plenary review by this Court because it is wrong

and conflicts with the decisions of three other courts of appeals. See Pet. at 13-28, *Barr* v. *Ming Dai*, No. 19-1155 (Mar. 20, 2020) (*Ming Dai* Pet.); see also Cert. Reply Br. at 2, *Ming Dai*, *supra* (No. 19-1155) (filed contemporaneously with this reply) (*Ming Dai* Reply). The government has suggested that the petition in this case be held pending the disposition of *Ming Dai*.

Respondent's opposition to certiorari lacks merit. His contention that "[t]he Ninth Circuit [d]oes [n]ot [p]resume [t]hat [a]n [a]pplicant's [t]estimony [i]s '[t]rue,'" Br. in Opp. 18 (emphasis omitted), ignores (among other things) the court of appeals' express, contrary statement in this very case. And starting from his erroneous premises about *Ming Dai* and this case, his remaining arguments about the need for review of the question presented—that the Ninth Circuit's decisions are correct and consistent with the approach in every other circuit—are mistaken as well.

A. The Ninth Circuit's Presumption Of Credibility And Truthfulness Is Incorrect

1. The decision below stated expressly that the Ninth Circuit "ha[s] repeatedly held that '[w]here the [Board] does not make an explicit adverse credibility finding, [the court] must assume that [the petitioner's] factual contentions are *true*.'" Pet. App. 2a (quoting *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 679 (9th Cir. 2010)) (emphasis added). And on that basis, the panel held that the Board had impermissibly credited the probation report about respondent's domestic assault conviction over respondent's testimony. *Id.* at 3a.

All but ignoring the panel's own description of the rule it was applying and its disposition of this case, respondent points instead to language in *Aden* v. *Holder*, 589 F.3d 1040 (9th Cir. 2009), and *Singh* v. *Holder*, 753

F.3d 826 (9th Cir. 2014), to argue that the court properly "distin[guishes] between credibility, on one hand, and persuasiveness or truthfulness, on the other." Br. in Opp. 19. But as the government has explained in *Ming Dai*, the Ninth Circuit has applied a presumption of truthfulness repeatedly over the last decade—apparently disregarding or finding inapplicable the language in *Aden* and *Singh* to which respondent points. See *Ming Dai* Reply 4-5. And the Ninth Circuit's refusal to address the issue through en banc rehearing in *Ming Dai* makes clear that if review of the court of appeals' errant presumption is to be had, it will have to be by this Court.

2. Respondent contends (Br. in Opp. 11-18) that the Ninth Circuit's approach is compelled by the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and background administrative law principles. Those arguments make no attempt to sustain the presumption of truthfulness that the Ninth Circuit actually applied in this case. And even on their own terms—taken as a defense of a presumption limited to *credibility*—they fail.

a. Respondent acknowledges (Br. in Opp. 15-16) the INA's broad statement that "[t]here is no presumption of credibility," 8 U.S.C. 1229a(c)(4)(C), subject to a single express exception that respondent concedes is inapplicable here. See 8 U.S.C. 1158(b)(1)(B)(iii) (establishing same rule in asylum hearings). But respondent maintains (Br. in Opp. 16) that this language should be read to apply "only to immigration judges, not courts," because elsewhere in the same subsection Congress referred specifically to "immigration judges."

Congress's express reference to immigration judges (IJs) in connection with other nearby instructions

weighs against respondent's reading, not in favor of it. It shows that where Congress intended instructions in Section 1229a(c)(4) to apply only to an IJ, it said so explicitly. See 8 U.S.C. 1229a(c)(4)(B) ("In determining whether the applicant has met [the applicant's] burden, *the immigration judge* shall weigh the credible testimony along with other evidence of record.") (emphasis added); 8 U.S.C. 1229a(c)(4)(C) ("[T]he *immigration judge* may base a credibility determination on" various factors.) (emphasis added). 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. 8 U.S.C. 1229a(c)(4)(C). As Judge Collins, writing for himself and six other judges in *Ming Dai* v. *Barr*, 940 F.3d 1143 (9th Cir. 2019), explained: If (as the Ninth Circuit held in *Ming Dai*) the INA's "'rebuttable presumption' exception does not apply in this court, then the result [is] that the default general rule applies instead—*i.e.*, that '[t]here is no presumption of credibility' in [the court of appeals]." *Id.* at 1163 (dissenting from denial of rehearing en banc) (second set of brackets in original).

b. Respondent also contends (Br. in Opp. 12-16) that the "no presumption of credibility" instruction cannot bind courts because Congress elsewhere provided a standard for judicial review. See 8 U.S.C. 1252(b)(4)(B). That standard, he asserts (Br. in Opp. 12), "compels the Ninth Circuit's presumption of credibility." Again, respondent is mistaken.

As respondent notes (Br. in Opp. 13), the INA establishes a "rebuttable presumption of credibility" that applies in proceedings before the Board when the IJ has not made an express adverse credibility finding.

8 U.S.C. 1229a(c)(4)(C). It does not follow, however, that the Board makes an *affirmative* "credibility finding" whenever its decision does not expressly state that the statutory presumption has been overcome. Br. in Opp. 14. Rather, the rebuttable presumption simply means that when the Board is assessing an IJ's decision that does not expressly address credibility, the Board cannot start from the assumption that the alien's "demeanor" and "responsiveness," for example, rendered the alien's testimony categorically unbelievable. 8 U.S.C. 1229a(c)(4)(C). Instead, the Board may either credit the alien's testimony; find the presumption rebutted (such that it concludes the alien's testimony on the whole was not believable); or identify the particular aspects of the record that lead it to disbelieve particular aspects of the alien's testimony and conclude that his testimony is not sufficiently persuasive to carry his burden of proof—making it unnecessary to decide the alien's underlying credibility more generally. So long as the Board's determination in that respect is "reasonable," the court of appeals must treat it as "conclusive." 8 U.S.C. 1252(b)(4)(B).

To understand the proper application of that statutory framework, consider how it should have been applied here. Rather than credit respondent's testimony or make a categorical adverse credibility determination —that his testimony was not "capable of being believed," see *Ming Dai* Pet. 20 (emphasis omitted)—the Board held that the probation report describing eyewitness accounts of respondent's assault on his ex-girlfriend provided a sufficient basis for the IJ's determination not to believe respondent's testimony about the circumstances of the offense. See Pet. App. 8a. That determination was a reasonable one, and the court of appeals

was therefore required to accept it. 8 U.S.C. 1252(b)(4)(B).

The court of appeals, of course, did not do that. Instead, it held that because "the BIA d[id] not make an explicit adverse credibility finding, [the court] must assume that [respondent's] factual contentions are true," and that the Board therefore "erred when it credited the probation report over [respondent's] testimony." Pet. App. 2a (citation omitted). That approach is irreconcilable with the INA, and respondent makes no meaningful attempt to defend it.

Rather, respondent offers a slightly different argument. He contends (Br. in Opp. 14) that the fact the Board did not make an express adverse credibility finding means that "the [Board] necessarily found the applicant credible," and further claims that the court of appeals was required to defer to that "finding" under the INA's judicial review provision, 8 U.S.C. 1252(b)(4)(B), as well as "basic principles of administrative law."

Respondent's argument fares no better than the faulty presumption the court of appeals applied. It is not plausible to suppose, from reading the Board's decision here, that the Board made a "finding" that respondent's testimony was credible. Br. in Opp. 14. The Board simply explained why the IJ had been justified in deciding that the probation report was more believable and persuasive, see Pet. App. 8a, and having done so had no need to make a "gratuitous" finding about whether respondent's testimony was credible, in the sense that it would have been reasonable for the IJ to choose to believe that testimony instead. *Ming Dai*, 940 F.3d at 1156 (Callahan, J., dissenting from denial of rehearing en banc) (citation omitted). Nothing in the INA

or background principles of administrative law authorized the court of appeals to set aside that reasonable determination.

B. The Question Presented Warrants This Court's Review

Respondent contends that this Court's review is unwarranted because there is no "meaningful division among the circuits" and the question presented is, in his view, insignificant. Br. in Opp. 21 (capitalization and emphasis omitted); see *id.* at 21-30. Petitioner's arguments, however, rest on his mischaracterization of the Ninth Circuit's decision.

1. Petitioner claims (Br. in Opp. 21) that there is no division of authority among the circuits, because "[s]ix circuits have adopted a presumption of credibility indistinguishable from the rule employed by the Ninth Circuit," and the First Circuit "has adopted a functionally similar rule." The key premise in that argument, however, is that the Ninth Circuit has likewise adopted a bare "presumption of credibility." As discussed above and in the government's contemporaneously filed *Ming Dai* Reply, that premise is incorrect, including in this very case. See pp. 2-3, *supra*; *Ming Dai* Reply 2-5.

The Ninth Circuit's practice of "assum[ing] that [the alien's] factual contentions are true" when "the [Board] does not make an explicit adverse credibility finding," Pet. App. 2a (citation omitted), squarely conflicts with the decisions of three other courts of appeals. Respondent acknowledges (Br. in Opp. 23) that the Eighth Circuit rejected such a presumption in *Doe* v. *Holder*, 651 F.3d 824 (2011), and that the Tenth Circuit did so in *Gutierrez-Orozco* v. *Lynch*, 810 F.3d 1243 (2016). And while respondent notes (Br. in Opp. 23) that those decisions cited the Ninth Circuit's earlier decision in *Aden* approvingly, that does not eliminate the conflict they

present with the Ninth Circuit's decisions embracing—notwithstanding *Aden*—a presumption of truthfulness, including in this case and in *Ming Dai* through its rigid two-step framework. See pp. 2-3, *supra*.

Turning to the First Circuit, respondent concedes (Br. in Opp. 25) that that court has previously declined to adopt even a presumption of credibility, let alone truthfulness, when the Board and IJ are silent about whether an alien's testimony is believable. See *Kho* v. *Keisler*, 505 F.3d 50, 56 & n.5 (1st Cir. 2007); *Zeru* v. *Gonzales*, 503 F.3d 59, 73 (1st Cir. 2007). But he contends (Br. in Opp. 25) that the First Circuit reversed course in a more recent post-REAL ID Act decision, *Guta-Tolossa* v. *Holder*, 674 F.3d 57 (2012). That is incorrect. In *Guta-Tolossa*, the First Circuit recognized that a presumption of credibility applies *before the Board*, and addressed the scenario—not present in either this case or *Ming Dai*—where the Board has denied an application for lack of corroborating evidence without informing the alien of the need for corroboration. See *id.* at 61-65. Nothing in the First Circuit's discussion of those issues calls into question its earlier decisions stating that no presumption of credibility applies in the court of appeals—a presumption at odds with both the Ninth Circuit's approach and respondent's preferred interpretation.

2. Respondent separately contends that the question presented is "not sufficiently important to merit review." Br. in Opp. 26 (capitalization and emphasis omitted). Pointing to his own survey of Ninth Circuit asylum decisions, respondent contends (*id.* at 26-27) that in practice, the court of appeals often denies aliens relief on other grounds even when it finds that its judge-made presumption is applicable. As this case and *Ming*

Dai indicate, however, the Ninth Circuit does not hesitate under its approach to "substitut[e] [its] judgment for the Board's" in particular cases—a "matter[] that must be corrected" because of the "significant damage" it does to the INA. *Ming Dai*, 940 F.3d at 1149 (statement of Trott, J., respecting the denial of rehearing en banc).

Respondent also fails to appreciate the practical effect of the Ninth Circuit's approach. Correctly understood, the statute does not require either an IJ or the Board to make a global adverse credibility decision when they decide more specifically to disbelieve a particular, but important, aspect of an alien's testimony that renders that testimony insufficiently persuasive to carry his burden of proof. See pp. 4-7, *supra*. That allows IJs and the Board to process decisions more efficiently, because they need not make "gratuitous credibility determination[s]" where their decision can rest on a more specific ground. *Ming Dai*, 940 F.3d at 1156 (Callahan, J., dissenting from denial of rehearing en banc) (citation omitted). Under the Ninth Circuit's decision in *Ming Dai* and the practice reflected in this case, however, failing to make an adverse credibility finding would lead the court of appeals to presume that the alien's testimony was not just believable but true—and to therefore reject the IJ or Board's factual determination that was based on the relative unpersuasiveness of that testimony (as in this case).

C. This Case Does Not Present A Preferable Vehicle In Which To Address The Question Presented

1. Finally, respondent contends that if the Court decides to grant certiorari to address the question presented, it should do so in his case, not *Ming Dai*. But

respondent's attempts to manufacture vehicle problems in *Ming Dai* are without merit.

First, respondent argues (Br. in Opp. 31) that *Ming Dai* presents "a factbound threshhold dispute" about whether the IJ made an express adverse credibility finding. That is incorrect. The government does not rely on an argument that the IJ in *Ming Dai* made an express adverse credibility finding. Rather, the government argues that the IJ was free to conclude that specific aspects of the alien's testimony were not true, without needing to make a finding of underlying credibility one way or the other. The fact that the IJ there clearly disbelieved particular aspects of the alien's testimony without making an express, overarching adverse credibility finding renders that case an especially suitable vehicle, because it squarely presents the key legal issue in dispute.

Second, respondent notes (Br. in Opp. 32) that in *Ming Dai*, the Board's decision suggests it found the evidence sufficient to rebut the statutory presumption that arose from the lack of an express adverse credibility finding by the IJ, though the Board did not say precisely that. In the government's view, the Board need not address one way or the other the presumption of credibility resulting from the absence of an express credibility finding by the IJ in order to accept an IJ's determinations about the truthfulness of particular aspects of an alien's testimony. If the Court were to reject that view, however, it would be important for the Court to make clear whether the Board must address the presumption explicitly, or whether it is sufficient that the Board set out reasonable justifications for not crediting particular testimony. *Ming Dai* would allow the Court

to resolve that issue if it chose. See *Ming Dai* Pet. 22-23.

Third, respondent notes (Br. in Opp. 33) that *Ming Dai* presents a second question, which he contends could "potentially obviate the relevance of the presumption of credibility to the outcome in that case." That contention is inaccurate. If the Court holds in *Ming Dai* that the Ninth Circuit's presumption is inconsistent with the INA, the appropriate course would be to reverse the Ninth Circuit's decision there and remand with instructions to deny the petition for review. Only if the Court were to agree with the Ninth Circuit's approach to credibility, truthfulness, and persuasiveness would it become necessary for the Court to address the second question presented there, in order to determine whether to direct the court of appeals to remand to the agency for further consideration of the alien's eligibility for asylum and entitlement to withholding of removal.

2. This petition, meanwhile, would not be an ideal vehicle for plenary review. Petitioner contends (Br. in Opp. 34) that the Ninth Circuit's presumption played only a "modest role" in its decision here, given the panel's separate determination that respondent should have had an opportunity to cross-examine witnesses who provided evidence about his earlier crime. See Pet. App. 2a-3a. The panel's decision to hold the petition for rehearing in this case pending consideration of the petition for en banc rehearing in *Ming Dai*, and the panel's subsequent statements in denying the petition, indicate that the court found the validity of a presumption of truthfulness to be relevant to the disposition of this case. See *id.* at 5a. But that issue can be sorted out by the court of appeals later if the petition is held pending the Court's disposition of *Ming Dai* and this case is

then remanded, if appropriate, in light of that disposition.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending this Court's consideration of the petition in *Barr* v. *Ming Dai*, *supra*, and then disposed of as appropriate in light of the Court's disposition in that case.

Respectfully submitted.

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