No. 15-450

In the Supreme Court of the United States

NIKOLAY IVANOV ANGOV,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The government maintains that the court below was correct in its holding, but wrong in its recognition that its decision creates a conflict in the circuits. In fact, it is the government that is in error, on both points. The acknowledged circuit conflict is real. And the Ninth Circuit erred in holding that the anonymous, uncorroborated, double-hearsay statement of a biased foreign official constitutes "substantial evidence" justifying denial of an asylum application. That decision should not stand.

A. The Circuits Are In Conflict On The Issue Presented Here.

We showed in the petition that the circuits are in conflict on the nature of the substantial evidence inquiry in cases where asylum is denied on the basis of an unsubstantiated, hearsay statement originating with a foreign official of the government alleged to have persecuted the applicant. Pet. 15-23. In response, the government contends that we "overstate the extent and nature of any disagreement among the courts of appeals." Opp. 25.

On the face of it, however, the government's contention is most improbable. The majority and dissenting judges below—although they disagreed about practically everything else—unanimously recognized that "[u]nder Second Circuit law * * * documents like the Bunton Letter categorically 'cannot support [an] adverse credibility finding'" (Pet. App. 12a (quoting *Lin* v. *U.S. Dep't of Justice*, 459 F.3d 255, 272 (2d Cir. 2006))) and that "[o]ur case cannot be distinguished from *Lin* or *Balachova*" (*id*. at 39a (Thomas, C.J., dissenting)). The government's position here thus turns on the proposition that all three judges below misread the import of the Second Circuit's holdings. That

hardly seems likely. Unsurprisingly, for several reasons, the government is wrong in contending that the court below erred in its candid recognition that it was "depart[ing] from the holding of a sister circuit." *Id*. at 12a.

1. At the outset, the government misstates the nature of the conflict in the circuits. We do not advocate, and the Second Circuit did not adopt, "a categorical rule barring (or requiring) the admission of consular investigation reports in asylum proceedings." Opp. 25. The question here does not concern the *admissibility* of evidence; the very different issue actually presented, and decided by the courts of appeals, is whether a consular report of the sort considered in this case, by itself, is *substantial evidence* sufficient to support denial of asylum.[1]

2. The government next contends that the conflict in the circuits is "narrow and fact-specific" and that the Second Circuit has not adopted a "categorical rule" holding that consular reports of this sort fail to provide substantial evidence supporting an adverse credibility finding. Opp. 25-26. But this argument rests on sleight-of-hand. We do not contend, and we agree that the Second Circuit did not hold, that "the category of consular investigation reports as a whole" is inherently unreliable. Opp. 26 n.8.

What the Second Circuit did do is catalog those considerations that render a consular report "highly unreliable and therefore insufficient to satisfy the substantial evidence requirement." *Lin*, 459 F.3d at

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[1] The issue here was not presented in *Garcia-Reyes* v. *Holder*, 134 S. Ct. 2133 (2014) (No. 13-680), cited at Opp. 15. That petition challenged a brief, unpublished decision that addressed the *admissibility* of hearsay evidence. See *Garcia-Reyes* v. *Holder*, 539 Fed. Appx. 467 (5th Cir. 2013).

269. These considerations include circumstances where the consular report is "based on the opinions of [foreign] government officials who appear to have powerful incentives to be less than candid" (*ibid.*); and those where the report "is insufficiently detailed to permit a reviewing court to assess its reliability" (*id.* at 270)—such as when it (a) offers "no information regarding [the] competency or qualifications" of foreign investigators, (b) offers no information about "where or when" the foreign report was received, and (c) "does not discuss the methods used to verify the information from the [foreign government source]." *Id.* at 271-272. The Ninth Circuit, in contrast, expressly treated these considerations as immaterial to the substantial evidence inquiry. See Pet. App. 18a.

This issue is one of considerable legal importance, reflecting disagreement about the characteristics of materials that constitute "substantial evidence." And whether or not this disagreement can fairly be described as "narrow," it concerns a circumstance—consular letters stating the views of unidentified officials of an oppressive government (almost by definition, the only sort of foreign government that will prompt an asylum request)—that, the volume of reported cases demonstrates, arises with great frequency. The government, moreover, does not deny that the question whether someone seeking asylum from such a government should be sent back to his or her country of origin is always one of profound practical importance.

3. The government's contention that the Bunton Letter "contains much of the information found lacking in *Lin*," so that it is "far from clear that the Bunton Letter 'would have been disregarded as unreliable in the Second Circuit'" (Opp. 27), does not withstand scrutiny. Some of the government's response on this

point rests on visits by U.S. embassy personnel to "locations provided by petitioner" (*ibid.*)—but such visits are immaterial here because they were not a basis for denial of the asylum request. See Pet. 8 n.4. Other observations made by the government were equally true in *Lin*—*e.g.*, the consular report here was submitted "under the signature of a named State Department official." Opp. 27. See *Lin*, 459 F.3d at 260 (information originated with named employees of U.S. Justice Department and INS). Yet others offer meaningless distinctions—*e.g.*, that information in this case originated with "'an official in the Archive Department' of the relevant police precinct" (Opp. 27), while information in *Lin* originated in "'[a] call from [the] Prison Affairs Section'" (459 F.3d at 260).

And the government's assertion that the letter in this case "conveys not a foreign official's barebones conclusion that the proffered document was fraudulent, but four specific flaws that the official identified" (Opp. 27), highlights the fundamental problem with the evidence in cases like this one. The supposed "flaws" in petitioner's subpoenas—*e.g.*, the assertions that the Bulgarian police officers named on the subpoenas never worked in that district, or that the case numbers on the subpoenas were incorrect—*were not* independently verified by the U.S. consulate and *could not* be independently evaluated by petitioner.[2] The government's reliance on unverifiable factual assertions by an unnamed foreign official to validate that same official's

[2] The government offers no reason to believe, for example, that petitioner could obtain the names of officers employed at a Bulgarian police precinct; such information is protected against disclosure even in the United States. See, *e.g.*, 5 U.S.C. § 552(b)(7); *Nunez* v. *Drug Enforcement Admin.*, 497 F. Supp. 209, 212 (S.D.N.Y. 1980).

conclusion that petitioner's documents are fraudulent therefore is circular. Such a report simply does not "contain sufficient detail to allow for the reviewing court to evaluate whether the report is reliable." *Lin*, 459 F.3d at 270.

4. The government gets no further in its attempt to distinguish the Second Circuit's approach by asserting that this case does not involve a violation of confidentiality requirements, which the government terms "a central and threshold concern of the court in *Lin*." Opp. 27-28. This contention is wrong in two respects.

To begin with, *Lin* identified the disclosure to foreign officials of documents from Lin's asylum application as a reason for reversal of the denial of asylum that was separate and independent of the lack of substantial evidence supporting that denial. See 459 F.3d at 258-259 ("We agree that the government violated the confidentiality guarantee * * * [and] *further conclude* that the BIA's adverse credibility finding was not supported by substantial evidence as it was based on the unreliable Consular Report.") (emphasis added). Thus, after finding a breach of confidentiality, the Second Circuit turned to address separately the contention "that the BIA's adverse credibility finding is not supported by substantial evidence." *Id.* at 258. The Second Circuit made just that point in *Balachova* v. *Mukasey* when it expressly held that the rule of *Lin* governs even when "the foreign official lacks a motive to fabricate." 547 F.3d 374, 383 n.7 (2d Cir. 2008). "[A]n insufficiently detailed consular report does not constitute substantial evidence," the court explained, "because its reliability cannot be verified." *Ibid*.[3]

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[3] The government relies for its reading of *Lin* on *Corovic* v. *Mukasey*, 519 F.3d 90, 95-96 (2d Cir. 2008), cited at Opp. 28. In

In any event, it is manifest that, in circumstances like those in this case, foreign officials *would* know that the U.S. consular request is related to an asylum application. In fact, the breach of confidentiality in this case is identical to that in *Lin*; in both cases, U.S. officials disclosed documents from an asylum application to foreign government personnel. See *Lin*, 459 U.S. at 262-67. And it is hard to imagine why the U.S. consulate would inquire whether Bulgarian police subpoenas were forgeries other than to investigate an asylum application. The subpoenas, moreover, included petitioner's name (see CAR 605, 608), and the government does not indicate that his name was redacted when the documents were shown to Bulgarian police officials. Yet if petitioner's account is accurate, his name would have been familiar to the employees of the police district who both beat him and were then asked to verify the validity of his documents.

The Second Circuit recognized that this "is a type of document that, when presented by a U.S. immigration official, gives rise to a strong inference that the prisoner is seeking asylum." *Lin*, 459 F.3d at 270. Accordingly, "[w]here, as here, the document at issue, if authentic, is evidence that a foreign government violated human rights, that government's 'opinion' as to the document's authenticity is obviously suspect and therefore of questionable probative value." *Ibid*. Accord *Corovic*, 519 F.3d at 95.

5. We showed in the petition that other courts of appeals have held letters similar to the Bunton letter to be so untrustworthy that reliance on them violates

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fact, although there was a breach of an asylum applicant's confidentiality in that case, the *Corovic* court nowhere suggested that evidence of the sort at issue in this case (or in *Lin*) would be adequate absent such a breach—a conclusion that would have been inconsistent with *Balachova*.

due process. Pet. 19-23. The government acknowledges that "the constitutional analysis conducted in those decisions is similar to the statutory analysis conducted in this case and *Lin*." Opp. 29. Although the government suggests that those decisions differ factually "in significant respects" from this case (Opp. 29-30), it makes *no* attempt to distinguish *Banat* v. *Holder*, 557 F.3d 886 (8th Cir. 2009), which is materially identical to this case. See Pet. 20-21. The only purported difference it identifies with *Amin* v. *Mukasey*, 535 F.3d 243 (4th Cir. 2008), is the breach of the applicant's confidentiality in that case; but we have explained why the circumstances here are identical. And decisions from other courts emphasize the importance of reliability in this context. See Pet. 22.[4]

The court below recognized that it was departing from the approach taken by other courts on a recurring matter of great importance. Pet. App. 12a. Because uniformity in this area of the law is essential, that is reason enough to grant review.

B. The Decision Below Is Wrong.

The government devotes the bulk of its brief to a defense of the merits of the decision below. Here, too, the government's very long presentation attempts to obscure the issue. The question in this case is *not* whether "any reasonable adjudicator would * * * be

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[4] The government attempts to defend the Ninth Circuit's rejection of petitioner's independent constitutional claim on the ground that noncitizens who slip across the border illegally have constitutional protections but those who present themselves legally do not. Opp. 15-16 n.6. But whether or not that is true as a general matter, the government makes no response at all to our demonstration that, as other courts of appeals have held, asylum applicants' *statutory* entitlement to specified protections triggers the due process right to the use of fair procedures. Pet. 19-20 n.5.

'compelled' to conclude that petitioner's account was credible." Opp. 15. In fact, the government does not dispute that, in this case, the IJ found that petitioner's account *was* credible "in the absence of [the Bunton] report." Pet. 7; CAR 308. The issue here—also addressed in *Lin*—therefore is whether such a consular report, standing alone, constitutes substantial evidence for an adverse credibility finding and the resulting denial of asylum. The government's argument on this point is wrong.

1. The government first asserts that the Bunton letter contained "[m]ultiple indicia of reliability." Opp. 17. The government thus declares that the letter shows the embassy had done "its own legwork" (Opp. 18), but that is a reference to the investigation of addresses provided by petitioner that ultimately were not relied upon by the BIA in its credibility determination. The government declares that the letter "'describes facts in the real world'" that petitioner could have rebutted (*ibid.*, quoting Pet. App. 19a), but we have shown that rebuttal evidence (for example, relating to the employment history of the foreign officials who beat petitioner) would not be reasonably available to an asylum applicant. In these circumstances, absent the real indicia of reliability identified in *Lin*—the identity and qualifications of the foreign investigators, details regarding the investigation conducted by those persons, and the methods used to verify the information discovered (see 459 F.3d at 271-72)—the "case-specific opportunity for rebuttal" (Opp. 19) described by the government is illusory.

2. The government does not even attempt to answer our demonstration that the decision below cannot be squared with the analysis of substantial evidence that underlies this Court's holding in *Richardson* v. *Perales*, 402 U.S. 389 (1971). As we

explained in detail in the petition (at 24-27), *Perales* identified specific considerations that bear on the reliability of hearsay evidence. The government makes no response at all to our showing that the Bunton letter falls short with respect to *each* of these considerations. See Opp. 20-22.

3. The government invokes the "presumption of regularity" for the proposition that the Bunton letter is "'legitima[te].'" Opp. 21 n.7 (citation omitted). But we showed in the petition that this presumption speaks to whether government action is the product of regular and legitimate procedures, not to the substantial evidence inquiry. If that were not so, every consular letter would amount to substantial evidence and *Lin* (and the many decisions like it) would be wrongly decided. The government makes no response to this point.

4. The government misunderstands our citation to the FAM and Cooper Memorandum. Opp. 22-23. We do not suggest that an exclusionary rule is triggered by the government's failure to comply with its own "'internal' rules of practice and procedure for conducting investigations." Opp. 23. Instead, our point—like that of the Second Circuit in *Lin* (see 459 F.3d at 271)—is that these materials demonstrate the government's own understanding of the sorts of safeguards that are necessary to produce reliable evidence. In this context, it surely is suggestive of unreliability that documents like the Bunton letter lack *all* of the government's own self-identified indicia of reliability.

5. Finally, the government has nothing meaningful to say about the court of appeals' disregard of the statutory requirement that persons in removal proceedings be given a "reasonable opportunity * * * to cross-examine witnesses presented by the Government." 8 U.S.C. §1229a(b)(4)(B). Offering petitioner

that opportunity would not have "require[d] the presence of the consular officials who carried out the investigation in Bulgaria" (Opp. 24); the government does not deny that telephonic cross-examination would have been possible. See Pet. 26-27 & n.7.

The government also is quite wrong in asserting that cross-examination of Ms. Bunton or others involved in the production of the Bunton letter would not have "'ameliorate[d]' the reliability concerns" (Opp. 24); we established in the petition (at 28-29) a number of ways in which cross-examination could have shed light on the reliability of the Bunton letter, none of which is addressed by the government. And the government fails even to attempt to explain how a blanket policy of *never* allowing cross-examination of *any* witness who provides information relied upon by the government satisfies the unequivocal statutory requirement to *permit* a "reasonable opportunity" for cross-examination.

C. The Issue Here Is One Of Continuing Importance.

The government offers one additional consideration in opposing review: that we have not "shown" that the issue presented here is one "of ongoing practical importance." Opp. 30. That is so, the government continues, because the consular letters considered in the reported decisions giving rise to the conflict in the circuits predate the ruling in *Lin*, while post-2006 consular investigations considered in several other decisions have "contained the type of information deemed important in *Lin* and petitioner's other cited decisions." Opp. 31.

It is revealing, however, that the government's argument on this point is so carefully phrased. The government does not represent that it actually has

taken *any* additional steps or put in place *any* additional policies to mandate the inclusion of *Lin*-required information in consular letters[5]; it does not affirm that all consular letters do in fact contain that information; it does not disavow reliance on such unreliable letters in opposing asylum applications; and it does not point to any letter containing the information required by *Lin*, or any judicial decision addressing such a letter, that relates to an asylum application being processed in a circuit that has not yet adopted the *Lin* standard.

In this context, there is every reason to believe that the problem presented in this case is an ongoing one of continuing, and pressing, importance. The circuits are in conflict on a recurring question of great consequence; the Court should "intervene and decide who's right." Pet. App. 17a.

[5] The Cooper Memorandum contains such requirements, but the reported decisions (including this one) demonstrate that the Memorandum is routinely ignored by government personnel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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