No. 17-1701

In the Supreme Court of the United States

WEI SUN, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the REAL ID Act of 2005's corroboration provision, 8 U.S.C. 1158(b)(1)(B)(ii), requires an immigration judge (IJ) to give an asylum applicant notice of the specific corroborating evidence the IJ deems necessary and an opportunity to obtain that evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 883 F.3d 23. The decisions of the Board of Immigration Appeals (Pet. App. 18a-20a) and the immigration judge (Pet. App. 21a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2018. On May 4, 2018, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 25, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unable or unwilling to return to his country of origin "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).

The REAL ID Act of 2005 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 303, added a new provision placing the "burden of proof" on the asylum applicant to "establish that [he] is a refugee." 8 U.S.C. 1158(b)(1)(B)(i). The Act also added a new provision governing how an applicant may sustain that burden:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. *Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.*

8 U.S.C. 1158(b)(1)(B)(ii) (emphasis added). The italicized sentence is referred to here as the REAL ID Act's corroboration provision. Along with the rest of Section 1158(b)(1)(B)(ii), it applies to all asylum applications

made on or after May 11, 2005, the Act's date of enactment. REAL ID Act § 101(h)(2), 119 Stat. 305.

b. Noting that the corroboration provision "is ambiguous with regard to what steps must be taken when the applicant has not provided" sufficient corroborating evidence, the Board of Immigration Appeals (Board) has established a procedure for immigration judges (IJs) to follow in those circumstances. *Matter of L-A-C-*, 26 I. & N. Dec. 516, 518 (2015); see *id.* at 520-522. In *Matter of L-A-C-*, the Board observed that immigration court proceedings are generally "separated into master calendar and merits hearings." *Id.* at 521. At master calendar hearings, the Board noted, "pleadings are taken, legal and factual issues in dispute are identified and narrowed, and continuances may be granted for good cause, such as to secure counsel or obtain evidence in preparation" for the merits hearings. *Ibid.* "Then, during the merits hearing, witness testimony and other evidence is presented, the [IJ] makes factual findings and legal conclusions, and any applications for relief are resolved." *Ibid.*

To implement the corroboration provision, the Board explained that "[a]t the merits hearing, in circumstances where the [IJ] determines that specific corroborating evidence should have been submitted, the applicant should be given an opportunity to explain why he could not reasonably obtain such evidence." *Matter of L-A-C-*, 26 I. & N. Dec. at 521. The applicant's explanation must be included in the record, as well as the IJ's finding on whether the applicant's explanation is sufficient. *Id.* at 521-522. Additionally, "if requested," the IJ must also "decide whether to grant a continuance for the applicant to obtain additional corroboration," based

on "whether good cause is shown in the individual circumstances of the case." *Id.* at 522. The Board observed that "a continuance would typically be warranted where the [IJ] determines that * * * the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Ibid.* Finally, the Board instructed that "in deciding whether an applicant has met his burden of proof, an [IJ] must not place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the claim." *Ibid.*

2. a. Petitioner, a native and citizen of China, was admitted to the United States on a non-immigrant visitor's visa on May 13, 2007, with an authorized period of admission not to exceed June 12, 2007. Pet. App. 3a; Administrative Record (A.R.) 220. On June 12, 2007, petitioner submitted an application for asylum to the Department of Homeland Security Citizenship and Immigration Services. Pet. App. 3a-4a; see A.R. 135-153. Petitioner claimed that he had suffered religious persecution stemming from his participation in a Christian house church in China. A.R. 147.

Petitioner's application was referred to the immigration court, A.R. 222, and on July 26, 2007, petitioner was served with a Notice to Appear charging him with removability as an alien who had remained in the United States "for a time longer than permitted." A.R. 220 (citing 8 U.S.C. 1227(a)(1)(B)); see Pet. App. 4a. In a subsequent motion to change venue from Los Angeles to New York, petitioner admitted the factual allegations against him and conceded his removability, reiterating that he wished to apply for asylum and related protection (withholding of removal and protection under the Convention Against Torture and other Cruel, Inhuman

or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85). A.R. 172; Pet. App. 4a.

b. At a merits hearing before an IJ in March 2014, petitioner testified that he began attending a house church following his wife's forced abortion in 1995 pursuant to China's family-planning policy. A.R. 82; see Pet. App. 3a. According to his testimony, in February 2007, Chinese authorities raided the home in which he was worshipping, detained petitioner and other congregants, and accused them of engaging in "cult activities." A.R. 84-85; see Pet. App. 3a. Petitioner testified that he was detained for a period of approximately ten days, during which he was subjected to physical punishment. A.R. 85; see Pet. App. 3a. Petitioner testified that he was released from detention after signing a confession, but was required to report to the police station once a week while he awaited sentencing. *Ibid.* Petitioner claimed that he complied with this requirement through the time of his departure from China in May 2007. A.R. 86; see Pet. App. 24a.

At his removal hearing, petitioner testified that since arriving in the United States, he had regularly attended Christian churches in Los Angeles and then in New York. A.R. 82-83, 86-87; see Pet. App. 3a. He testified that his wife and son remained in China and that, since petitioner left in 2007, neither had "had any problems" with the Chinese authorities. A.R. 92-93. Petitioner explained that, although Chinese police had visited his wife twice in a two-week period about six months after petitioner left in 2007, asking about petitioner's whereabouts, they had not returned since. A.R. 93-94. Nev-

ertheless, he testified that he was scared that, if returned to China, Chinese authorities would arrest him and "carry out the sentencing." A.R. 86.

In addition to testifying, petitioner submitted a medical certificate relating to his wife's 1995 abortion (A.R. 103-106); a 2007 certificate of baptism (A.R. 107-109); and several Chinese identification documents, including his household registeration and marriage certificate (A.R. 110-134). Petitioner submitted no other documentary evidence in support of his claims, including no evidence relating to his attendance of a house church in China, his arrest and interrogation in February 2007, or his continued attendance at Christian churches in the United States. Nor did any other witnesses testify or submit statements corroborating petitioner's factual account.

At the end of petitioner's testimony, the IJ asked petitioner whether he had asked the person who brought him to the New York church to write a letter to the court on his behalf or whether he had asked the Los Angeles church for any records of his five years of attendance at that church. A.R. 98-99. Petitioner stated that he had not anticipated needing any further documentation, but that he could bring a letter from his friend at the New York church, if needed, when he next returned to immigration court. *Ibid.*

3. The IJ denied petitioner's applications for relief and protection. Pet. App. 21a-31a.

a. Reviewing petitioner's testimony, the IJ concluded that petitioner was credible "overall in the sense that [his] testimony was internally consistent, and mostly consistent with his written statement." Pet. App. 27a. But the IJ found petitioner's testimony to be "at times vague and lacking in detail," such that the testimony was not sufficient, standing alone, to meet his

burden of proving eligibility for asylum. *Ibid.* The IJ noted, for example, that petitioner could not provide details regarding the location of the Los Angeles church he purportedly attended for approximately five years, and his testimony regarding when he started attending church in New York varied. *Id.* at 27a-28a.

Moreover, the IJ stated, petitioner had submitted no evidence corroborating his claim that he was persecuted for attending an underground church in China or that he regularly attended Christian churches in the United States. Pet. App. 28a-29a. The IJ observed that neither the pastors nor any parishioners from the churches he claimed to have regularly attended in the United States testified on his behalf or offered letters or statements in support of his attendance. *Ibid.* Nor was there any corroborating evidence of his past persecution, the IJ noted, such as a letter from petitioner's wife, with whom petitioner stated he was in regularly contact. *Id.* at 29a. Although petitioner had stated that he could bring a church letter to another hearing, the IJ reasoned that in the more than six years between petitioner's 2007 asylum application and the 2014 hearing, petitioner had "ample time to collect any and all necessary documentation." *Ibid.*

b. "Alternatively," the IJ determined that petitioner failed to demonstrate "an objectively well-founded fear of future persecution in China," in light of the fact that the police had not been in touch with his wife or son in over six years, nor had they subjected either his wife or son to any mistreatment since his departure. Pet. App. 29a. The IJ observed that "it appears that the Chinese government has lost any interest that it may have had in [petitioner] in the past." *Ibid.* (citing *Melgar de Torres* v. *Reno*, 191 F.3d 307, 313 (2d Cir. 1999)). And

the IJ found that petitioner's belief that a criminal case remained open against him appeared to be based on mere speculation. *Ibid.*

Accordingly, the IJ denied petitioner's application for asylum or other relief, and ordered him removed to China. Pet. App. 30a-31a.

4. The Board dismissed petitioner's administrative appeal. Pet. App. 18a-20a. The Board "agree[d] with the [IJ]'s determination that [petitioner] testified in a vague manner, and he did not submit sufficient evidence to corroborate his testimony." *Id.* at 19a. The Board observed that petitioner had failed to submit corroborating evidence "that he attended an underground church in China, was mistreated for his attendance, [and] that he attends a Christian church in the United States." *Ibid.* And it explained that, although petitioner argued that he should have been notified that such corroborative evidence was necessary, an immigration judge "is not required to identify the specific evidence necessary for the [alien] to meet his burden of proof and continue the proceedings for him to gather the evidence prior to rendering a decision on the application." *Id.* at 19a-20a (citing *Matter of L-A-C-*, *supra*).

5. The court of appeals denied the petition for review. Pet. App. 1a-17a.

a. The court of appeals rejected petitioner's contention that the Board erred in construing the corroboration provision. Pet. App. 7a-16a. The court explained that, under the REAL ID Act, an applicant's testimony can be sufficient to establish a claim for asylum "only if [he] satisfies the trier of fact that [his] testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."

Id. at 8a-9a (quoting 8 U.S.C. 1158(b)(1)(B)(ii)) (brackets in original). And where, "as here, 'the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.'" *Id.* at 9a (quoting 8 U.S.C. 1158(b)(1)(B)(ii)). "The question here," the court explained, "is the procedure required when the trier of fact determines that corroboration is required." *Ibid.* The court observed that the Board had established such procedures in *Matter of L-A-C-*, *supra*, and it evaluated those procedures under the framework of *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 9a-11a.

First, the court of appeals determined that Congress had not directly spoken to the question at issue. It noted that, although "[t]he statutory language makes clear that corroborating evidence should be provided under certain circumstances if it is reasonably available," the text "is silent * * * as to the procedure to be followed where corroborating evidence is needed." Pet. App. 12a. The court observed that the statute "does not provide, for example, that the trier of fact must advise the applicant that corroborating evidence is necessary before issuing a final decision nor does it provide that the trier of fact must allow a continuance to permit the gathering of corroborating evidence." *Ibid.*

The court of appeals rejected petitioner's contention that the corroboration provision requires the IJ to provide notice of the specific corroborating evidence required and a subsequent opportunity to gather and produce that evidence because the provision "does not say 'should *have* provided,' but rather 'should provide.'" Pet. App. 13a (quoting *Ren* v. *Holder*, 648 F.3d 1079,

1091 (9th Cir. 2011)). The court reasoned that, "[w]hile the Ninth Circuit's interpretation is plausible, it is not the only reasonable interpretation." *Ibid.* Specifically, it noted that a requirement for such specific notice and opportunity to respond "simply do[es] not appear in the statute." *Ibid.* The court added that applicants should already be on notice about the corroboration requirement through the instructions for asylum applications—which state that applicants "'must submit reasonably available corroborative evidence'" of "the specific facts upon which the claim is based" and "must provide an explanation if such evidence is not reasonably available"—and by virtue of the REAL ID Act itself. *Id.* at 14a (citation omitted). The court also observed that "the statute does not provide any indication that there must be a continuance so that the applicant can produce additional corroborating evidence." *Ibid.*

Second, having concluded that the "statute is ambiguous as to the procedure an IJ must follow when an applicant fails to provide corroborating evidence," the court further determined that the Board's procedures were reasonable. Pet. App. 14a-15a. The court reasoned that the procedures adopted by the Board in *Matter of L-A-C-* "afford[] the same protection as" the Second Circuit's "pre-REAL ID Act case law" regarding corroboration. *Ibid.* (citing *Liu* v. *Holder*, 575 F.3d 193, 198 (2d Cir. 2009)). And it found that the procedures followed in this case "comported with th[o]se procedures." *Id.* at 15a. The court thus determined that the "BIA's interpretation of § 1158(b)(1)(B)(ii) is reasonable and entitled to deference, and that the IJ followed an appropriate procedure" in petitioner's own case. *Id.* at 16a.

b. Finally, the court of appeals rejected petitioner's contention that, even under the standards of *Matter of*

L-A-C-, he was entitled to a continuance. Pet. App. 16a-17a. The court noted that petitioner never requested that the immigration judge grant a continuance for him to obtain additional evidence. *Id.* at 16a. Moreover, the court observed that, despite having six years between the filing of his application and the merits hearing, he had failed to proffer any evidence corroborating the faith-based aspects of his claim, other than the baptism certificate, or his claim that he was still sought by police in China. *Ibid.* The court reasoned that petitioner could not be said to be "unaware of [such] evidence 'essential to meeting the burden of proof.'" *Id.* at 16a-17a (citation omitted). Accordingly, the court determined that the IJ had not erred in not granting him a continuance to obtain and proffer additional corroborative evidence. *Id.* at 17a.

ARGUMENT

Petitioner contends (Pet. 16-19) that when an IJ determines, pursuant to 8 U.S.C. 1158(b)(1)(B)(ii), that additional evidence should be provided to corroborate otherwise credible testimony, the IJ must provide notice to the asylum applicant of what evidence the IJ deems lacking and an opportunity to obtain it. The court of appeals, like two other circuits, correctly rejected that contention. Although the Ninth Circuit has held that the REAL ID Act's corroboration provision requires an IJ to give notice and an opportunity to present the specific corroborating evidence the IJ determines is necessary, this Court's intervention would be premature. The Ninth Circuit has recently clarified its precedent in a manner that may eliminate practical distinctions between the courts of appeals' different approaches. Moreover, even if the question otherwise warranted this Court's review, further percolation would be bene-

ficial given that, since the Board has addressed the issue in a precedential decision, no court of appeals has adopted a contrary position. In any event, this case would be a poor vehicle for resolving the question because this Court's review would not likely affect the outcome. The petition for a writ of certiorari therefore should be denied.

1. The court of appeals correctly determined that the REAL ID Act's corroboration provision does not impose an obligation on the IJ to notify an asylum applicant of specific corroborating evidence that the IJ concludes is necessary to carry the alien's burden of proof and then provide the applicant with an opportunity to gather and present that specific evidence.

a. The plain text of the corroboration provision does not impose such a requirement. The provision states: "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. 1158(b)(1)(B)(ii). That text makes clear that an IJ may find an applicant's testimony to be "otherwise credible" and yet determine that "corroborat[ing]" evidence is necessary for the applicant to satisfy his burden of proof. *Ibid.* It also makes clear that the applicant must furnish such evidence unless the applicant does not have it and cannot reasonably obtain it. *Ibid.* But the statutory text makes no mention of any requirement of prior notice that specific evidence must be provided and does not specify any particular procedure that an IJ must follow before determining that the applicant has failed to meet his burden of proof.

The history of the corroboration provision likewise indicates that Congress did not intend to impose any particular procedure on IJs. The relevant Conference Report explained that the corroboration provision was "based upon the standard set forth in the [Board's] decision in *Matter of S-M-J-*," H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 166 (2005) (Conf. Rep.); see *ibid.* ("Congress anticipates that the standards in *Matter of S-M-J-* * * * will guide the [Board] and the courts in interpreting this clause."). In that decision, the Board stated that "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided." *Matter of S-M-J-*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997). But the Board made no mention of any requirement of prior notice and did not mandate any particular procedure for IJs to follow. See *Matter of L-A-C-*, 26 I. & N. Dec. 516, 520 (B.I.A. 2015) ("The framework set forth in *Matter of S-M-J-* did not require the [IJ] to identify the specific corroborating evidence at the merits hearing that would be considered persuasive under the facts of the case to meet the applicant's burden of proof."). In "[c]odifying the [Board's] corroboration standards," Conf. Rep. 165, Congress presumably did not intend to mandate any particular procedure either.

Indeed, requiring IJs to give notice and an opportunity to present specific corroborating evidence they deem necessary would undermine "[t]he overall purpose" of Section 1158(b)(1)(B), which "was to allow [IJs] to follow commonsense standards in assessing asylum claims without undue restrictions." *Matter of L-A-C-*, 26 I. & N. Dec. at 520. Instead of removing such restric-

tions, petitioner's construction of the corroboration provision would further tax the resources of "already overburdened" IJs and the Department of Homeland Security (DHS) by "necessitat[ing] two [merits] hearings" in many cases—"the first to decide whether * * * corroborating evidence is required and then another hearing after a recess to allow the alien more time to collect such evidence." *Rapheal* v. *Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008). Petitioner's construction would also be inconsistent with the general expectation in litigation that "parties with the burden of proof [must] ordinarily provide whatever corroboration they have when presenting their case in chief." *Singh* v. *Holder*, 602 F.3d 982, 988 (9th Cir. 2010), vacated, 649 F.3d 1161 (9th Cir. 2011) (en banc).

At a minimum, the Board's statutory construction of the corroboration provision is a reasonable one. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 & n.11 (1984). In *Matter of L-A-C-*, the Board concluded that Section 1158(b)(1)(B)(ii) "was intended to codify *Matter of S-M-J-* and not to impose additional rigid requirements for the consideration of corroboration." 26 I. & N. Dec. at 524. The Board thus held that under the statute, "[a]pplicants have the burden to establish their claim without prompting from the [IJ]." *Id.* at 523-524. The Board emphasized, however, that the statute does not displace "the discretion of the [IJ] to decide whether there is good cause to continue the proceedings in a particular case for additional corroboration." *Id.* at 524. And the Board noted that "a continuance would typically be warranted where the [IJ] determines that * * * the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Id.* at 522. Because the Board's

position is at the very least consistent with the text, history, and purpose of the corroboration provision, it should be given deference. See *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012).

b. Petitioner's counterarguments lack merit. Petitioner argues (Pet. 16-17) that "the plain text of the statute—and in particular, Congress's use of a present- and future-oriented verb tense—indicates that Congress intended to allow applicants an opportunity to obtain and provide corroborative evidence requested by an immigration judge." Using as his statutory reference the point at which the IJ determines that corroborative evidence is necessary, Pet. 17 ("[t]he statute states that 'where the trier of fact determines'"), petitioner contends that "[t]he determination that an applicant 'should provide evidence' is forward-looking and calls for action on the part of the applicant: to provide that evidence unless the applicant 'cannot reasonably obtain' it." *Ibid.* (quoting 8 U.S.C. 1158(b)(1)(B)(ii)).

But Section 1158(b)(1)(B)(ii)'s future-directed language can be read from the perspective of a different reference point—namely, the filing of the application for asylum. The language would thus inform applicants looking ahead to their hearings that in some cases, their testimony "may be sufficient," while in others, corroborating evidence "must be provided," such that the IJ can in turn assess the issue from the perspective of what the applicant should submit at the hearing. 8 U.S.C. 1158(b)(1)(B)(ii). Indeed, the instructions accompanying the asylum application are phrased in a similar forward-looking way. See DHS & Dep't of Justice, *I-589, Application for Asylum and for Withholding of Removal: Instructions* 8 (May 16, 2017) (*I-589 Appli-*

cation Instructions), https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf. ("You must submit reasonably available corroborative evidence showing * * * the specific facts on which you are relying to support your claim."). Congress's use of future-directed language is therefore not dispositive.

Petitioner also argues (Pet. 17) that the Board's interpretation of Section 1158(b)(1)(B)(ii) renders the last sentence of the provision "superfluous" on the theory that "[t]he first two sentences of that provision are by themselves sufficient to allow an [IJ] to require evidence corroborating otherwise credible testimony, and to deny a claim that is not adequately corroborated." But under either interpretation of Section 1158(b)(1)(B)(ii), the third sentence qualifies the authority granted by the rest of the provision, by establishing circumstances in which, notwithstanding the first two sentences, an applicant cannot be expected to provide particular corroborating evidence—namely, where "the applicant does not have the evidence and cannot reasonably obtain [it]." 8 U.S.C. 1158(b)(1)(B)(ii). To be sure, petitioner ascribes more meaning to the third sentence. Under his view, the third sentence supplies not only a substantive standard for determining whether an applicant can be expected to provide specific corroborating evidence, but a procedure for submitting such corroborating evidence or determining whether that substantive standard is met. That does not, however, render the Board's interpretation of the third sentence redundant.

Petitioner finally contends that a notice requirement is necessary for an applicant who is "insufficiently clairvoyant regarding what specific corroboration the [IJ] would decide the applicant 'should provide.'" Pet. 19

(citation omitted). But no clairvoyance is required to foresee that an IJ may require some objective evidence establishing the core premises supporting the validity of an asylum applicant's claim. As the Seventh Circuit has noted, by "clearly stat[ing] that corroborative evidence may be required," the statute itself "plac[es] immigrants on notice of the consequences [of] failing to provide corroborative evidence," *Rapheal*, 533 F.3d at 530, as do the instructions accompanying the asylum application, see *I-589 Application Instructions* 8 ("You must submit reasonably available corroborative evidence showing * * * the specific facts on which you are relying to support your claim."). In this case, for example, the IJ concluded that, although petitioner's testimony was credible "in the sense that [his] testimony was internally consistent, and mostly consistent with his written statement," Pet. App. 27a, it was "vague" and could not carry his burden without any corroboration of his claimed attendance at an underground church in China or either church in the United States, or of his alleged persecution or fear of persecution for that attendance, *id.* at 27a-28a. These are not tangential details of petitioner's "life story," Pet. 19; they are the core factual predicates underlying his asylum claim. The IJ's determination that corroboration was required should not have come as a surprise to petitioner and his counsel.

In any event, the Board's procedures for implementing Section 1158(b)(1)(B)(ii), adequately protect an alien who reasonably did not anticipate the need for particular corroborating evidence. Those procedures provide, for example, that an IJ may not "place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the [alien's] claim." *Matter of*

L-A-C-, 26 I. & N. Dec. at 522. And they authorize IJs to grant continuances to allow the applicant to obtain and submit corroborating evidence where there is "good cause" to do so, such as when "the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Ibid.* Petitioner did not request such a continuance in this case, however, and failed to establish that he would have been entitled to one in any event. Pet. App. 16a-17a.

2. Although there is a circuit conflict on the interpretation of the REAL ID Act's corroboration provision, 8 U.S.C. 1158(b)(1)(B)(ii), this Court's intervention would be premature at this time.

a. Petitioner is correct (Pet. 10-15) that there is division among the circuits. Like the Second Circuit in this case, both the Sixth and Seventh Circuits have rejected the contention that the corroboration provision requires notice of the requirement of additional corroborative evidence and an opportunity to obtain that evidence. See *Gaye* v. *Lynch*, 788 F.3d 519, 530 (6th Cir. 2015) ("Even if it could be said that the statute is silent on the issue, and thus possibly could allow for such a construction (and we conclude it does not), it is plainly erroneous to say that the statute *unambiguously* mandates such notice."); *Silais* v. *Sessions*, 855 F.3d 736, 745-746 (7th Cir. 2017) ("[N]o such prior notice or later opportunity is required, because the REAL ID Act itself informs petitioners that the IJ may require corroborating evidence—even if, as here, they are found to be credible.") (citing *Darinchuluun* v. *Lynch*, 804 F.3d 1208, 1216-1217 & n.22 (7th Cir. 2015)), cert. denied, 138 S. Ct. 976 (2018); accord *Rapheal*, 533 F.3d at 530. By contrast, the Ninth Circuit has held that the corroboration provision requires an IJ to give such notice and

opportunity. See *Ai Jun Zhi* v. *Holder*, 751 F.3d 1088, 1094-1095 (2014) (citing *Ren* v. *Holder*, 648 F.3d 1079, 1090-1092 (9th Cir. 2011)).[1]

b. This Court's intervention, however, would be premature.

The Ninth Circuit has recently clarified its interpretation of Section 1158(b)(1)(B)(ii) in a manner that may eliminate most of the practical differences between that court's interpretation and that of the other courts of appeals. In *Jie Shi Liu* v. *Sessions*, 891 F.3d 834 (9th Cir. 2018), the Ninth Circuit addressed the claim of an alien who was not, during the merits hearing on his application, given notice of the specific corroboration that the IJ thought would be necessary or an opportunity to obtain that evidence. *Id.* at 837. The court nevertheless concluded that Section 1158(b)(1)(B)(ii) was satisfied because the alien "was put on notice that corroboration was needed" when the IJ observed, almost a year prior to the merits hearing, that he was "going to have to supplement" the statement accompanying his asylum appli-

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[1] The Third Circuit held in pre-REAL ID Act case that an IJ "must give the applicant notice of what corroboration will be expected." *Chukwu* v. *Attorney Gen. of the U.S.*, 484 F.3d 185, 192 (2007); see *id.* at 191 n.2 (explaining that Section 1158(b)(1)(B)(ii) "[wa]s inapplicable" because the application was filed before the REAL ID Act's effective date of May 11, 2005). The court of appeals subsequently cited that holding in a footnote of a post-REAL ID Act case, suggesting that its precedent may survive enactment of the REAL ID Act. See *Alimbaev* v. *Attorney Gen. of the U.S.*, 872 F.3d 188, 201 n.11 (3d Cir. 2017). But the court made no mention in *Alimbaev* of the intervening statutory change, much less, as petitioner concedes (Pet. 13 n.1), engage in any rigorous analysis of the corroboration provision.

cation. *Id.* at 839;[2] see *ibid.* (concluding that "the notice provided to Liu by the IJ was specific enough to satisfy the requirements identified by *Ren*" and that the alien had sufficient time between the two hearings to produce corroborating evidence).

Under *Jie Shi Liu*, then, any notice requirement imposed by Section 1158(b)(1)(B)(ii) can be met by a general observation that corroborative evidence will be necessary for an alien, when provided in sufficient time for the alien to gather such evidence. Contrary to petitioner's contention (Pet. 19), that notice may predate the compiling of the evidentiary record at an applicant's merits hearing and the IJ's credibility determination. And the IJ may then deny the application at the merits hearing rather than provide *additional* notice of specific corroborative evidence the IJ deems necessary and an opportunity to obtain that evidence. Given this clarification of *Ren*, it would be premature for this Court to consider the issue, where that clarification and further developments could mitigate or entirely eliminate the practical implications of the lopsided conflict that currently exists.

Moreover, the decision below is the first by a court of appeals to consider the question in light of the

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[2] As the court of appeals explained:

> The IJ observed that Liu's application for asylum was supported only by his own statement. The IJ, addressing Liu's counsel, said, "[y]ou're going to have to supplement this, aren't you?" Liu's counsel explained that he had told Liu "that he would need to come up with some . . . other evidence." The IJ then explained to Liu that Liu's counsel "would like more time for [him] to provide evidence to support [his] case."

Jie Shi Liu, 891 F.3d at 839 (brackets in original).

Board's precedential decision in *Matter of L-A-C-*, *supra*, establishing procedures implementing Section 1158(b)(1)(B)(ii). The Seventh and Ninth Circuits adopted their interpretations long before the Board issued that decision, and the Sixth Circuit similarly based its interpretation on the statute alone. Now that the Board has spoken, it would be prudent for this Court to permit other courts of appeals to address the relevant issue, in light of that decision.

3. Finally, this case would be a poor vehicle for the Court's review of this issue because it is far from clear that the Court's review would have any effect on the outcome of this case.

Although before the Board and court of appeals petitioner contended that he would have provided additional corroborative evidence of his claims had he been given the opportunity to do so, the evidence petitioner would have submitted—a statement from a church friend in New York or a pastor—likely would not have made any difference in the denial of his application. See A.R. 9; Pet. C.A. Br. 17. Such evidence may have corroborated petitioner's attendance at a church in the United States since 2013. But it would not have been relevant to other key elements of his claim—his attendance at a house church in China, the February 2007 arrest and detention, or his church attendance for the first five years after his entry into the United States. Petitioner never represented before the Board or court of appeals that he would obtain such evidence from his wife in China, with whom the evidence indicates he maintains contact, or from the Los Angeles church, nor has petitioner ever demonstrated that such evidence is not reasonably available.

In any event, the IJ's alternative finding that petitioner failed to establish an objectively reasonable fear of future persecution would independently bar petitioner's claims for relief. Pet. App. 29a. As of 2014, the IJ observed that the Chinese authorities had not been in contact with his wife or son, or subjected them to any form of mistreatment. *Ibid.* In light of that, as well as the lack of any independent information that the authorities would be interested in him, the IJ concluded that "it appears that the Chinese government has lost any interest that it may have had in [petitioner] in the past." *Ibid.* This Court's intervention and resolution of the corroboration issue would not have any effect on that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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