No. 19-1155

IN THE
Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL,

Petitioner,

v.

MING DAI,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court of appeals may decide in the first instance that an asylum applicant's testimony is not credible when neither the immigration judge nor the Board of Immigration Appeals rested its decision on a finding that the testimony lacked credibility.

2. Whether the court of appeals must remand to the agency to determine whether an applicant is eligible for asylum when the court of appeals has concluded that the evidence compels a finding of past persecution and the government has never argued that country conditions have changed.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Ming Dai testified before the immigration judge ("IJ") that when his wife became pregnant with their second child, five Chinese family planning officers came to their house to take her for a forced abortion. When Dai tried to stop the officers from taking his wife and forcibly aborting his child, he was arrested, beaten, deprived of food and water, and threatened with sterilization. He fled to the United States and sought asylum and withholding of removal on the ground that he had been persecuted for his opposition to China's coercive population control program—a form of persecution that the Immigration and Nationality Act ("INA") singles out as sufficient for purposes of asylum eligibility. Neither the IJ nor the Board of Immigration Appeals ("Board") found that Dai's testimony regarding his wife's forced abortion and his arrest and abuse was not credible—in other words, neither the IJ nor the Board found that Dai had lied. Nor did the IJ or Board identify any other evidence that contradicted Dai's testimony about his abuse at the hands of the Chinese family planning officers. Still, the IJ and the Board found Dai ineligible for asylum.

The Ninth Circuit's decision granting Dai's petition for review was a straightforward application of well-settled standards of judicial review to the specific facts of this case. The Ninth Circuit first held that, because neither the IJ nor the Board had found that Dai was not a credible witness, the court of appeals could not conclude that Dai was not credible in the first instance. The court therefore accepted Dai's

testimony as credible—or, as the government puts it (at 20), "*capable* of being believed"—but did *not* deem that testimony to be necessarily *true*.

The court then held that Dai's testimony, viewed as part of the record as a whole, persuasively and indisputably showed that Dai suffered past persecution—*i.e.*, that the Chinese family planning officers persecuted Dai on account of his opposition to their forced abortion of his child. In reaching that conclusion, the court of appeals considered and rejected each of the Board's stated reasons for finding Dai's testimony unpersuasive, concluding, as required by the INA, that any reasonable adjudicator would be compelled to conclude to the contrary.

In seeking certiorari, the government primarily asks this Court to decide a question that is not presented by this case: whether a court of appeals "may conclusively presume that an asylum applicant's testimony is credible *and true* whenever an immigration judge or the Board of Immigration Appeals adjudicates an application without making an explicit adverse credibility determination." Pet. (I) (emphasis added). The Ninth Circuit simply did not hold that Dai's testimony must be taken as true; it held only that Dai's testimony must be taken as credible. The court then analyzed at length whether any reasonable adjudicator would be compelled to conclude, based on the record as a whole, that Dai's credible testimony persuasively established that Dai's treatment at the hands of Chinese family planning officers constituted past persecution—an inquiry that would have been completely unnecessary if, as the government insists, the court of appeals had already accepted Dai's testimony as the truth. The govern-

ment may disagree with the court's fact-bound conclusion regarding persuasiveness, but it plainly does not warrant this Court's review.

The Ninth Circuit's actual holding—that, absent an adverse credibility finding by the agency, a court of appeals must take an applicant's testimony as credible, though not necessarily true—also does not warrant this Court's review. Contrary to the government's argument, that holding does not conflict with decisions of other courts of appeals. The Eighth and Tenth Circuit cases the government identifies are distinguishable, and any slight disagreement with the First Circuit is largely semantic. Furthermore, the Ninth Circuit's holding is correct, as it is consistent with both the REAL ID Act and the fundamental principle of administrative law that a court cannot base its decision on a ground on which the agency did not rely.

Far from having the "significant practical consequences" the government predicts, *Dai* has only been cited a handful of times in the two years since it was decided, often for entirely uncontroversial propositions unrelated to the government's petition. In the unlikely event that the Ninth Circuit's holding does have significant consequences down the road, this Court can grant review at that time.

The second question the government presents also does not warrant this Court's review. The government does not even try to argue that the Ninth Circuit's decision not to remand creates or implicates a circuit conflict. And the Ninth Circuit's refusal to remand to allow the government to present an argument it had not previously raised is consistent

with *INS v. Ventura*, 537 U.S. 12 (2002), and *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam). This Court's cases held only that a court of appeals may not consider in the first instance a factual issue that the agency *has not yet addressed*. The Ninth Circuit complied with that rule: it addressed an issue the agency *had* considered (whether Dai suffered past persecution), and then *refused to address* a second issue (whether country conditions had changed) because the government had introduced no evidence and made no argument on that issue before the agency. The Ninth Circuit's decision was not only correct, but consistent with decisions from other courts of appeals, which have similarly declined to remand to the agency to address issues the agency has already decided or issues the government did not preserve.

This Court should deny certiorari.

STATEMENT

A. Legal Framework.

The provisions in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, governing asylum and withholding of removal are relevant here.

1. Under the INA, asylum is available to any "refugee." 8 U.S.C. § 1158(b)(1)(A). A "refugee" is anyone who is "unable or unwilling to avail himself or herself of the protection of [his or her native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). If an asylum applicant establishes past persecution, and that he is

unable or unwilling to return to his native country as a result, he is entitled to asylum absent evidence that country conditions have changed. *See* 8 C.F.R. § 208.13(b)(1)(i). The government bears the burden of showing that country conditions have changed. 8 C.F.R. § 208.13(b)(1)(ii).

As amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 303, the INA promulgates particular rules governing the ability of an applicant to establish asylum eligibility through testimony alone. Specifically, it provides that an applicant's testimony before the trier of fact may be sufficient in certain circumstances to establish the applicant's eligibility for asylum. 8 U.S.C. § 1158(b)(1)(B)(ii). Three requirements must be met: first, the testimony must be "credible"; second, the testimony must be "persuasive"; and, third, the testimony must "refer[] to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.*

The INA also provides particular rules related to the first of these requirements—credibility. "[A] trier of fact may base a credibility determination" on various factors, including "the demeanor, candor, or responsiveness of the applicant." 8 U.S.C. § 1158(b)(1)(B)(iii). Moreover, "[t]here is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." *Id.*

If the agency determines that the applicant is not eligible for asylum, the applicant may seek further review by filing a "petition to review" the agency's

order in the court of appeals. 28 U.S.C. § 2344; *see also* 8 U.S.C. § 1252.

2. The substantive requirements for withholding of removal are similar to those for asylum. A person is entitled to withholding of removal if his "life or freedom would be threatened in [the country to which he would be removed] … because of [his] race, religion, nationality, membership in a particular social group, or political opinion." See 8 U.S.C. § 1231(b)(3)(A). Moreover, the same rules regarding the applicant's testimony and credibility apply. First, the applicant's testimony alone may establish entitlement to withholding of removal so long as the testimony is credible, persuasive, and sufficient. Second, the trier of fact may make a credibility determination based on various factors. And, third, if no adverse credibility determination is made, the applicant is entitled to a presumption of credibility on appeal. *See* 8 U.S.C. §§ 1231(b)(3)(C), 1158(b)(1)(B)(ii)–(iii).

B. Facts and Procedural History.

1. Ming Dai, a native and citizen of China, entered the United States in 2012 and filed an application for asylum soon thereafter. Pet. App. 5a. An asylum officer denied Dai's application; the Department of Homeland Security initiated removal proceedings; and Dai conceded removability and sought asylum and withholding of removal. Pet. App. 5a–6a.[1]

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[1] Dai also sought protection under the Convention Against Torture. Pet. App. 6a. The agency denied CAT relief and Dai did

Dai testified before the IJ that when his wife of twenty years, Li Ping Qin, became pregnant with their second child, five Chinese family planning officers came to their house to take Qin for a forced abortion. Pet. App. 2a–3a, 5a. When Dai tried to stop the officers from taking his wife and aborting his child, the officers handcuffed him and severely beat him. They detained him for ten days, largely depriving him of food and water and subjecting him to physical abuse that led to a dislocated arm and broken ribs. Pet. App. 3a–4a. Upon release, he was fired from his job. Pet. App. 4a. Dai believes that if he returns to China, he will be forcibly sterilized. Pet. App. 7a.

Neither the IJ nor the Board found that Dai was not credible—*i.e.*, "no adverse credibility determination [was] explicitly made," 8 U.S.C. § 1158(b)(1)(B)(iii)—and no record evidence suggests that these events did not occur. Further, these facts unquestionably establish eligibility for asylum, as a person "who has been persecuted for … resistance to a coercive population control program[] shall be deemed to have been persecuted on account of political opinion," and a person suffering "persecution … on account of … political opinion" is a "refugee" and therefore eligible for asylum, absent evidence that conditions in the country have changed. 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42). The government presented no evidence or argument before the IJ or the

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not challenge that denial before the court of appeals. Pet. App. 26a n.13.

Board of any changed country conditions. Pet. App. 25a.

2. The IJ nevertheless denied Dai's applications for asylum and withholding of removal and the Board affirmed. Both the IJ and the Board relied for their decisions on statements Dai had made to the asylum officer and before the IJ regarding his wife and daughter's return to China. *See* Pet. App. 7a–8a.

In particular, when asked during the interview where his wife and daughter had travelled outside of China, Dai failed to initially disclose that they had travelled to the United States with him. Pet. App. 5a. When told the record showed they had done so, Dai acknowledged as much. Pet. App. 5a. When asked why he had not initially disclosed this fact, Dai responded that he was afraid he would be asked why they had returned to China, and explained that they had gone back "[s]o that my daughter can go to school." Pet. App. 6a. After being asked to tell the "real story," Dai said that he "wanted a good environment" for his daughter; that his daughter returned to China to go to school and his wife returned to her job; and that Dai did not have a job in China and that is why he stayed in the United States. Pet. App. 5a–6a. Before the IJ, the government asked Dai about his failure to initially disclose his wife and daughter's travel to the United States and back to China. Pet. App. 6a. Dai testified that he "was very nervous" in the interview, and stated that his wife and daughter had returned to China so his wife could care for his father-in-law and his daughter could attend school. Pet. App. 6a.

The IJ stated that Dai's testimony regarding his wife and daughter was the "principal area of concern" with respect to Dai's eligibility for asylum and withholding of removal. Pet. App. at 169a. The Board similarly found that Dai's family returning to China and "his not being truthful about it is detrimental to his claim and [] significant to his burden of proof." Pet. App. 163a–64a.

3. Dai filed a petition for review of the Board's decision in the Ninth Circuit. The court granted the petition and held that Dai was eligible for asylum and entitled to withholding of removal. Pet. App. 1a–67a.

The court first observed that, to "establish eligibility for asylum," Dai's testimony must be "credible, [] persuasive, and refer[] to specific facts sufficient to demonstrate that the applicant is a refugee." Pet. App. 11a (quoting 8 U.S.C. § 1158(b)(1)(B)(ii)). Taking each requirement in turn, the court of appeals held that the record compelled the conclusion that Dai's testimony was credible, sufficient, and persuasive; the court therefore held that Dai is eligible for asylum.

Beginning with credibility, the Ninth Circuit held that because neither the IJ nor the Board had made an "explicit[]" "adverse credibility determination," 8 U.S.C. § 1158(b)(1)(B)(iii), the court was required to take Dai's testimony as credible. Pet. App. 12a–17a. The court explained that this rule is consistent with the fundamental principle that a court cannot "deny a petition for review on a ground [on which] the BIA itself did not base its decision." Pet. App. 15a–16a (quotation marks omitted). The court acknowledged

that the INA, as amended by the REAL ID Act, stated that, in the absence of an adverse credibility finding, "a rebuttable presumption of credibility [applies] on appeal," but in the context of immigration hearings, the court held, "appeal" refers to an appeal from the IJ to the Board, not a "petition for review" of the agency's decision in the court of appeals. Pet. App. 13a–15a (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)) (emphasis omitted). The Ninth Circuit never held that the court was required to treat that credible testimony as *true*.

Having concluded that it must take Dai's testimony as credible, the Ninth turned to the question whether the agency could have permissibly concluded that Dai's credible testimony was either insufficient or unpersuasive. The court held, consistent with the agency's decision, that Dai's testimony was sufficient: Dai's testimony that he "was beaten, arrested, detained, and deprived of food and sleep because of his attempt to oppose his wife's involuntary abortion" was sufficient to establish that he had been persecuted on account of his opposition to a coercive population-control program, and thus on account of his political opinion. Pet. App. 16a–19a (citing 8 U.S.C. § 1101(a)(42)).

The Ninth Circuit also held that any reasonable factfinder would have found Dai's testimony persuasive: taking into account "the record as a whole, nothing undermines the persuasiveness of Dai's credible testimony—that is, the [Board's] determination that Dai's testimony was unpersuasive is not supported by substantial evidence," and "[t]he record compels the conclusion that Dai's testimony satisfies his burden of proof." Pet. App. 19a, 24a. The Ninth

Circuit acknowledged that the Board had found significant the fact that Dai had not been forthright about his wife and daughter's return to China. Pet. App. 19a. "The [Board's] framing of the issue," the court observed, "suggests that it is relevant because it casts doubt on Dai's credibility." Pet. App. 22a. However, because neither the IJ nor the Board made an adverse credibility finding, "the exercise in which we engage when evaluating persuasiveness requires that in this case we treat Dai's testimony before the IJ as credible." Pet. App. 22a. Dai's failure to be forthcoming about his family's return to China is therefore "relevant only to the extent that it affects the persuasiveness of the applicant's testimony for reasons *other* than challenging his credibility." Pet. App. 22a. The IJ, the Board, and the government had all failed to identify any such relevance, nor could the court. Pet. App. 23a. And no other evidence counterbalanced Dai's credible testimony as to the key facts that established his asylum eligibility.

The Ninth Circuit addressed the Board's two other stated reasons for concluding that Dai's testimony did not persuasively show his eligibility for asylum: first, that Dai's wife and daughter had returned to China, and, second, that Dai had stated in the interview with the asylum officer that he had come to the United States for a "good environment for his child" and "[m]y wife had a job and I didn't, and that is why I stayed here." Pet. App. 19a. The court held that Dai's family's return to China did not render Dai's testimony regarding his own persecution any less persuasive because the record established that the harms he and his wife suffered were distinct. His wife had been subject to a forced abortion and the

involuntary insertion of an IUD, whereas Dai had been beaten, jailed, fired from his job, and threatened with sterilization for resisting the Chinese family planning officers' treatment of his wife and unborn child. Pet. App. 20a–22a. And whereas Dai's wife had faced no further persecution in China upon her return, the police had come looking for Dai several times. Pet. App. 21a. As for Dai's statements regarding desiring a "good environment" for his child and his lack of a job in China, the court held, consistent with longstanding Ninth Circuit precedent that the government does not challenge, that "[a] valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States, including seeking economic opportunity." Pet. App. 23a–24a.

Dai's showing of past persecution, the court of appeals held, "entitled [him] to a presumption of a well-founded fear of future persecution." Pet. App. 25a. The Court stated that the government had presented no evidence or argument before the IJ or the Board regarding changed country conditions. Pet. App. 25a. "In this situation," the court of appeals held, "we are not required to remand for a determination of whether Dai is eligible for asylum. We hold that he is eligible for asylum." Pet. App. 25a (quotation marks and brackets omitted). The court of appeals did not order the agency to grant asylum, however, but remanded to the Board for it to exercise its statutory discretion as to whether asylum was warranted. Pet. App. 25a.

The Ninth Circuit also held that Dai had established entitlement to withholding of removal, for es-

sentially the same reasons he had established eligibility for asylum, the two inquiries being almost identical. Pet. App. 25a–26a.

Judge Trott dissented. He wrote that "there is no material difference between an appeal and a petition for review, none," and therefore the "rebuttable presumption of credibility" that the INA expressly applies "on appeal" to the Board, *see* 8 U.S.C. § 1158(b)(1)(B)(iii), also applies on a petition for review to the court of appeals. Pet. App. at 76a–78a. Applying a rebuttable presumption of credibility, Judge Trott would have rejected Dai's testimony. Pet. App. 84a–108a.

4. The Ninth Circuit denied the government's petition for rehearing en banc. Pet. App. 110a–57a. Judge Trott issued a statement respecting the denial in which he repeated the arguments in his dissenting opinion. Pet. App. 111a–22a. Judge Collins dissented from the denial of rehearing, agreeing with Judge Trott that, even absent an adverse credibility finding by the agency, the courts of appeals can still find an asylum applicant noncredible if a rebuttable presumption of credibility is overcome. Pet. App. 140a–50a. Judge Callahan also dissented, accusing the panel of reinstating the Ninth Circuit's pre-REAL ID Act "deemed true rule." Pet. App. 135a–36a.

REASONS FOR DENYING THE WRIT

A. The primary question on which the government seeks review is not presented in this case.

The government principally asks this Court to decide "[w]hether a court of appeals may conclusively

presume that an asylum applicant's testimony is credible *and true* whenever" an IJ or the Board does not make an adverse credibility determination. Pet. (I) (emphasis added). But that the question is not presented by this case: The court of appeals did not presume that Dai's testimony was *true*; it presumed only that it was *credible*.

The court of appeals repeatedly stated that the presumption it applied was only one of credibility, not truth. "There is one clear and simple issue in this case," the court wrote at the beginning of its decision: "neither the [IJ] nor the [Board] made a finding that Dai's testimony was not credible. Under our well-established precedent, we are required to treat a petitioner's testimony as *credible* in the absence of such a finding." Pet. App. 2a (emphasis added). Similarly, the court identified the "rule upon which we rely in this case" as being "that[,] in the absence of an adverse credibility finding by either the IJ or the [Board], we are required to treat the petitioner's testimony as *credible*." *Id.* at 14a n.8; *accord id.* at 16a ("we may not deny the petition for review based on lack of credibility … because under our well-established case law we must deem the petitioner's testimony *credible*" (emphasis added)); *id.* at 17a ("[O]ur rule that we are required to treat a petitioner's testimony as *credible* when the agency does not make an adverse credibility finding remains applicable." (emphasis added)). This uncontroversial holding is consistent with the rule in other courts of appeals. *E.g.*, *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2011) (W. Pryor, J.) ("Where an [IJ] fails to explicitly find an applicant's testimony incredible and cogently explain his or her reasons for

doing so, we accept the applicant's testimony as credible.").

Applying this rule to the facts, the court held that Dai's testimony must be taken as credible, not true: "Because neither the IJ nor the [Board] made an adverse credibility determination in Dai's case, we must treat his testimony as *credible*." Pet. App. 17a (emphasis added); *accord* Pet. App. 17a ("Dai's testimony must be deemed *credible*." (emphasis added)); Pet. App. 19a ("[W]e must treat Dai's testimony as *credible*." (emphasis added)); Pet. App. 24a ("The [Board] did not enter an adverse credibility finding, so we are required to treat Dai's testimony as *credible*." (emphasis added)). The government cites *nothing* in the court's decision deeming Dai's testimony *true* rather than simply credible.[2]

Indeed, had the court of appeals presumed Dai's testimony not just credible, but also *true*, it could have simply deleted much of its opinion. After all, were it *true* that, as Dai testified, he had been beaten and starved because he resisted the Chinese government's forced abortion of his child, there would be no question that he had been persecuted by Chinese family planning officers on account of his political beliefs, and no reason to ask whether his testimony

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[2] The government asks the Court to infer that the Ninth Circuit held that Dai's testimony must be taken as true from the court's citation to a footnote in *Navas v. I.N.S.*, 217 F.3d 646 (9th Cir. 2000). *See* Pet. 20. But the Ninth Circuit did not cite *Navas* for the deemed-true rule; it cited *Navas* for the proposition that "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." Pet. App. 13a.

was "persuasive" on that dispositive issue. Yet the court engaged in an extensive persuasiveness analysis, analyzing whether *other* aspects of Dai's credible testimony—for example, the fact that his wife and daughter had returned to China—permitted the agency to find that his testimony regarding his past persecution was unpersuasive. *See* Pet. App. 18a–24a. Thus, the court plainly was not taking Dai's credible testimony as true, but only as *credible—i.e.*, as "*capable* of being believed," Pet. 20. The government's real disagreement is with the Ninth Circuit's persuasiveness analysis, *see, e.g.*, Pet. 16, 22, but that factbound holding certainly does not warrant this Court's review.

The Ninth Circuit also did not question, let alone overrule, its own prior holdings that, under the REAL ID Act, testifying credibly is *not* equivalent to testifying truthfully and is *not* necessarily sufficient to prove eligibility for asylum. In *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009), for instance, the Ninth Circuit recognized that the REAL ID Act abrogated the court's prior "deemed true" rule by allowing an IJ to require corroboration of credible testimony. *Id.* at 1045. The amended statute, *Aden* acknowledged, allows the IJ to require corroboration even of credible testimony, and to find an applicant ineligible for asylum if the applicant fails to either provide corroboration or explain why it cannot be obtained. *Id.* at 1043–45. Similarly, in *Singh v. Holder*, 753 F.3d 826 (9th Cir. 2014), the Ninth Circuit recognized that the IJ can weigh credible testimony against conflicting evidence introduced by the government, like a country conditions report describing a lack of persecution of the applicant's social group—again recognizing

that, under the REAL ID Act, credible testimony is not the same as true testimony. *Id.* at 836.

Nowhere does the decision below dispute this binding precedent. To be sure, the Ninth Circuit did not consider in this case any corroborating evidence or evidence that contradicted Dai's testimony. But that is because the IJ never requested corroborating evidence (as the IJ had in *Aden*) and the government never introduced any evidence that contradicted Dai's testimony (as it had in *Singh*). *See* Pet. App. 6a–8a.

At the very least, the Ninth Circuit's decision does not *clearly* present the first question on which the government seeks review, and for that reason alone, this Court should deny review to avoid an unproductive dispute concerning what the Ninth Circuit actually held. If the Ninth Circuit ultimately interprets its decision in the way the government suggests—such that an asylum applicant's testimony must be presumed both credible *and true* by a court of appeals absent an adverse credibility finding by the agency—this Court could review a future case in which the issue is clearly presented.

B. The Ninth Circuit's actual holding does not warrant this Court's review.

There is also no reason for this Court to review the Ninth Circuit's actual holding. First, there is no meaningful disagreement between the Ninth Circuit's decision and the decisions of other courts of appeals. Second, the Ninth Circuit's actual holding—that a court of appeals must take testimony as credible (but not necessarily true) absent an adverse credibility finding by the agency—is correct. Third,

if the two years since *Dai* was decided are any indication, the case will not cause the upheaval to the judicial review of asylum denials that the government predicts.

1. The government wrongly claims that the Ninth Circuit's decision conflicts with *Doe v. Holder*, 651 F.3d 824 (8th Cir. 2011), *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243 (10th Cir. 2016), and three First Circuit decisions. Pet. 24. The Ninth Circuit's decision is entirely consistent with *Doe* and *Gutierrez-Orozco*, and there is also no clear disagreement between the Ninth Circuit's decision and the decisions of the First Circuit.

In *Doe*, the applicant sought relief from removal under the Convention Against Torture ("CAT"). He testified that he had been attacked when he tried to report corruption in his police unit and that he feared he would be tortured or killed if he were to return to Mexico. 651 F.3d at 827. The IJ found Doe credible but held that he was not eligible for relief under CAT. *Id.* at 828. The Board affirmed. It held that, while Doe's testimony was credible, the testimony was not persuasive because it lacked important details about the attack. *Id.* at 828. Doe argued to the Eighth Circuit that when the Board deemed his testimony credible, it also "necessarily found that all facts stated within the testimony were true," and therefore it "erred by considering separately whether his testimony was 'persuasive.'" *Id.* at 829. The Eighth Circuit rejected that argument. Observing that the INA instructs an IJ to determine both whether an applicant's testimony is "credible" and whether that testimony is "persuasive," the Eighth Circuit held that the statute "contemplates

that an alien's testimony may be 'credible' yet not 'persuasive,' for otherwise the second determination would be superfluous." *Id.* at 830 (citing 8 U.S.C. § 1229a(c)(4)(B)). "Congress thus rejected a rule that 'credible' testimony necessarily means that the facts asserted in that testimony must be accepted as true." *Id.*

In *Gutierrez-Orozco*, the Tenth Circuit similarly rejected the petitioner's argument that his testimony established that he was entitled to relief simply because the IJ had failed to make an adverse credibility determination. The Tenth Circuit held that "credibility alone is not determinative under the guidelines governing an IJ's evaluation of an applicant's testimony in a removal proceeding," because the statue instructs the IJ to consider both whether the testimony is "credible" and whether the testimony is "persuasive." 810 F.3d at 1246. "Thus, even credible testimony may not be 'persuasive or sufficient in light of the record as a whole.'" *Id.* (quoting *Doe*, 651 F.3d at 830). Analyzing the record as a whole, the Court found no error with the Board's conclusion that Gutierrez's evidence was not persuasive in light of gaps in his testimony and deficiencies in his supporting affidavits. *Id.* at 1246–47.

The Ninth Circuit's decision is entirely consistent with *Doe* and *Gutierrez-Orozco*. After holding that it was required to take Dai's testimony as credible, the Ninth Circuit nevertheless went on to evaluate whether that testimony was persuasive, Pet. App. 18a–24a, clearly acknowledging, like the Eighth and Tenth Circuits, that "even credible testimony may not be persuasive or sufficient in light of the record as a whole." *Gutierrez-Orozco*, 810 F.3d at 1246; *Doe*,

651 F.3d at 830. Indeed, if anything it is the government's position that conflicts with *Doe* and *Gutierrez-Orozco* by effectively collapsing the credibility and persuasiveness inquiries and depriving the credibility inquiry of any independent role—precisely what the Eighth and Tenth Circuits rejected.

There is also no meaningful conflict between the Ninth Circuit and First Circuit decisions. The holding of *Kho v. Keisler*, 505 F.3d 50 (1st Cir. 2006), the primary case on which the government relies, is not entirely clear. The First Circuit at times appears to hold that a court may not take testimony as *credible* in the absence of an adverse credibility finding, while elsewhere it appears to hold only that a court of appeals cannot take that testimony as *true*. *See id.* at 55–56. The government also cites *Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007), and *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010), *vacated on other grounds*, 614 F.3d 572 (1st Cir. 2010). But in *Zeru*, the IJ *did* make an adverse credibility finding so there was no reason for the First Circuit to address the question presented here—*i.e.*, whether, *absent* an adverse credibility finding, the court must accept the applicant's testimony as credible. *Id.* at 65, 67. The sentence the government cites from that decision is best interpreted as describing a credibility rule that applies to the *Board*, not to the court of appeals. *See id.* at 73. And the footnote the government cites in *Mejilla-Romero*, addressing an argument that was not even explicitly raised in the case, cannot itself create a circuit conflict. 600 F.3d at 72 n.5.

In sum, there is no clear, meaningful disagreement between the Ninth Circuit's decision in this case and the decision of any other court of appeals.

2. The Court should also deny review because the Ninth Circuit's holding is correct.

a. The court's holding is consistent with the fundamental principle of administrative law that a court cannot base a decision on reasoning on which the agency did not rely. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (when a court reviews final agency action, its review is limited to "[t]he grounds upon which … the record discloses that [the agency's] action was based"). When neither the IJ nor the Board denied asylum because the applicant's testimony was not "*capable* of being believed," Pet. 20, then neither can a court of appeals. The government does not cite a single case even suggesting that an appellate court can make its own adverse credibility determination in deciding a petition for review.

The absence of such a case is no surprise given that the REAL ID Act squarely places the credibility determination with the IJ as the "trier of fact." 8 U.S.C. § 1158(b)(1)(B)(iii). The Act gives the "trier of fact" broad discretion concerning what factors are relevant to an adverse credibility determination, including factors like "demeanor" that cannot be assessed by a reviewing court. *Id.* The legislative history of the REAL ID Act, on which the government relies (at 17–18), discusses at great length the "expertise that the Immigration Judges bring" to credibility determinations. *See* H.R. Rep. No. 109-72, at 166–68; *see also id.* at 167 (emphasizing that the Act was intended to "allow *Immigration Judges and the BIA* to follow commonsense standards in assessing … credibility" (emphasis added)). Nothing in the REAL ID Act undermines the extensive body of precedent holding that courts cannot usurp the agency's role in

determining credibility by making adverse credibility determinations that the agency did *not* make.

The government's contrary argument is unconvincing. The government argues that the REAL ID Act requires that a court of appeals apply "'[n]o presumption of credibility' in evaluating an application for asylum." Pet. 14 (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)); Pet. 16–19. But, read in context, the phrase "[t]here is no presumption of credibility" plainly applies to *the IJ—i.e.*, the "trier of fact"—not to *any* agency body or court reviewing an asylum application in any posture. The full paragraph states:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other

> relevant factor. *There is no presumption of credibility,* however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). The phrase"[t]here is no presumption of credibility" follows instructions to the "trier of fact" to assess the "demeanor" of the applicant—a reference that can only be to the IJ—and is most naturally read as also applying to that same trier of fact. And the sentence precedes the instruction that "if no adverse credibility is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal"—an instruction that the government *agrees* refers to the Board, not the court of appeals, the latter of which hears immigration matters not on appeal but on a "petition for review." 28 U.S.C. § 2344; *see* Pet. 18. There is no reason Congress would have snuck a rule that applies to a court of appeals between a rule for the IJ and a rule for the Board.

The government also argues that the Ninth Circuit's holding is inconsistent with "Congress's primary purposes in adopting the relevant provisions of the REAL ID Act." Pet. 25. Not so. According to the government, the purpose of the Act was to "creat[e] a uniform standard for credibility" by eliminating the "conflict on this issue between the Ninth Circuit on the one hand and other circuits and the BIA on the other." Pet. 25. But as the government explains (at 17–18), before the REAL ID Act, the Ninth Circuit had held that, in the absence of an adverse credibility finding, the applicant's testimony was deemed not

just credible, *but also true*, on the theory that an IJ cannot require corroboration of credible testimony. *See, e.g.*, *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir. 2000). Congress indeed abrogated this "deemed true" rule, but it did so not by taking the unprecedented step of allowing appellate courts to make independent credibility determinations on a cold record, but instead by rejecting the rule that an IJ cannot require corroboration or balance conflicting evidence. P. 16, *supra*.

In summary, the Ninth Circuit correctly held that where, as here, neither the IJ nor the BIA made an adverse credibility finding, the Ninth Circuit was not permitted to make such a finding in the first instance. Nothing in the text or history of the REAL ID Act requires otherwise.

b. The court of appeals also correctly held that—on the specific facts in this case—no reasonable factfinder could find that Dai's credible testimony did not persuasively establish that he suffered persecution.

There is no dispute that, as a legal matter, the court of appeals was correct that it must set aside an IJ's factual findings when they are not based on "substantial evidence"—*i.e.*, when "any reasonable adjudicator would be compelled to conclude to the contrary." *See* Pet. 19a; 8 U.S.C. § 1252(b)(4)(B). The government acknowledges that a court of appeals can review factual findings under this standard, and does not dispute that the court applied that standard here. *See* Pet. 9, 15.

The government disputes the court's application of that standard to the facts of this case, arguing that

the agency's decision was "well within the range of conclusions that a 'reasonable adjudicator' could reach." Pet. 15–16 (quoting 8 U.S.C. § 1252(b)(4)(B)). But that factbound dispute with the Ninth Circuit's decision certainly does not warrant this Court's review.

Moreover, the government's factual argument is wrong, as it focuses largely on the fact that Dai's wife and daughter—who, unlike Dai, did not face an outstanding threat of forced sterilization by Chinese family planning officers—had returned to China. Pet. 16, 23. Dai's asylum claim, after all, was based on what the Chinese family planning officers did to *him* in response to his resistance to their forced abortion of his child; his claim did not depend on what happened to his family. Pet. App. 2a–5a, 17a–18a. What Dai said or did not say about his family's travels and motivations is irrelevant to the question of what happened to him, except potentially as generalized evidence of across-the-board untruthfulness, and the IJ and the BIA did *not* make such a sweeping adverse credibility determination. Similarly, well-settled Ninth Circuit law that the government does not challenge makes it irrelevant that Dai was motivated to apply for asylum *both* to avoid forced sterilization *and* to take advantage of economic opportunity in this country. *See* p. 12, *supra*; Pet. App. 23a–24a (citing *Li v. Holder*, 559 F.3d 1096, 1105 (9th Cir. 2009)).

The Ninth Circuit thus correctly held that—absent a finding that Dai was *lying* that the agency never made—there was no permissible basis in the record for a factfinder to conclude that Dai's testimony was not persuasive. Pet. App. 18a–24a. At the very

least, that factbound application of the correct legal standard does not warrant this Court's review.

3. The government also argues that the Ninth Circuit's decision will have "significant practical consequences for the administration of the Nation's immigration laws." Pet. 26. But the decision was issued more than two years ago, and the only tangible consequence the government identifies is an unpublished Ninth Circuit decision that does not even cite *Dai*. *See* Pet. 27 n.5 (citing *Alcaraz-Enriquez v. Sessions*, 727 Fed. App'x 260 (9th Cir. 2018)). Indeed, *Dai* has only been cited a handful of times in the Ninth Circuit, and mostly for uncontroversial propositions in unpublished decisions. It has been cited just twice outside the Ninth Circuit, both times in the Third Circuit, in unpublished decisions, and for a principle with which the government *agrees*: that an asylum applicant "appeals" to the Board but "petitions" the court of appeals, and that the INA's rebuttable presumption of credibility that applies "on appeal" applies only to the Board. *See Solano-Chamba v. Atty. Gen.*, 764 Fed. App'x 224, 228 (3d Cir. 2019); *Ndou v. Atty. Gen.*, 758 Fed. App'x 288, 293 n.1 (3d Cir. 2018); *see also* Pet. 18 (conceding that the rebuttable presumption of credibility does not apply to a petition for review in the court of appeals). In short, the government's *prediction* about *Dai*'s impact directly conflicts with *Dai*'s *actual* impact over a several-year timeframe.

The government is also wrong that the decision will upend immigration courts by "t[ying] the hands of IJs who are presented with conflicting evidence" and "forcing them to accept an applicant's favorable testimony as the whole truth." Pet. 26. To the con-

trary, the decision acknowledges, as it must, that *the IJ* should apply "no presumption of credibility," but should evaluate credibility from a blank slate, "[c]onsidering the totality of the circumstances, and all relevant factors." 8 U.S.C. § 1158(b)(1)(B)(iii). The IJ is also free to balance credible testimony against other record evidence in making a "persuasive[ness]" inquiry. The only thing the IJ *cannot* do is collapse the statutorily-distinct credibility and persuasiveness inquiries by making *no* finding that the applicant is not credible—*i.e.*, no finding that the applicant is *lying*—but then rejecting the asylum application based on facts that do *not* contradict the asylum applicant's credible testimony. The Ninth Circuit correctly recognized that it cannot find Dai's testimony incredible in the first instance and that nothing in the record contradicted that credible testimony.

C. The Ninth Circuit's decision not to remand is consistent with *Ventura* and *Thomas*.

The second question the government presents also does not warrant this Court's review. Identifying no disagreement among the courts of appeals on this issue, the government seeks pure error correction. But there is no error at all, and certainly not one that requires this Court's review.

1. The decision below is entirely consistent with *INS v. Ventura*, 537 U.S. 12 (2002), and *Gonzales v. Thomas*, 547 U.S. 183 (2006).

In *Ventura*, the petitioner, a citizen of Guatemala, sought asylum after being threatened with harm unless he joined the guerrilla army. *Ventura*, 537 U.S.

at 14. The IJ concluded that he had failed to demonstrate past persecution, adding that it appeared that the political situation in Guatemala had changed for the better. *Id.* at 14–15. The Board affirmed but did not address whether circumstances had in fact changed. *Id.* On petition for review, the court of appeals held that the evidence compelled the conclusion that the applicant had suffered past persecution. *Id.* Instead of remanding for further fact-finding on changed country conditions, the court of appeals found in the first instance based on evidence in the record that circumstances in Guatemala had not changed significantly, and therefore that the petitioner was eligible for asylum. *Id.* at 14–16.

This Court reversed. It held that the court of appeals should have remanded the question whether circumstances in Guatemala had changed to the BIA. *Id.* at 16–17. The Court reasoned that "an appellate court [may not] intrude upon the domain which Congress has exclusively entrusted to an administrative agency" and that the court of appeals "is not generally empowered to conduct a *de novo* inquiry into a matter being reviewed." *Id.* at 16. The Court went on to observe that the State Department report used by the court of appeals was outdated and ambiguous. *Id.* at 17–18. Given this uncertainty, the Court explained, remand was necessary for the agency to evaluate the evidence and make the initial determination. *Id.* at 17. Because the court of appeals had created "potentially far-reaching legal precedent about the significance of political change in Guatemala … without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise," *id.*, the Court reversed the decision

not to remand the case to the agency. Nowhere in *Ventura* did the Court hold, as the government suggests (at 28–29), that remand is warranted whenever "a court of appeals determines that the findings of the IJ or the Board are insufficient to support the denial of asylum."

In *Thomas*, as in *Ventura*, the court of appeals erroneously addressed a factual question *de novo*, before the agency had a chance to address it.

The asylum applicants in *Thomas* alleged that they feared persecution on account of their race and their membership in a "particular social group," which they identified as their family. 547 U.S. at 184. The IJ denied the petition for asylum and the Board affirmed. *Id.* Both the IJ and the Board focused on the applicants' race-related arguments. *Id.* The court of appeals granted the petition for review. The court held that a family could, in certain circumstances, constitute a particular social group. *Id.* at 184. The court of appeals went on to find that the applicants' family qualified, and that the applicants faced persecution on account of their family—factual questions the agency had not addressed. *Id.* at 184–85. This Court reversed. It held that the court of appeals should have remanded to the Board to decide in the first instance whether the applicants' family qualified as a particular social group. *Id.* at 186–87. As in *Ventura*, this Court in *Thomas* emphasized that the court of appeals was "not generally empowered to conduct a *de novo* inquiry into the matter being reviewed." *Id.* at 186.

The Ninth Circuit's decision in this case is perfectly consistent with *Ventura* and *Thomas*. The Ninth

Circuit did not conduct any "*de novo* inquiry into the matter being reviewed." Rather, it reviewed a factual issue the agency *had* considered—whether Dai had suffered persecution in China on account of his political opinion—and it held that the evidence compelled the conclusion that he had. *See, e.g.*, Pet. App. 24a ("The record … compels the conclusion that Dai's testimony satisfied his burden of proof …"). In other words, the court of appeals did precisely what *Ventura* and *Thomas* instructed: after the Board had "evaluate[d] the evidence" and made the "initial determination" regarding past persecution, the court determined that the Board's decision in that respect "exceed[ed] the leeway that the law provides" because the record compelled the contrary conclusion. *Thomas*, 547 U.S. at 186–87 (quoting *Ventura*, 537 U.S. at 17).

The Ninth Circuit's decision not to remand the issue of changed country conditions is also entirely consistent with this Court's precedent. *Ventura* did not hold that remand is *always* required on the question of changed country conditions once the court of appeals determines that the applicant suffered past persecution. Rather, *Ventura* held that the court of appeals had erred in in addressing, in the first instance, the factual merits of a changed-country-conditions argument the government had presented to the agency. *See Ventura*, 537 U.S. at 13, 17. The Ninth Circuit in this case did not engage in *any* fact-finding regarding changed country conditions. Quite the opposite: the court refused to consider the issue because the government had "made no arguments concerning changed country conditions to the IJ or the BIA, and presented no documentary evidence for

that purpose"—*i.e.*, because the government had *waived* any argument that country conditions had changed. Pet. App. 25a.

2. The Ninth Circuit's decision not to remand is consistent with numerous decisions from other courts of appeals that decline to remand issues to the Board that the Board has already addressed or that the government has waived. Those courts, too, correctly perceive no inconsistency with this Court's decisions in *Ventura* and *Thomas*.

For example, in *Ghebremedhin v. Aschroft*, 392 F.3d 241 (7th Cir. 2004), the Seventh Circuit held that once it had determined that the record evidence compelled a finding that the petitioner had suffered past persecution on account of his religion, *Ventura* did not require it to remand the issue to the Board to analyze that issue anew:

> [W]e do not agree that *Ventura* stands for the broad proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified …. [T]he issue in *Ventura* was whether the Ninth Circuit impermissibly usurped the BIA's fact-finding role; here, however, the issue does not require finding new facts, but rather is narrowly confined to whether the undisputed record evidence compels the conclusion that Ghebremedhin would be subject to persecution on account of his religion if returned to Eritrea. We are well-within our authority

> to reverse the IJ's eligibility determination if manifestly contrary to law.

Id. at 243.

The Seventh Circuit is not alone; courts of appeals regularly decline to remand to the Board to reconsider an issue once the court determines that the record definitively rejects the Board's conclusion. *See, e.g.*, *Alvarez Lagos v. Barr*, 927 F.3d 236, 249–52 (4th Cir. 2019) (*Ventura* did not require remand for agency to decide whether applicant had established a nexus between her persecution and her protected status where the evidence "would compel any reasonable adjudicator" to conclude that she had); *Castenada-Castillo v. Gonzales*, 488 F.3d 17, 25 (1st Cir. 2007) ("[I]f the record compelled the IJ and the Board to believe [the applicant,] it would be appropriate … for us to treat the issue … as definitively resolved in [the applicant's] favor" and limit any remand to the issues that remain); *Zhao v. Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (declining to remand issue of changed country conditions where the Board had already ruled on the issue); *Yusupov v. Att'y Gen. of the United States*, 650 F.3d 968, 993 (3d Cir. 2011) (declining to remand question whether petitioners presented a danger to national security where the Board had "twice considered the whole record and failed to support its conclusion that [applicants] are a danger to national security with substantial evidence" and where there were "no additional facts or evidence" for the Board to consider); *cf. Watson v. Geren*, 569 F.3d 115, 129 n.5 (2d Cir. 2009) (neither *Ventura* nor *Thomas* required the district court to remand question of conscientious objector status to the army re-

view board where the board "plainly denied [the] application for conscientious objector status").

The Ninth Circuit's decision that the government's waiver meant it was not required to remand the issue of changed country conditions also is not an outlier. In *Doe v. Att'y Gen. of the United States*, 956 F.3d 135 (3d Cir. 2020), for example, the asylum applicant alleged that he faced persecution in Ghana on account of his sexual orientation, the IJ denied his application, and the Board affirmed. *Id.* at 138–39. The Third Circuit held that the evidence compelled a finding that Doe was persecuted on account of his sexual orientation. *Id.* at 150–51. But it declined to remand the question of changed country conditions, despite the fact that the Board had not addressed that question, in part because, as in this case, "the Government did not introduce evidence of changed country conditions or even attempt to make the case that conditions have changed," and therefore "it would be unfair to give the Government a second bite at the apple." *Id.* at 151; *see also Zhu v. Gonzales*, 493 F. 3d 588, 602 (5th Cir. 2007) (refusing to remand issue of future persecution after finding past persecution in part because the government "never offered evidence to rebut the presumption [of future persecution] before the IJ or before the BIA"); *cf. Sook Young Hong v. Napolitano*, 772 F. Supp. 2d 1270, 1282 (D. Haw. 2011) (*Ventura* did not require remand of "a brand new argument raised by the Government for the first time before this court").[3]

[3] Some courts may exercise their discretion to remand in these circumstances, but such a discretionary choice is not incon-

3. To the extent the government means to argue that the court of appeals was required to remand to the Board because it announced a new rule of law, *see* Pet. 29–30, that argument makes no sense. The purportedly new rule the government identifies—"that the absence of an explicit adverse credibility finding required the court to assume that respondent's testimony was credible," *id.* at 29—applies *only to the court of appeals*, not to the Board; the government *agrees* that the Board is required to apply a rebuttable presumption of credibility where the IJ does not make an adverse credibility determination. *See* 8 U.S.C. § 1158(b)(1)(B)(iii); Pet. 18. It would make no sense for the Ninth Circuit to remand to the Board for the Board to apply a rule that *only applies to the court of appeals*.

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sistent with the Ninth Circuit's decision not to remand, nor, for the reasons given, is it compelled by this Court's decisions in *Ventura* or *Thomas*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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