No. 11-1119

In the Supreme Court of the United States

RUI YANG,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief is notable for its failure to contest the central points made in the petition. The government *agrees* that "there is a conflict in the circuits on the question presented in this case." Opp. 12; see also Opp. 9-10 (recognizing "disagreement in the courts of appeals"). And the government does not (and surely could not) deny that questions of applicant credibility are central to the resolution of asylum claims; that such claims involve matters of compelling importance to the affected individuals; and that consistent treatment of credibility is essential for the thorough, accurate, and efficient resolution of asylum claims.

In nevertheless opposing review, the government asserts principally that the issue presented here is of "diminishing importance" (Opp. 10) because it concerns only cases arising prior to enactment of the REAL ID Act. But the question whether IJs must determine credibility in pre-REAL ID Act asylum cases is itself one of tremendous and continuing importance that warrants this Court's attention: *Thousands* of pre-REAL ID Act cases remain unresolved, and such cases will continue to work their way through the system for many years. Moreover, resolution of the pre-REAL ID Act standard will be of considerable assistance to the BIA and appellate courts as they address the rules governing subsequently filed asylum cases. Accordingly, the question presented here should be answered by this Court.

A. The Circuits Are In Conflict On The Treatment That Must Be Accorded Pre-REAL ID Act Asylum Applications.

The government concedes that there is a conflict in the circuits on the question presented, at least for cases filed before May 11, 2005, the effective date of the REAL ID Act. Opp. 12. It thus recognizes that "the Seventh Circuit in pre-REAL ID Act cases 'require[s] that, before denying a claim for lack of corroboration, an '[immigration judge] must * * * make an explicit credibility finding.'" Opp. 13 (citation omitted). We showed in the petition (at 12-14) that the Second Circuit applies the same rule.

Although the government contends that the Second Circuit's rule is "not clear" (Opp. 13), that assertion is mistaken: The Second Circuit consistently cites and applies the rule it announced in *Diallo* v. *INS* that IJs must make "explicit" credibility determinations before denying asylum applications for lack of corroboration. 232 F.3d 279, 290 (2000); see, *e.g.*, *Zaman* v. *Mukasey*, 514 F.3d 233, 237 (2d Cir. 2008) ("Vague, unclear, and passing statements do not suffice to fulfill the agency's obligation to 'rule explicitly on the credibility of [an asylum applicant's] testimony.'" (citation omitted)); see also *Meixiang Liu* v. *Holder*, 318 F. App'x 13, 14 (2d Cir. 2009) (citing *Zaman* and finding that "the agency's analysis was sufficient to qualify as an 'explicit credibility finding'"); *Jia Yan Weng* v. *Mukasey*, 272 F. App'x 98, 99 (2d Cir. 2008) (citing *Zaman* and reiterating that an IJ must "decide explicitly" whether the candidate's testimony was credible).

The government's contrary suggestion cites a single decision, *Liu* v. *Holder*, 575 F.3d 193 (2d Cir. 2009), as evidence that the Second Circuit has no

settled rule. But *Liu* is wholly consistent with the Second Circuit's requirement of a credibility determination. Pet. 12-13. In fact, the IJ in *Liu made* an express adverse credibility finding, and the BIA accepted the IJ's asylum decision without approving or disapproving the credibility finding. 575 F.3d at 195. And as we explained in the petition (at 19-22), the crucial credibility determination is the one made by the IJ, the factfinder who observes and assesses the applicant's testimony.

Moreover, contrary to the government's claim of a "lopsided" circuit split (Opp. 13), since the time that we filed the petition, the Eighth Circuit has reiterated that it agrees with the Second and Seventh Circuits in requiring IJs to make express credibility determinations before requiring an applicant to furnish corroborating evidence. See *Omondi* v. *Holder*, 674 F.3d 793, 798 (8th Cir. 2012) (noting for a pre-REAL ID Act case that the Eighth Circuit has "agreed with the rule expressed by the Second Circuit [in *Diallo* v. *INS*] that a denial of an asylum application based on a lack of corroboration could not be sustained if 'the BIA failed to (1) rule explicitly on the credibility of [the applicant's] testimony'" (quoting *El-Sheikh* v. *Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004))); see also *Bushira* v. *Gonzales*, 442 F.3d 626, 631 n.2 (8th Cir. 2006) (stating that the IJ's decision "could not be sustained" where "[t]he IJ in this case never explicitly ruled that Bushira's testimony on past persecution was not credible" before requiring corroboration).

The government also notes that five other courts of appeals have rejected this approach, citing at least one decision of a circuit that first addressed the issue after the filing of the petition. Opp. 12 (citing cases).

The government is correct in this submission—but that principally shows that the conflict is extensive and continuing to grow.

B. Thousands Of Cases Involving Pre-REAL ID Act Asylum Applications Remain Unresolved.

In arguing that the conflict nevertheless should remain unresolved, the government's central argument is that the disagreement in the courts concerns pre-REAL ID Act asylum applications and therefore "is one of diminishing importance." Opp. 10. But if the government means by this to suggest that there are few such cases in the pipeline, it is simply incorrect. In fact, there are a huge number of cases that turn on application of pre-REAL ID Act law. And delay in the resolution of such cases at the administrative level, as well as the immigrant's right to seek to reopen asylum cases, ensures that pre-REAL ID cases will continue to percolate through the immigration system for many years.

So far as we have been able to determine, roughly half of all asylum cases now pending in the courts of appeals involve applications filed before the enactment of the REAL ID Act. For example, the Ninth Circuit's clerk's office has advised us that there are more than 1500 asylum cases currently pending before that court. Approximately half of these cases involve asylum applications filed prior to enactment of the REAL ID Act, and approximately one-third involve questions of credibility.[1] These data

[1] The Ninth Circuit clerk's office informed us that, as of March 9, 2012, there were approximately 1806 asylum cases pending in that court, of which 781 were pre-REAL ID Act (about 278 of which appear to involve credibility determinations), 745 were post-REAL ID Act (about 249 appear to involve credibility de-

confirm the numbers we presented in the petition: As many as half of the thousands of asylum applications decided by the courts of appeals each year are pre-REAL ID Act cases. See Pet. 24-27. In fact, approximately half (52%) of the asylum cases decided by the courts of appeals *since* the petition was filed and for which the date of the asylum application can be determined involved applications filed before enactment of the REAL ID Act.[2] Although we cannot be

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terminations), and 280 could not be definitely identified as pre- or post-REAL ID Act by the clerk. Thus, of the 1526 cases for which the date of filing of the asylum application could be definitively determined, 51% (781) were pre-REAL ID Act. These numbers involve only fully briefed cases. E-mail from Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit (Mar. 9, 2012).

[2] In the petition, we reported that 43% of the asylum cases decided by the courts of appeals between January 1 and March 2, 2012, for which the date of asylum application could be determined from the face of the opinion, involved applications filed before May 11, 2005. See Pet. 26 & n.14. Using the same search query for cases decided between March 2 and May 24, 2012 discloses sixty cases. In twenty-five of those cases, the initial application for asylum was filed before the enactment of the REAL ID Act. See *Maruahal* v. *Holder*, 2012 WL 1743226 (9th Cir. 2012) (2003 application); *Nicholas-Bartolome* v. *Holder*, 2012 WL 1700703 (6th Cir. 2012) (1993 applications); *Agbomah* v. *Holder*, 2012 WL 1674291 (2d Cir. 2012) (hearings on application as far back as 2005); *Majeed* v. *Att'y Gen. of U.S.*, 2012 WL 1634233 (3d Cir. 2012) (application from 1990s); *Jose* v. *Holder*, 2012 WL 1522789 (6th Cir. 2012) (1992 application); *Morales* v. *U.S. Att'y Gen.*, 2012 WL 1478735 (11th Cir. 2012) (2003 application); *Jian Kang Wu* v. *Holder*, 2012 WL 1371416, at *2 (2d Cir. 2012) (initial asylum application filed "before May 11, 2005"); *Boar* v. *Holder*, 2012 WL 1237849 (6th Cir. 2012) (application no later than 2001); *Thapa* v. *Holder*, 2012 WL 1216475 (6th Cir. 2012) (application in or around 2003); *Kaur* v. *Holder*, 2012 WL 1195054 (6th Cir. 2012) (1997 application); *Alexandrov* v. *Holder*, 2012 WL 1139001 (6th Cir. 2012) (1998 updated application); *Singh* v. *Holder*, 2012 WL 1142357 (2d

sure how many such cases are yet to be resolved across the nation, they surely number in the thousands; these data belie the government's contention that the pre-REAL ID Act question is one of limited importance.

The same factors that have contributed to the huge number of pre-REAL ID Act asylum cases that currently swamp the courts also ensure that pre-REAL ID Act cases will remain in the system for some time. As this case itself illustrates, the immigration administrative process is painfully—and often inexplicably—slow. See, *e.g.*, *Hasan* v. *Holder*, 673 F.3d 26, 28 (1st Cir. 2012) ("Over a decade [after the immigrants filed their 1993 asylum application], on May 25, 2007, the government filed Notices to Appear ("NTA") in immigration court * * *."); *Jose* v. *Holder*, 2012 WL 1522789 (6th Cir. 2012) (1992 ap-

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Cir. 2012) (2002 application); *Ling Dan Zhan* v. *Holder*, 2012 WL 1109474 (6th Cir. 2012) (2003 application); *Arbid* v. *Holder*, 674 F.3d 1138, 1140 (9th Cir. 2012) (application around 2000); *Gavoci* v. *U.S. Att'y Gen.*, 2012 WL 1033021 (11th Cir. 2012) (application filed between 2001 and 2005); *Lopez* v. *Holder*, 2012 WL 1034541 (6th Cir. 2012) (2000 application); *Pllumaj* v. *Holder*, 2012 WL 1021526 (6th Cir. 2012) (applications filed in 2002 and 2004); *Omondi* v. *Holder*, 674 F.3d 793 (8th Cir. 2012) (2002 application); *Mei Fang Guo* v. *Att'y Gen. of U.S.*, 2012 WL 812340 (3d Cir. 2012) (2000 application); *Toure* v. *Holder*, 2012 WL 806493 (6th Cir. 2012) (2003 application); *Valle* v. *Holder*, 2012 WL 833657 (6th Cir. 2012) (1995 application); *Geagea* v. *Holder*, 2012 WL 805916 (6th Cir. Mar. 13, 2012) (2001 application); *Hasan* v. *Holder*, 673 F.3d 26 (1st Cir. 2012) (1993 application); *Asllani* v. *Att'y Gen. of U.S.*, 2012 WL 748381 (3d Cir. 2012) (2002 application); *Mindeng Zheng* v. *Holder*, 2012 WL 718040 (2d Cir. 2012) (1993 application).

The initial date of filing for twelve of the asylum applications could not be determined from the opinions, and in the remainder of the sixty cases, the applications were filed after May 11, 2005.

plication; notice to appear issued in 2007). In addition, immigrants may file motions to reopen asylum cases, and such motions frequently are granted, as in petitioner's case. See also 8 U.S.C. § 1229a(c)(7)(C)(ii) ("There is no time limit on the filing of a motion to reopen if the basis of the motion is * * * changed country conditions * * *."). And if a petition to reopen is granted, the law that applied at the time of the initial filing governs. Accordingly, if the set of cases affected by the question presented here is a "diminishing" one, it is a very large set that is diminishing very slowly.

In these circumstances, the enactment of the REAL ID Act does not make this case unsuitable for review. Notably, the Court has granted review in immigration cases despite intervening changes in the law, given the significant liberty interests at stake. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 420 (1999) ("The parties agree IIRIRA [enacted in 1996] does not govern respondent's case."). The Court should do so here as well.

C. The Decision Below Is Incorrect.

Given the acknowledged conflict in the circuits, the government's defense of the merits of the decision below cannot justify denial of review. See Opp. 10-12. But that defense is, in any event, flawed on its own terms. The government focuses its argument on the BIA's insistence that asylum seekers provide evidence corroborating their claims. But the government offers no justification for the court of appeals' *different* holding that IJs need not make credibility determinations *at all*. As we showed in the petition (at 17-18), the Fifth Circuit itself recognized that the BIA's approach is "in tension with the language of"

the regulation, which "seems to imply that the first step for the BIA in assessing applications for asylum should be to determine whether the applicant's testimony, by itself, satisfies the applicant's burden of proof." Pet. App. 11a. The government offers no response to this point.

Nor does the government address our demonstration that assessing credibility is essential to the integrity of asylum determinations, whether or not the Board also generally requires the applicant to offer evidence corroborating his or her story: Determining credibility imposes discipline on the inquiry, may help settle the scope and nature of the corroborative evidence that is required—and may, if the testimony is compelling enough, itself warrant the grant of asylum. Indeed, this Court has recognized the "probative force" "intrinsically command[ed]" by reports of "an impartial, experienced examiner who has observed the witnesses and lived with the case." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 495-496 (1951). But the rule embraced by the government would remove the assurance that such evidence is taken into account in asylum determinations.

D. The Question Presented Warrants Review.

Finally, we agree with the government that resolution of a pre-REAL ID Act case cannot definitively settle the meaning of the REAL ID Act. It is equally true, however, that decision of a post-REAL ID Act case will leave the pre-REAL ID Act rule unsettled and the existing conflict, which implicates thousands of cases, unresolved. As we explained in the petition (at 25-27) and discuss above, that conflict is an important one in its own right that should be resolved by this Court.

Moreover, settling the pre-REAL ID Act question would have the collateral benefit of shedding important light on the prospective rule. As we explained in the petition (at 4-5 & 16 n.10), although the REAL ID Act is new, the pre-REAL ID Act regulation (8 C.F.R. § 1208.13(a)) applies to *both* pre- and post-REAL ID Act asylum applications—and the REAL ID Act was understood to codify the pre-existing regulatory structure. Resolution of the question presented as it relates to pre-REAL ID Act cases therefore would both settle the meaning of the current regulation and address more general considerations that will have some bearing on the interpretation of the REAL ID Act.[3] And that is especially so because, as we showed in the petition (at 16 n.10), both the Second and the Seventh Circuits have continued to insist upon IJ credibility determinations even in cases originating after enactment of the REAL ID Act.[4]

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[3] The government maintains that the REAL ID Act "does not require immigration judges invariably to make credibility findings" because the Act establishes a presumption of credibility in cases "in which 'no adverse credibility determination is explicitly made.'" Opp. 14 (citation omitted). But this language likely was intended to provide a default rule to govern when the IJ erroneously fails to make a credibility determination. In fact, the REAL ID Act itself establishes an elaborate mechanism for determining credibility, which suggests that Congress *expected* IJs actually to make such determinations in asylum cases. See 8 U.S.C. § 1158(b)(1)(B)(iii).

[4] The government takes issue with this submission. Opp. 15-17. But in a post-REAL ID Act case, the Second Circuit cited its pre-REAL ID Act decision in *Zaman*, for the proposition that "an IJ must: (1) 'decide explicitly' whether or not the candidate's testimony was credible (without relying exclusively on the lack of corroborating evidence)." *Jia Yan Weng* v. *Mukasey*, 272 F. App'x 98, 99 (2d Cir. 2008) (asylum application filed June 24, 2005). Two other Second Circuit decisions relied upon by the government noted the impact of the REAL ID Act on *dif-*

But even if that were not the case, the acknowledged conflict concerning asylum applications filed prior to enactment of the REAL ID Act should be resolved.

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ferent requirements having to do with *how* to determine credibility, not the requirement *that* credibility be determined. Opp. 15-16 & n.2 (citing *Xiu Xia Lin* v. *Mukasey*, 534 F.3d 162, 165 (2d Cir. 2008), and *Chen* v. *U.S. Att'y Gen.*, 454 F.3d 103, 106 n.2 (2d Cir. 2006)). In both cases, the IJ *did* make a credibility determination. 534 F.3d at 166; 454 F.3d at 106. Similarly, the Seventh Circuit in *Rapheal* v. *Mukasey*, 533 F.3d 521 (2008), recognized that the REAL ID Act abrogated the requirement that an IJ give a detailed explanation for his or her decision to demand corroborating evidence of an otherwise credible applicant; it did not suggest that the REAL ID Act dispensed with the requirement *of* a credibility determination. To the contrary, the court remanded for the IJ to make a credibility determination prior to demanding corroborating evidence. *Id.* at 528, 534.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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