No. __-___

IN THE

# Supreme Court of the United States

PULCHERIE TEKEU DJADJOU,

*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Fourth Circuit panel majority—deepening a mature circuit split that involves circuits handling the majority of immigration cases—held that an Immigration Judge's adverse credibility finding may trump a petitioner's wholly independent evidence demonstrating entitlement to relief. Applying this rule, the panel discounted compelling evidence that Petitioner Pulcherie Tekeu Djadjou had been persecuted in Cameroon and would likely face future persecution and torture, and made its own factual findings disconnected from the IJ's findings to support its conclusion. On this basis, the panel denied her petition for asylum, withholding of removal, and relief under the Convention Against Torture. Pet. App. 30a.

The question presented in this case is whether a finding that an applicant for asylum or withholding of removal did not testify credibly may trump substantial independent evidence that compels the conclusion that the applicant is entitled to relief.

## PARTIES TO THE PROCEEDING

Petitioner is Pulcherie Tekeu Djadjou, petitioner below.

Respondent is Eric H. Holder, Jr., Attorney General of the United States, respondent below.

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## PETITION FOR A WRIT OF CERTIORARI

Pulcherie Tekeu Djadjou respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The Fourth Circuit's panel opinion, Pet. App. 2a–40a, is reported at 662 F.3d 265. The Fourth Circuit's order denying panel rehearing and rehearing *en banc* is unreported. *Id.* at 1a. The decisions of the Board of Immigration Appeals, *id.* at 41a, and the Immigration Judge, *id.* at 50a–72a, are also unreported.

## JURISDICTION

The Fourth Circuit panel issued an opinion on December 5, 2011. Pet. App. 2a. The Fourth Circuit's judgment became final when it denied panel rehearing and rehearing *en banc* on March 9, 2012. *Id.* at 1a. On May 30, 2012, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including August 6, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## LEGAL PROVISIONS INVOLVED

Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158(b), provides in pertinent part:

> (1)(A) In General – The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that such

> alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. * * *

Section 101(a)(42) of the INA, 8 U.S.C. § 1101(a)(42), provides in pertinent part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. * * *

Section 241 of the INA, 8 U.S.C. § 1231(b)(3), provides in pertinent part:

> (A) In General – * * * [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

Article 3 of the United Nations Convention Against Torture provides in pertinent part:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial

grounds for believing that he would be in danger of being subjected to torture.

## STATEMENT OF THE CASE

### A. Background

Pulcherie Tekeu Djadjou is a native and citizen of Cameroon. Ms. Djajdou was repeatedly imprisoned, tortured, raped, and harassed at the hands of Cameroonian officials because of her political activities as a member of several groups, opposing the regime of dictator Paul Biya the "Group of Less," the Social Democratic Front (SDF), and the Southern Cameroons National Council (SCNC). *See Djadjou v. Holder*, 662 F.3d 265, 267–70 (4th Cir. 2011); Pet. App. 4a–8a. Ms. Djadjou is not alone in her plight. The Cameroonian government is reported routinely to imprison, torture, and harass members of the SCNC. *See* Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Cameroon Country Reports on Human Rights Practices—2007,* Pet. App. 127a–158a.

Ms. Djadjou fled to the United States on March 12, 2002. Pet. App. at 3a. After her authorization to stay in the United States expired, the U.S. Government initiated removal proceedings against her. Ms. Djadjou timely applied for asylum, withholding of removal, and relief under the Convention Against Torture on February 18, 2003. *Id.*

### B. Administrative Proceedings

Ms. Djadjou's removal proceedings were overseen by an Immigration Judge (IJ) whose decisions repeatedly have been vacated for failing to weigh properly an immigrant's independent evidence. *See*

Pet. App. 50a–72a; *see also Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004); *Curumi v. Ashcroft*, 119 F. App'x 468 (4th Cir. 2005). The IJ rejected Ms. Djadjou's claims for relief. *Id.* at 70a.

1. At her hearing on the merits, Ms. Djadjou testified extensively regarding her persecution in Cameroon. Pet. App. 4a–8a. Since 1991, Ms. Djadjou has been an active member of several political organizations, including the "Group of Less," the SDF, and the SCNC. In response to her membership in and activities with these organizations, Cameroonian officials have blacklisted her from obtaining employment and have arrested and detained her on four separate occasions. *Id.*

Ms. Djadjou was first arrested in 1992 for helping to organize a protest march. During the first night of her detainment, Ms. Djadjou was raped by an interrogator, and for the next three days, she was beaten on "her legs and feet" by prison guards until her uncle finally arranged for her release. Pet. App. 5a.

Ms. Djadjou was arrested a second time in 1997 as a result of her work for the SCNC. Over the course of a week, her captors beat her repeatedly until her uncle was again able to obtain her release. Pet. App. 6a.

Cameroonian officials arrested Ms. Djadjou for a third time in July 2000. According to a police summons that Ms. Djadjou produced at her hearing before the immigration judge, officials arrested Ms. Djadjou because of her perceived role as a leader in the SCNC. Pet. App. 7a. During that arrest, officers again denied her food, beat her, and tortured her until her family secured her release. Pet. App. 7a.

Finally, Ms. Djadjou was arrested again on December 15, 2001. Pet. App.7a. During the course of the arrest, a car door was slammed on Ms. Djadjou's leg, cutting it badly. Despite this serious wound, Ms. Djadjou was kept in a cell flooded with urine without food, water, or medical care for four days. Pet. App. 7a. On the fifth day, Ms. Djadjou lost consciousness, collapsed, and was hospitalized. Ms. Djadjou testified that she escaped custody only because one of her detainers had abandoned his post at the hospital. Pet. App. 7a. After she escaped the hospital, she fled into hiding at her sister's home until it was safe for her to depart Cameroon a few months later. Pet. App. 7a–8a.

Ms. Djadjou also testified that she believes her life would still be in danger if forced to return to Cameroon. Cameroonian officials have issued a convocation for her capture and have broken into and destroyed her store. Pet. App. 8a–11a.

2. Ms. Djadjou submitted extensive, independent, documentary and testimonial evidence to support her claims of persecution and likelihood of torture. Her documentary evidence included: (i) a 2002 telegram from a Cameroonian official stating that Djadjou was fleeing to Bonaberi and requesting that she be stopped for "illegal political meetings," (ii) a "'convocation' issued on July 9, 2000, that summoned [Djadjou] to appear at [a] police station," (iii) "SCNC and SDC membership cards" bearing Ms. Djadjou's name, and (iv) "Amnesty International and United States Department of State reports" and other evidence regarding "the persecution of SCNC leaders and members in Cameroon." Pet. App. 8a–11a.

Ms. Djadjou also submitted an affidavit from Derrick Njoh, the Chairman of the Southern Cameroons National Council in the United States of America (SCNC-USA). The affidavit stated that Mr. Njoh had contacted Mr. Nyaah, an SCNC official in Cameroon, and that Mr. Nyaah had confirmed that Ms. Djadjou's "activities made her the target of acrimonious arrest and detention such as the arrest of 2000." Pet. App. 35a.

Reinforcing Mr. Njoh's affidavit was testimony from Howard Njeck, the Vice Chairman of the SCNC-USA. Mr. Njeck described Mr. Njoh's investigation and separately confirmed that the SCNC's records documented Ms. Djadjou's political activities. Mr. Njeck testified that all of the information in Mr. Njoh's affidavit had been verified by two Cameroonian SCNC officials. Pet. App. 36a. Through these contacts, the U.S. office of SCNC confirmed Ms. Djadjou's arrest in 2000 as well as the arrest of her husband in 1997. Mr. Njeck also testified that he had personally contacted the officials and verified that Ms. Djadjou had been an SCNC activist and had suffered persecution. *Id.* at 97a.

3. At the conclusion of Ms. Djadjou's hearing, the IJ rendered an oral decision denying all forms of relief and ordering her voluntary departure. Pet. App. 70a.

The IJ made an adverse credibility determination regarding Ms. Djadjou's testimony. The IJ based this determination on several perceived minor inconsistencies in Ms. Djadjou's story that did not go to the heart of her claim. In sum, the IJ found that Ms. Djadjou testified that she was arrested four times; however, she was only able to produce

documentary evidence verifying one of these arrests. Pet. App. 64–70a. Ms. Djadjou testified that she was the SCNC general secretary for youth for the Macolo, Comcona, and Cariare wards in Cameroon; yet the documents she submitted did not specifically mention that position. *Id.* Ms. Djadjou presented an SCNC membership card that contained a misspelled word ("Cameroon" instead of "Cameroons"). *Id.* at 66a. She presented a 2003 letter from the SDF that states that she "is" an active member, even though she testified to joining the SCNC in 1997. Pet. App. 66a.

Finally, the IJ emphasized that Ms. Djadjou testified that she was in hiding from December 2001 to March 11, 2002; yet she submitted an eviction notice that stated: "residing in Yaoundé and her residence or place of work where she was and talking to: (her being present on the premises receives the copy and refused to sign)." Pet. App. 67a. This eviction notice does not state that the server had verified Ms. Djadjou's identity in any way or that the person receiving the notice had identified herself as Ms. Djadjou, and Ms. Djadjou testified with respect to the eviction notice that she employed a shopgirl who was in fact the person upon whom the notice must have been served. *Id.*

The IJ next analyzed other, independent evidence supporting Ms. Djadjou's application for asylum. First, the IJ found the testimony of Mr. Njeck credible "insofar as [he] testified credibly with Mr. [Njoh]'s statement." Pet. App. 64a.

Second, the IJ discredited several letters and affidavits from Ms. Djadjou's family and friends on the ground that they were not "objective." Pet. App. 69a. Third, the IJ discredited Ms. Djadjou's

membership cards because they contained the typographical error in the spelling of "Cameroons." Pet. App. 66a. Finally, the IJ discredited the police convocation and police telegram because they had not been authenticated and because Ms. Djadjou did not provide a "chain of custody for them." Pet. App. 68a.

Despite finding the affidavit of Mr. Njoh and the testimony of Mr. Njeck credible, the IJ concluded that the independent evidence submitted by Ms. Djadjou "*do[es] not overcome* the Court's adverse credibility finding," and so the IJ denied relief. Pet. App. 71a (emphasis added).

4. The Board of Immigration Appeals (BIA) dismissed Ms. Djadjou's appeal. The BIA affirmed the IJ's adverse credibility determination regarding Ms. Djadjou's testimony. Pet. App. 46a–47a.

Then, the BIA found that Ms. Djadjou "failed to produce authenticated objective evidence" to corroborate her claim of past persecution. Pet. App. 46a. It concluded that the documents obtained from SDF and SCNC as well as the police convocation and police telegram were unreliable because they were not authenticated and no chain of custody had been established. *Id.* The BIA discredited the letters from Ms. Djadjou's uncle, sister, and friend because they were not "independent evidence" of past persecution. *Id.* Finally, the BIA agreed with the IJ that Mr. Njeck's testimony was credible, but concluded that Mr. Njeck "had no firsthand knowledge of the alleged mistreatment." *Id.*

The BIA never expressly found that Ms. Djadjou failed to establish past persecution, but it concluded that she failed to carry her burden of proving a well-founded fear of future persecution or a probability of

torture. Accordingly, the BIA ruled that Ms. Djadjou was ineligible for asylum, withholding of removal, and CAT relief. Pet. App. 47a.

### C. Fourth Circuit Appeal

1. The Fourth Circuit denied the petition for review of the BIA's decision. Pet. App. 2a–40a. After concluding that the Board's adverse credibility finding was supported, the panel majority recognized that Ms. Djadjou had submitted abundant documentary evidence that the Board "did not discredit or appropriately discredit." Pet. App. 29a. The Fourth Circuit majority observed that Ms. Djadjou's documentary evidence "demonstrate[d]" that "Djadjou was a member of opposition organizations whose members have suffered persecution in Cameroon." Pet. App. 30a. However, the majority reasoned that because Ms. Djadjou's own testimony did not provide "any context or credible explanation" for the documents, it concluded that the documentary evidence failed to show that *Ms. Djadjou* "was among those persecuted." *Id.* The court rejected various pieces of Ms. Djadjou's independent evidence on this same ground—that the evidence "lack[ed] any meaningful significance without a credible explanation as to its context." Pet. App. 30a.

The majority acknowledged that the IJ and BIA concluded that the testimony of Mr. Njeck and the affidavit of Mr. Njoh were credible. However, the majority "glean[ed]" from the record that the agency had "essentially found" that Mr. Njeck's and Mr. Njoh's statements regarding Ms. Djadjou's 2000 arrest and her husband's 1997 arrest were "unreliable" because they were based on multiple

levels of hearsay. Pet. App. 23a–24a. Accordingly, the Fourth Circuit held that Ms. Djadjou's supporting testimonial evidence did not support her claim for relief. *Id.* at 30a.

2. In dissent, Judge Wynn agreed with the majority's statement that "applicants for asylum . . . may establish past persecution through independent evidence." Pet. App. 34a. He then criticized the agency for failing to "consider [the] independent evidence" of Ms. Djadjou's persecution "separate and apart from the immigration judge's adverse credibility determination." *Id.* at 39a.

Judge Wynn also disagreed that the IJ's decision rested on a purported finding of "multiple levels of hearsay." Pet. App. 40a. Judge Wynn emphasized the IJ's findings that Mr. Njeck had "testified credibly with Mr. Njoh's [affidavit]" and that "this Court will find him credible." *Id.* at 37a. Discrepancies between Ms. Djadjou's statements and her independent documentary evidence, Judge Wynn explained, have "no bearing on the reliability of Njoh's affidavit." *Id.* at 38a.

In Judge Wynn's view, the IJ's finding that Mr. Njoh and Mr. Njeck were credible entitled Ms. Djadjou to relief. Judge Wynn was "confound[ed] that the majority's speculation and conjecture of what the immigration judge and Board of Immigration Appeals 'essentially found' and what the majority is able to 'glean' from the cold record can form the basis of its decision to affirm." Pet. App. 39a. Judge Wynn further observed that the IJ apparently discredited Mr. Njoh and Mr. Njeck only because "the records from the SCNC" on which their testimony relied "have not been provided to this

Court." Pet. App. 38a. As Judge Wynn explained, however, that judgment was erroneous, because letters from foreign party leaders can demonstrate past persecution. Pet. App. 38a.

Judge Wynn concluded:

> [T]he record . . . shows that Djadjou presented independent evidence, separate and apart from her own testimony, that established her past persecution in Cameroon. The agency may not ignore such independent evidence, and the agency may not reject such independent evidence solely on the basis of an adverse credibility determination. Nor may an appellate court "glean" a basis for rejecting independent evidence when no such basis is to be found in the decisions of the immigration judge or Board of Immigration appeals.

Pet. App. 41a.

3. On March 9, 2012, the Fourth Circuit denied Ms. Djadjou's Petition for rehearing or for rehearing *en banc*; Judge Wynn dissented from the denial of panel rehearing. Pet. App. 1a.

## REASONS FOR GRANTING THE PETITION

This case involves the proper procedure for adjudicating claims under the Immigration and Nationality Act (INA) and the United Nations Convention Against Torture (CAT). Due to delays associated with escaping their home countries, individuals seeking asylum, withholding of removal, and CAT relief must testify to traumatizing events that occurred many years in the past. Accordingly,

petitioners often understandably have difficulties recounting the specific details of such events to a court. Thus, they often rely heavily on independent evidence of their persecution.

There exists an entrenched circuit split as to whether an immigration judge's determination that a petitioner failed to testify credibly may trump compelling independent evidence showing entitlement to relief. Three circuits hold that an adverse credibility finding may not influence the consideration of other, unrelated evidence showing that the petitioner was persecuted or would likely face torture if removed. Three other circuits, however, including the Fourth Circuit in this case, have concluded otherwise, and permit an adverse credibility finding to trump independent evidence demonstrating an entitlement to relief. Moreover, within this division, there is a subsidiary conflict as to whether the court of appeals may support the denial of relief by making findings about evidence on appeal not rendered by the agency itself in its decisions.

The Fourth Circuit's approach in endorsing an unbalanced consideration of a petitioner's evidence is plainly incorrect, as it excuses the BIA and IJ from making a decision based on the only evidence that is not prone to nerves, mistranslation, and faded memory. Moreover, the question presented is of exceptional importance. For many immigrants, the agency's decision on their applications for relief can be the difference between life and death. Courts that fail to segregate an adverse credibility determination from their analysis of a petitioner's independent evidence threaten to turn an immigrant's flawed or

incomplete memory into the only relevant factor in determining eligibility for relief, regardless of how strong the independent documentary evidence.

This Court should grant review to restore uniformity to the application of the law on the question presented.

# I. THE FOURTH CIRCUIT'S REJECTION OF THE PETITIONER'S INDEPENDENT EVIDENCE ON THE SOLE BASIS THAT SHE DID NOT TESTIFY CREDIBLY EXACERBATES A DEEP AND INTRACTABLE CIRCUIT SPLIT

The Fourth Circuit's rejection of Ms. Djadjou's independent evidence demonstrating entitlement to relief on the sole basis that she did not testify credibly deepens the preexisting circuit split between the Seventh, Second, and Ninth Circuits on one side and the First and Eighth Circuits on the other. Moreover, within this division, there is a subsidiary conflict as to whether a court of appeals may support the denial of relief by making factual findings about independent evidence not rendered by the agency below.

1a. The Seventh Circuit has held that a "prior adverse credibility finding need not undermine" the petitioner's demonstration of persecution so long as the evidence proffered is "independent of the testimony that the IJ found not to be credible." *Gebreeyesus v. Gonzales*, 482 F.3d 952, 955 (7th Cir. 2007). In that case, the court concluded that because the petitioner's evidence of persecution was distinct from the discredited testimony, the BIA's decision denying relief on the basis of the adverse credibility finding was unsupported. *Id.* This ruling is consistent with the Seventh Circuit's earlier decision

in *Mansour v. INS*, in which the court held that the BIA impermissibly allowed an adverse credibility determination based on the petitioner's inconsistent testimony to "overshadow" and "wash over" the consideration of other evidence, including a State Department report, that supported a finding that the petitioner was entitled to relief. *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000).

The Second Circuit's approach to consideration of independent evidence when an adverse credibility finding has been made is consistent with the Seventh Circuit's approach. In *Paul v. Gonzales*, the Second Circuit held that "under settled circuit law," a petitioner may demonstrate that he is entitled to asylum based in part on independent evidence despite the IJ's supported "finding that an applicant's anecdotes of *past* persecution are not believable." 444 F.3d 148, 154 (2d Cir. 2006) (emphasis in original). Thus, "regardless of the IJ's view of the petitioner's stories of past persecution," independent evidence including a country report supporting petitioner's claims of persecution "should have been considered." *Id.* at 154–55. And, in *Ramsameachire v. Ashcroft*, that court again held that a petitioner may establish entitlement to relief despite an adverse credibility by "proffer[ing] objective evidence." 357 F.3d 169, 184–85 (2d Cir. 2004). *Ramsameachire* held that the BIA must consider "*all* evidence . . . regardless of the weight it accords to the alien's testimony." *Id.* Accordingly, this evidence must be "considered independently" of the adverse credibility finding "before rejecting [the] claim." *Id.*

The Ninth Circuit has also held that substantial documentary evidence, such as a summons to appear

in court for interrogation and country reports that were consistent with the petitioner's claims, "*independently* established" the petitioner's entitlement to withholding of removal despite the IJ's adverse credibility finding and denial of relief. *Zahedi v. INS*, 222 F.3d 1157, 1163 (9th Cir. 2000) (emphasis in original). Later in *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001), the court similarly concluded that the BIA's failure to evaluate separately independent evidence from an adverse credibility finding and "show proper consideration of all factors when weighing evidence and denying relief" necessitated remand for further consideration. *Id.* at 1284. And, as recently as last year, the Ninth Circuit confirmed the vitality of this rule and remanded the petitioner's withholding of removal and CAT claims because the BIA and IJ failed to consider "evidence independent of his credibility demonstrating his eligibility for relief." *Maung Sein Win v. Holder*, 435 F. App'x 663, 664 (9th Cir. 2011).

b. Adopting a conflicting rule, the First and Eighth Circuits have allowed an adverse credibility finding to trump substantial independent evidence which, considered apart from the finding, compels the conclusion that the petitioner is entitled to withholding of removal or CAT relief. The First Circuit held that the IJ and BIA's failure to independently consider petitioner's documentary evidence, including a government notice accusing her of prohibited religious practices and State Department country reports, separately from the adverse credibility finding was permissible. *Weng v. Holder*, 593 F.3d 66, 69, 72 (1st Cir. 2010). It concluded "[w]e can infer that the IJ reviewed the documents [the petitioner] submitted but found they

did not establish her case or overcome his doubts as to her credibility." *Id.* at 72.

The Eighth Circuit has also expressly allowed an adverse credibility finding to trump substantial independent evidence in determining whether a petitioner is entitled to relief. In *Esaka v. Ashcroft*, 397 F.3d 1105 (8th Cir. 2005), the petitioner raised strikingly similar claims of persecution as does Ms. Djadjou here. *Id.* at 1107–08. The petitioner claimed that she was beaten and imprisoned in Cameroon for her participation in an anti-government group. *Id.* The court there held that "an IJ can properly consider a claimant's discounted credibility" when weighing independent evidence, such as police summons and newspaper articles describing how anti-government protesters are frequently beaten, imprisoned, and murdered. *Id.* at 1111. Applying this rule, the court denied the petitioner's claim, finding that the petitioner lacked "credible evidence" showing she was entitled to relief. *Id.*

c. In this case, the Fourth Circuit determined that the BIA's adverse credibility finding was supported by substantial evidence and, as such, it trumped any showing of persecution based on independent evidence. The Fourth Circuit repeatedly stated that Ms. Djadjou's failure to provide a "credible explanation" to support each piece of independent evidence she presented showed that the evidence could not support a finding of persecution. Pet. App. 30a In line with the First and Eighth Circuits, the Fourth Circuit disregarded substantial evidence which, segregated from the adverse credibility determination compellingly demonstrated past

persecution, and denied Ms. Djadjou's petition for relief.

Because the Fourth Circuit's decision deepens an entrenched split of authority between six circuits that address a large number of the immigration appeals in this country, the Court should grant review.

2. Moreover, a subsidiary conflict exists between circuits that allow an adverse credibility finding to trump the consideration of independent evidence, and those that consider such evidence separately. Often, courts of appeal that do not require the IJ to weigh independent evidence separately will support the denial of relief by making factual findings on appeal as to the persuasiveness of such evidence. The Fourth and First Circuits have made such factual findings, while the Seventh Circuit has rejected this approach as inconsistent with Supreme Court precedent.

It is well-established that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). In addition, "a court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002). Where further factual findings are necessary, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* Moreover, "[t]his principle has obvious importance in the immigration context." *Id.* at 16–17.

Here, although the IJ expressly found the testimony of Mr. Njeck and the affidavit of Mr. Njoh credible, the Fourth Circuit majority found just the opposite. Pet. App. 39a. Yet the panel could identify no passage or page in the record demonstrating that the agency actually made an adverse reliability finding as to Mr. Njoh or Mr. Njeck. Indeed, the majority's own choice of words—that it had "*glean[ed]*" what the agency had "essentially found"—reveal its attempt to evade *Chenery* and its progeny. *Id.* Helping the agency to articulate what it had already "essentially found"—especially when it in fact found the opposite—fails to respect the "domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery*, 332 U.S. 194, 196 (1947). The finding ostensibly affirmed by the panel decision "is not the product of either the immigration judge or the Board of Immigration Appeals," but the panel majority's own legal imagination. Pet. App. 40a.

At least one other circuit—the First Circuit in *Weng*—similarly violated *Chenery* in its rejection of a petitioner's argument that independent evidence demonstrated that he was entitled to relief solely based on improper conjecture drawn from the IJ's adverse credibility finding as to the petitioner's testimony. *Weng* found that the BIA's denial of asylum, withholding of removal, and CAT relief was supported by substantial evidence despite the fact that the IJ had not found that petitioner's documentary evidence was inauthentic. 593 F.3d at 71–72. Nevertheless, the court concluded that it could "*infer* that the IJ rejected these documents . . . for the same reasons he chose not to credit her

testimony and the country reports," and thus denied the petition. *Id.* at 73 (emphasis added).

The Seventh Circuit, on the other hand, expressly rejected the government's invitation to make the same error blessed in *Weng* and in the present case, and disregard independent evidence on "grounds that are not stated or at least discernible in the decision itself." *Gebreeyesus*, 482 F.3d at 952. In *Gebreeyesus*, the government argued the fact that the BIA had not properly weighed independent evidence did not require remand because the evidence considered on appeal did not demonstrate a likelihood of future persecution. *Id.* at 955–56. It reasoned that, under clear Supreme Court precedent, "judges cannot resolve administrative litigation on grounds that the agency ignored." *Id.* at 956 (internal citation omitted).

## II. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING AN ISSUE OF GREAT AND GROWING IMPORTANCE TO THE FEDERAL IMMIGRATION SYSTEM

The Fourth Circuit not only adds to the wrong side of an entrenched circuit split and grossly misapplies Supreme Court precedent, the issues at the heart of the split are recurring and of compelling national importance. The question whether an adverse credibility determination can trump independent evidence compelling asylum or withholding of removal is likely to affect hundreds or even thousands of immigration proceedings every year. Over 56,000 individuals were admitted to the United States as refugees during 2011. Daniel C. Martin and James E. Yankay, Department of Homeland Security, Annual Flow Report: Refugees and Asylees:

2011 (May 2012). And, according to petitioner's calculations, the federal courts of appeals thus far have reviewed over 600 decisions of the BIA in 2012 alone, and over 100 of these decisions involved discussion of adverse credibility determinations. The current split in authority includes the Ninth Circuit, which handles a large percentage of the immigration appeals in this country. *See, e.g.*, Marcia Coyle, "*Court Paralysis Warned if Federal Budget Frozen*," Fulton Cty. Daily Rep., Nov. 15, 2004 (identifying the Ninth Circuits' "huge influx of immigration appeals"). The split also includes the First, Second, Seventh, Eighth Circuits, and now the Fourth Circuit as well. It is thus apparent that the split covers circuits handling the majority of immigration cases.

Proper resolution of the question presented is also critical to the administration of justice in immigration cases. "Most" appeals "focus on whether the immigration court and the Board drew proper inferences and conclusions from the testimony and documentary evidence in the case." Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 375–76 n.143 (2008). The burden placed on immigrants for "coherent, unchanging, detailed testimony," however, often "create[s] a barrier too high to be surmounted by many valid asylum seekers" because "maladies common to victims of persecution" including "minor traumatic brain injury, stress, sleep loss, depression, and chronic pain . . . can impair accurate recall." James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 B.U. Intn'l L.J. 1, 39–40 (2012). Accordingly, independent evidence has

particular "import[ance] beyond the credibility assessment, since it may independently establish or rebut a well-founded fear of being persecuted, and needs to be evaluated in its own right." Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigr. L.J. 367, 384 (2003).

Moreover, consistent review in the courts of appeal is essential to fair adjudication of asylum petitions. IJs "appear to adjudicate asylum cases inconsistently." For example, "[i]n the three largest immigration courts, more than 25% of the judges have asylum grant rates . . . that deviate from their own court's mean rate for such cases by more than 50%," and there are also "dramatic differences" in grant rates "[a]cross geographic territory," making the likelihood of success "turn significantly on the region of the United States in which [immigrants] happen to file their applications." *Id.* at 375. The immigration judge in this case is a prime example of such inconsistency and had before this case been reversed a number of times by the Fourth Circuit for failing to properly consider independent evidence of persecution and likelihood of torture. *See, e.g.*, *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004); *Curumi v. Ashcroft*, 119 F. App'x 468 (4th Cir. 2005).

In addition, as a result of recent regulatory reforms, "the BIA has ceased to function as an effective appellate body" of these varied decisions and remands an increasingly small number of the appeals it reviews. 17 Geo. Immigr. L.J. at 378. This view is widely shared; Judge John Walker, Jr., a former Chief Judge of the Court of Appeals for the Second Circuit, remarked that "the circuit courts are 'the

first meaningful review that the petitioner has.'" Michael Corradini, *The Role of Circuit Courts in Refugee Adjudication: A Comparison of the Fourth and Ninth Circuits*, 23 Geo. Immigr. L.J. 201, 215 (2008) (internal citation omitted). It is essential that the circuit courts uniformly and properly perform their reviews.

## III. THE FOURTH CIRCUIT'S DENIAL OF THE PETITION WAS ERRONEOUS

Lastly, the petition should be granted because the Fourth Circuit's haphazard approach to reviewing substantial independent evidence is erroneous.

Allowing an adverse credibility determination based on a petitioner's testimony to trump a showing of persecution and/or the likelihood of future torture based on wholly independent evidence is contrary to Supreme Court precedent requiring the IJ and BIA to consider the record as a whole in determining whether the petitioner is entitled to relief. It is well-established that the BIA's determination that a petitioner is ineligible for relief may be upheld only where "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (citation omitted). The BIA may not act arbitrarily and discount an immigrant's independent evidence of persecution solely because he testified incredibly as to other, unrelated issues. Such a finding would not be supported by the "record *considered as a whole*." *Id.* (emphasis added). Nor would it be reasoned decisionmaking based on evaluation of all the relevant factors, as is necessary to support denial of relief. *Judulang v. Holder*, ____ U.S. ____, 132 S.Ct. 476, 483 (2011).

The Fourth Circuit's endorsement of such a haphazard approach to evaluating whether a petitioner has established persecution and/or the likelihood of future torture is plainly wrong, and contrary to fundamental principles of administrative review. This is all the more clear as the Fourth Circuit *itself* only a few years prior to its decision here held that an IJ's denial of asylum was erroneous where the IJ "completely ignored" "strong circumstantial evidence" that a petitioner faced persecution. *Camara v. Ashcroft*, 378 F.3d 361, 371 (4th Cir. 2004). The Fourth Circuit has since radically changed course, and has confirmed that it will follow the contrary rule announced in this case, and not its prior decision in *Camara*. *See Abebe v. Holder*, 468 F. App'x 227, 228 (4th Cir. 2012) ("This court's recent opinion in *Djadjou v. Holder*, 662 F.3d 265, 272–74 (4th Cir. 2011), summarized the law regarding our review of the Board's final order").

In this case, the Fourth Circuit did not properly consider compelling evidence that Ms. Djadjou was persecuted based solely on the fact that she did not testify credibly. Had it required the BIA and IJ to independently evaluate her documentary evidence—apart from her testimony—the petition should have been granted. As discussed above, Ms. Djadjou submitted substantial independent evidence that she was a member of a disfavored political group and that she was targeted for arrest and torture based on this participation. Pet. App. 8a–11a. For example, this evidence included the uncontested statement by Mr. Njeck, the vice chairman of the SCNC of America who himself had been granted asylum, that Ms. Djadjou had been arrested in 2000 for her participation in the SCNC and a police convocation

that corroborated that arrest. Pet. App. 36a–37a. There was simply no question on this record that Ms. Djadjou was a member of the SCNC and had been persecuted because of it. Moreover, her treatment was entirely consistent with the country conditions and other reports submitted to the immigration court. The documentary record also included a telegram from Cameroonian officials ordering her detention. Pet. App. 123a. And while the IJ reasoned that the eviction notice for her shop undermined one element of Ms. Djadjou's testimony, that evidence combined with the telegram certainly confirmed the likelihood of future persecution and/or torture. *Id.* at 123a–126a.

The IJ and BIA's failure to "discredit or appropriately discredit" this evidence before denying relief is determinative. The court below should have remanded this case to the BIA to have it properly credit this evidence. *See INS. v. Orlando Ventura*, 537 U.S. 12, 18 (2002). Because it joined the First and Eighth Circuits in applying an erroneous legal rule, the Fourth Circuit erroneously failed to do so.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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