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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. )

- - - - -

Washington, D.C.

Tuesday, February 23, 2021

The above-entitled matter came on for  
oral argument before the Supreme Court of the  
United States at 10:00 a.m.

1 APPEARANCES:

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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 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. The Ninth Circuit  
7 rejected the agency's reasoning because it  
8 concluded that the absence of an adverse  
9 credibility determination entitled a reviewing  
10 court to disregard some record evidence and to  
11 treat the alien's allegations of persecution as  
12 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 Dai's testimony sufficiently persuasive.

16 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 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 facts 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.

8 And if the judge doesn't say, Congress  
9 tells us what to do. Presume that he's telling  
10 the truth, but the presumption is rebuttable, so  
11 if nobody says anything, you look at it and you  
12 simply say, assuming it was rebutted, we assume  
13 that the judge found it was rebutted, and is  
14 there substantial evidence? Period. With the  
15 assumption that it was rebutted.

16 And that could include, there isn't  
17 enough evidence to show it was rebutted. That  
18 will just be part of the matter. What we tell  
19 the court of appeals is review for substantial  
20 evidence, follow the statute as I said, end  
21 of -- end of case.

22 MS. SINZDAK: Absolutely. But the  
23 statute does not say to presume that the alien  
24 is telling the truth. It doesn't even tell the  
25 Board to presume that the alien is telling the



1 truth.

2 JUSTICE BREYER: Doesn't it say,  
3 though -- doesn't it say presumption of  
4 credibility?

5 MS. SINZDAK: Absolutely it says  
6 credibility, but it's now common ground among  
7 all of the parties that credible is not the same  
8 as truth.

9 JUSTICE BREYER: Well, it may be  
10 common ground on all of the parties, but it  
11 isn't common ground with me because I would be  
12 quite worried about introducing into  
13 administrative law, with thousands of agency  
14 decisions, some kind of distinction between  
15 credible and truthful. I haven't seen that in  
16 administrative law cases, but even were it  
17 there, I would be afraid of getting everybody  
18 mixed up.

19 MS. SINZDAK: I think that Congress  
20 introduced a distinction in the text of the REAL  
21 ID Act because the REAL ID Act says the  
22 testimony must be not merely credible but also  
23 persuasive. The REAL ID Act also says that a  
24 judge is entitled to weigh credible evidence  
25 alongside other evidence. And it says that a

1 judge may ask for --

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

3 MS. SINZDAK: -- corroboration of  
4 otherwise credible evidence. That doesn't make  
5 sense if "credible" means true --

6 JUSTICE BREYER: Why?

7 MS. SINZDAK: -- because -- well,  
8 because, if the testimony is true, if the  
9 testimony -- if credible testimony has to be  
10 accepted as true, it's not clear why you would  
11 ever need corroboration. If credible evidence  
12 has to be accepted as true, then --

13 JUSTICE BREYER: Well, it depends on  
14 what it is. What he says is, my wife told me  
15 that she wanted to see her dying mother in  
16 China, and now it's credible or not?

17 MS. SINZDAK: I -- I -- I'm -- I'm --  
18 I'm not --

19 JUSTICE BREYER: The judge says it's  
20 credible. Now what?

21 MS. SINZDAK: If the judge says that  
22 it's credible, he then has to determine whether  
23 that's persuasive. So is there other -- other  
24 evidence that suggests --

25 JUSTICE BREYER: Holding it

1 persuasive, that's true, that's true.

2 MS. SINZDAK: So, if there's other  
3 evidence that suggests --

4 JUSTICE BREYER: But I don't get the  
5 between distinguish -- my point I don't get  
6 right now is the distinction between credible  
7 and true.

8 MS. SINZDAK: Well, I --

9 JUSTICE BREYER: See, my wife told me  
10 her mother was dying in China and that's why she  
11 went back, she said. Okay? That's the  
12 testimony. And you say it's credible.

13 Now how could it not be true if it's  
14 credible?

15 MS. SINZDAK: Well, I think the -- the  
16 easiest way to understand this for me is to  
17 think about a scenario where a credible witness  
18 says that the light was red and three credible  
19 witnesses say that the light was green. You may  
20 decide that, in fact, the light was green. That  
21 doesn't mean the first witness didn't credibly  
22 testify that the light was red.

23 JUSTICE BREYER: That's true because  
24 what I have --

25 MS. SINZDAK: It does mean that it

1 wasn't true.

2 JUSTICE BREYER: -- that testimony  
3 means I think the light was red. I saw it as  
4 red. And some other people could see it as  
5 blue. It depends on the issue in the case.  
6 Let's start working this through the court of --  
7 there are millions of issues that can come up  
8 with substantial evidence.

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

10 JUSTICE BREYER: Do you see what's  
11 worrying me? I'm worrying about this Court  
12 writing some kind of opinion and saying credible  
13 is different than true, and before you know it,  
14 who knows what will happen.

15 MS. SINZDAK: I -- I --

16 JUSTICE BREYER: So I think we stay to  
17 substantial evidence, period, and we get as  
18 close to that as we can reading into it the  
19 part -- well, it may be too long to explain in a  
20 question, but I've made -- I've made my point.

21 MS. SINZDAK: Yes, I think that the  
22 Court could say that with -- by the -- according  
23 to the plain text of the INA, Congress did not  
24 consider "credible" to be synonymous with  
25 "true." And I think that --

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Alito.

4 JUSTICE ALITO: Well, I think you have  
5 an argument. The Ninth Circuit said in both  
6 cases, as I read their opinions, that the -- the  
7 BIA must explicitly say that the alien's  
8 testimony is not credible or else there is a  
9 presumption of credibility. I think that's  
10 incorrect as to the BIA as a matter of law.

11 But, beyond that, I will be truthful.  
12 I -- I found the way that you have briefed this  
13 case to be extraordinarily baffling. "Credible"  
14 means capable of being believed, worthy of  
15 belief. It doesn't mean that the testimony is  
16 accurate. A person -- it may turn out that it's  
17 inaccurate. But this distinction that you were  
18 drawing between credibility and persuasiveness  
19 is -- I -- I -- I think it's extraordinarily  
20 confusing and invalid.

21 If at the end of the day you conclude  
22 that your son really did eat the cookies, he was  
23 not credible, what he said was not worthy of  
24 belief. To -- to say, well, he was worthy of  
25 belief, but in the end, I don't believe him,

1 that escapes me. But maybe you can explain it  
2 to me.

3 MS. SINZDAK: I think that a problem  
4 here is that we often, in common parlance, use  
5 the term "credible" to -- to mean that -- that  
6 we believe it. I think it -- it is often to --  
7 it is common to just say, you know, yes, I found  
8 him credible, I believed what he said.

9 It's just that we know from the very  
10 particular text of the INA -- of the INA that  
11 that isn't what Congress had in mind, that in  
12 the INA what Congress meant was credibility is a  
13 baseline. It is just capable of being believed,  
14 not that the judge actually thinks that it's  
15 true, not that the judge actually believes it,  
16 but just that the judge can believe -- can --  
17 can recognize that someone could -- that it's  
18 capable of being true. That's the baseline.

19 And -- and the -- the -- the INA  
20 itself makes it clear that credibility and  
21 persuasiveness are different because it uses  
22 both terms. So, first, it says the -- the  
23 testimony definitely has to be credible, and  
24 then it has to be more than just credible. It  
25 also has to be persuasive. It has to have the

1 power to persuade.

2 So I think that if you look at the  
3 text of the INA, it draws the very distinction  
4 that we are relying on.

5 JUSTICE ALITO: Now, if I don't agree  
6 with you about that distinction, does that mean  
7 you lose these cases?

8 MS. SINZDAK: No, it does not,  
9 because, again, we think that what these cases  
10 ultimately come down to is that you -- that you  
11 have to analyze whether there is substantial  
12 evidence underlying the reasoning that the Board  
13 put forward.

14 And, here, we think that -- just  
15 setting aside the entire debate about what  
16 credibility means and -- and -- and -- and --  
17 and whether something should be deemed --  
18 whether evidence should be deemed responsive to  
19 credibility or persuasiveness, what is very  
20 clear here is that the agency pointed to  
21 multiple pieces of evidence in both cases that  
22 demonstrated that the alien could not meet his  
23 burden of proof. And that's --

24 JUSTICE ALITO: What should we make of  
25 --

1 MS. SINZDAK: -- all that we --

2 JUSTICE ALITO: -- before my time  
3 expires, one last question, what should we make  
4 of the hospital records? Are they something  
5 that we should not consider at all?

6 MS. SINZDAK: You should not consider  
7 it. The alien did not raise the -- the hospital  
8 records in his briefing before the Board, and  
9 under 1252, administrative exhaustion is  
10 required. It's a prerequisite for judicial  
11 review.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor.

15 JUSTICE SOTOMAYOR: Could you clarify  
16 that last point? The medical records were  
17 before the IJ, correct?

18 MS. SINZDAK: They were before the IJ,  
19 and before the IJ, the government elicited  
20 testimony from Dai to the extent that he had not  
21 done anything to authenticate the letter -- the  
22 -- the medical records and that when the  
23 government asked how -- what would prevent  
24 someone from just writing in information into  
25 the record themselves, he said that he didn't



1 know, but he hadn't done that.

2 So I think the government was clearly  
3 suggesting that -- that there were some  
4 authenticity problems with -- with the evidence.  
5 And then, when the IJ rejected the asylum  
6 request --

7 JUSTICE SOTOMAYOR: Counsel, can I --  
8 I'm going to stop you there because I don't want  
9 you eating up my time, okay? I -- I am very  
10 confused, and if I'm confused, I -- I think the  
11 rest of the world is confused and so are my  
12 colleagues to some extent.

13 Evidence can be credible but not  
14 adequate to meet a burden. People can say  
15 certain things and you can still say, yes, I  
16 believe he encountered the police. Yes, I  
17 believe they did something to him. But, no, I  
18 don't think it rises to the level of  
19 persecution.

20 That's a form of a lack of  
21 persuasiveness. There are situations in which  
22 people can be credible about one aspect of  
23 something but not another. This is a perfect  
24 case.

25 Dai may have been credible about the

1 persecution of his wife and the fact that they  
2 were forced to abort a child but incredible as  
3 to why he left China and whether it was based on  
4 the fear of persecution or not. That his wife  
5 went back, all the things you mentioned could be  
6 viewed that way. There are any dozen reasons.

7 Are we responsible for figuring out  
8 what the BIA meant? If it doesn't make an  
9 adverse credibility finding, which wasn't made  
10 here, and it's not clear what the basis of their  
11 decision was, aren't simple administrative law  
12 principles at play, and shouldn't we just remand  
13 to say what is it that you found incredible?

14 MS. SINZDAK: No. First of all,  
15 the -- the -- the INA -- the text of the INA  
16 says -- and I'm not going to talk about  
17 persuasiveness because I -- I think that, you  
18 know, that's a little bit of a red herring. It  
19 says that the judge -- the IJ has to weigh  
20 credible evidence along with other evidence of  
21 record.

22 So, here, I -- I think that it is a  
23 very familiar situation in which, even assuming  
24 the IJ found the testimony of Dai credible and  
25 found the testimony of Alcaraz credible, he then

1 had to weigh that against the other evidence in  
2 the record. And if other evidence in the record  
3 suggested that, in fact, Dai had not been  
4 persecuted, then it was -- then Dai had not met  
5 his burden.

6 And, here, the IJ pointed to three  
7 pieces of evidence that suggested that Dai just  
8 hadn't met his burden, even assuming that the  
9 testimony was credible.

10 And in Alcaraz, the IJ --

11 JUSTICE SOTOMAYOR: Counsel, before  
12 you go on with Alcaraz, there, the BIA did  
13 remand, and the issue was whether or not the --  
14 and the -- and the Ninth Circuit found that they  
15 couldn't rely on the probation report,  
16 presumably, because the BIA will have to decide  
17 whether or not that witness was available for  
18 cross-examination or not.

19 But I'm not sure why we granted cert  
20 in Alcaraz because the Ninth Circuit did what  
21 you're asking, it remanded there.

22 MS. SINZDAK: No, we aren't asking for  
23 a remand. What we're saying is that the Court  
24 should apply the substantial evidence standard,  
25 and because there was substantial evidence in

1 Alcaraz, even if you ignore the credible -- the  
2 probation report, the IJ pointed to the fact  
3 that it was a domestic violence offense.

4 She pointed to the fact that the  
5 elements involved the willful infliction of  
6 corporal injury resulting in trauma and the fact  
7 that he had been sentenced to two years, which  
8 indicated that the sentencer thought that he had  
9 committed a very -- a particularly serious  
10 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. Sinzduk, 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 Sinzduk.

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 Sinzduk, did the Board believe that Mr. Dai was  
11 lying?

12 MS. SINZDUK: 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. SINZDUK: 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 and,  
8 if he did get beat up for that reason, then he  
9 has a well-founded fear of persecution under the  
10 regulations.

11 And are you saying that the Board said  
12 that he was mistaken as to whether he got beat  
13 up?

14 MS. SINZDAK: I am saying that the  
15 Board did not think he had submitted sufficient  
16 evidence to meet his burden of proof.

17 JUSTICE KAGAN: I know, but how did  
18 the Board reach that determination unless the  
19 Board decided that he was lying?

20 MS. SINZDAK: It looked at other  
21 testimony of his, and, remember, there's no  
22 adverse credibility determination, so it's  
23 looking at all of his testimony. And it said  
24 that he had also credibly testified that the  
25 real story behind his travel to the United

1 States was that he wanted a better life for his  
2 daughter, and --

3 JUSTICE KAGAN: Well, then that  
4 suggests that his other testimony was a lie, was  
5 false, and that is inconsistent with a  
6 presumption of credibility.

7 There's no extraneous evidence in this  
8 case at all. It all relies on whether Dai is  
9 telling the truth or not. And there's a  
10 presumption that kicks in, and you're saying,  
11 well, we -- you're -- you're not grounding your  
12 argument on whether that presumption was  
13 overturned by the Board. Instead, you're saying  
14 that the Board presumed he was credible and then  
15 did something else. But there's nothing else to  
16 be done in the Dai case.

17 MS. SINZDAK: If the --

18 JUSTICE KAGAN: He told a story. It's  
19 an honest, true story, or it's not.

20 MS. SINZDAK: If the Court thinks that  
21 all of the evidence that the agency pointed to  
22 is only relevant to credibility, then I think it  
23 would -- and -- and has to meet -- would --  
24 would necessarily dictate that the Board didn't  
25 and the agency and the IJ didn't think he was



1 telling the truth, then I think the only mistake  
2 that was made here was that they didn't use the  
3 word "credibility."

4 JUSTICE KAGAN: Thank you --

5 MS. SINZDAK: And --

6 JUSTICE KAGAN: -- Ms. Sinzduk.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch.

9 JUSTICE GORSUCH: Good morning, Ms.  
10 Sinzduk. I'd like to explore a slightly  
11 different point and -- and that is where does  
12 this presumption apply. In the government's  
13 opening brief, it took the position that it  
14 applies only in appeals to the BIA and not in  
15 court.

16 The reply brief didn't appear to me to  
17 press that point with the vigor of the opening  
18 brief, and I'm just curious what -- what -- what  
19 the government's position is now.

20 MS. SINZDAK: The government's  
21 position remains that the presumption applies  
22 before the Board and not before the court.

23 As we explained in our reply brief, we  
24 don't think that we need to get bogged down in  
25 that because, here, we just don't think that

1 credibility is the issue. But we continue to --  
2 to believe that the -- the -- the clear language  
3 of the statute makes the presumption applicable  
4 before the Board.

5 JUSTICE GORSUCH: Okay. Let's suppose  
6 you're right about that just for the moment.  
7 What -- what difference does that make if a  
8 court of -- of -- you know, a court of appeals  
9 has to review for substantial evidence and  
10 reasonableness. Doesn't it have to also inquire  
11 as to whether the Board reasonably treated the  
12 presumption?

13 MS. SINZDAK: Yes, and if -- if  
14 credibility became an issue, which, again, we  
15 think that the court should have reviewed the  
16 noncredibility-related grounds that the -- that  
17 the -- the Board relied on, but, if credibility  
18 became an issue, yes, it would have to say, we  
19 think the Board implicitly found that the --  
20 that Dai was not credible, and we think there  
21 was sufficient evidence that the presumption of  
22 credibility was overcome.

23 And, here, I -- I think, frankly,  
24 there is because --

25 JUSTICE GORSUCH: I -- I -- I -- let

1 me just stop you there. I'm sorry, but you say  
2 implicitly, and I -- I guess I'm wondering how a  
3 court could decide that the Board acted  
4 reasonably based on an implicit credibility  
5 determination when the statute seems to require  
6 the Board to make an explicit one.

7 MS. SINZDAK: I don't think the  
8 statute requires the Board to make an explicit  
9 credibility determination. The only thing the  
10 statute says in that regard is that, if the  
11 fact-finder or if -- if it had not made an  
12 explicit adverse credibility determination, the  
13 Board should apply the presumption. It doesn't  
14 then say --

15 JUSTICE GORSUCH: Right.

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

17 JUSTICE GORSUCH: Okay. So -- so we  
18 don't have an explicit finding from the IJ. Why  
19 wouldn't it be unreasonable, therefore, for the  
20 Board to -- let's just assume for the moment it  
21 did -- implicitly reject the credibility of  
22 the -- of -- of the witness?

23 MS. SINZDAK: I think you have to look  
24 at this against the backdrop of what the  
25 circuits have considered an explicit adverse

1 credibility finding in -- insofar as -- as the  
2 Ninth Circuit in the majority opinion explained,  
3 you know, they haven't even credited things  
4 where the Board -- the -- the Board has said  
5 that, you know, he didn't seem quite credible.

6 JUSTICE GORSUCH: Okay. But let --  
7 let -- let -- just -- just let's -- let's --  
8 let's assume it's implicit, as -- as your  
9 answer -- first answer seemed to suggest.

10 Could -- could the Board reasonably  
11 affirm an IJ based on implicit credibility  
12 determinations, or would that be something a  
13 court of appeals would have to reverse in light  
14 of the statute?

15 MS. SINZDAK: If it found the  
16 presumption overcome, it could certainly affirm  
17 an IJ based on an implicit credibility  
18 determination because, again, the statute  
19 doesn't apply an irrebuttable presumption. It  
20 applies a rebuttable presumption.

21 So, if the Board looked at the IJ and  
22 said, you cited three major pieces of evidence  
23 that show that Dai was not credible, you seem to  
24 have forgotten to say -- to make an adverse  
25 credibility determination, that would, of

1 course, be acceptable.

2 JUSTICE GORSUCH: How about -- I -- I  
3 certainly understand the reluctance of  
4 immigration judges and trial judges everywhere  
5 to make adverse credibility determinations  
6 expressly. It's -- it's an uncomfortable task.

7 But what -- what -- on the other hand,  
8 what's so difficult about requiring the  
9 government to do just that? I mean, if you  
10 point to, as Judge Collins did, you know, eight  
11 different problems with Dai's testimony, for  
12 example, the probation report in the other case,  
13 it surely wouldn't require much more than a few  
14 words to -- to -- to make express what -- what's  
15 implicit.

16 MS. SINZDAK: Well, I think it would  
17 be going beyond what Congress stated because  
18 Congress in 1252 said that the courts have to  
19 uphold agency determinations unless the -- any  
20 reasonable fact-finder would be compelled to  
21 reach the opposite conclusion.

22 So I think it would be flouting  
23 Congress's plain text to -- to require something  
24 that Congress did not.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you, Chief  
4 Justice.

5 Good morning, Ms. Sinzdak. On the  
6 statutory language, if I could start there and  
7 pick up on Justice Gorsuch's questioning, it  
8 says if no adverse credibility determination is  
9 explicitly made -- and you said that's by the  
10 IJ -- the applicant or witness shall have a  
11 rebuttable presumption of credibility on appeal.

12 And I just want to know what work the  
13 presumption does and -- on -- on appeal. In  
14 other words, I would think the presumption does  
15 work when there's no other evidence at all,  
16 other than the testimony of the applicant, and  
17 there hasn't been an adverse credibility  
18 determination. Then there's -- then you have  
19 that presumption of credibility on appeal, and,  
20 presumably, that will sustain the burden. But  
21 you can tell me if that's wrong.

22 If there's any other evidence,  
23 however, then the presumption, I guess, drops  
24 out or the case becomes like any other case. Is  
25 that right? Is that your argument, or how do

1 you think about that?

2 MS. SINZDAK: I mean, I'm -- I'm --  
3 I'm certainly willing to go with that, but I  
4 think -- I think that also --

5 JUSTICE KAVANAUGH: But why is that  
6 wrong? You don't think that's right. What's --  
7 what's wrong with what I said there?

8 MS. SINZDAK: Well, I -- I think that  
9 if the IJ has not made an explicit adverse  
10 credibility determination, then the -- the court  
11 needs to -- sorry, then the Board needs to  
12 determine whether the presumption has been  
13 overcome. And I think that could occur in cases  
14 where there is other evidence.

15 And the way I think about it is if,  
16 for example, the IJ said, I'm not going to  
17 address credibility, I'm going to -- but I think  
18 that, you know, the -- the -- the testimony is  
19 not persuasive or I think other evidence  
20 demonstrates that this isn't correct, could say  
21 any number of those things, and the -- the Board  
22 could evaluate it and say, well, we don't accept  
23 the grounds that the IJ relied on, but we  
24 think -- you know, but we -- we think he's  
25 probably not particularly credible. And I

1 think, there, the presumption would kick in and  
2 say no, you can't make that finding. You  
3 actually need to either determine whether the  
4 presumption has been overcome or remand to the  
5 IJ to make a credibility determination.

6 JUSTICE KAVANAUGH: What -- what's the  
7 point of this provision, do you think?

8 MS. SINZDAK: I think exactly what I  
9 just said. I think it prevents the Board from  
10 just assuming that the alien was not credible.  
11 I think that if you look at the concurrence in  
12 S-M-J-, which is the Board decision referred to  
13 in the -- the legislative history of the REAL ID  
14 Act, one of -- there was a concurrence there  
15 that was very concerned that adjudicators might  
16 just assume aliens are lying because -- because  
17 they're seeking asylum, because it's to their  
18 benefit. And I think the presumption infers  
19 that the Board doesn't make that -- that -- that  
20 -- that -- that negative inference, that it  
21 actually has to point to some evidence to rebut  
22 the presumption of credibility.

23 JUSTICE KAVANAUGH: Then, on the  
24 terminology, there's a lot of confusion  
25 obviously inherent in these terms, but I -- I



1 would think the way you would approach it when  
2 -- with a witness's testimony is you would ask,  
3 is the witness lying, first, about whether the  
4 light was red or green, for example. The  
5 witness knows it was red but testifies it was  
6 green. So the witness is lying. That's the  
7 first inquiry, is the witness lying?

8 Then the second inquiry would be, even  
9 if the witness is not lying, is the witness  
10 mistaken or wrong? You know, they truly believe  
11 the light was red, but, in fact, the light was  
12 green, the other evidence shows.

13 Now that's how I usually think about  
14 it, and I'm curious how you think that fits into  
15 the term "credibility." In other words, is the  
16 witness lying? Even if not, is the witness  
17 mistaken?

18 MS. SINZDAK: Yes, I think that that's  
19 a good way. I would just give you the terms of  
20 the statute. So I think the first question is,  
21 is the witness credible? Is he even capable of  
22 being believed, or is it just obvious that he's  
23 lying?

24 And the next question is, well, is the  
25 witness persuasive? Is there a possibility

1 that, for whatever reason, he's mistaken? Even  
2 if he's capable of being believed, the testimony  
3 just hasn't -- doesn't have the power to  
4 persuade me that the light actually was, you  
5 know, green.

6 JUSTICE KAVANAUGH: And won't a finder  
7 of fact often say, I'm not quite sure if they're  
8 lying, but I still don't think they're correct?  
9 They're -- they're mistaken about the -- the  
10 light being red or green. I'm not quite sure  
11 they're lying, but they are mistaken given the  
12 other evidence in the record.

13 MS. SINZDAK: Absolutely, and, again,  
14 you know, you just have to think about the  
15 scenario where you have two credible witnesses  
16 that are testifying to conflicting facts. You  
17 can say both those witnesses are credible, but I  
18 think only one of what they're saying -- only  
19 one of the witnesses is -- is telling the truth.  
20 And I think that's --

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett.

23 MS. SINZDAK: -- a familiar exercise.

24 JUSTICE BARRETT: Good morning, Ms.  
25 Sinzduk. I -- I have to say join me up with

1 Justices Alito and Kagan. I'm baffled by the  
2 distinction that you're drawing between  
3 credibility and persuasiveness. And it's not  
4 actually consistent with the way that I've seen  
5 cases come up for review in the court of appeals  
6 from IJs who make adverse credibility  
7 determinations.

8           The ones I've seen, you know, they've  
9 essentially been equivalent to saying that the  
10 witness is lying. This -- this fine distinction  
11 between "believable" and "believed" just seems,  
12 you know, nitpicking to me. As Justice  
13 Kavanaugh was saying, it seems to me more like  
14 credibility refers to are they lying, and then  
15 persuasiveness, as Justice Kavanaugh was  
16 suggesting, points to other reasons why you  
17 might not believe them.

18           So I could -- you know, thinking about  
19 your example with the child and the crumbs, I  
20 was thinking, as you talked, about an example  
21 about my child. I come home and find the child  
22 hysterically crying, and she says someone was  
23 beating at the door, I think somebody was trying  
24 to break into her house -- our house. And I can  
25 believe her. I don't think she's lying. But

1 then my neighbor says, yeah, you know, I -- I  
2 saw it was the UPS man.

3           So I would not find her story  
4 persuasive, not because of credibility but  
5 because there was other evidence that showed she  
6 was not, in fact, in danger. It was the UPS  
7 delivery man. So I don't think that -- you --  
8 you seem to be leaning heavily on the fact that  
9 the statute uses both the words "credibility"  
10 and "persuasiveness," and I just don't see it.

11           So I want to ask you what's wrong with  
12 seeing it this way: That the IJ makes a  
13 determination about credibility, and that has to  
14 be express. And when it gets up to the Board,  
15 there are two ways in which the Board might have  
16 to confront this presumption. Either the IJ  
17 actually found the alien incredible and the  
18 Board disagrees, in which case it has to  
19 confront the presumption and explain why it  
20 thinks the evidence rebuts that presumption of  
21 credibility, or the IJ might not have done a  
22 good enough job in making an adverse credibility  
23 determination explicit, as the statute requires,  
24 and then, still, the Board has to presume  
25 credibility and then explain why it thinks the

1 presumption is rebutted.

2           If the Board offers such an  
3 explanation, once it gets up to the court of  
4 appeals, the court of appeals isn't applying any  
5 kind of presumption. The court of appeals is  
6 just reviewing it for substantial evidence and  
7 seeing if the Board's explanation -- and the  
8 Board has to show that it understood what  
9 presumption should be there -- whether the  
10 Board's explanation was rational and substantial  
11 evidence supported its determination that the  
12 alien was not telling the truth.

13           Is that an okay way to think about it,  
14 and how is that different from your way?

15           MS. SINZDAK: I -- I -- I don't think  
16 it's -- it's obviously a little bit different  
17 from the way that we think about it because we  
18 think it is coherent and, in fact, what the  
19 statute dictates, that an alien's testimony can  
20 be credible but not ultimately persuasive. But  
21 I also don't want to resist it too much because  
22 I think we may just come out the same way.

23           The key thing here is that under 1252,  
24 the -- a court -- a reviewing court should not  
25 overturn an agency's findings that are supported

1 by substantial evidence. And what 1252 does not  
2 say is: And they have to have appropriately  
3 labeled that evidence as going to credibility or  
4 persuasiveness or sufficiency or something else.  
5 It just says you have to look and, as long as  
6 any reasonable fact-finder could say that there  
7 is evidence in the record that supports the  
8 agency's determination, it has to be affirmed.

9 So, if you think that what happened  
10 here is the agency -- the IJ and the Board  
11 should have said the word "credible" and didn't,  
12 then I still think that leads to upholding the  
13 agency's determination. I mean, this Court has  
14 said that judicial review is not a ping-pong  
15 game. We don't just bat back and forth --

16 JUSTICE BARRETT: Counsel, let me --

17 MS. SINZDAK: -- so that the agency  
18 can use it for --

19 JUSTICE BARRETT: -- let me just  
20 interrupt a bit, sneak in one more question. Is  
21 it your position that IJs actually, on the  
22 ground, proceed in the way that you're  
23 suggesting, drawing this distinction between  
24 someone could believe you, but I don't, and just  
25 using credibility in the way that Justices Alito

1 and Kagan and I have been using it, just as it  
2 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 -- that -- that the alien  
22 was not eligible for asylum or withholding of  
23 removal. And the only question here is whether  
24 the evidence should have been labeled as to --  
25 as persuasive or credible or some other way.

1                   I think the statute makes very clear  
2                   that it is within the IJ's right to say that  
3                   testimony is credible but not persuasive. The  
4                   IJ, after all, has to be satisfied that the  
5                   testimony is persuasive.

6                   But even if you doubt that, under  
7                   1252, the agency's determination has to be  
8                   upheld so long as any reasonable fact-finder  
9                   would not be compelled to reach the contrary  
10                  conclusion.

11                  Thank you.

12                  CHIEF JUSTICE ROBERTS: Thank you,  
13                  counsel.

14                  Mr. Katyal.

15                  ORAL ARGUMENT OF NEAL K. KATYAL  
16                  ON BEHALF OF THE RESPONDENT IN 19-1156

17                  MR. KATYAL: Thank you, Mr. Chief  
18                  Justice, and may it please the Court:

19                  The government petition for certiorari  
20                  claimed courts should not enforce the  
21                  presumption of credibility when reviewing Board  
22                  decisions, but now, as they said to Justice  
23                  Gorsuch, they accept that this presumption does  
24                  apply in federal court.

25                  So all we are left with is a purely



1 fact-bound issue of whether, in this specific  
2 case, once the presumption is applied, the Board  
3 had substantial evidence that a particularly  
4 serious crime was committed.

5 I'm not sure that this question alone  
6 would be cert-worthy, but, in any event, the  
7 answer to that is easy because the Board  
8 provided no reasoned explanation for rejecting  
9 Alcaraz's testimony, which the government admits  
10 had to be presumed credible.

11 The government made a remarkable  
12 concession that for the legal standard that  
13 Encino Motorcars requires that "the pathway must  
14 be clearly discerned," to use Ms. Sinzdak's  
15 words.

16 Here, that's impossible to discern.  
17 As the court of appeals found, the Board's  
18 decision was based on "a probation report which  
19 directly contradicts Alcaraz's testimony." If  
20 that court were to ask why did the Board believe  
21 one account and not the other, it would have to  
22 guess, was it based on a reason at odds with the  
23 record, arbitrary, or something else?

24 Did the immigration judge overlook the  
25 only eyewitness account from the mom which is

1 curiously never mentioned by the -- by the IJ or  
2 by the Board? Did he misunderstand Alcaraz's no  
3 contest plea? Did he think Alcaraz agreed with  
4 the probation office report even though that  
5 report was written months after the plea?

6 If this Court is to endorse the  
7 application of the government's rule today, it  
8 set a new basement level standard for the  
9 quantum of reasoning an agency must offer to  
10 support its factual findings, one that would  
11 radiate far beyond immigration throughout the  
12 administrative state.

13 This Court should decline that  
14 invitation and affirm.

15 CHIEF JUSTICE ROBERTS: Mr. Katyal,  
16 just to be -- be clear sort of starting out  
17 here, the question presented is whether a court  
18 of appeals may conclusively presume that an  
19 asylum -- asylum applicant's testimony is  
20 credible and true if there's no explicit  
21 adversary -- adverse credibility determination.

22 And -- and your answer to that is no,  
23 the court of appeals cannot conclusively presume  
24 that the applicant's testimony is credible and  
25 true. Is that right?

1           MR. KATYAL: Yes, to a point, Your  
2 Honor. As our brief in opposition said, it is  
3 to presume the testimony is credible, but there  
4 is sometimes a distinction with truth, and, you  
5 know, I think Justices Alito and Kagan are  
6 getting at the fact that there's a massive  
7 overlap here, and we don't push that point too  
8 much.

9           But to the -- there is at least some  
10 distinction and so those words, true, are the  
11 part in which we would disagree with -- that  
12 we -- that we find a problem.

13           CHIEF JUSTICE ROBERTS: And I also  
14 understand your position to be that there are no  
15 magic words here. The -- the BIA does not  
16 specifically have to find that we think --  
17 doesn't have to have an explicit adverse  
18 credibility determination. Is that right?

19           MR. KATYAL: There are no magic words  
20 to create that express adverse credibility  
21 determination. There is to be one in order to  
22 have a rebuttable presumption. And once there  
23 is that rebuttable presumption, Mr. Chief  
24 Justice, we do think it makes the persuasiveness  
25 inquiry very hard because of cases -- cases like

1 Greenwich Collieries which say that an agency  
2 can't "stand mute and disbelieve credible  
3 evidence."

4 CHIEF JUSTICE ROBERTS: Right. So  
5 what it comes down to in -- in your view is  
6 simply how much of an explanation BIA is  
7 required to provide before the court of appeals  
8 can say that it implicitly made an adverse  
9 credibility determination?

10 MR. KATYAL: I -- I think that's  
11 largely right. So our point is, as the case  
12 comes to the Board, there was a rebuttable  
13 presumption of credibility. The Board then had  
14 two options.

15 One -- and I think they were laid out  
16 by Justice Barrett. One is to say, I rebut  
17 that, it's actually not credible. The other is  
18 to make a persuasiveness finding and to say, you  
19 know, I believe it -- you know, it's capable of  
20 being believed, but the evidence is outweighed  
21 -- outweighed. There is --

22 CHIEF JUSTICE ROBERTS: Thank --

23 MR. KATYAL: -- no magic words.

24 CHIEF JUSTICE ROBERTS: -- thank you,  
25 counsel.

1 Justice Thomas.

2 JUSTICE THOMAS: Yes, Mr. Katyal, the  
3 -- I'm a bit confused. The -- you say that  
4 there's no magic word requirement. But what if  
5 there is just the -- the -- the Board makes a  
6 choice or the IJ makes a choice between two sets  
7 of evidence? Isn't it implicit that it found  
8 one more credible than the other?

9 MR. KATYAL: Justice Thomas, we don't  
10 think that you can just implicitly rely on a  
11 persuasiveness calculation, particularly when  
12 the evidence is presumed credible. I think  
13 that's what I'm getting at with Greenwich  
14 Collieries, which is cited at page 39 of our  
15 brief.

16 And, indeed, Congress has this whole  
17 thing in the REAL ID Act about credibility,  
18 about the need to make express adverse  
19 credibility findings. It would make hash of the  
20 statute, make hash of Congress's work to accept,  
21 I think, what the government is saying here,  
22 which is, hey, as long as you've got something  
23 that might implicitly be read one way, that's  
24 enough.

25 I mean, that's not what this Court

1 ever accepts in the administrative law context.  
2 You wouldn't accept it for the SEC or the EPA,  
3 and I certainly don't think you should accept it  
4 here.

5 JUSTICE THOMAS: But is -- is your  
6 argument the argument that the Ninth Circuit  
7 used?

8 MR. KATYAL: Our argument -- we read  
9 the Ninth Circuit differently than the  
10 government. We read it to basically be saying  
11 there was a presumption of credibility that came  
12 into the Board and the Board then had to explain  
13 why it accepted one contrary view as opposed to  
14 another. They're diametrically opposed.

15 And the IJ's opinion is like a bad  
16 lawsuit exam, Justice Thomas. It lays out the  
17 facts on both sides, but it never applies them  
18 to explain how it resolved this case. And that  
19 would be bad in general, but particularly when  
20 there's a presumption of credibility coming in,  
21 and Greenwich Collieries says you can't as an  
22 agency just disbelieve that credible evidence.  
23 That's where the agency fell down.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Good morning. I -- I  
3 think you and every -- everyone seems to agree  
4 with this: The Ninth Circuit's wrong when they  
5 say that you, even though where there's no  
6 finding, you assume that the person is credible.  
7 That isn't what the statute said.

8 It says where there's no -- no -- no  
9 finding, you presume, not assume. And so the  
10 question is, did the -- did -- did -- is that  
11 what the agency did? Did it presume it? No.  
12 Well, maybe, because they might have assumed  
13 that the presumption was rebutted.

14 So we have a question on appeal. They  
15 didn't write whether it was rebutted or not.  
16 But that's true of district court judges: When  
17 they make a lot of findings that are appealed,  
18 they don't always have to write. It could be  
19 the situation. It could be implicit from the  
20 record that they assumed that it was rebutted.  
21 Lower courts or the agency thought the  
22 presumption was rebutted. Now you don't have to  
23 write about everything on -- an agency doesn't  
24 have to and a district judge doesn't have to.

25 So how do we deal with that?

1                   MR. KATYAL: I think, Justice Breyer,  
2 we deal with it by recognizing first that  
3 Congress in Section 1252 expressly enabled  
4 judicial review of agencies and used the  
5 substantial evidence standard.

6                   JUSTICE BREYER: Yeah.

7                   MR. KATYAL: The government even  
8 admits that that's the standard.

9                   JUSTICE BREYER: Right.

10                  MR. KATYAL: And then, as part of that  
11 standard, as T-Mobile says, you know, "courts  
12 cannot exercise their duty of substantial  
13 evidence review unless they're advised of the  
14 considerations underlying the action under  
15 review."

16                  And the problem is, in this case, and  
17 this is, you know, a representative case, as our  
18 brief in opposition says, you know, they haven't  
19 actually told you how they resolved the problem.

20                  JUSTICE BREYER: They haven't --

21                  MR. KATYAL: And --

22                  JUSTICE BREYER: -- but do you think  
23 they have to write an opinion or district judges  
24 all the time are making rulings where they don't  
25 write opinions, and suddenly an administrative



1 law judge has to write an opinion on this matter  
2 on every matter?

3 MR. KATYAL: I think --

4 JUSTICE BREYER: Is this different  
5 from any other matter?

6 MR. KATYAL: I think an all-agency  
7 review context, as opposed to district court  
8 circumstances, yes, there has to be a reasoned  
9 explanation.

10 JUSTICE BREYER: Why should that be?

11 MR. KATYAL: But that's not detailed  
12 in --

13 JUSTICE BREYER: Why should that be?  
14 I haven't -- I mean, why should a -- why could  
15 you not infer from the situation what the IJ  
16 thinks, whereas we do infer from the situation  
17 what a district judge thinks?

18 MR. KATYAL: Because, Justice Breyer,  
19 for seven decades, the Chenery rule has required  
20 more and said it's not rational basis, that  
21 there's a worry about agency decisionmaking, and  
22 all -- it's not -- it's not some extreme --  
23 extreme standard, as, you know, Judge -- then  
24 Judge Gorsuch's opinion in Lin Yan said. You  
25 know, it's pretty easy to meet the standard,

1 you've just got to say something, or Judge  
2 Colloton's opinion in Singh. So this is not --

3 JUSTICE BREYER: I have a question --

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: I don't know that I  
6 have very much to add here. The -- the Ninth  
7 Circuit said, and I'm quoting from the opinion  
8 in your case, "We have repeatedly held that  
9 where the BIA does not make an explicit adverse  
10 credibility finding, the court must assume that  
11 the petitioner's factual contentions are true."

12 I understand you now to acknowledge  
13 that that was an inaccurate statement of the  
14 law. Isn't that right?

15 MR. KATYAL: That's correct, as our  
16 brief in opposition says. Yes, Justice Alito.  
17 We --

18 JUSTICE ALITO: Okay. So the -- the  
19 BIA can implicitly find that the presumption was  
20 rebutted. And then the question does seem to  
21 come down to whether it is permissible to read  
22 the BIA's opinion as sufficiently stating that  
23 they -- that the -- that the Board found that --  
24 that the -- the requirements for asylum were not  
25 met, whether they provided a sufficient

1 explanation. They don't have to do it  
2 explicitly, but they have to provide an  
3 explanation.

4 That's -- that's the question, right.

5 MR. KATYAL: So -- so, Justice Alito,  
6 that question is different than the first one  
7 you asked me because you're saying could it be  
8 done implicitly. And I think seven decades of  
9 administrative law provide a reasoned -- require  
10 a reasoned explanation. I could imagine it  
11 could be done implicitly. They don't have to  
12 say and -- come out and say, you know, exactly  
13 all of their handiwork, but they have to show  
14 enough to explain what they did.

15 And as I said in my opening, here, you  
16 just don't know that. Like, for example,  
17 there's only one eyewitness to this whole  
18 account. It's nowhere mentioned in the IJ  
19 report or in the Board's decision.

20 JUSTICE ALITO: Well, the -- the Board  
21 could say -- could do this, could it not? The  
22 alien testified to this, there were other  
23 witnesses that testified to this, another  
24 witness testified to this. Without going  
25 through each witness and saying we believe A, we

1 -- we disbelieve B, we believe C, they simply  
2 say these are the facts that we -- that we --  
3 that we find. That would be sufficient,  
4 wouldn't it?

5 MR. KATYAL: Well, Justice Alito, I'm  
6 not sure that that is the reasoned explanation  
7 that is required. I mean, you don't even have  
8 that here, but I think that isn't that -- I  
9 think just to lay out the facts and then just  
10 say we decide on one.

11 I mean, Congress created judicial  
12 review in 1252 for a reason. It's got to be  
13 meaningful. And it's not meaningful if a  
14 litigant like Alcaraz can't even, you know, make  
15 heads or tails of what the decision actually  
16 said. And, you know, we've heard many different  
17 versions of what we think the IJ and the Board  
18 did or the government thinks it did. That makes  
19 it impossible to appeal. And, remember, these  
20 are --

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor.

23 MR. KATYAL: -- associated with  
24 counsel.

25 JUSTICE SOTOMAYOR: Mr. Katyal, I have

1 a basic problem in this case starting from where  
2 Justice -- Justice Alito did, which is you've  
3 admitted the Ninth Circuit applied the wrong  
4 presumption. It seems to me that then the only  
5 thing that happens is a remand to see exactly  
6 what they intended or didn't intend.

7 I do have a problem in this case  
8 believing that this ruling was on anything other  
9 than credibility, i.e., they -- that the IJ and  
10 the BI -- and the BIA didn't believe your client  
11 with respect to the nature of the assault. Am I  
12 correct in that assumption?

13 MR. KATYAL: I don't think so. So,  
14 first of all, Justice -- Justice Sotomayor, we  
15 don't think that the Ninth Circuit actually held  
16 what the government says. Our point is, if you  
17 read it that way, then, yes, it's got some stray  
18 extraneous language. But, remember, here, the  
19 Ninth Circuit remanded this case to the agency  
20 because of hearsay. And if Alcaraz's test --

21 JUSTICE SOTOMAYOR: Well, answer --  
22 answer, please, the question I asked most  
23 directly, which is, can the BIA's decision be  
24 upheld if it found this person credible as to  
25 his explanation as to -- as to what happened?

1           MR. KATYAL:  If -- if it found  
2   Alcaraz's testimony credible and -- then I don't  
3   think it's possible because the story he -- that  
4   -- Alcaraz's version of events, which is  
5   diametrically opposed to the probation office  
6   report, is he did it to protect his daughter,  
7   and there's only one incident of violence, one  
8   punch to the face, and that alone wouldn't be  
9   the "particularly serious crime" necessary to  
10  make someone ineligible for relief from -- from  
11  removal.

12           JUSTICE SOTOMAYOR:  So I think that  
13  goes to the basic question.  Without a adverse  
14  credibility finding or a statement that he is --  
15  they did not believe or didn't credit his  
16  explanation, then, without that finding, you  
17  can't uphold their judgment.  Is that your  
18  argument?

19           MR. KATYAL:  Our -- well, I think you  
20  could either do it on credibility or on  
21  persuasiveness.  Again, it wouldn't, as Justice  
22  -- as Justice Gorsuch said, require any sort of  
23  magic words or an onerous burden, but you'd have  
24  to, in substance, either rebut the presumption  
25  of credibility or show that the evidence wasn't

1 persuasive. It's got two options. The agency's  
2 gotten --

3 JUSTICE SOTOMAYOR: All right. Thank  
4 you, counsel.

5 MR. KATYAL: -- it done in two stages.

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

7 JUSTICE KAGAN: Mr. Katyal, this seems  
8 like a -- this -- this is a pretty simple case,  
9 right? There's -- there's basically two pieces  
10 of evidence in it. Mr. Alcaraz says this was  
11 nothing, I -- I -- I just -- I didn't really  
12 seriously beat my -- my girlfriend, and I was  
13 trying to protect my daughter. And then, on the  
14 other hand, you have a probation report.

15 So it comes up to the Board, and  
16 because there was no finding, it comes with a  
17 presumption of credibility, but the Board is now  
18 looking at the probation report and saying, you  
19 know, generally, we believe probation reports  
20 rather than convicted criminals with incentives  
21 to lie, and that's exactly what we're doing  
22 here. We're going to believe the probation  
23 report that this was an extremely serious crime.

24 So isn't the surrounding  
25 circumstances, and then you look at this case,

1 and, basically, it just comes back -- down to do  
2 you believe Mr. Alcaraz or do you believe the  
3 probation report, doesn't it -- isn't it just  
4 clear that the Board believed the probation  
5 report rather than Mr. Alcaraz? And, if that's  
6 so, isn't it clear that essentially the Board  
7 decided to rebut the presumption?

8 MR. KATYAL: Justice Kagan, the  
9 government doesn't even make that argument, and  
10 I think as your hypothetical demonstrates why,  
11 because there is no language anywhere in there  
12 that we don't believe criminals or anything like  
13 that, or we tend to believe probation officers  
14 or the like.

15 Indeed, had that language been in  
16 there, that would enable precisely the kind of  
17 meaningful judicial review Congress put in 1252.  
18 As it stands, we have to guess whether those are  
19 the rationales, something else that the  
20 government has offered are the rationales, and  
21 the like. That's the problem. And, again --

22 JUSTICE KAGAN: But aren't you just  
23 asking, like -- I mean, it seems as though  
24 you're just asking for one more sentence, which  
25 is -- or even half of a sentence: We believe



1 the probation report rather than Mr. Alcaraz  
2 because .... And what would that "because" look  
3 like and -- and -- and why is it necessary?

4 MR. KATYAL: The "because" could be  
5 any of the reasons that Judges Colloton and  
6 Gorsuch did in Singh and Lin Yan. So they could  
7 say, you know, we didn't find that person  
8 credible on the stand. There was an agitated  
9 demeanor. There were inconsistencies in the  
10 testimony. They admitted, you know, filing  
11 false documents. Those are all the kinds of  
12 rationales that are given in case after case.

13 The problem here is there's nothing,  
14 and if you accept nothing here, it's going to be  
15 the rule not just in immigration cases but in  
16 other cases, I mean, and we --

17 JUSTICE KAGAN: Thank you, Mr. Katyal.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning,  
21 Mr. Katyal. I'd like to pick up where Justice  
22 Kagan left off. I'm -- I'm struggling to  
23 identify any other ground on which the BIA could  
24 possibly have acted other than it -- it believed  
25 the probation report rather than your client.

1 And if that's the case and no magic words are  
2 required, what's -- what's left?

3 MR. KATYAL: So, Justice Gorsuch, it's  
4 not rational basis review; it's substantial  
5 evidence review, so we're to look to what the  
6 agency actually said. And let me give you two  
7 possibilities that would answer this. One is,  
8 did the IJ and the Board just overlook the only  
9 eyewitness account, which is from the mom? It's  
10 just nowhere by the -- in the IJ or in the  
11 Board's report.

12 And, remember, this is an IJ judge  
13 who's a bit worrisome. I mean, he blew off the  
14 expire statute requiring cross-examination.  
15 It's an express statute by Congress. So, you  
16 know, if he could ignore that, he could ignore,  
17 you know, the fact that there was the mom's  
18 testimony.

19 And then the other way of thinking  
20 about it, just a second example is, you know,  
21 Alcaraz's no contest plea was made three months  
22 before the probation office report was written,  
23 and there's a lot of reliance on what that  
24 report said. Indeed, we just heard Justice  
25 Kagan talking about that. But Alcaraz never

1 agreed to any of that because his plea preceded  
2 that by three months. We have no idea whether  
3 the IJ understood that or the Board understood  
4 that. And, indeed, before the Board, we  
5 actually gave them a chance to correct their  
6 mistakes and to say, you know, provide that  
7 specific cogent reasoned explanation that, Judge  
8 -- Justice Gorsuch, you called for in Lin Yan.

9 The Board filed -- excuse me, ICE  
10 filed a one-page answer before the Board, and  
11 the Board, of course, did nothing. Zero plus  
12 zero is still zero.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief  
17 Justice.

18 Good morning, Mr. Katyal. On the  
19 statutory language, I'll repeat a question I  
20 asked your colleague. It says, the applicant or  
21 witness shall have a rebuttable presumption of  
22 credibility on appeal if no adverse credibility  
23 determination is explicitly made.

24 I think the purpose of that was that  
25 if the only real testimony in the record is from

1 the applicant that -- and the IJ did not say, I  
2 think the applicant is lying or make an adverse  
3 credibility determination, it would not be open  
4 to the BIA to -- to do that.

5 But, by -- and this is what I want you  
6 to focus on -- by using the phrase "rebuttable  
7 presumption" -- I think Justice Kagan was  
8 talking about this and Justice Gorsuch -- if  
9 other evidence comes in, it's not just the  
10 applicant's testimony and you have nothing else,  
11 other testimony comes in, then that you just do  
12 normal substantial evidence review as the  
13 reviewing court.

14 And if the BIA has explained, we think  
15 the other evidence is inconsistent with the  
16 applicant's testimony and -- and the other  
17 evidence is more persuasive or we choose to  
18 believe that other evidence, then that rebuts  
19 the presumption.

20 MR. KATYAL: Justice Kavanaugh, we,  
21 you know, agree that the Board absolutely could  
22 rebut the presumption. The problem here is the  
23 Board expressly "adopted and affirmed the IJ's  
24 findings," which didn't have that credibility  
25 determination.

1                   And so the Board never discussed  
2                   credibility or gave any reason to find Alcaraz  
3                   noncredible. You know, nothing like what  
4                   Justice Kagan was getting at about how we don't  
5                   believe criminals or we believe probation office  
6                   reports or any of that.

7                   JUSTICE KAVANAUGH: Just put aside  
8                   this case, and I understand why you're focused  
9                   on this case. Is that how you think the  
10                  statutory provision operates?

11                  MR. KATYAL: We do think that the  
12                  Board absolutely can rebut the presumption.  
13                  They've got to do so with some work. And, you  
14                  know, a circuit court sitting on 1252 review  
15                  would look for a reasoned explanation, so it's  
16                  got to explain what they're doing and have some  
17                  reason behind it, just as in any administrative  
18                  law context. That's all. It's not an onerous  
19                  standard. It's just one that the government  
20                  can't meet here.

21                  JUSTICE KAVANAUGH: That's helpful.  
22                  Thank you, Mr. Katyal.

23                  CHIEF JUSTICE ROBERTS: Justice  
24                  Barrett.

25                  JUSTICE BARRETT: Good morning, Mr.

1 Katyal. You said -- I -- I just want to be sure  
2 that I understand the ways in which your  
3 position is distinct from the government.

4 So it seems like you don't quite buy  
5 the government's argument that credibility  
6 simply means is this person capable of being  
7 believed rather than I believe them, but I did  
8 hear you earlier say something about something  
9 can be credible and not persuasive on the  
10 grounds that you don't believe the person.

11 So can you just tell me what you mean  
12 by "credible," how you understand it?

13 MR. KATYAL: So, to me, credible is  
14 capable of being believed and sometimes, and  
15 rarely, there will be a difference between  
16 credibility and persuasiveness. You know, for  
17 example, if someone says, you know, I'm worried  
18 if I go to Mexico that I'm going to be beaten  
19 up, and the judge doesn't think he's lying,  
20 thinks it's genuine but, as a result of country  
21 testimony by the State Department and others,  
22 just thinks that's not right, you know, those  
23 are the types of circumstances.

24 Here, as I was saying to the Chief  
25 Justice, when a case comes in with a presumption

1 of credibility, Greenwich Collieries says, you  
2 know, that really heightens the burden on the  
3 agency to explain the line.

4 JUSTICE BARRETT: But -- but, Mr.  
5 Katyal, in the example you gave, I think  
6 actually then you and I might be interpreting it  
7 the same way, because that's kind of like my  
8 child and the UPS man example. On that example,  
9 it's not that the person was lying. It's just  
10 that they're mistaken based on other outside  
11 evidence. So there you're right, they may be  
12 credible but it not be persuasive.

13 But that's consistent with credibility  
14 referring to the truth or falsity of the  
15 testimony, is the person lying or not, right?

16 MR. KATYAL: It is consistent. The  
17 one point I'd make, though, Justice Barrett, is  
18 when you're answering that second question about  
19 whether other evidence outweighs or disproves  
20 it, it's got to be a reasoned explanation. The  
21 agency just has to explain what it's doing  
22 clearly and provide some reason for it. That's  
23 not --

24 JUSTICE BARRETT: But the presumption  
25 --

1 MR. KATYAL: -- that's what doesn't  
2 happen.

3 JUSTICE BARRETT: -- wouldn't apply  
4 then before the Board, right, because, in that  
5 instance, it's not that the Board -- or I guess  
6 would it. Because it's not the Board is saying,  
7 you know, that there would be a presumption that  
8 the person wasn't lying, right?

9 MR. KATYAL: Justice Barrett, this  
10 isn't a presumption in -- in the air. It's a  
11 presumption about credibility. And so, when  
12 Congress uses those words, it picks up  
13 preexisting cases like Greenwich Collieries,  
14 which say that you can't disbelieve credible  
15 evidence. Now -- and so -- without -- without a  
16 reasoned explanation.

17 So we don't doubt that the agency  
18 could provide that reasoned explanation, and,  
19 indeed, they almost always do. As the amici  
20 briefs say, IJs are trained to do that. They  
21 just didn't do it here, and it would be very  
22 dangerous for you to accept on this record this  
23 application of the government's --

24 JUSTICE BARRETT: Thank you, Mr.  
25 Katyal. My time's up.



1 CHIEF JUSTICE ROBERTS: A minute to  
2 wrap up, Mr. Katyal.

3 MR. KATYAL: Thank you. My central  
4 point, as I was saying to Justice Breyer, is  
5 that this is a standard agency case. The agency  
6 had one job and it fell down on it.

7 Justice Breyer was worried about this  
8 being too burdensome. But this isn't hard to  
9 meet. Indeed, it's how immigration judges have  
10 operated for decades, as I was just saying to  
11 Justice Barrett.

12 It requires no magic words, just a  
13 reasoned explanation, which this Court in  
14 Judulang has already unanimously said applies.

15 And, Justice Alito, you had suggested  
16 that the record here was enough. And if you  
17 were sitting as a rational basis court, I think  
18 you could find something to justify what the  
19 agency did, but that's not the test.

20 Here, as the Ninth Circuit said, there  
21 were two contradictory accounts. The agency  
22 just had to explain why it believed one of them.  
23 And the agency always has two bites to do so at  
24 the IJ and Board stages. Here, the IJ wrote a  
25 detailed opinion except in the one place where

1 it mattered, its reasoning. It tells us  
2 everything else but that. And you wouldn't  
3 accept this reasoning or lack thereof if this  
4 were the SEC or EPA. You shouldn't accept it  
5 here.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Zimmer.

9 ORAL ARGUMENT OF DAVID J. ZIMMER  
10 ON BEHALF OF THE RESPONDENT IN 19-1155

11 MR. ZIMMER: Thank you, Mr. Chief  
12 Justice.

13 The parties have no real dispute, as  
14 this argument shows, as to the legal question on  
15 which this Court granted certiorari. And at  
16 least in Mr. Dai's case, the court of appeals  
17 applied the precise legal framework that all  
18 parties accept.

19 The court did not presume Dai's  
20 credible testimony to be true but held that the  
21 record compelled the conclusion that Dai's  
22 testimony, if credible, was persuasive.

23 That case-specific conclusion was  
24 plainly correct. Mr. Dai's eligibility for  
25 asylum and his entitlement to withholding turned

1 entirely on whether he was, in fact, persecuted  
2 based on his resistance to the Chinese  
3 government's forced abortion of his child.

4 Mr. Dai testified in great detail  
5 about that persecution and submitted significant  
6 evidence corroborating his testimony.

7 The government agrees that the agency  
8 here made no adverse credibility finding; in  
9 other words, the agency did not conclude that  
10 Dai lied. And there is simply no evidence in  
11 the record that would support a conclusion that  
12 Dai was not lying but was nevertheless somehow  
13 mistaken about the severe persecution inflicted  
14 on him. This Court should therefore affirm.

15 CHIEF JUSTICE ROBERTS: Counsel,  
16 first, did Mr. Katyal say anything with which  
17 you disagree?

18 MR. ZIMMER: No, I -- I -- I -- I  
19 don't think he said anything that I -- that I  
20 disagree with.

21 CHIEF JUSTICE ROBERTS: Okay. On --  
22 on the remand question --

23 MR. ZIMMER: Yes.

24 CHIEF JUSTICE ROBERTS: -- it -- it  
25 seems to me that the bottom line is that, in

1 that respect, you are insisting on magic words.  
2 In other words, the -- the -- the -- the court  
3 of appeals was all right not sending it back  
4 because there was an absence of those words in  
5 the BIA decision. Is that -- is that wrong?

6 MR. ZIMMER: I think it is wrong.  
7 I -- I -- I guess I'm not sure what magic words  
8 we would be requiring. I think that -- that --  
9 that, ultimately, the way that the -- the  
10 statutory presumption works is sort of as a gap  
11 filler as to credibility when the -- in the face  
12 of administrative silence.

13 And so where, as here, the agency sort  
14 of accepts -- the agency accepts the testimony  
15 as credible and moves on to persuasiveness, then  
16 it's -- it is under the statute taking the  
17 testimony as credible and there's nothing left  
18 to do as to credibility.

19 I don't -- does that -- I think that  
20 gets at the question you were -- you were  
21 asking, but I don't think that there's anything  
22 specific the agency would have to say. It just  
23 has to follow what the government agrees is a --  
24 a clearly discernible path as to finding the  
25 presumption rebutted.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief  
5 Justice.

6 Counsel, the -- like Judge Trott  
7 below, I have difficulty with the distinction  
8 between persuasive and credible, and it just  
9 seems like a false dichotomy to me.

10 But the -- can something be -- can you  
11 have two points of view, both of which seem  
12 credible, but yet one is not persuasive?

13 MR. ZIMMER: Sure. I mean, I think  
14 this gets at -- at Justice Barrett's example  
15 of the -- of the UPS delivery person where you  
16 can have -- you can have two narratives that are  
17 both credible but one of which turns out to just  
18 be incorrect based on other evidence of record,  
19 that somebody can be credible and yet mistaken.

20 And I -- and I think that's sort of  
21 where the distinction between credibility and  
22 persuasiveness comes up, that -- that,  
23 ultimately, somebody can be testifying honestly,  
24 in other words, not perjuring themselves, not  
25 lying, but ultimately just be wrong. And I

1 think that's really the key distinction that the  
2 statute is drawing in recognizing that you can  
3 have credible testimony but nevertheless sort of  
4 just be -- be wrong.

5 JUSTICE THOMAS: Do you think that in  
6 this case, in your case, there's quite a bit of  
7 evidence that seems to undermine both  
8 Respondent's credibility and -- or at least  
9 go -- could go to credibility and to  
10 persuasiveness.

11 What magic -- what words are missing  
12 in -- in this opinion, the IJ opinion, to your  
13 way of thinking?

14 MR. ZIMMER: Well, I -- I guess it's  
15 not so much magic words. I mean, the IJ -- the  
16 IJ never -- it's very clear in this case that  
17 the IJ did not find Mr. Dai to be not credible.  
18 In other words, it never concluded that -- that  
19 he was lying. And -- and if you look at page  
20 164a of the Petition Appendix, the Board said  
21 this explicitly, that the -- that the IJ had not  
22 made any adverse credibility finding. And the  
23 Board adopted and affirmed that decision.

24 So I think that to the extent the  
25 evidence goes to credibility, and -- and we

1 think that it very clearly does only go to  
2 credibility, well, the IJ never made neither --  
3 the IJ or the Board never made an adverse  
4 credibility finding.

5 As to persuasiveness, I -- I actually  
6 strongly disagree that any of the evidence that  
7 the -- that the government relies on and the  
8 agency relies on, does in fact go to  
9 persuasiveness. You know, the government  
10 primarily notes the fact that Qin, Dai's wife,  
11 and their daughter went back to China. But they  
12 were in a completely different situation than  
13 Dai was, in the sense that they faced very low  
14 risk of at least any sort of persecution in the  
15 short term and had very strong reasons to go  
16 back; whereas Dai faced a very real risk of --  
17 of persecution in the short term -- the police  
18 had, in fact, come looking for him in the -- in  
19 the few months after Qin and his daughter  
20 returned to China -- and had very little reason  
21 to return immediately because he had been fired  
22 from his job after resisting the forced abortion  
23 of his child. And so --

24 CHIEF JUSTICE ROBERTS: Justice  
25 Breyer.

1                   MR. ZIMMER: -- Qin and their daughter  
2 were -- go ahead. Sorry.

3                   CHIEF JUSTICE ROBERTS: Justice  
4 Breyer.

5                   JUSTICE BREYER: Yes, can I -- two  
6 things: One, as I read the Ninth Circuit, I  
7 thought there is language there that says  
8 something like the following: Where there's no  
9 adverse credibility determination in the agency,  
10 a reviewing court of appeals must assume that  
11 the statement was credible. That couldn't be  
12 right because, after all, the agency is told  
13 that, if there is no adverse credibility  
14 requirement, there is a presumption, and so,  
15 agency, you can say the presumption is rebutted.  
16 Am I right about what the Ninth Circuit is  
17 saying or not?

18                   MR. ZIMMER: I -- I think you are  
19 right about what the Ninth Circuit is saying.

20                   JUSTICE BREYER: Well, then that's  
21 right. That isn't right. That isn't right  
22 because you could -- it would be weird to have  
23 an agency which says we can write down the words  
24 in this situation we find the presumption of  
25 credibility rebutted because, with the most



1 convincing reasons ever. And they -- they would  
2 have to accept that in a court of appeals, or  
3 you're going to get -- it's not going to make  
4 sense. All right. That's my first problem.

5 MR. ZIMMER: Right.

6 JUSTICE BREYER: I think we have to  
7 say that. But the more serious problem which I  
8 really don't understand thoroughly, and I'm  
9 trying to work out, is what happens. No adverse  
10 credibility determination. Now there is a  
11 presumption. The IJ and the agency think it's  
12 a -- possibly think it was -- it was rebutted,  
13 that presumption. Now, do they have to write  
14 those words? We find it rebutted. Or are they  
15 implicit? Can a reviewing court ever find them  
16 implicit? And, if so, when? What words would  
17 you write in an opinion? If you believe the  
18 latter, you don't want to give them too much  
19 power to disregard what an applicant for refugee  
20 status says, but you do not want them to have to  
21 write magic words in every case.

22 So what -- what would you do? What  
23 words would you use for -- to tell the reviewing  
24 court be careful about this, where they don't  
25 make an explicit finding that it was rebutted,

1 that the presumption was rebutted, no explicit  
2 finding?

3 MR. ZIMMER: Well, I think --

4 JUSTICE BREYER: Go ahead.

5 MR. ZIMMER: The agency has to give  
6 the reasons that it's denying the application.  
7 I don't think there's any dispute about that.  
8 And so if the reason is that it's finding the  
9 presumption of credibility rebutted, well, then  
10 it does have to say that. I don't think it has  
11 to be -- you know, I'm not sure -- I -- I think  
12 the easiest way to do that is to just say it up  
13 front, if everyone agrees, the government  
14 agrees, that it has to be clearly discernible  
15 from the opinion in some way. And -- and I  
16 think that if the agency finds -- if the Board  
17 finds the presumption rebutted, well, then,  
18 obviously, that's a finding that's entitled to  
19 deference --

20 JUSTICE BREYER: Right, but --

21 MR. ZIMMER: -- by the court of  
22 appeals.

23 JUSTICE BREYER: -- you -- you --

24 CHIEF JUSTICE ROBERTS: Justice --  
25 Justice -- Justice Alito.

1 JUSTICE BREYER: All right.

2 JUSTICE ALITO: Well, I -- I thought I  
3 was agreeing with you, but now the last thing  
4 you said gives me pause. The Ninth Circuit -- I  
5 read its opinion as saying -- here as saying  
6 exactly what it said very succinctly in the  
7 other case, that unless the BIA makes an  
8 explicit finding that the applicant is not  
9 credible, it must be presumed that the applicant  
10 was credible. That, I think, is a -- an  
11 incorrect statement of the law. And do you  
12 disagree that that is -- that that's the -- the  
13 rule that the Ninth Circuit applied in this  
14 case?

15 MR. ZIMMER: I do think it's correct,  
16 but I don't -- I disagree that it's not -- I  
17 mean, I do think that that is what the Ninth  
18 Circuit applied. Again I want to be clear that  
19 they did not presume that the testimony was  
20 necessarily true in the sense of being accurate,  
21 but I think that what they were saying was that  
22 if -- if the agency is silent as to credibility,  
23 then that is effectively a determination that  
24 the -- the testimony was credible. And I think  
25 that's the work that the rebuttable presumption

1 does.

2 JUSTICE ALITO: There's a difference  
3 -- maybe there's a difference between silence  
4 and -- and a requirement of -- as an explicit  
5 statement. Must they make an explicit  
6 statement? Are they under the same obligation  
7 as the IJ?

8 MR. ZIMMER: Oh, no. Not -- no, no.  
9 I mean, there's -- because there's no similar  
10 statutory requirement. I think they have to say  
11 something that makes it clear that that's what  
12 the basis for their decision -- for their  
13 decision is, but we're not -- you know, we're  
14 not arguing that the same explicitness  
15 requirement that is -- that is explicitly by the  
16 statute applied to the IJ applies to the Board.

17 JUSTICE ALITO: Can the BIA's decision  
18 be read in this way: Dai had the burden of  
19 showing that he was unwilling to return to -- to  
20 China because of fear of persecution, and we do  
21 not believe that he had that fear; he did not  
22 establish that he actually is unwilling to  
23 return to China based on the -- the fact that he  
24 was less than truthful and -- or less than  
25 forthright in his explanation of -- of his

1 family's travels and his own plans.

2 MR. ZIMMER: No, I don't -- I don't  
3 think so. And -- and then the reason is that  
4 what you described is, very clearly, an adverse  
5 credibility finding, and if you look at page  
6 164a of the Petition Appendix, which is the  
7 BIA's decision, the Board made very clear that  
8 it was not resting its decision on an adverse  
9 credibility finding. So I -- I don't think that  
10 that's a way that you could read the Board's  
11 decision.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor.

14 JUSTICE SOTOMAYOR: If that's not the  
15 way we can read the Board's decision, but it's a  
16 permissible conclusion, was the -- why wasn't  
17 the Ninth Circuit wrong in not remanding this  
18 case?

19 MR. ZIMMER: Right. I -- so -- and I  
20 think that really comes down to the presumption  
21 in the statute because the way that the  
22 presumption works, where you have the IJ silent  
23 as to credibility and the case then goes up to  
24 the Board, where this presumption of credibility  
25 applies, and the Board is effectively also

1 silent, doesn't find the presumption rebutted,  
2 then I think that's the end of the matter. And  
3 I think that's treated under the statutory  
4 framework as accepting the testimony as  
5 credible. And so then there's no -- no basis on  
6 which the court of appeals needs to basically  
7 remand to give the agency another shot to  
8 re-adjudicate credibility.

9 JUSTICE SOTOMAYOR: Well, the IJ here  
10 did find explicitly that Dai's explanation for  
11 his wife's return to China are inadequate and to  
12 outweigh that they returned, not because of  
13 persecution. And then he says Dai failed to  
14 prove his burden. The BIA affirmed that Dai had  
15 lied to the asylum officer because the truth  
16 would be perceived as inconsistent with his  
17 claims of past and fear -- and fear of future  
18 persecution.

19 That to me suggests the conclusion  
20 that Justice Alito suggested. So if it that is  
21 possible given what they did say, why isn't an  
22 automatic remand appropriate?

23 MR. ZIMMER: Well, look, I think, to  
24 be clear, if -- I think if the agency was sort  
25 of keeping open the -- the remand -- you know,

1 keeping open the credibility issue as something  
2 it wasn't addressing, then maybe a remand would  
3 be appropriate, but I think if you look at page  
4 164a of the -- of the Petition Appendix --

5 JUSTICE SOTOMAYOR: Counsel, they  
6 said -- both the IJ and BIA said he lied about  
7 something.

8 MR. ZIMMER: Well, I guess --

9 JUSTICE SOTOMAYOR: So they didn't  
10 believe him about something. So why shouldn't  
11 we figure out what that meant?

12 MR. ZIMMER: Right. I mean, so -- so  
13 to be clear, Dai -- Dai never actually lied. I  
14 mean -- and they never accused him of lying. He  
15 was -- he was -- he sort of was reluctant to  
16 disclose this information. When he was sort of  
17 asked point-blank whether they had come to the  
18 United States, he was -- he was up-front about  
19 it. There's no dispute --

20 JUSTICE SOTOMAYOR: All right. Thank  
21 you, counsel.

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

23 JUSTICE KAGAN: Mr. Zimmer, I want to  
24 work off the understanding of law that you  
25 started with, which is the same as the one

1 Justice Barrett was using, which is that this  
2 presumption of credibility, what it says is that  
3 in the absence of a finding we are going to take  
4 the testimony of the applicant as honest, as  
5 truthful. The applicant didn't perjure himself.

6 But then there are -- there is  
7 extraneous evidence that could come in to show  
8 that the applicant was wrong. And -- and -- and  
9 that distinction actually makes all the sense in  
10 the world in a statute like this, which is about  
11 a well-grounded fear of persecution, that the  
12 applicant can testify as to his fear and all the  
13 things underlying it.

14 But then there can be other evidence  
15 which shows that that fear is not well grounded,  
16 notwithstanding the truthfulness of what the  
17 applicant said.

18 So let's take that as the sort of -- a  
19 premise of what the statute does. Dai, it seems  
20 to me, could have lost in two ways in -- in that  
21 world. One is if we understand the Board to  
22 have rejected the -- the presumption of  
23 credibility, in other words, they have decided  
24 that, in fact, Dai was lying when he said that  
25 this was the reason that he wanted asylum.



1                   And the second is, no, they accepted  
2                   that he was telling the truth but there is  
3                   extraneous evidence indicating that he is wrong  
4                   as to his fear of going back to China.

5                   So if you could comment on either of  
6                   those two ways of saying that Dai was wrong and  
7                   why you think neither of those is supportable.

8                   MR. ZIMMER: Right. So I certainly  
9                   agree with -- with all that. And as to the  
10                  first one, sort of the idea that he was lying, I  
11                  point the Court again to page 164A, where the  
12                  Board made very clear that it was not resting  
13                  its -- the IJ had not rested its decision on and  
14                  that it was not resting its decision on an  
15                  adverse credibility finding.

16                  So the agency just didn't find that he  
17                  was lying. And so I just -- I don't think  
18                  that's a basis on which the -- the court of  
19                  appeals could have affirmed.

20                  And -- or could -- could have denied a  
21                  petition for review. As to whether or not he  
22                  was somehow testifying truthfully but -- but  
23                  mistaken, again, I don't think that there's  
24                  anything in the record that would support that  
25                  in the sense that everything pointed basically

1 the same way. Dai gave very detailed testimony  
2 about the persecution he suffered. He submitted  
3 corroborating evidence in the form of hospital  
4 records that showed his injuries and his wife's  
5 abortion, and he showed country conditions  
6 evidence that was extremely -- extremely  
7 probative.

8 JUSTICE KAGAN: Thank you, Mr. Zimmer.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch.

11 JUSTICE GORSUCH: Good morning, Mr.  
12 Zimmer. The BIA, as I -- I read it, said that  
13 your client failed to meet his burden because  
14 his wife and daughter returned to China. That  
15 -- that is the ground on which which it rests.

16 Why isn't that sufficient? I mean,  
17 maybe -- maybe you'd argue that that's not  
18 sufficient evidence or something like that.

19 MR. ZIMMER: Right.

20 JUSTICE GORSUCH: But for purposes of  
21 our discussion here, why -- why wouldn't that be  
22 enough to overcome credible testimony by Mr. Dai  
23 about --

24 MR. ZIMMER: Well --

25 JUSTICE GORSUCH: -- his well-founded

1 fears?

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

3 JUSTICE GORSUCH: Is the testimony  
4 credible, it's like the light is green versus  
5 red. Mr. Dai thinks it's green but there is  
6 other evidence in the form of his wife and  
7 daughter's behavior that suggests it's red.

8 MR. ZIMMER: Right. So, and I think  
9 the answer just goes to the, as the court of  
10 appeals explains, very, very significant  
11 differences in situations that he was in versus  
12 his wife and daughter. And his -- his wife and  
13 daughter --

14 JUSTICE GORSUCH: Perhaps. Perhaps.  
15 And that would go to whether there's substantial  
16 evidence in the record, I suppose.

17 MR. ZIMMER: Right.

18 JUSTICE GORSUCH: But it wouldn't go  
19 to anything having to do with the credibility  
20 determination issue before us, would it?

21 MR. ZIMMER: No, I -- I -- well, I  
22 mean, I -- I -- I -- I think probably not. I  
23 mean, I don't think -- there's certainly nothing  
24 about that that contradicts the story or  
25 suggests that he was lying.

1 JUSTICE GORSUCH: Right. Okay. Thank  
2 you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you. Good  
6 morning, Mr. Zimmer. Just to make sure you --  
7 you agree with the distinction between is the  
8 witness lying, and then the second question,  
9 regardless of whether the witness might be  
10 lying, is the witness, nonetheless, mistaken,  
11 and you agree that credibility in the statute  
12 only goes to the first of those two questions;  
13 is that correct?

14 MR. ZIMMER: That's correct.

15 JUSTICE KAVANAUGH: Okay. And then  
16 going to page 164A, the BIA does say that the  
17 Respondent's family voluntarily returning and  
18 his not being truthful about it is detrimental  
19 to his claim and is significant to his burden of  
20 proof. What do you say to that sentence?

21 MR. ZIMMER: Well, again, I -- I mean,  
22 so first of all, I just disagree with it as a  
23 factual matter. But sort of I think that if you  
24 look -- if you look at the --

25 JUSTICE KAVANAUGH: But just to

1 interrupt, isn't that the Board saying I guess  
2 the first of Justice Kagan's two options and how  
3 she posited it?

4 MR. ZIMMER: Well, I think it might,  
5 it -- it -- it possibly could be read that way  
6 except that if you look at 164A, the Board goes  
7 on to say that the -- the immigration judge need  
8 not have made an explicit adverse credibility  
9 finding. So I think that -- I -- I think that  
10 --

11 JUSTICE KAVANAUGH: The very next  
12 sentence says that the Respondent, "not being  
13 truthful" about it, "is detrimental to his  
14 claim," which sounds like is the witness lying,  
15 or credibility is, to use the statutory term.

16 MR. ZIMMER: Well, truthful, but that  
17 was truthful not as to the fundamental facts on  
18 which he was basing his asylum claim. This is  
19 -- this is based on his lack of forthrightness  
20 about telling -- telling the agency that his  
21 wife and daughter had come with him and gone  
22 back to China.

23 But I don't think that that could be  
24 read as an adverse credibility finding as to the  
25 testimony about his, you know, being detained

1 and beaten and deprived of food and water and  
2 sleep and --

3 JUSTICE KAVANAUGH: The last --

4 MR. ZIMMER: -- the police --

5 JUSTICE KAVANAUGH: -- last legal  
6 question: The rebuttable presumption, do you  
7 think the Board can find the presumption  
8 rebutted just on the face of the applicant's  
9 testimony without any external evidence? Do you  
10 understand the question?

11 MR. ZIMMER: Yes, I -- I do. I think  
12 it -- it would probably be an unusual case but I  
13 don't think there's anything that statutorily  
14 precludes that.

15 JUSTICE KAVANAUGH: Thank you, Mr.  
16 Zimmer.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Barrett.

19 JUSTICE BARRETT: Good morning, Mr.  
20 Zimmer. So I have a question about Justice  
21 Kagan's two ways to understand what the Board  
22 has done.

23 One, that Mr. Dai was lying or the  
24 other that he was telling the truth but external  
25 circumstances show that he was mistaken.

1                   And my question is about the standard  
2 of review that the Board would apply in  
3 reviewing the IJ's explanation. So in the first  
4 scenario, the lying, we all agree that there  
5 would be a rebuttable presumption that he was  
6 actually telling the truth, right?

7                   MR. ZIMMER: Yes.

8                   JUSTICE BARRETT: His credibility --  
9 if there's no express adverse credibility  
10 determination, the Board has to apply this  
11 presumption, right?

12                  MR. ZIMMER: Yes.

13                  JUSTICE BARRETT: So is that better or  
14 worse? In the second, let's assume that what  
15 the Board wants to conclude is that, in fact,  
16 it's reviewing what it thinks is the IJ's  
17 determination that he might be telling the truth  
18 but he's wrong because of external reasons.

19                  MR. ZIMMER: Yeah.

20                  JUSTICE BARRETT: What's the standard  
21 of review there?

22                  MR. ZIMMER: I think that would be,  
23 under the agency regulations, that would be  
24 clear error review, if you look at, what I think  
25 it's 8 CFR 1003.1(d), I believe, that would be

1 clear error review.

2 JUSTICE BARRETT: Okay. And my other  
3 question is a factual one. Justice Sotomayor  
4 asked the government about the hospital records.  
5 Do you want to explain what significance they  
6 have here?

7 MR. ZIMMER: Yeah, absolutely. I  
8 think they have great significance. I mean,  
9 these were introduced -- this was not a huge  
10 administrative record. There were only a few  
11 exhibits. This is one of the -- some of the key  
12 exhibits that Dai introduced.

13 And -- and I think if you look at page  
14 101 of the joint appendix, I mean, the  
15 government tried to impeach Dai about the  
16 hospital records, but all it could get out of  
17 him was his testimony that you can only get them  
18 if you're admitted to the hospital and that he  
19 had never written in one of them in his life.

20 And the idea that they would somehow  
21 be not evidence that -- that -- that is -- that  
22 is relevant and that could be considered by this  
23 court makes little sense. And the same with  
24 this exhaustion argument. I mean, there's no --

25 JUSTICE BARRETT: Let me just ask you



1 one other question.

2 MR. ZIMMER: Yeah.

3 JUSTICE BARRETT: Did the IJ say they  
4 were not going to be -- that he was not going to  
5 consider them because of the authenticity  
6 questions that the government posed.

7 MR. ZIMMER: No, the agency said  
8 nothing about them. And, in fact, the agency  
9 simply ignored them, which I think is actually  
10 quite mind-boggling given how probative they are  
11 to Dai's burden of proof.

12 JUSTICE BARRETT: Thank you, Mr.  
13 Zimmer.

14 CHIEF JUSTICE ROBERTS: A minute to  
15 wrap up, Mr. Zimmer.

16 MR. ZIMMER: Thank you, Mr. Chief  
17 Justice. I just want to emphasize in conclusion  
18 that -- that really the government's argument  
19 depends almost entirely on the idea that Dai  
20 could somehow be credible and yet have been  
21 lying.

22 And that just makes no sense for many  
23 of the reasons that -- that we've already  
24 discussed in -- in -- in great detail. The --  
25 the ultimate distinction under the statute is

1 that there is a preliminary inquiry into  
2 credibility, which is really just a question as  
3 to whether or not the -- the agency believes  
4 that the person was honest, whether they were  
5 submitting a fraudulent claim or whether they  
6 were testifying honestly.

7 The way in which that differs from  
8 persuasiveness only comes into play if you can  
9 have external evidence that shows that you can  
10 have honest testimony that is somehow mistaken.  
11 And there is simply none of that here.

12 Dai gave extremely detailed testimony  
13 about the abuse the Chinese government inflicted  
14 on him for his resistance to their forced  
15 abortion of his child. He testified that the  
16 police are looking for him in China. And he  
17 testified about the continuing threats he faces.  
18 There is simply nothing that undermines that and  
19 the agency never found that that testimony was  
20 noncredible. And we, therefore, would urge this  
21 court to affirm.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Rebuttal, Ms. Sinzdak.

25

1 REBUTTAL ARGUMENT OF COLLEEN R. SINZDAK  
2 ON BEHALF OF THE PETITIONER  
3 MS. SINZDAK: Thank you. I think it's  
4 important to look at the history here. Before  
5 the REAL ID Act, the Ninth Circuit would often  
6 reverse the Board by parsing its decision and  
7 trying to see if it had specifically said that  
8 the alien was not credible. And even if the  
9 alien -- if the -- if the Board said things like  
10 the alien was not entirely credible, that wasn't  
11 enough. The Board -- the Ninth Circuit would  
12 say you didn't make an explicit adverse  
13 credibility determination and so we're going to  
14 presume that everything in the alien's testimony  
15 was fact.

16 And so Congress passed the REAL ID  
17 Act, and in the REAL ID Act, it made clear that  
18 what the Ninth Circuit had been doing was not  
19 appropriate. And it did that in part by making  
20 clear that even credible testimony isn't  
21 sufficient to establish a fact. A fact finder  
22 that is not satisfied that testimony is  
23 credible, persuasive, and contains sufficiently  
24 detailed information to satisfy the  
25 requirements, can reject the testimony. So the

1 mere absence of an explicit adverse credibility  
2 determination is not enough to dictate that the  
3 testimony of the alien has to be accepted as  
4 fact.

5           And the -- I think that at this point,  
6 everyone has acknowledged that the Ninth Circuit  
7 has continued to apply it's pre-REAL ID Act  
8 rule. And for that reason, the decisions below  
9 have to be reversed. And, in -- in fact,  
10 looking at 1252, the only question that the  
11 Ninth Circuit should have been asking is whether  
12 any reasonable fact finder would have been  
13 compelled to reject the agency's conclusion.

14           And I think a realistic examination of  
15 the evidence in both of these cases, even in  
16 light of the rebuttable presumption of the  
17 credibility before the Board, makes very clear  
18 that a reasonable fact finder could deny relief  
19 in both cases.

20           In Alcaraz, we had the testimony of  
21 the -- of the alien and -- and -- and the IJ  
22 dutifully summarized the alien's account, and  
23 then it pointed to multiple pieces of evidence  
24 demonstrating that the alien had committed a  
25 particular -- a particularly serious crime, even

1 setting aside the probation report. It pointed  
2 out that he was convict -- convicted of a  
3 domestic violence offense, that the domestic  
4 violence offense involved as its elements the --  
5 the willful infliction of corporal injuries  
6 resulting in trauma, and that he was sentenced  
7 to two years.

8           If you look at Dai, the Board pointed  
9 to multiple pieces of evidence that demonstrated  
10 that what Dai was saying just wasn't true,  
11 however you want to categorize that. And it  
12 wasn't true because his wife had returned to  
13 China voluntarily just two weeks later. It  
14 wasn't true because he said the real story was  
15 that he had come to the United States for -- to  
16 get a better life for his daughter and to get a  
17 job.

18           And I think if you just look at that  
19 evidence and apply Section 1252, it's very clear  
20 that the agency decisions here have to be  
21 affirmed.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           The cases are submitted.

25

1                   (Whereupon, at 11:35 a.m., the cases  
2 were submitted.)  
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## Official - Subject to Final Review

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