No. 19-1156

IN THE

Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL,
Petitioner,

v.

CESAR ALCARAZ-ENRIQUEZ,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Immigration and Nationality Act requires the Board of Immigration Appeals ("BIA") to apply a "rebuttable presumption of credibility" if an immigration judge fails to "explicitly ma[k]e" an "adverse credibility determination." 8 U.S.C. § 1229a(c)(4)(C). A court of appeals in turn must grant "conclusive" deference to the findings of the BIA, "unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* § 1252(b)(4)(B).

The question presented is:

Whether the Ninth Circuit correctly held—in agreement with every other circuit to consider the question—that it must conclusively deem an alien credible where (1) the immigration judge failed to "explicitly ma[k]e" an "adverse credibility determination" and (2) the BIA failed to find the "presumption of credibility" "rebutt[ed]."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 4

A. Factual Background 4

B. Procedural History 6

REASONS FOR DENYING THE PETITION 10

I. THE PRESUMPTION OF CREDIBILITY EMPLOYED BY THE NINTH CIRCUIT IS CORRECT 11

A. The INA Compels A Presumption Of Credibility 12

B. The Ninth Circuit Does Not Presume That An Applicant's Testimony Is "True." 18

II. THERE IS NO MEANINGFUL DIVISION AMONG THE CIRCUITS 21

III. THE QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO MERIT REVIEW 26

IV. IF THE COURT DEEMS CERTIORARI APPROPRIATE, IT SHOULD GRANT THIS PETITION AND HOLD *MING DAI* 30

A. *Ming Dai* Is An Unsuitable Vehicle 30

B. This Case Does Not Suffer From Comparable Vehicle Defects 34

TABLE OF CONTENTS—Continued

Page

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES:

Aden v. *Holder*,
589 F.3d 1040 (9th Cir. 2009)....................2, 19, 23

Alonzo-Rivera v. *U.S. Attorney Gen.*,
649 F. App'x 983 (11th Cir. 2016).................22, 24

Anaya-Ortiz v. *Holder*,
594 F.3d 673 (9th Cir. 2010)............................9, 21

Antropova v. *Holder*,
553 F. App'x 49 (2d Cir. 2014).............................23

Carreto-Escobar v. *Barr*,
--- F. App'x ---, 2020 WL 1934884 (9th
Cir. 2020)..27

Doe v. *Holder*,
651 F.3d 824 (8th Cir. 2011)...............................23

Ernesto Navas v. *INS*,
217 F.3d 646 (9th Cir. 2000)..........................20, 21

Guo v. *Sessions*,
897 F.3d 1208 (9th Cir. 2018).............................29

Guta-Tolossa v. *Holder*,
674 F.3d 57 (1st Cir. 2012)........................3, 25, 26

Gutierrez-Orozco v. *Lynch*,
810 F.3d 1243 (10th Cir. 2016)...........................23

Haider v. *Holder*,
595 F.3d 276 (6th Cir. 2010).............12, 22, 24, 26

HongBin Sun v. *Barr*,
794 F. App'x 650 (9th Cir. 2020)..........................28

Hong Fei Gao v. *Sessions*,
891 F.3d 67 (2d Cir. 2018)..................................15

TABLE OF AUTHORITIES—Continued

Page(s)

In re Beckles,
2010 WL 1251022 (BIA Feb. 23, 2010)................29

In re Duran-Zavala,
2015 WL 3896308 (BIA May 22, 2015) 29

In re Frentescu,
18 I. & N. Dec. 244 (BIA 1982)..............................7

In re Jones,
2015 WL 3896297 (BIA May 5, 2015) 29

In re Munguia de Morales,
2015 WL 3932344 (BIA May 6, 2015) 29

In re Ortega,
2010 WL 2224575 (BIA May 12, 2010) 13, 29

In re Ramirez,
2012 WL 3911867 (BIA Aug. 27, 2012)...............29

In re S-A-,
22 I. & N. Dec. 1328 (BIA 2000)..........................14

Jibril v. *Gonzales*,
423 F.3d 1129 (9th Cir. 2005)..............................17

Kazemzadeh v. *U.S. Attorney Gen.*,
577 F.3d 1341 (11th Cir. 2009)............................22

Kho v. *Keisler*,
505 F.3d 50 (1st Cir. 2007) 16, 21, 25

Kumar v. *Barr*,
770 F. App'x 381 (9th Cir. 2019)....................21, 27

Kwong v. *Holder*,
671 F.3d 872 (9th Cir. 2011)..................................9

Lin-Jian v. *Gonzales*,
489 F.3d 182 (4th Cir. 2007)................................22

TABLE OF AUTHORITIES—Continued

Page(s)

Lin Yan v. *Holder*,
559 F. App'x 658 (10th Cir. 2014)........................15

Luziga v. *Attorney Gen.*,
937 F.3d 244 (3d Cir. 2019) 22, 24, 26

Marynenka v. *Holder*,
592 F.3d 594 (4th Cir. 2010)..........................22, 24

Mejia v. *U.S. Attorney Gen.*,
498 F.3d 1253 (11th Cir. 2007)............................22

Mendoza Manimbao v. *Ashcroft*,
329 F.3d 655 (9th Cir. 2003)................................28

Ming Dai v. *Sessions*,
884 F.3d 858 (9th Cir. 2018)........................*passim*

Mubarack v. *Holder*,
595 F. App'x 54 (2d Cir. 2014).............................24

Ndou v. *Attorney Gen.*,
758 F. App'x 288 (3d Cir. 2018)...........................22

Patel v. *Sessions*,
868 F.3d 719 (8th Cir. 2017)..........................22, 24

SEC v. *Chenery Corp.*,
332 U.S. 194 (1947)...14

Shrestha v. *Holder*,
590 F.3d 1034 (9th Cir. 2010)..............................15

Singh v. *Barr*,
804 F. App'x 644 (9th Cir. 2020)..........................29

Singh v. *Gonzales*,
491 F.3d 1019 (9th Cir. 2007)..............................27

Singh v. *Holder*,
753 F.3d 826 (9th Cir. 2014)................................19

TABLE OF AUTHORITIES—Continued

Page(s)

Tijani v. *Holder*,
628 F.3d 1071 (9th Cir. 2010)....................................32

Toure v. *Attorney Gen.*,
443 F.3d 310 (3d Cir. 2006) 24

Wen Shu Chen v. *Holder*,
337 F. App'x 36 (2d Cir. 2009)..........................22, 24

Xiao Yun Yan v. *Lynch*,
646 F. App'x 542 (9th Cir. 2016)...............................32

Yan Dan Li v. *Gonzales*,
222 F. App'x 318 (4th Cir. 2007)...............................22

Zeru v. *Gonzales*,
503 F.3d 59 (1st Cir. 2007) 25

STATUTES:

8 U.S.C. § 1158(b)(1)(B)(iii) 17

8 U.S.C. § 1158(b)(2)(B)(i)..6

8 U.S.C. § 1229a...16

8 U.S.C. § 1229a(b)(4)(B) 9

8 U.S.C. § 1229a(c)(4)(B) 12

8 U.S.C. § 1229a(c)(4)(C) ....*passim*

8 U.S.C. § 1231(b)(3)(B)(ii) 6

8 U.S.C. § 1252...16

8 U.S.C. § 1252(b)(4)(B) ....*passim*

LEGISLATIVE MATERIAL:

H.R. Rep. No. 109-72 (2005) (Conf. Rep.) 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

Black's Law Dictionary (11th ed. 2019) 13

U.S. Courts of Appeals – Judicial Business 2018, U.S. Courts, *available at* https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2018 (last visited June 18, 2020) ... 29, 30

U.S. Dep't of Justice, Exec. Office for Immigration Review, *Statistics Yearbook: Fiscal Year 2018* 29

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BRIEF IN OPPOSITION

INTRODUCTION

When a foreign national seeks asylum or withholding of removal in the United States, the Immigration and Nationality Act ("INA") prescribes a three-tiered scheme of review. First, an immigration judge is responsible for assessing whether the applicant's claim is credible, without affording him any "presumption of credibility." 8 U.S.C. § 1229a(c)(4)(C). Then, if the immigration judge fails to "explicitly ma[k]e" an "adverse credibility determination," the applicant is entitled to "a rebuttable presumption of credibility on appeal" to the Board of Immigration Appeals ("BIA"). *Id.* And, finally, if the applicant petitions for review of the BIA's decision, the court of appeals must afford "conclusive" deference to the

"administrative findings of fact * * * unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* § 1252(b)(4)(B).

Every court of appeals to consider the question has held that this scheme requires a court of appeals to deem an applicant credible if neither the immigration judge nor the BIA made an explicit adverse finding of credibility. The logic of this position is straightforward: If (1) the immigration judge failed to "explicitly ma[k]e" an adverse credibility finding, and (2) the BIA did not find the "presumption of credibility" "rebutt[ed]," then (3) the "administrative finding[]" is that *the applicant is credible*—and that finding is entitled to "conclusive" deference by the court of appeals. The Government's contrary position—that an appellate court may reexamine the record to decide for itself whether the alien is credible—would contradict the plain text of the statute and flout basic principles of administrative law. It would also be a first: No court of appeals, not a single judge writing in *Ming Dai* v. *Sessions*, and not even the Government's briefs in prior cases have taken such a position.

The Government's efforts to convert this straightforward, splitless issue into a viable candidate for certiorari are a sight to behold. The Government contends that, where the presumption of credibility applies, the Ninth Circuit presumes not merely that an applicant's testimony is "credible" but also that it is "true." Pet. I; *see Ming Dai* Pet. 13, 14, 20-22, 25, 26-27, 28 (No. 19-1155). Actually, the Ninth Circuit has said just the opposite: It has held that where testimony is found "credible," an immigration judge "*need not* accept such testimony as true," *Aden* v. *Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009) (empha-

sis added), and that after applying the presumption of credibility, a court must separately assess whether an applicant's testimony is "persuasive," *Ming Dai* Pet. App. 19a.

The Government also claims that the First Circuit has split from the Ninth Circuit (along with every other circuit to address the question). *Ming Dai* Pet. 24. Wrong again. Although the First Circuit did not accept the presumption of credibility in cases predating enactment of the relevant statutory text, since then it has enforced the statute's "rebuttable presumption of credibility" in a manner indistinguishable from other circuits. *See Guta-Tolossa* v. *Holder*, 674 F.3d 57, 61-62 (1st Cir. 2012). The Government simply fails to cite the operative precedent.

Finally, the Government claims that the validity of the presumption of credibility is an issue of significant practical import. *Ming Dai* Pet. 26-27. But the Ninth Circuit has found the presumption of credibility outcome-determinative in only a miniscule fraction of asylum cases; in over 99% of cases in which an applicant's credibility was in issue, the court accepted the agency's credibility finding as sufficiently explicit or denied the petition regardless.

For these reasons, and others besides, the question presented does not merit certiorari. But if the Court wishes to review the issue, it should grant the petition in *Alcaraz* and hold *Ming Dai*. *Alcaraz* cleanly presents the validity of the presumption of credibility and accurately illustrates its limited practical significance. *Ming Dai*, in contrast, is rife with threshold disagreements and alleged procedural errors that would frustrate, distort, and potentially preclude review of the question presented.

STATEMENT

A. Factual Background

Cesar Alcaraz-Enriquez ("Alcaraz") was born in Mexico and brought to the United States when he was eight years old. Pet. App. 16a. Since then, he has lived most of his life in the United States. *Id.* at 16a-17a. Both of his parents and all three of his siblings lawfully reside in this country. *Id.* at 16a.

Alcaraz has repeatedly been diagnosed with schizophrenia, and has endured profound challenges related to that condition. *Id.* at 18a-19a. In 1998, when he was 19 years old, Alcaraz had a daughter with his girlfriend, Esmeralda. *Id.* at 17a. The following year, he pleaded no contest to charges of domestic violence against Esmeralda, as well as to possession of a controlled substance, and was sentenced to two years in prison. *Id.* at 11a-14a. While imprisoned, Alcaraz suffered severe depression, and attempted suicide by slicing his wrist with a razor blade. *Id.* at 17a. Alcaraz was confined to a bed and medicated for three months. *Id.*

Upon his release from prison, Alcaraz was deported to Mexico because of his controlled-substance conviction. *Id.* For much of his time in Mexico, Alcaraz stayed at a "rehabilitation program." *Id.* After two and a half years, Alcaraz returned to the United States to live with his family. *Id.* at 17a-18a. He was observed "speak[ing] and laugh[ing] to himself," "star[ing] off," and "hear[ing] voices." *Id.* at 18a. His family took him to a mental health clinic in California, where he was diagnosed with schizophrenia. *Id.*

Alcaraz began to receive monthly counseling and medication, and his condition improved. *Id.* But in 2005, he was again deported to Mexico because of his

1999 controlled-substance conviction. *Id.* at 17a. Two years later, Alcaraz returned to the United States. *Id.* In 2007, he was deported again. *Id.* at 18a.

Unable to live with Alcaraz in the United States, but fearing that he could not support himself in Mexico, Alcaraz's family rented him an apartment in Tijuana and subsidized his living. *Id.* That assistance proved insufficient. In 2013, Alcaraz and his neighbor had an altercation, and police were called. *Id.* The officers arrested Alcaraz and placed him in jail for two days. *Id.* After he was released, Alcaraz found that his apartment was locked and was unable to gain access. *Id.* The police were called again; this time, they accused Alcaraz of being a drug addict, beat him with batons, and placed him in a patrol car. *Id.* They then took him to an unknown location, where five officers beat him, pepper sprayed him, and Tasered him. *Id.* He was placed in jail for three to four months, and was released only after he pleaded guilty to assault. *Id.* at 18a-19a.

Upon his release, Alcaraz was again placed in a rehabilitation facility in Mexico. *Id.* at 19a. His father traveled to Mexico to rent Alcaraz an apartment and live with him for a month. *Id.* He also took Alcaraz to a psychologist, who again diagnosed Alcaraz with a paranoid disorder related to schizophrenia. *Id.* Yet Alcaraz's challenges continued. In December 2013, he left his apartment, became disoriented, and could not find his way home. *Id.* His family posted fliers and reported his disappearance; they also searched for him in hospitals, morgues, and other locations. *Id.* Unable to find Alcaraz, his family believed he was dead. *Id.*

In February 2014, Alcaraz called his family from San Diego. *Id.* He reported that, after several months, he had wandered to the San Ysidro port of entry and walked through the border in the vehicle-only lane. *Id.* Immigration officers spotted him there, and he was apprehended and taken into custody. *Id.*

B. Procedural History

1. The Government once again sought Alcaraz's removal to Mexico. *Id.* at 11a. In removal proceedings, Alcaraz acknowledged that he was removable on the basis of his controlled-substance conviction from 15 years earlier. *Id.* But with the aid of a lawyer, he sought humanitarian relief: If returned to Mexico, he pleaded, he would face a severe threat to his life and freedom because of his psychological condition. He requested withholding of removal or protection under the Convention Against Torture. *Id.*

An immigration judge denied relief and ordered Alcaraz removed. *Id.* at 21a-22a. The judge first found that Alcaraz was ineligible for asylum. *Id.* The asylum statute bars a person from obtaining asylum if he was previously convicted of an "aggravated felony." 8 U.S.C. § 1158(b)(2)(B)(i). The judge concluded that Alcaraz's 1999 domestic violence offense was categorically an aggravated felony within the meaning of this provision, and so permanently barred him from seeking asylum. Pet. App. 11a-12a.

The judge also found Alcaraz ineligible for withholding of removal. A person is ineligible for withholding of removal if he has committed a "particularly serious crime." 8 U.S.C. § 1231(b)(3)(B)(ii). This standard—unlike the standard for an aggravated

felony—is assessed on a "case-by-case basis," and turns on case-specific factors such as "the circumstances and underlying facts of the conviction" and whether "the type and circumstances of the crime indicate that the alien will be a danger to the community." *In re Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982); *see* Pet. App. 12a.

The Government and Alcaraz, however, presented "directly contradict[ory]" accounts of Alcaraz's offense. Pet. App. 2a. The Government introduced a probation officer's report written in 1999, which stated that Alcaraz had repeatedly hit, dragged, and kicked his girlfriend and then forced her to have sex with him. *Id.* at 12a-13a. The report acknowledged that Alcaraz denied many of these acts at the time, and stated instead that he grabbed his girlfriend by the arm and punched her when she "was about to hit him." *Id.* at 14a. At the immigration hearing, Alcaraz again testified that the report misstated his conduct. He explained that the altercation began because he saw his girlfriend hitting his infant daughter excessively. Alcaraz Decl. ¶ 6, *In re Alcaraz-Enriquez*, No. A075-191-250 (EOIR July 21, 2014). When he asked her to stop, she refused, and he struck his girlfriend to protect his daughter. *Id.*; *see* Hr'g Tr. 21-22, *Alcaraz*, No. A075-191-250 (EOIR July 31, 2014). Alcaraz categorically denied dragging his girlfriend, kicking her, forcing her to have sex with him, or engaging in any other violent acts. Hr'g Tr. 63-65, *Alcaraz*, No. A075-191-250 (EOIR Aug. 28, 2014).

The immigration judge did not determine whether Alcaraz's testimony was credible. Instead, it accepted the probation officer's account without further explanation, stating that "the probation officer's

evaluation," taken together with the "elements of the crime" and Alcaraz's two-year sentence, indicated that Alcaraz would be a "danger to the community." Pet. App. 14a-15a. The judge accordingly found Alcaraz's crime "particularly serious" and deemed him ineligible for withholding of removal. *Id.* at 15a.

Finally, the immigration judge held that Alcaraz was ineligible for relief under the Convention Against Torture. He found that Alcaraz "was credible as far as testifying to the harm he suffered while in the custody of the police." *Id.* at 20a. He also found that Alcaraz's "mental condition is relevant to the Court's consideration of whether or not [he] would be tortured if returned to his home country." *Id.* As he explained, the State Department has found that "mental institutions and care facilities across" Mexico are rife with "human rights abuse[s]"; that individuals with disabilities are subjected to "lack of access to justice, the use of physical and chemical restraints, physical and sexual abuse, disappearance, and illegal adoptions"; and that "[m]any of Mexico's institutions are filthy, leaving people to walk around in ragged clothing on barren floors covered with urine and feces." *Id.* at 20a-21a. Nonetheless, the judge found that Alcaraz's mistreatment was not "tantamount to torture." *Id.* at 21a.

2. The BIA summarily "adopt[ed] and affirm[ed] the decision of the Immigration Judge." *Id.* at 7a. It stated that the immigration judge "properly considered all evidence of record in assessing the seriousness of the respondent's conviction," and "was not required to adopt the respondent's version of events over other plausible alternatives." *Id.* at 8a. It also found that the judge "properly denied the respond-

ent's [Convention Against Torture] claim." *Id.* It therefore dismissed the appeal. *Id.* at 9a.

3. Alcaraz filed a petition for review in the Ninth Circuit. *Id.* at 1a. In a memorandum opinion, a panel comprised of Circuit Judges Bea and N.R. Smith and District Judge Nye explained that where, as here, "the BIA adopts and affirms an IJ's decision with further reasoning, th[e] court reviews both the decision of the IJ and the BIA." *Id.* at 3a n.2 (citing *Kwong* v. *Holder*, 671 F.3d 872, 876 (9th Cir. 2011)). Conducting that review, the panel unanimously held that "[t]he BIA erred" when it denied Alcaraz's application for withholding of removal on the basis of "a probation report, which directly contradicts Alcaraz's testimony." *Id.* at 2a.

"[W]e have repeatedly held," the panel wrote, "that 'where the BIA does not make an explicit adverse credibility finding, the court must assume that the petitioner's factual contentions are true.'" *Id.* (brackets omitted) (quoting *Anaya-Ortiz* v. *Holder*, 594 F.3d 673, 679 (9th Cir. 2010)). In this case, however, the BIA "credited the probation report over Alcaraz's testimony without making an explicit adverse credibility finding as to Alcaraz." *Id.* at 3a. Furthermore, the BIA did not give Alcaraz "any sort of opportunity to cross-examine the witnesses whose testimony was embodied in the probation report," in violation of his statutory right to "cross-examine witnesses presented by the Government." *Id.* (quoting 8 U.S.C. § 1229a(b)(4)(B)). The Ninth Circuit thus "remand[ed] to the BIA for reconsideration of th[e] claim" for withholding of removal. *Id.* at 2a.

The court found no error, however, in the BIA's resolution of Alcaraz's claim for protection under the

Convention Against Torture. *Id.* at 3a-4a. It therefore denied his petition as to that separate claim. *Id.* at 4a.

4. The Government petitioned for rehearing. *Id.* at 5a. While that petition was pending, the Ninth Circuit issued its decision in *Ming Dai* v. *Sessions*, 884 F.3d 858 (9th Cir. 2018). There, the court reiterated that, "in the absence of an adverse credibility finding by the IJ or the BIA, the petitioner is deemed credible." *Ming Dai* Pet. App. 14a. It further explained that "credibility" is distinct from "persuasiveness," and that a petitioner whose testimony is deemed credible must nonetheless demonstrate that his testimony is persuasive in order to be entitled to relief from removal. *Id.* at 19a; *see id.* at 23a n.12. Applying those rules, a divided panel held that Dai's testimony conclusively established that he was both eligible for asylum and entitled to withholding of removal. *Id.* at 24a-26a.

The Ninth Circuit denied the Government's petition for rehearing en banc in *Ming Dai* over the dissent of several judges, including Judge Bea. *Id.* at 110a; *see id.* at 123a. Following that decision, the panel in this case denied rehearing as well. Pet. App. 5a. No judge dissented. *Id.*

REASONS FOR DENYING THE PETITION

The Government claims that this case presents "the same question" as *Ming Dai*, and should be reviewed for the same reasons. Pet. 7-8. The Government is correct that the principal question in both cases is the same: whether the Ninth Circuit's presumption of credibility is valid. But as the Ninth Circuit's unanimous resolution of this case both before and after *Ming Dai* reflects, that question is

neither difficult nor worthy of this Court's review. The plain text of the INA dictates the presumption of credibility employed by the panel below. Contrary to the Government's portrayal, every court of appeals to consider the question has adopted a functionally identical presumption. Further, the question presented is of extremely limited practical importance: In the rare case in which the presumption of credibility is outcome-determinative, it often results in a remand to the agency so that it can reconsider, and potentially correct, its failure to make a credibility finding. The Court should not review this splitless question, but if it deems the question worthy of certiorari, it should grant the petition in this case and hold *Ming Dai*.

I. THE PRESUMPTION OF CREDIBILITY EMPLOYED BY THE NINTH CIRCUIT IS CORRECT.

The Government rests its case for certiorari principally on the contention that the Ninth Circuit's presumption of credibility is "[w]rong." *Ming Dai* Pet. 15. It elaborates at length on the purported defects of that rule, *see id.* at 15-23, and confidently asserts that its position is compelled by "[t]he plain text" of the REAL ID Act of 2005, *id.* at 17-18.

At the outset, there is more than a little reason to be skeptical of the Government's claim. Despite the Government's assertion that its position is obviously correct, every member of the Ninth Circuit to express a view in *Ming Dai* disagreed with it; both the panel majority and the en banc dissenters determined that the INA imposes *some* presumption of credibility. *Compare Ming Dai* Pet. App. 13a-14a (panel majority) (holding that the INA imposes a conclusive pre-

sumption of credibility), *with id.* at 147a-148a (Collins, J., joined by six other judges, dissenting from denial of rehearing en banc) (arguing that the INA imposes a "*rebuttable* presumption of credibility" (citation omitted)). Every court of appeals to express a view on the question, including the First Circuit, has also disagreed with the Government. *See infra* Part II. And although the Government—remarkably—does not acknowledge it, it too accepted a presumption of credibility until very recently: Prior to its en banc petition in *Ming Dai*, it "urge[d]" appellate courts to adopt the presumption of credibility employed by the Ninth Circuit. *See, e.g.*, *Haider* v. *Holder*, 595 F.3d 276, 282 & n.4 (6th Cir. 2010) (noting that "[t]he government urges us" to apply a presumption of credibility).

If the plain text of the REAL ID Act "forecloses" a presumption of credibility, then, *Ming Dai* Pet. 17, that fact has managed to elude every judge and nearly every government lawyer to examine the issue for over a decade. Sometimes, perhaps, the correct interpretation of statutory text is hiding in plain sight. But this is not one of those cases.

A. The INA Compels A Presumption Of Credibility.

1. The INA establishes a three-tier scheme for review of asylum and withholding-of-removal claims. A straightforward reading of that scheme compels the Ninth Circuit's presumption of credibility.

Start at the bottom. Review of an applicant's claim begins with the immigration judge, whose role is to *make credibility determinations*. The Act provides that "the immigration judge will determine whether or not the [applicant's] testimony is credible." 8

U.S.C. § 1229a(c)(4)(B). It further provides that the immigration judge should make those determinations based on "all relevant factors," including the applicant's "demeanor, candor, or responsiveness." *Id.* § 1229a(c)(4)(C). The immigration judge may not apply a "presumption of credibility." *Id.*

After that, an applicant appeals to the BIA, which is required to apply "*a rebuttable presumption of credibility*." *Id.* (emphasis added). The INA states that, "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." *Id.* As the Government agrees, an "appeal" from an immigration court is to the BIA. *Ming Dai* Pet. 18. And a "rebuttable presumption" means that the decisionmaker must find the fact presumed unless it finds evidence to the contrary. *See* Black's Law Dictionary (11th ed. 2019). Thus, if the immigration judge fails to "explicitly ma[k]e" an "adverse credibility determination," and the BIA does not find that the "presumption of credibility" has been "rebutt[ed]," the BIA must find that the applicant is credible. That is precisely how the BIA itself reads the statute. *See, e.g.*, *In re Ortega*, 2010 WL 2224575, at *1 n.1 (BIA May 12, 2010).

Last, when an applicant files a petition for review, the court of appeals must *defer to the BIA's credibility findings*. The INA states that "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Hence, if the BIA finds an applicant non-credible, the court of appeals must defer to that finding. But if the "rebuttable presumption of credibility" holds—that is, if the immigration judge does not make an explicit adverse

credibility finding and the BIA does not find the presumption rebutted—the court of appeals must find the applicant credible. *Id.* § 1229a(c)(4)(C). After all, in that circumstance, the BIA necessarily found the applicant credible: that is what the statutory presumption of credibility dictates. And the court is required to deem that finding "conclusive." *Id.* § 1252(b)(4)(B).

In short, putting the scheme together: if (1) the immigration judge does not "explicitly ma[k]e" an "adverse credibility determination," and (2) the BIA does not find the "presumption of credibility" "rebut[ed]," then (3) the court of appeals must "conclusive[ly]" deem the applicant credible. Or, as the Ninth Circuit summarized: "in the absence of an explicit adverse credibility finding by the IJ or the BIA we are required to treat the petitioner's testimony as credible." *Ming Dai* Pet. App. 13a.

This conclusion is reinforced by basic principles of administrative law. "[A] reviewing court * * * must judge the propriety of [an agency's] action solely by the grounds invoked by the agency," and the agency's rationale must be set forth with sufficient "clarity" and "precis[ion]" that a court can determine "whether it is right or wrong." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947) (citation omitted). Unless an agency finds that an applicant is non-credible, a reviewing court cannot uphold its decision on that ground. And unless that finding is explicit, a court cannot determine whether it is reasonable. As the BIA and numerous courts of appeals have explained (and as the Government does not contest), an immigration judge must offer "specific, cogent reasons" for finding that an applicant did not testify credibly. *In re S-A-*, 22 I. & N. Dec. 1328, 1331 (BIA 2000); *see,*

e.g., *Hong Fei Gao* v. *Sessions*, 891 F.3d 67, 77 (2d Cir. 2018); *Lin Yan* v. *Holder*, 559 F. App'x 658, 659 (10th Cir. 2014) (Gorsuch, J.); *Shrestha* v. *Holder*, 590 F.3d 1034, 1042-43 (9th Cir. 2010). If the agency does not even make its adverse credibility *finding* explicit, then its *reasons* for that finding will necessarily be a matter of guesswork for the reviewing court, stymying review and depriving the applicant of a fair chance to demonstrate that the agency erred by disbelieving him.

2. The Government disagrees. It contends that, even if the immigration judge and the BIA fail to make an adverse credibility finding, a reviewing court is free to conduct an independent review of the record and find the applicant non-credible on its own. *Ming Dai* Pet. 13-14. The Government offers several rationales for that position, and none has merit.

a. The Government first argues that because the "rebuttable presumption of credibility" applies only "on appeal" to the BIA, reviewing courts cannot also be subject to such a presumption. *Id.* at 18-19. This argument, however, overlooks the requirement that circuit courts must accord deference to the findings of the BIA. *See* 8 U.S.C. § 1252(b)(4)(B). When the presumption applies, it requires the BIA to find that the applicant is credible. A court, in turn, must deem that finding "conclusive" on review. *Id*. The fact that the presumption is binding on the BIA is precisely what compels a reviewing court to defer to the outputs of that presumption.

b. The Government also suggests that reviewing courts may not presume an applicant credible because the statute elsewhere states that "[t]here is no presumption of credibility." *Ming Dai* Pet. 16-17

(citation omitted). That language, however, is most naturally read as applying only to immigration judges, not courts. It appears immediately after language specifying how immigration judges should make credibility determinations, *see* 8 U.S.C. § 1229a(c)(4)(C), in a provision that sets forth the procedures for "[r]emoval proceedings," *id.* § 1229a. The standards for *judicial* review are contained in 8 U.S.C. § 1252. And far from allowing courts to make *de novo* credibility determinations based on an independent examination of the record, it states that judges must deem administrative findings of fact "conclusive." *Id.* § 1252(b)(4)(B); *accord Kho* v. *Keisler*, 505 F.3d 50, 56-57 (1st Cir. 2007) (interpreting statute similarly).

Indeed, reading the provision as the Government proposes would turn the statutory scheme on its head. It would make the statutory "rebuttable presumption of credibility" all but meaningless, because any finding of credibility made by the BIA pursuant to that presumption would cease to have effect as soon as the applicant filed a petition for review. It would also mean that a court of appeals would have *more* discretion than the BIA to make credibility determinations, since the BIA would be subject to a presumption of credibility but the court would not. It is deeply implausible that Congress intended that inversion of the normal roles of court and agency.

c. Lacking any footing in the statutory text, the Government turns to legislative history. It asserts that Congress "amended the INA to reject the Ninth Circuit's pre-REAL ID Act approach adopting * * * a presumption [of credibility]." *Ming Dai* Pet. 13. As support for that claim, it cites a single sentence from

the Conference Report for the REAL ID Act in which the drafters stated that "the creation of a uniform standard for credibility is needed to address a conflict on this issue between the Ninth Circuit on one hand and other circuits and the BIA." *Id.* at 18 (quoting H.R. Rep. No. 109-72, at 167 (2005) (Conf. Rep.)); *see id.* at 25 (same).

Members of this Court have lamented that legislative history is too often prone to misuse, and the Government's citation is, regrettably, a case in point. As even a brief examination discloses, the quoted passage was referring to a distinct issue: It was discussing a statutory amendment that clarified the standards "on which an adjudicator may make a credibility determination," H.R. Rep. No. 109-72, at 166-167, including by clarifying that immigration judges may take into account "inaccuracies or falsehoods * * * without regard to whether [they] go[ ] to the heart of the applicant's claim." 8 U.S.C. § 1158(b)(1)(B)(iii); *see* H.R. Rep. No. 109-72, at 74. As Judge O'Scannlain has explained, this amendment thus abrogated a line of Ninth Circuit precedent restricting when immigration judges may consider such evidence in making credibility determinations. *Jibril* v. *Gonzales*, 423 F.3d 1129, 1138 n.1 (9th Cir. 2005). The passage the Government quotes was not addressing the presumption of credibility at all; the Conference Report addressed that issue on *the next* page, where it simply quoted the relevant statutory language nearly verbatim without

suggesting it was intended to overturn Ninth Circuit precedent. *See* H.R. Rep. No. 109-72, at 168.[1]

B. The Ninth Circuit Does Not Presume That An Applicant's Testimony Is "True."

Perhaps because its principal merits argument is so infirm, the Government tries another gambit. It claims that, in the absence of an explicit adverse credibility finding, the Ninth Circuit does not presume merely that an applicant's testimony is *credible*, but that it is "*truthful* in its entirety." *Ming Dai* Pet. 20. According to the Government, this approach impermissibly conflates the questions of credibility and persuasiveness, and renders superfluous the statutory requirement that an applicant demonstrate that his testimony is "persuasive." *Id.* at 20-22.

The premise of this argument is demonstrably false. The *Ming Dai* panel expressly rejected the contention—offered by Judge Trott in dissent—that "there is bar[el]y a dime's worth of substantive difference between 'credible' and 'persuasive,'" explaining that "[t]his assertion is flatly contradicted

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[1] The quoted language also could not have been referring to the presumption of credibility because there was no "conflict" on that issue "between the Ninth Circuit on one hand and other circuits and the BIA." H.R. Rep. No. 109-72, at 167. Even by the Government's reckoning, the only circuit-court decision to cast doubt on the Ninth Circuit's presumption was issued more than two years after the REAL ID Act was enacted. *See Ming Dai* Pet. 24; *but see infra* pp. 25-26 (explaining that even that conflict is illusory). And there is no contention that the BIA has ever issued a decision questioning the validity of that presumption.

by the text of the REAL ID Act, which requires that testimony be both 'credible' *and* 'persuasive.'" *Ming Dai* Pet. App. 23a n.12 (citations omitted). The panel thus stated that it presumed only that Dai's testimony was "credible." *Id.* at 17a. It explained that Dai needed to separately satisfy the "requirement" of "persuasiveness." *Id.* at 19a. And in determining whether Dai met that distinct requirement, the court did not apply any presumption, but considered in painstaking detail whether "substantial evidence" supported "the BIA's determination that Dai's testimony was unpersuasive," when that testimony was considered in light of "the record as a whole." *Id.* at 19a-24a.

Other precedents confirm that the Ninth Circuit fully recognizes the distinction between credibility, on one hand, and persuasiveness or truthfulness, on the other. In *Aden* v. *Holder*, the court held that the REAL ID Act "restricts the effect of apparently credible testimony by specifying that the IJ *need not accept such testimony as true*." 589 F.3d at 1044 (emphasis added). Other cases have described the distinction similarly, and rejected the truthfulness of testimony even after presuming it to be credible. *See, e.g.*, *Singh* v. *Holder*, 753 F.3d 826, 836-837 (9th Cir. 2014) (giving examples).

The Government suggests that the *Ming Dai* panel confused credibility and persuasiveness when it held that the BIA could not deny Dai's petition simply because it found he was "not being truthful" about certain ancillary facts. *Ming Dai* Pet. 9 (citing *Ming Dai* Pet. App. 24a, 164a). That passage, however, did exactly the opposite: It *distinguished* between credibility and persuasiveness. It explained that, once the BIA determined that the facts did not rebut

the presumption of credibility, that "issue [wa]s settled." *Ming Dai* Pet. App. 22a. The BIA, therefore, could not "smuggle[ ]" credibility issues "into the persuasiveness inquiry." *Id.* at 22a-23a. But it did not dispute that the BIA could "question[ ] *the facts* regarding Dai's persecution in China." *Id.* at 23a (emphasis added). It simply found that neither the BIA nor the Government could explain how Dai's alleged lack of truthfulness "was relevant in any way other than to undermine Dai's credibility." *Id.*[2]

The Government also observes that *Ming Dai* quoted a decision in which the Ninth Circuit stated that a reviewing court "must assume that the applicant's factual contentions are true" absent an explicit adverse credibility determination. *Ming Dai* Pet. 20 (quoting *Ernesto Navas* v. *INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000)). That case, however, was issued five years before the REAL ID Act, when there was "no practical difference * * * between credibility and truth," and the court had no reason to be "careful in [its] phrasing." *Ming Dai* Pet. App. 129a n.3 (Callahan, J., dissenting from denial of rehearing en banc). Since *Ming Dai* squarely addressed this issue, the court has been more precise: It has stated that it presumes an applicant is "credible," and that she

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[2] Contrary to Judge Callahan's suggestion, then, the Ninth Circuit emphatically did not hold that courts must "disregard any evidence that would call into question the applicant's credibility." *Ming Dai* Pet. App. 134a n.7 (Callahan, J., dissenting from denial of rehearing en banc). It held that courts may consider such evidence only to determine the truth of the applicant's assertions, not to determine the applicant's credibility. *See id.* at 22a-23a (panel opinion).

must separately satisfy the requirement of persuasiveness. *See, e.g.*, *Kumar* v. *Barr*, 770 F. App'x 381, 382-383 (9th Cir. 2019).[3]

II. THERE IS NO MEANINGFUL DIVISION AMONG THE CIRCUITS.

Not only is the decision below correct, it is also consistent with the rule applied by every other court of appeals to consider the question. Six circuits have adopted a presumption of credibility indistinguishable from the rule employed by the Ninth Circuit. The First Circuit has adopted a functionally similar rule: Although it rejected a presumption of credibility for pre-REAL ID Act cases in *Kho*, it has since interpreted the REAL ID Act in a manner that is in practice identical to the approach taken by other courts.[4]

1. Six circuits have unequivocally held that, where an immigration judge fails to make an explicit adverse credibility finding, the reviewing court presumes that the alien is credible.

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[3] In the decision below (which was issued before *Ming Dai*), the Ninth Circuit quoted a case using the same "assume * * * true" phrasing. Pet. App. 2a (quoting *Anaya-Ortiz*, 594 F.3d at 679, in turn quoting *Navas*, 217 F.3d at 652 n.3). But the court made clear that the BIA's error was in "credit[ing]" the probation report over the applicant without making an explicit adverse credibility finding. *Id.* at 3a. And because the court remanded without resolving the merits of Alcaraz's claim, there was no practical difference between "credibility" and "truth" in resolving the petition for review.

[4] Three regional circuits—the Fifth, Seventh, and Tenth—have not expressed a view on this issue.

The Eleventh Circuit has held that "[i]n the absence of an explicit adverse credibility finding, we accept an asylum applicant's testimony as credible on review." *Alonzo-Rivera* v. *U.S. Attorney Gen.*, 649 F. App'x 983, 992 (11th Cir. 2016) (per curiam); *see Kazemzadeh* v. *U.S. Attorney Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (same); *Mejia* v. *U.S. Attorney Gen.*, 498 F.3d 1253, 1257 (11th Cir. 2007) (same).

The Fourth Circuit likewise holds that where "neither the IJ nor the BIA made an express adverse credibility determination," "we 'presume that [the applicant] testified credibly.'" *Marynenka* v. *Holder*, 592 F.3d 594, 600 (4th Cir. 2010) (quoting *Lin-Jian* v. *Gonzales*, 489 F.3d 182, 191 (4th Cir. 2007)); *see Yan Dan Li* v. *Gonzales*, 222 F. App'x 318, 323 (4th Cir. 2007) (per curiam) (indicating that this rule is consistent with the Ninth Circuit's rule).

The Second, Third, Sixth, and Eighth Circuits have all issued similar holdings. *See Wen Shu Chen* v. *Holder*, 337 F. App'x 36, 37 (2d Cir. 2009) (because "the IJ did not make an explicit adverse credibility determination * * * we assume [the applicant's] credibility"); *Luziga* v. *Attorney Gen.*, 937 F.3d 244, 249 (3d Cir. 2019) ("[i]n the absence of an explicit adverse credibility determination, we assume that the noncitizen testified credibly"); *Ndou* v. *Attorney Gen.*, 758 F. App'x 288, 293 & n.1 (3d Cir. 2018) (repeating this rule and favorably invoking *Ming Dai*); *Haider*, 595 F.3d at 282 (6th Cir.) ("when an IJ or the BIA * * * fails to make an explicit adverse determination * * * we will assume that the applicant was credible"); *Patel* v. *Sessions*, 868 F.3d 719, 724 (8th Cir. 2017) (if the immigration judge "made no express credibility finding with regard to [the appli-

cant's] testimony, we presume her testimony was credible").

The Government proposes two distinctions between these courts and the Ninth Circuit. *Ming Dai* Pet. 20-23. Neither has merit.

First, the Government claims that whereas other courts apply a presumption of credibility, the Ninth Circuit applies a presumption of truth. *Id.* at 20-22, 25. As already noted, that is just wrong. Like every other court of appeals, the Ninth Circuit presumes only that an applicant's testimony is "credible," and has expressly distinguished between credibility and truth. *See supra* pp. 18-21. Indeed, both of the cases the Government cites as evidence of a split on this point expressly *relied on and agreed with* the Ninth Circuit in describing the distinction between credibility and persuasiveness. *See Doe* v. *Holder*, 651 F.3d 824, 830 (8th Cir. 2011) ("The statute thus contemplates that an alien's testimony may be 'credible' yet not 'persuasive,' for otherwise the second determination would be superfluous." (citing *Aden*, 589 F.3d at 1044-45)); *Gutierrez-Orozco* v. *Lynch*, 810 F.3d 1243, 1246 (10th Cir. 2016) (explaining that "even credible testimony may not be 'persuasive or sufficient in light of the record as a whole' " (citation omitted), and noting that the Ninth Circuit "appl[ies] a similar interpretation" (citing *Aden*, 589 F.3d at 1044-45)); *see also Antropova* v. *Holder*, 553 F. App'x 49, 50 (2d Cir. 2014) (similar).

Second, the Government claims that other circuits apply a *rebuttable* presumption of credibility, whereas the Ninth Circuit applies a *conclusive* presumption. *Ming Dai* Pet. 22-23. That too is incorrect. Other circuits frame the presumption of credibility in

the same categorical terms as the Ninth Circuit: They state that "[i]n the absence of an explicit adverse credibility finding," courts must "*accept* an * * * applicant's testimony as credible," *Alonzo-Rivera*, 649 F. App'x at 992 (emphasis added); "*presume* that [the applicant] testified credibly," *Marynenka*, 592 F.3d at 600 (emphasis added and citation omitted); *see Patel*, 868 F.3d at 724; or "*assume* [the applicant's] credibility," *Wen Shu Chen*, 337 F. App'x at 37 (emphasis added); *see Luziga*, 937 F.3d at 249; *Haider*, 595 F.3d at 282. Not one of these circuits has described its presumption as rebuttable. Further, we are unaware of a single case—and the Government has identified none—in which any one of these circuits found the presumption rebutted or even suggested that such rebuttal was possible.

The Government bases its contrary reading entirely on the fact that, in explaining the basis for the presumption of credibility, some circuits have cited the INA's rebuttable presumption of credibility. *See Ming Dai* Pet. 19-20. But those courts did not assert that the rebuttable presumption applied *directly* to reviewing courts; indeed, all of the decisions the Government cites (along with other cases in those circuits) omitted the word "rebuttable" when describing the presumption of credibility applicable in the courts of appeals. *See, e.g.*, *Mubarack* v. *Holder*, 595 F. App'x 54, 56 (2d Cir. 2014); *Toure* v. *Attorney Gen.*, 443 F.3d 310, 326 (3d Cir. 2006); *Marynenka*, 592 F.3d at 600. Rather, each of those circuits appears to have grasped the critical textual point: whereas the REAL ID Act makes the presumption of credibility rebuttable on appeal to the BIA, once the BIA fails to find the presumption rebutted, the applicant's credi-

bility is conclusively established for purposes of review.

2. The First Circuit has not meaningfully departed from the rule employed by other circuits. It is true that, in cases pre-dating the application of the REAL ID Act, the First Circuit rejected the proposition that "[an] alien's testimony must be taken as credible" if the immigration judge "has not made an express finding of non-credibility." *Zeru* v. *Gonzales*, 503 F.3d 59, 73 (1st Cir. 2007). In *Kho*, the First Circuit faithfully applied that holding to another pre-REAL ID Act case. 505 F.3d at 56 & n.5. But it did not decide what standard of review it would apply in cases under the REAL ID Act: It simply noted that the REAL ID Act establishes a "rebuttable presumption of credibility" for the BIA, but not the courts, without resolving how that presumption affects the scope of judicial review. *Id.* at 56-57.

Since then, however, the court has given effect to the REAL ID Act's presumption of credibility in essentially the same manner as other circuits. In *Guta-Tolossa*—a case the Government neglects to cite—the First Circuit found that because the immigration judge did not "ma[k]e an explicit adverse credibility finding," the BIA was required to "grant [the applicant] a presumption of credibility in analyzing his appeal." 674 F.3d at 61. "Nevertheless," the court continued, "in analyzing whether the IJ properly determined that Guta-Tolossa had not met his burden of proof, the BIA does not seem to have granted him a presumption of credibility." *Id.* at 62. Accordingly, the First Circuit remanded the case to the BIA with instructions to "review[ ] Guta-Tolossa's appeal in light of that presumption, or explain[ ] why the presumption did not apply." *Id.* at 62, 65. It

then analyzed whether Guta-Tolossa could "meet his burden of proof" if the BIA were to find "the presumption of credibility" unrebutted. *Id.* at 62.

This decision thus reaches a result functionally identical to the rule in other circuits. The First Circuit held that the rebuttable presumption of credibility applies to the BIA. *Id.* at 61-62. It also held that, where the BIA has not found the presumption rebutted, the court must accept the alien's testimony as credible and review his remaining claims on that basis. *Id.* at 62-65. The fact that the First Circuit remanded the case to permit the BIA to clearly address whether it found the alien credible does not distinguish it from other circuits: The Ninth Circuit issued a similar remand in this very case, *see* Pet. App. 2a (remanding to the BIA "for reconsideration of [Alcaraz's] claim"), and other circuits that employ a presumption of credibility frequently do the same, *see, e.g.*, *Haider*, 595 F.3d at 282; *Luziga*, 937 F.3d at 257.

III. THE QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO MERIT REVIEW.

In addition to being correct and consistent with the position of every other circuit to address the issue, the decision below is also of limited importance. The presumption of credibility is outcome-determinative in only a miniscule number of cases, and has no plausible effect on the incentives or workloads of immigration judges.

1. The presumption of credibility affects outcomes in an exceedingly small share of immigration cases. In the last five years, the Ninth Circuit has considered more than 1,650 petitions for review of asylum

or withholding-of-removal decisions.[5] Of those cases, more than 450 discussed whether the applicant testified credibly.[6] And it appears that in only *four* of them—specifically, *Ming Dai*, this case, and two unpublished opinions[7]—the Ninth Circuit found that the immigration judge or the BIA failed to make an explicit adverse credibility finding and relied on the presumption of credibility. Put differently, in more than *99%* of cases in which credibility was at issue, the court accepted the immigration judge's or the BIA's credibility finding as sufficiently explicit or denied relief regardless.

And even that lopsided count overstates matters. In a substantial share of cases in which the Ninth Circuit applied the presumption of credibility, it did not reverse the agency outright. Rather, it remanded to the agency to give it an opportunity to fix its errors and make a clear credibility determination. This is one such case. *See* Pet. App. 2a. There are several others. *See, e.g.*, *Singh* v. *Gonzales*, 491 F.3d

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[5] Counsel conducted a Westlaw search for <("asylum" OR "withholding of removal") AND "petition for review">. That search yielded 1,682 Ninth Circuit cases. A selective review of the results did not reveal the need to discount that number.

[6] Counsel conducted the following Westlaw search: <("credib!" /5 ("ruling" or "holding" or "finding" or "determination")) /50 ("true" or "credible") AND ("asylum" OR "withholding #of removal")>. That search yielded 482 Ninth Circuit cases, and we examined each result individually and yielded the numbers stated in text.

[7] *See Carreto-Escobar* v. *Barr*, --- F. App'x ---, 2020 WL 1934884 (9th Cir. 2020); *Kumar*, 770 F. App'x 381.

1019, 1026-27 (9th Cir. 2007); *Mendoza Manimbao* v. *Ashcroft*, 329 F.3d 655, 662-663 (9th Cir. 2003).[8]

Thus, there is no merit to the Government's assertion that the presumption "tie[s] the hands of [immigration judges]" and threatens a spate of "improper reversals." *Ming Dai* Pet. 26-27 (citation omitted). The overwhelming majority of immigration judges have no difficulty rendering explicit credibility findings, to which the Ninth Circuit regularly defers. *See, e.g.*, *HongBin Sun* v. *Barr*, 794 F. App'x 650, 651 (9th Cir. 2020) ("only the most extraordinary circumstances will justify overturning" an "IJ's credibility finding"). And the presumption leads to reversals in a tiny fraction of the Ninth Circuit's immigration caseload.

2. The importance of the issue is still further diminished by the fact that the presumption of credibility has no appreciable impact on the incentives for immigration judges to issue clear credibility findings. As all agree, immigration decisions are subject to a presumption of credibility when reviewed "on appeal" to the BIA. 8 U.S.C. § 1229a(c)(4)(C). The BIA, moreover, has enforced that presumption rigorously: It has repeatedly invoked the presumption upon finding that an immigration judge failed to "make an

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[8] The Government claims that, on remand from a decision applying the presumption of credibility, an immigration judge would be "forc[ed] to accept an applicant's favorable testimony as the whole truth and to disregard unfavorable evidence." *Ming Dai* Pet. 26-27 (citation omitted). Again, that is a misreading of the Ninth Circuit's precedents, which say the opposite. *See supra* pp. 18-21.

explicit adverse credibility finding." *In re Duran-Zavala*, 2015 WL 3896308, at *1 n.1 (BIA May 22, 2015); *see In re Munguia de Morales*, 2015 WL 3932344, at *1 (BIA May 6, 2015); *In re Jones*, 2015 WL 3896297, at *1 (BIA May 5, 2015); *In re Ramirez*, 2012 WL 3911867, at *2 n.2 (BIA Aug. 27, 2012); *In re Ortega*, 2010 WL 2224575, at *1 n.1; *In re Beckles*, 2010 WL 1251022, at *2 n.3 (BIA Feb. 23, 2010); *see also Guo* v. *Sessions*, 897 F.3d 1208, 1212 n.2 (9th Cir. 2018); *Singh* v. *Barr*, 804 F. App'x 644, 644 n.4 (9th Cir. 2020). Yet we have found *no* publicly available decision—either published or unpublished—in which the BIA found the presumption rebutted.

Accordingly, regardless of whether circuit courts apply a presumption of credibility, immigration judges face the same incentive: either make an explicit adverse credibility finding, or the applicant will be deemed credible on review. The statistics reinforce the point. Each year, the BIA completes approximately 20,000 appeals from the immigration courts,[9] of which one-quarter are reviewed by the courts of appeals;[10] one-eighth are reviewed by the

[9] U.S. Dep't of Justice, Exec. Office for Immigration Review, *Statistics Yearbook: Fiscal Year 2018*, at 36 ("Table 20: BIA Receipts and Completions by Type").

[10] *U.S. Courts of Appeals – Judicial Business 2018*, U.S. Courts, *available at* https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2018 (last visited June 18, 2020) (reporting that 85% of the 6,089 administrative agency appeals filed in 2018 were appeals of BIA decisions).

Ninth Circuit;[11] and approximately *one* is reversed or remanded each year by the Ninth Circuit on the basis of the presumption of credibility, *see supra* pp. 26-27. The prospect that this beyond-remote chance of reversal will alter immigration judges' incentives or workloads—particularly when their decisions are already reviewed pursuant to a near-conclusive presumption of credibility in the BIA—is nothing short of fanciful.

IV. IF THE COURT DEEMS CERTIORARI APPROPRIATE, IT SHOULD GRANT THIS PETITION AND HOLD *MING DAI*.

For the foregoing reasons, this Court should deny review. But if the Court wishes to consider the question, it should grant the petition in this case and hold *Ming Dai*. *Ming Dai* suffers from several significant vehicle flaws that would potentially prevent the Court from resolving the question presented, and would at minimum distort and impair its analysis. This case does not suffer from comparable vehicle problems, and accurately illustrates the limited stakes of the question presented.

A. Ming Dai Is An Unsuitable Vehicle.

Ming Dai presents at least three serious vehicle problems that counsel against review.

1. The parties in *Ming Dai* disagree as to a potentially case-dispositive threshold question: whether the immigration judge actually made an adverse

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[11] *Id.* (reporting that 56% of BIA cases filed in the courts of appeals were filed in the Ninth Circuit).

credibility finding. The panel concluded that the judge did not make such a finding. *Ming Dai* Pet. 12a. But several Ninth Circuit judges contended that he did. Judge Trott filed three lengthy opinions arguing that the immigration judge found the applicant non-credible. *Id.* at 42a (Trott, J., dissenting) (arguing the immigration judge's findings were "another way of saying [the testimony] wasn't credible"); *id.* at 84a (Trott, J., dissenting) (same); *id.* at 111a-112a (statement of Trott, J., respecting denial of rehearing en banc) (quoting the immigration judge's finding concerning the applicant's "lack of forthrightness," and criticizing the panel for "elevating form over substance"). Judge Collins, joined by six other judges, likewise wrote that "the record amply confirms that the IJ *obviously* (even if not explicitly) disbelieved certain of Dai's statements." *Id.* at 144a (Collins, J., dissenting from denial of rehearing en banc) (emphasis added). The Government repeats those arguments here, contending that "[t]he IJ devoted extensive attention to his 'concern with regard to the respondent's testimony,'" and that the panel imposed a "magic-words requirement." *Ming Dai* Pet. 23, 27 (citation omitted).

This threshold dispute would impede and potentially prevent the Court from resolving the question presented. If the immigration judge in *Ming Dai* in fact made an adverse credibility finding, the presumption of credibility by its own terms would not apply. *Ming Dai* Pet. App. 12a-13a, 27a n.14. Before reaching the first question presented in *Ming Dai*, this Court would thus need to resolve a factbound threshold dispute about what the immigration judge found and whether it was sufficiently explicit. And if the Court agreed with the Government and the

dissenters that the immigration judge made the requisite finding, it would be unable to reach the question presented at all.

That threshold impediment, moreover, is highly unusual. In most cases in which the Ninth Circuit has applied the presumption of credibility—including the decision below—the immigration judge was entirely silent on the question of the applicant's credibility, leaving no doubt that he or she failed to make an adverse credibility determination. *See, e.g.*, Pet. App. 14a-15a. Furthermore, the Ninth Circuit has elsewhere made clear that "an adverse credibility finding does not require the recitation of a particular formula." *Tijani* v. *Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010); *see, e.g.*, *Xiao Yun Yan* v. *Lynch*, 646 F. App'x 542, 544 (9th Cir. 2016). The Court should not resolve the validity of the presumption of credibility on these atypical facts and in the face of a vigorous argument that the presumption by its terms does not apply.

2. *Ming Dai* is also an unsuitable vehicle because the parties disagree as to whether the BIA found the presumption of credibility rebutted. In her dissent, Judge Collins contended that by describing the applicant as "not * * * truthful," the BIA made an "*express* adverse credibility determination" that "should have precluded the panel majority from invoking the deemed-credible rule even on that rule's own terms." *Ming Dai* Pet. App. 152a-154a. Judge Trott agreed. *Id.* at 119a-120a (statement of Trott, J., respecting denial of rehearing en banc). The Government likewise contends the BIA's statements should have been "more than sufficient to overcome a 'rebuttable presumption of credibility.'" *Ming Dai* Pet. 23 (citation omitted).

Once again, the Court could not reach the question presented if it agreed with these contentions. *See Ming Dai* Pet. App. 16a (acknowledging that the presumption does not apply if the BIA finds it rebutted). And this complication is also highly unusual, as we are aware of no prior case in which the question of whether the BIA found the presumption rebutted was open to dispute.

3. Finally, *Ming Dai* presents a second question that would reduce and potentially obviate the relevance of the presumption of credibility to the outcome in that case. In addition to challenging the presumption of credibility in *Ming Dai*, the Government contends that the panel erred by failing to remand the case to the BIA. *See Ming Dai* Pet. I, 28-31. This question is highly *sui generis*: As this case illustrates, the Ninth Circuit often remands cases to the BIA after applying the presumption of credibility. Pet. App. 2a; *see supra* pp. 27-28. Moreover, were the Court to conclude that a remand was required, there would be little remaining reason for it to consider whether the *Ming Dai* panel properly invoked the presumption of credibility in the first place.

That is because, if the Government is correct that the Ninth Circuit erred by failing to remand in *Ming Dai*, reversal would be warranted regardless of how the first question presented is resolved: In either case, the panel should not have entered judgment for the petitioner or granted his petition for withholding of removal. This Court typically prefers to resolve cases on the narrowest possible grounds. Following that principle would be particularly sound in *Ming Dai*, given that a remand might well dispose of the case entirely. If the BIA or the immigration judge

were to clarify on remand that they found Dai's testimony non-credible, his case would presumably be over.

Furthermore, because a remand would entail vacatur of much of the *Ming Dai* opinion—including everything that followed the Court's invocation of the presumption of credibility—the Court would likely need to address the need for a remand before analyzing the merits of that opinion. The second question presented would thus pose yet another threshold barrier to review, further complicating the Court's resolution of the only recurring legal issue in the case.

B. This Case Does Not Suffer From Comparable Vehicle Defects.

This case does not suffer from any comparable threshold barrier. Unlike *Ming Dai*, this case presents no factual dispute about whether the immigration judge or the BIA made an adverse credibility finding; it is indisputable that they did not. *See* Pet. App. 7a-8a, 14a-15a. In addition, the panel remanded the case after applying the presumption of credibility, eliminating any possibility that the failure to remand will thwart the Court's review. *Id.* at 2a.

Moreover, this case illustrates the comparative insignificance of the presumption of credibility. The presumption of credibility played a modest role in the panel's decision: The panel found that the immigration judge erred not only by disregarding Alcaraz's testimony in the absence of an adverse credibility determination, but also by failing to give Alcaraz an opportunity to cross-examine the Government's witnesses. *Id.* at 2a-3a. Furthermore, the court remanded the case, affording the BIA and the

immigration judge another opportunity to render an explicit finding on Alcaraz's credibility. *Id.* at 2a. No judge dissented from the panel's ruling—not even Judge Bea, who joined the dissents from denial of rehearing en banc in *Ming Dai*.

This case is accordingly representative of the cases in which the presumption of credibility is employed. There is no cause for the Court to review this amply justified, widely accepted, and comparatively unimportant rule. But if it does, it should do so on the straightforward record in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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