NOTE

THE DISCREDIT BUREAU: ANALYZING THE CIRCUIT SPLIT ON THE *FALSUS IN UNO, FALSUS IN OMNIBUS* DOCTRINE'S APPLICABILITY TO ADVERSE CREDIBILITY FINDINGS

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> *"We must not forget that the stakes in asylum proceedings are high and that serious errors in decisions issued by overworked immigration judges and BIA officials are not unusual."*[1]

INTRODUCTION

The REAL ID Act of 2005 ("the Act") codified, among other things, the current standard for evaluating immigration judges' adverse credibility findings.[2] Prior to its passage, courts employed differing stan-

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1 Ren v. Holder, 648 F.3d 1079, 1084-85 (9th Cir. 2011).

2 *See* REAL ID Act of 2005, 8 U.S.C. § 1158 (b)(1)(B)(iii):

> "Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's ac-

dards for evaluating those findings, some of which conflicted with the standard subsequently articulated in the Act.[3] One such earlier standard was that an adverse credibility finding must relate to an issue that goes to the heart of an asylum applicant's claim.[4] Under the Act, consideration of whether inconsistencies in the testimonial evidence "[go] to the heart of the applicant's claim" is explicitly prohibited in keeping with the Act's grant of broad authority to immigration judges.[5]

In the wake of its passage, courts adopted conflicting interpretations. In particular, federal circuits diverge on whether *falsus in uno, falsus in omnibus* applies to adverse credibility findings under the Act.[6] *Falsus in uno, falsus in omnibus* is a largely maligned doctrine,[7] which means that when "the fact-trier believes . . . a witness's testimony on a material issue is intentionally deceitful, the fact-trier is permitted to disregard all of that witness's testimony."[8] In this Note, I will explain the doctrine's origins, mandatory and permissive jury instructions, and why the doctrine has fallen out of favor as an evidentiary rule. Since the Act established that inconsistencies supporting an adverse credibility finding do not have to go to the "heart of the . . . claim," some courts have expressed concern that the Act will result in judges disregarding an applicant or witness's entire testimony based upon minor, immaterial inconsistencies.[9] Consequentially, and despite the broad authority

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> count, the consistency between the applicant's or witness's written and oral statements . . . the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.".

3 *See* Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002) (finding that inconsistencies must go to the "heart of the asylum claim"); Giday v. Gonzales, 434 F.3d 543, 550 (7th Cir. 2006) ("[C]redibility findings must be based on specific cogent reasons . . . that go to the heart of the applicant's claim.").

4 *See, e.g.*, Sylla v. I.N.S., 388 F.3d 924, 926 (6th Cir. 2004) ("An adverse credibility finding must be based on issues that go to the heart of the applicant's claim."); Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 660 (9th Cir. 2003) (explaining that inconsistencies that do not "go to the heart of the asylum claim" are "insufficient to support an adverse credibility finding"); *Gao*, 299 at 272 (3d Cir. 2002) (noting that inconsistencies must involve the "heart of the asylum claim").

5 8 U.S.C. § 1158 (b)(1)(B)(iii).

6 DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 3.20 (2020 ed.) ("Federal circuits are . . . split with respect to whether the doctrine of *falsus in uno, falsus in omnibus* . . . is applicable under the REAL ID Act.").

7 *See, e.g.*, Parker v. United States, 801 F.2d 1382, 1385 (D.C. Cir. 1986) (". . . [T]he *falsus in uno* instruction has been criticized frequently as superfluous and potentially confusing . . .").

8 *Falsus in Uno*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9 *See, e.g.*, Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) ("Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment.").

conferred upon immigration judges to base adverse credibility findings on nearly any aspect of an applicant's testimony,[10] some courts have etched out an exception to such findings when only "trivial" aspects of an individual's testimony are found to be inconsistent.[11]

I. BACKGROUND

A. *Falsus in Uno, Falsus in Omnibus Doctrine*

During the early to mid-nineteenth century, the *falsus in uno, falsus in omnibus* doctrine ("the doctrine") was widely held to be an indispensable evidentiary principle.[12] The doctrine's defenders argued that once a witness was shown to be willfully deceitful, the entire testimony had been tainted and, as such, had to be disregarded by the factfinder.[13] The Supreme Court has not passed judgment on the doctrine since 1822 when it expressly endorsed the principle in *The Santissima Trinidad*, 20 U.S. at 339; however, by the early twentieth century, some lower courts had come to question the doctrine's viability as an evidentiary principle.[14] In *State v. Williams*, the Supreme Court of North Carolina overturned its previous endorsement of the doctrine, emphasizing that there is no "rule laid down in any English book of reports or by any writer upon evidence" supporting the doctrine's use as an evidentiary principle.[15] The doctrine was also criticized because it is open to "misconstructions," "involve[s] such real doubts as to [its] true intent," and is "seriously prejudi-

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10 8 U.S.C. § 1158 (b)(1)(B)(iii).

11 *Compare* Chen v. U.S. Att'y Gen., 463 F.3d 1228, 1233 (11th Cir. 2006) (denying an applicant's petition for review, in part, because "to the extent [he] argues the inconsistencies and discrepancies [upon which the immigration judge based the adverse credibility finding] are 'trivial' and 'irrelevant to the dispositive issues,' he ignores the amendment to [the Act]."), *with* Shrestha v. Holder, 590 F.3d 1034, 1044 (9th Cir. 2010) ("When an inconsistency is cited as a factor supporting an adverse credibility determination, that inconsistency should not be a mere trivial error such as a misspelling . . . and the petitioner's explanation for the inconsistency, if any, should be considered in weighing credibility . . . .").

12 *See, e.g.*, The Santissima Trinidad, 20 U.S. 283, 339 (1822) ("[W]here the party speaks to a fact in respect to which he cannot be presumed liable to mistake . . . if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and Courts of justice . . . are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus*.").

13 *See* Stoffer v. State, 15 Ohio St. 47, 55 (1864) ("The presumption that the witness will declare the truth, ceases as soon as it manifestly appears that he is capable of perjury. *Faith in a witness' testimony can not* [sic] *be partial or fractional*; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and, according to the result, his testimony is to be credited or *rejected*.").

14 *See, e.g.*, N. Pac. R.R. Co. v. Hayes, 87 F. 129, 132 (7th Cir. 1898) (rejecting the doctrine because it was impermissibly broad and vague and allowed juries to "unrestrictedly . . . believe or disbelieve any witness").

15 47 N.C. 257, 263 (N.C. 1855).

cial."[16] By the mid-twentieth century, courts were explicitly rejecting the principle.[17]

Historically, courts have used either mandatory or permissive instruction to explain the doctrine to juries.[18] Mandatory instruction was considered the "true application of the *falsus in uno falsus in omnibus* maxim."[19] In the late nineteenth century, courts would use such instruction to inform jurors that they were required to disregard an individual's testimony only if he "has *knowingly* and *willfully* testified to a falsehood."[20] As the doctrine evolved, courts continued to embrace the mandatory instruction, but with a caveat: the testimony may not be disregarded if it has been corroborated by other unimpeachable testimony or evidence.[21] Although this provided jurors with a basis to reject the doctrine, it was an incredibly narrow exception.

In contrast, states that utilize the doctrine's permissive instruction inform the jury to "disregard the evidence altogether and [that they] should do so if the witness has wilfully [*sic*] sworn falsely to a material fact in the case but that they may not be required to do so by the court."[22] Similar to the mandatory instruction, some states require or permit a corroboration exception to the permissive instruction.[23] For instance, in *State v. Hall*, the defendant requested that the trial court instruct the jury "that if you believe any witness in this case has knowingly sworn falsely to any material matter in this case, you may reject all the testimony of such witness."[24] The trial court agreed to provide the jury with the requested instruction but with an exception for any such false testimony that is "corroborated by other competent testimony which is believed by

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16 W.W. Allen, Annotation, *Modern View as to Propriety and Correctness of Instructions Referable to Maxim "Falsus in Uno, Falsus in Omnibus,"* 4 A.L.R.2d 1077, § 1 (1949) (collecting cases).

17 Crawford v. State, 54 So.2d 230, 232 (Miss. 1951) (emphasizing that "[t]his Court has repeatedly declared that [the *falsus in uno, falsus in omnibus* doctrine's] instruction should not be granted" and collecting cases).

18 W.W. Allen, *supra* note 16, at § 2.

19 *Id.* at § 2 n.12 (collecting cases).

20 Hale v. Rawallie, 8 Kan. 136, 143 (Kan. Sup. Ct. 1871); *see also* Stoffer v. State, 15 Ohio St. 47, 56-57 (1864).

21 *See* Nipper v. Minix, 176 S.E. 890, 891 (Ga. Ct. App. 1934) (upholding a jury instruction allowing *falsus in uno, falsus in omnibus* where a witness's testimony is corroborated); Pierce v. State, 53 Ga. 365, 368 (Ga. 1874).

22 Norfolk v. McKenzie, 116 F.2d 632, 635 (6th Cir. 1941).

23 *See* Shecil v. United States, 226 F. 184, 187 (7th Cir. 1915) ("[Jurors] may . . . well be cautioned and advised against rejecting so much of a discredited witness' testimony as is corroborated by other credible evidence, and especially when they come to . . . determining whether or not the burden of proof has been sustained.").

24 State v. Hall, 238 N.W. 302, 303-04 (S.D. 1931).

you."[25] The trial court's ruling was reversed on appeal.[26] In its decision, the appellate court reasoned that

> "[t]he [corroboration clause] instruction as requested is proper and has been approved by this court repeatedly . . . but as qualified by the trial court it is quite senseless. As so qualified it carries with it the implication that the jury is to believe the witness, even though they may think him dishonest. If the jury believe a witness is dishonest, they are at liberty to reject all his testimony if they see fit, even though he may be corroborated."[27]

In light of this criticism, some courts have rejected a corroboration exception to the permissive instruction,[28] while others have approved it.[29] Regardless, some states continue to employ a permissive instruction for the *falsus in uno* doctrine.[30]

A permissive instruction further provides that the falsehood must involve a material fact.[31] If a witness is deliberately dishonest about an immaterial fact, the jury may not infer that the rest of the testimony is tainted.[32] And courts have disagreed on whether the permissive instruction must include a definition for materiality or identify the material facts

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25 *See id.* at 304.

26 *Id.*

27 *Id.*

28 *See* State v. Sjoberg, 223 N.W. 320, 321-22 (S.D. 1929) (affirming that no corroboration qualification "is required where the instruction as given limits its effect to the testimony of witnesses whom the jury believes to have 'knowingly' or 'willfully' testified falsely'"); Gantling v. State, 40 Fla. 237, 247 (Fla. 1898) (holding an instruction erroneous that informed the jury "that the law would not permit them to discard the entire testimony of such a witness, where he was corroborated by some circumstances or another credible witness").

29 *See* State v. McPherson, 291 P. 313, 314 (Idaho 1930); Chicago v. Kelly, 71 N.E. 355, 356 (Ill. 1904) ("[T]he jury are at liberty to disregard the evidence of a witness who upon the trial has willfully sworn falsely to a material fact, except in so far as such witness has been corroborated by other credible evidence, or by facts and circumstances proven upon the trial.").

30 State v. Carey, 187 Conn. App. 438, 465 (Conn. App. Ct. 2019); *see also* In re Rich's Estate, 131 N.W.2d 909, 911 (Wis. 1965) ("Once a witness has testified falsely in a material respect the trier of the fact may, but is not compelled to, disregard all of that witness' testimony which is not corroborated.").

31 *See* Palmer v. Rucker, 268 So.2d 773, 777 (Ala. 1972) (explaining that the witness must "willfully and corruptly sw[ear] falsely as to a material matter to the issues in the case" for the jurors to justifiably disregard the witness' testimony).

32 *See* State v. Harris, 396 S.W.2d 585, 587 (Mo. 1965) (holding that although the witness "admittedly had lied on . . . two occasions," "[t]hese falsehoods were not as to material matters with reference to the offense charged and did not destroy the substantiality of her testimony).

relevant to the case at hand in order to assist the jury in choosing whether to disregard certain testimony.[33]

Today, the doctrine's mandatory instruction has been eradicated from all 50 states' evidentiary rules. In 2013, Georgia became the final state to remove from its code that a jury is required to disregard the entirety of a witness's testimony if she intentionally deceives the jury.[34] Although the mandatory instruction no longer exists, courts are split on whether it is prudent to employ the permissive version.[35] Moreover, the procedural safeguards that various states have implemented to better balance the doctrine's impact—shifting towards permissive rather than mandatory instruction, corroboration exceptions, and requiring the adjudicator to define materiality for the jury—belie the danger of this doctrine in empowering a jury or an immigration judge to disregard a witness's testimony.

Nonetheless, the doctrine is commonly utilized within the American immigration system, especially after Congress enacted the Act.[36] In fact, the First Circuit called the *falsus in uno* doctrine "a natural and instinctive tool of the factfinder, like a carpenter's hammer or plumber's wrench," which is frequently invoked even regardless of the immigration judge's awareness of the doctrine.[37]

B. Adverse Credibility Determinations in Asylum Claims

Adverse credibility determinations are uniquely important in asylum claims. Many asylum seekers "have fled urgent circumstances with nothing but the shirts on their backs, and thus have nothing but their own testimony to establish the truth of their claims."[38] "Because asylum cases

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[33] *Compare* People v. Ruffin, 94 N.E.2d 433, 436 (Ill. 1950) (reversing jury instructions because "the instructions do not set forth what are the material facts in a manner clearly showing their relation to this instruction"), *with* State v. Jones, 365 S.W.2d 508, 517 (Mo. 1963) (affirming jury instructions that did not define materiality because " 'material facts' is so commonly understood 'that an attempt to define it would confuse rather than enlighten' ").

[34] Ga. Code Ann. § 24-9-85, *repealed by* Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; *see* Walker v. State, 348 Ga. App. 273, 275 n.3 (quoting the repealed statute).

[35] *Compare Carey*, 187 Conn. App. at 465 (recognizing the "falsus in uno, falsus in omnibus [doctrine] as a permissive instruction . . . resting in the sound discretion of the trial judge"), *with* Butler v. State, 245 So. 2d 605, 607 (Miss. 1971) ("The instruction . . . should not have been given for the reason it has incorporated therein the 'falsus in uno, falsus in omnibus' theory. We have held in a number of cases that this type of instruction should not be given.").

[36] *See* Castaneda-Castillo v. Gonzales, 488 F.3d 17, 23 (1st Cir. 2007) (explaining that under the Act "the fact-finder is entitled to draw the *falsus in omnibus* reference based upon inaccuracies, inconsistencies, or falsehoods without regard to whether . . . [they go] to the heart of the applicant's claim" (alterations in original) (citations omitted)).

[37] Siewe v. Gonzales, 480 F.3d 160, 171 (2d Cir. 2007).

[38] Tania Galloni, *Keeping it Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 UNIV. OF MIAMI L. REV. 1037 (2008) (internal quotation marks and citation omitted).

are inherently difficult to prove, an applicant may establish his case through his own testimony alone."[39] Conversely, courts may deny an applicant's claims based solely upon an adverse credibility determination.[40]

Despite the harsh conditions many applicants have faced before arriving in front of an immigration judge, the Act also empowers judges to require "that the applicant . . . provide evidence that corroborates otherwise credible testimony . . . unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[41] Some courts have interpreted this provision to have "swept away [the] doctrine that 'when an alien credibly testifies to certain facts, those facts are deemed true.' "[42] Prior to the Act, courts did not impose an additional burden on applicants to produce evidence to corroborate credible testimony or, in the alternative, to explain why they were unable to obtain such evidence.[43] Now, if an immigration judge requests corroborating evidence, the applicant must be able to explain "why he did not or could not reasonably obtain additional evidence," or he risks "exacerbat[ing] his credibility problems."[44] And logic dictates that when an immigration judge is seemingly predisposed to discrediting otherwise credible testimony by requesting corroborating evidence then it may be more difficult for the applicant to meet her burden to establish that she did not have such evidence and was unable to reasonably obtain it.

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39 Garrovillas v. I.N.S., 156 F.3d 1010, 1016-17 (9th Cir. 1998); *see also* 8 C.F.R. §§ 208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."), 208.16(b), (c); 8 U.S.C. § 1158.

40 *See* Ayele v. Holder, 468 F. App'x 328, 329 (4th Cir. 2012) ("An adverse credibility finding can support a conclusion that the alien did not establish past persecution."); Chen v. U.S. Att'y Gen., 463 F.3d 1228, 1231 (11th Cir. 2006) ("An IJ's denial of asylum relief . . . can be supported solely by an adverse credibility determination, especially if the alien fails to produce corroborating evidence.").

41 8 U.S.C. § 1158 (b)(1)(B)(ii).

42 Aden v. Holder, 589 F.3d 1040, 1045 (9th Cir. 2009); *see* Balachandran v. Holder, 566 F.3d 269, 273 (1st Cir. 2009) (explaining that under the Act an "IJ can required corroboration, even if a petitioner gives credible testimony, and that 'such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence' "); Sandie v. Att'y Gen, 562 F.3d 246, 252 (3d Cir. 2009) (citing the Act as the reason that even with credible testimony, "an applicant for asylum must provide reliable evidence to corroborate testimony when it is reasonable to expect corroborating evidence and there is no satisfactory explanation for its absence").

43 Wiransane v. Ashcroft, 366 F.3d 889, (10th Cir. 2004) (acknowledging that the "inherent difficulties a purported refugee may have in obtaining documentation" justifies that a credible applicant's testimony "may be sufficient to sustain the [applicant's] burden of proof without corroboration" (alteration in original)).

44 *See* Singh v. Holder, 699 F.3d 321, 331 (4th Cir. 2012). *But see* Maryenka v. Holder, (vacating and remanding because immigration judge erroneously discredited the applicant and found that his sister, who had recently suffered a brain concussion and was "advised not to be exposed to anything that make[s] her upset," should have testified (alteration in original)).

Further complicating matters for asylum seekers, the recent increase in inexperienced immigration judges may lead to inconsistent findings that are unlikely to be reversed on appeal.[45]

Consistent application of the Act's "totality of the circumstances" standard which includes myriad factors for judges to consider, can be a challenge for seasoned immigration judges, let alone those that are inexperienced in immigration matters. For instance, under the Act, immigration judges must distinguish between witnesses' mistakes made "in all innocence" and "slips that . . . show that the witness is a liar or his memory completely unreliable."[46] The failure to discern the difference, coupled with the complexity of immigration law,[47] is particularly troubling in light of the highly deferential standards that appellate courts use to review adverse credibility findings.[48] The lack of experience among new immigration judges is also concerning because circuit courts have, at times, lionized the ability of immigration judges to assess an applicant's testimony "by virtue of [their] acquired skill" when deferring to their adverse credibility determinations.[49] The skill and knowledge required of immigration judges to adequately apply the Act's adverse credibility analysis is especially important because, as the Ninth Circuit has remarked, "[a]n appellate body is simply unable to distill the dynamics of an interview, observe whether words were interpreted properly, whether there was hesitation or whether the supposed inconsistency . . . was a matter of interpretation, confusion, or a true inconsistency."[50]

The risk of unjust outcomes for asylum seekers is further exacerbated by the fact that appellate courts, enabled by the applicable standards of review, afford adverse credibility determinations significant deference.[51] The Board of Immigration Appeals ("BIA") applies a "clearly erroneous" standard to an immigration judge's adverse credibil-

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45 Nolan Rappaport, *No Experience Required: US Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, THE HILL (Feb. 3, 2020) (reporting that while 28 new immigration judges were sworn in in December 2019, "11 of them had no immigration law experience").

46 Kadia v. Gonzales, 501 F.3d 817, 822 (7th Cir. 2007).

47 *See U.S. Immigration Law: The Big Picture*, NOLO, https://www.nolo.com/legal-encyclopedia/us-immigration-law-the-big-picture (last visited Jan. 16, 2021) (explaining that U.S. immigration law is "[w]idely considered [to be] more complex than the tax code").

48 *See* 8 C.F.R. § 1003.1 (d)(3)(i)-(ii).

49 *Compare* Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003); Sarvia-Quintanilla v. I.N.S., 767 F.2d 1387, 1395 (9th Cir. 1985) (explaining that an immigration judge is, "by virtue of his acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth") *with Kadia v. Gonzales*, 501 F.3d at 823 (no deference given to immigration judge's adverse credibility determination who lacked "edge in knowledge" over that of generalist judges and failed to realize "what [was] obvious even to a generalist judge – that conventions regarding spelling and vocabulary differ among the world's English-speaking populations.").

50 *Mendoza Manimbao*, 329 F.3d at 662.

51 *See generally id.*

ity finding.[52] A finding is clear error when the account of the evidence is not "plausible in light of the record viewed in its entirety," and requires significant "deference to the trier of fact."[53] Circuit courts apply a similarly deferential standard: the substantial evidence standard.[54] That standard requires adjudicators to "examine the record to see whether substantial evidence supports [the immigration judge's] conclusion, and determine whether the reasoning employed by the [immigration judge] is fatally flawed."[55]

C. Revival of the Doctrine under the Act

In stark contrast to the near universal rejection of the doctrine as an evidentiary principle throughout the past century, many courts consider the Act to have revived the doctrine in the immigration context.[56] In the Second Circuit's view, Congress enacted the legislation "in order to 'creat[e] . . . a uniform standard for credibility determinations."[57] Courts believe the legislation revived the doctrine because it empowers immigration judges to discredit an asylum-seeker's entire testimony based upon subjective factors such as, *inter alia*, his "demeanor, candor, or responsiveness" which need not go to the "heart of the claim."[58]

Prior to the Act's passage, multiple federal appellate courts required that an inconsistency forming the basis of an adverse credibility claim be sufficiently connected to the applicant's asylum claim.[59] A wide range of discrepancies were considered too minor to justify an adverse credibility

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52 8 C.F.R. § 1003.1 (d)(3)(i) ("Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").

53 Anderson v. City of Bessemer, 470 U.S. 564, 565, 575 (1985).

54 *See* 8 U.S.C. § 1252 (5)(b)(4)(B) (2017).

55 Aguilera-Cota v. U.S. I.N.S., 914 F.2d 1375, 1381 (9th Cir. 1990); *see* Maciene v. U.S. Att'y Gen., 618 F. App'x 516, 518 (11th Cir. 2015) (explaining that the inquiry is "only whether there is substantial evidence for the findings made by the BIA, *not* whether there is substantial evidence for some *other* finding that could have been, but was not, made").

56 *See* Wen Feng Liu v. Holder, 714 F.3d 56, 61 (1st Cir. 2013) ("[T]he REAL ID Act gave the [immigration judge] discretion to draw the *falsus in uno, falsus in omnibus* . . . inference."); Enying Li v. Holder, 738 F.3d 1160, 1163 (9th Cir. 2013) ("The law of this circuit permits the use of the maxim *falsus in uno, falsus in omnibus* in the immigration context.").

57 Xiu Xia Lin v. Mukasey, 534 F.3d 162, 165 (2d Cir. 2008) (alteration in original).

58 REAL ID Act of 2005, 8 U.S.C. § 1158 (b)(1)(B)(iii).

59 *See* Giday v. Gonzales, 434 F.3d 543, 550 (7th Cir. 2006) ("[C]redibility findings must be based on specific cogent reasons . . . that go to the heart of the applicant's claim."); Sylla v. I.N.S., 388 F.3d 924, 926 (6th Cir. 2004) ("An adverse credibility finding must be based on issues that go to the heart of the applicant's claim."); Bojorques-Villanueva v. I.N.S., 194 F.3d 14, 16 (1st Cir. 1999) ("[A]n adverse credibility determination cannot rest on trivia but must be based on discrepancies that involve[ ] the heart of the asylum claim." (internal quotations omitted)); Ceballos-Castillo v. I.N.S., 904 F.2d 519, 520 (9th Cir. 1990) (upholding an adverse credibility determination because the misstatements "involved the heart of the asylum claim").

finding, ranging from translation errors to omitting "unimportant facts."[60] Further, in most circuits, any inconsistencies or omissions serving as a basis for an adverse credibility finding needed to "go to the heart of the claim."[61] Notably, the Act expressly overturned that standard employed by courts and empowered immigration judges to base applicants' adverse credibility findings on inconsistencies tangential or central to an asylum claim.[62]

In the wake of the Act, courts have grappled with how much of their jurisprudence Congress intended to overturn. The First Circuit noted that before the legislation, the court did not allow for adverse credibility determinations to be based on the *falsus in uno* doctrine.[63] Following passage of the Act, the court has explained that the immigration judge "is entitled to draw the *falsus in omnibus* inference based upon inaccuracies, inconsistencies, or falsehoods 'without regard to whether . . . [they go] to the heart of the applicant's claim.' "[64]

For these reasons, the ways in which courts have interpreted the Act, and subsequently used it to justify adverse credibility determinations by immigration judges based solely on incidental or minor discrepancies in witness testimony must be closely scrutinized. This is essential because many applicants receiving adverse credibility determinations may otherwise be eligible for some form of refuge in the United States.

II. ANALYSIS

A. *Current Split*

This Note will examine the current circuit split surrounding whether *falsus in uno, falsus in omnibus* is applicable to an asylum applicant's testimony following the Act.[65] In light of the Trump Administration's harmful immigration laws and policies,[66] and the increasingly burdened immigration system,[67] it is imperative that courts predictably and adequately review these judges' decisions. Ultimately, "[t]he First, Second,

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60 Elaine C. Schneider, *Challenging an Incredibility Finding on Appeal: An Incredibility Paradigm*, 27 WM. MITCHELL L. REV. 2375, 2399-2405 (2001) (collecting cases that illustrate inconsistencies that do not go to the heart of an applicant's claim).

61 *See Sylla*, 388 F.3d at 926.

62 REAL ID Act of 2005, 8 U.S.C. § 1158 (b)(1)(B)(iii).

63 Castañeda-Castillo v. Gonzales, 488 F.3d 17, 23 n.6 (1st Cir. 2007) (alteration in original).

64 *Id.*

65 REAL ID Act of 2005, 8 U.S.C. § 1158 (b)(1)(B)(iii).

66 *See* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 585-94 (2019) (compiling and explaining recent immigration laws passed by the Trump Administration).

67 *See, e.g.*, Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, THE WALL STREET JOURNAL (Sept. 18, 2019) (explaining that the "backlogged deportation docket pending in U.S. immigration courts surpassed one million cases in August" 2019).

and Ninth Circuits have upheld the [*falsus in uno, falsus in omnibus*] doctrine, although to a varying extent" but "the Seventh Circuit has criticized this approach."[68] Further, although the Fourth Circuit has dodged the question of whether the doctrine applies, the court did acknowledge that, in the wake of the Act, it was unclear "how small an inconsistency is sufficient to justify an adverse credibility finding."[69]

The First Circuit affirmed that the Act "confirmed the IJ's discretion to [draw the *falsus in uno, falsus in omnibus* inference], because drawing this inference was permissible in appropriate circumstances even before the adoption of the 'totality of the circumstances' rule."[70] The Second Circuit explained that immigration judges may apply the doctrine of *falsus in uno, falsus in omnibus* to their adverse credibility findings.[71] However, the court carved out an exception for when immigration judges may apply the principle, explaining that the "maxim is inapplicable when an asylee admits to using a 'fraudulent document to escape immediate danger or imminent persecution.'"[72] The Second Circuit has also extended the doctrine to the BIA, allowing the Board to employ it when evaluating motions to reopen.[73]

Prior to the Act's passage, the Second Circuit had carved out five categories of exceptions to the *falsus in uno* doctrine as applicable to an asylum-seeker's credibility determination.[74] First, the court noted that even if some of the petitioner's evidence is found to be "false," that "does not excuse the assessment of evidence that is independently corroborated."[75] Second, an immigration judge cannot rely on "fraudulent documents that were created to *escape* persecution" and were not submitted as genuine, to discredit an applicant and, in fact, their existence "may actually tend to support an alien's application."[76] Third, false evidence that is unrelated to the applicant's claim may be "insufficient by itself to warrant a conclusion that the entirety of the alien's uncorroborated material evidence is also false."[77] Fourth, inaccurate statements made during an "airport interview" may carry less weight than other interviews be-

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68 *See* Anker, *supra* note 6.

69 Singh v. Holder, 699 F.3d 321, 332 n.13 (4th Cir. 2012).

70 *See Wen Feng Liu*, 714 F.3d at 61 (emphasis omitted) (affirming that an adverse credibility finding applied to all of the applicant's claims, even where the claims "could be viewed as distinct").

71 Daoliang Cao v. Holder, 571 F. App'x 3, 4 (2d Cir. 2014).

72 *Id.* (quoting Rui Ying Lin v. Gonzales, 445 F.3d 127, 133 (2d Cir. 2006)).

73 Qin Wen Zhang v. Gonzales, 500 F.3d 143, 147 (2d Cir. 2007) (affirming the denial of a motion to reopen because, in part, the *falsus* maxim "supported a general adverse credibility finding based on a determination that the petitioner had submitted a fraudulent document").

74 Siewe v. Gonzales, 480 F.3d 160, 170 (2d Cir. 2007).

75 *Id.* at 170.

76 *Id.* (emphasis in original).

77 *Id.* at 170-71.

cause they may "perce[ive] that it is 'coercive' and 'threatening,'" which leads to less forthcoming answers.[78] Finally, "[a]n alien's submission of documentary evidence that the alien does not know, and has no reason to know, is inauthentic" does not justify invoking the *falsus in uno* doctrine.[79] However, if a case did not involve any of these categories, then the Second Circuit recognized the *falsus in uno* doctrine.[80]

In a case which was submitted before the Act went into effect, but after Congress had enacted it, the Ninth Circuit allowed minor lapses in memory to support an adverse credibility finding.[81] In *Don v. Gonzales*, the court explained that the applicant's inability to remember a date during his initial interview, coupled with his clarity at the immigration judge's hearing, supported the inference that he had a propensity to lie.[82] In a salient dissent, Justice Wardlaw condemned the practice of discrediting applicants' testimonies because of irrelevant discrepancies.[83] He contended that the majority's willingness to base its holding on minor discrepancies, which may not be discrepancies at all, "places our court's imprimatur on a sloppy, illogical and barely coherent six-page [immigration judge] opinion."[84]

In *Enying Li v. Holder*, the Ninth Circuit permitted immigration judges to apply *falsus in uno, falsus in omnibus* to discredit a witness's entire testimony, holding that an adverse credibility determination "on any theory of asylum is sufficient to dismiss an asylum petition based on a completely different theory."[85] Although the court limited the doctrine's application, noting that it applies "*only* when the 'witness . . . has willfully testified falsely as to any material fact," that exception is rendered toothless in the next paragraph, where the court concedes that an immigration judge's determination will stand "even if [she] cannot point to specific, contrary evidence in the record to refute it."[86] Essentially, the Ninth Circuit's purported constraint on the doctrine, that it only be applied when a petitioner willfully lies, is nominal at best—even if the immigration judge cannot explicitly state why the petitioner is *willfully* lying, or *lying at all*, the ruling will stand. The Ninth Circuit's concession that the immigration judge need not point to support in the record is

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78 *Id.* at 171; *see* Guan v. Gonzales, 432 F.3d 391, 396 (2d Cir. 2005) (explaining that the court "exercise[s] caution when reviewing [an asylum-seeker's] statements made within the context of airport interviews.").

79 *Siewe*, 480 F.3d at 171.

80 *Id.*

81 Don v. Gonzales, 476 F.3d 738, 748 & n.6 (9th Cir. 2007).

82 *Id.* at 741 ("A statement that one's memory is better now than it was earlier supports an inference of untruthfulness.").

83 *Id.* at 747 (Wardlaw, J., dissenting).

84 *Id.*

85 *Enying Li*, 738 F.3d at 1170.

86 *Id.* at 1168.

deeply problematic; it actually goes beyond the typical restraint placed on immigration judges by the BIA: it must point to "specific and cogent reasons" for any disbelief.[87] The court also indicated that the *falsus in uno* doctrine was applicable in pre-Act cases.[88] However, the dissent in *Enying Li* casts aspersions on the majority's assertion; it argued that applying the *falsus in uno* doctrine to pre-Act cases "defies well-settled pre-Act precedent that adverse credibility findings must go to the heart of a petitioner's claim."[89]

The Ninth Circuit has disallowed the BIA from applying the doctrine when evaluating an applicant's motion to reopen.[90] The Ninth Circuit has also held that "the . . . Act's 'totality of the circumstances' standard is permissive as to the breadth of factors that may form the basis of an adverse credibility determination," but constrains an immigration judge from "cherry pick[ing] solely facts favoring an adverse credibility determination while ignoring facts that undermine that result."[91] Finally, the Ninth Circuit has further limited immigration judges' bases for these determinations, explaining that "conjecture and speculation cannot serve as a reason for an adverse credibility finding."[92] The implication of this limitation is that the immigration judge must be able to point to specific evidence in the record that supports his inference regarding the applicant's credibility.

In contrast, the Seventh Circuit considers *falsus in uno, falsus in omnibus* to be a "discredited doctrine," even in the asylum context.[93] The court notes that, although *Kadia v. Gonzales* concerns an asylum application submitted prior to the Act, the correct interpretation is that "[t]he immigration judge may consider accuracies or falsehoods that do not go to the heart of the asylum applicant's claim, but he [or she] can do so only as part of his consideration of 'the totality of the circumstances, and all relevant factors.' "[94] Essentially, the Seventh Circuit treats the 'totality of the circumstances' as an analytical floor and the immigration judge may consider inconsistencies that are not material to the claim, but they

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87 Matter of S-A-, 22 I&N Dec. 1328, 1331 (BIA 2000) (holding that an adverse credibility finding is clear error without such reasons).

88 *Enying Li*, 738 F.3d at 1163 ("*Falsus in uno, falsus in omnibus* is a hoary maxim which allows a fact-finder to disbelieve a witness's entire testimony if the witness makes a *material* and *conscious* falsehood in one aspect of his testimony.").

89 *Id.* at 1170.

90 Shouchen Yang v. Lynch, 822 F.3d 504, 508 (9th Cir. 2016) ("The idea that the BIA could apply the *falsus* maxim to deny a motion to reopen is in tension with the BIA's limited and deferential role in reviewing immigration judges' credibility determinations in the first place.").

91 *Shrestha*, 590 F.3d at 1040.

92 Chawla v. Holder, 599 F.3d 998, 1009 (9th Cir. 2010).

93 Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007).

94 *Id.* at 822.

must be considered among the totality of the circumstances rather than independently dispositive of an applicant's credibility.[95]

There is a fundamental problem with the First, Second, and Ninth Circuit's endorsements of the *falsus in uno* doctrine: it belies the reality of immigration. The Seventh Circuit recognized this dissonance in *Kadia*, noting that "[h]uman memory is selective as well as fallible, and the mistakes that witnesses make in all innocence must be distinguished from slips that, whether or not they go to the core of the witness's testimony, show that the witness is a liar or his memory completely unreliable."[96] The fact that many immigrants experience traumatic incidents which prompt their migration further complicates their abilities to provide a clear, consistent, and fulsome testimony at all times.[97] Given that many immigrants are victims of horrific abuse, the Ninth Circuit requires immigration judges to "recognize that the normal limits of human understanding and memory may make some inconsistencies or lack of recall present in any witness's case" when evaluating the totality of the circumstances.[98]

Ultimately, courts that interpret the Act as giving immigration judges the discretion to apply the *falsus in uno* doctrine have no way of ensuring that judges are applying the doctrine accurately and predictably. Another concern is that, in light of the circuit split in evaluating adverse credibility claims, an applicant's success within the immigration system may be tied to which circuit court controls the jurisdiction of his immigration hearing. These concerns are readily apparent in light of the various approaches circuit courts take to evaluating adverse credibility determinations.

B. Existing Safeguards

Although some circuits have endorsed the *falsus in uno* doctrine, there are still existing safeguards that limit an immigration judge's discretion in making an adverse credibility determination. One of those safeguards is that the immigration judge must offer "specific" and "cogent" reasons for any adverse credibility basis.[99] The Ninth Circuit took

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95 *See* Alexandra Fleszar, *Finding Firm Ground: Exploring the Limits of Adverse Credibility*, 11 IMMIGR. L. ADVISOR 1, 3 (2017) (explaining the circuit split).

96 501 F.3d at 822.

97 Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. OF AIR L. AND COM. 1421, 1462-63 (2001) (explaining that individuals who experience traumatic events can react in diverging ways; they may have "persistent and intrusive" memories or may experience amnesia ranging from "broad scale psychogenic amnesia, involving loss of most or all of their personal past, or very specific amnesia for some or all aspects of the traumatic event itself").

98 Ren v. Holder, 648 F.3d 1079, 1085 (9th Cir. 2011).

99 *See, e.g.*, Garcia v. Barr, 954 F.3d 1095, 1098 (8th Cir. 2020) (holding that the court will defer to the lower court's findings only if they are "supported by specific, cogent reasons

this requirement further, holding that the articulated bases must be "supported by the record," and although this does not require a "pinpoint citation," the immigration judge must "identify specific instances."[100]

Further, in spite of the Second Circuit's explicit endorsement of the *falsus in uno* doctrine, the court has used "totality of the circumstances" as an analytical floor and prevented immigration judges from employing the doctrine in certain situations.[101] The court explained that "while an IJ's application of the maxim *falsus in uno, falsus in omnibus* may at times be appropriate, an applicant's testimonial discrepancies—and, at times even outright lies—must be weighed in light of their significant to the total context of his or her claim of persecution."[102] The Second Circuit has also held that minor omissions or inconsistencies which are collateral or ancillary to the asylum claim may support an adverse credibility finding only if "the cumulative effect" is deemed consequential.[103]

In 2021, the Second Circuit explicitly established an analytical floor for adverse credibility determinations.[104] The court held that an adverse credibility determination "may [not] be based on an inconsistency so trivial and inconsequential that it has little or no tendency to support a reasonable inference that the petitioner has been untruthful."[105] This is because "[s]uch an inconsistency bears no legitimate nexus to credibility and thus cannot, on its own, constitute the substantial evidence needed to support an adverse credibility finding."[106] As such, the Second Circuit has essentially placed a restriction on an immigration judge's ability to discredit an applicant's claim—something the Act may have intended to do through its "totality of the circumstances" language.[107]

Unfortunately, the Supreme Court recently overturned a procedural safeguard implemented by the Ninth Circuit.[108] The Ninth Circuit cre-

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for disbelief"); Rizk v. Holder, 629 F.3d 1083, 1087-88 (9th Cir. 2011) ("The IJ must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief.") (internal citations omitted); Kueviakoe v. A.G., 567 F.3d 1301, 1305 (11th Cir. 2009) (holding that an immigration judge "must offer specific, cogent reasons for the [adverse credibility] finding").

100 Iman v. Barr, 972 F.3d 1058, 1065 (9th Cir. 2020) (quoting *Shrestha*, 590 F.3d at 1045).

101 *See* Xiu Xia Lin v. Mukasey, 534 F.3d 162, 167 (2d Cir. 2008); Qin Wen Zhang v. Gonzales, 500 F.3d 143, 147 (2d Cir. 2007).

102 Zhong v. Dep't of Just., 480 F.3d 104, 127 (2d Cir. 2007).

103 *Xiu Xia Lin*, 534 F.3d at 167.

104 Singh v. Garland, 6 F.4th 418 (2d Cir. 2021).

105 *Id.* at 426-27.

106 *Id.* at 427.

107 REAL ID Act § 1158 (b)(1)(B)(iii).

108 Garland v. Ming Dai, 884 F.3d 858 (2021) (invalidating the Ninth Circuit's rule that "[i]n the absence of an explicit credibility finding [by the agency], [the court] must assume that [the alien's] factual contentions are true" (first, second, and fourth alterations in original)).

ated a presumption in favor of credibility when an immigration judge did not issue an explicit adverse credibility finding.[109] This presumption was supported by the INA, which "provides that absent an explici[t] adverse credibility determination, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[110] However, the Supreme Court found that an immigration case brought before a circuit court constitutes a petition for review, rather than an appeal.[111] As a result, the Supreme Court found that the "the INA provides that a reviewing court must accept 'administrative findings' as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'"[112] Although the Supreme Court refused to say what the BIA "must say or do to furnish an explicit adverse credibility determination," the Court also held that when the agency's "reasons for rejecting an alien's credibility are reasonably discernible, the agency must be understood as having rebutted the presumption of credibility."[113] This finding undermines the purpose of the presumption of credibility, and belies a misunderstanding of the importance of an immigrant's testimony.

Despite the Supreme Court's recent invalidation of the presumption of credibility rule, there are still procedural safeguards that limit an immigration judge's seemingly boundless discretion. Circuit courts have limited that discretion by requiring that the immigration judges conduct context-specific inquiries into the totality of each immigrant's circumstances. These safeguards are crucial because an adverse credibility claim is usually fatal to a claim. An immigrant's credible testimony is "the linchpin of the judge's analysis—asylum is all but certain to be denied to an applicant who is deemed not credible."[114]

C. Proposed Resolution

If the Supreme Court were to resolve this circuit split, the "totality of the circumstances" language in the Act would likely be considered an analytical floor. Thus, the Ninth Circuit's and Second Circuit's interpretations would likely serve as blueprints for evaluating adverse credibility determinations.[115] Further, the Seventh Circuit's assertion that the Act

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109 *See* Hu v. Holder, 652 F.3d 1011, 1016 (9th Cir. 2011) ("The [BIA's] decision is silent on the issue of credibility, despite the [Immigration Judge's] explicit adverse credibility finding, so we may assume that the BIA found [the immigrant] to be credible.").

110 Garland v. Dai, 141 S. Ct. 1669, 1677 (2021) (internal quotation marks omitted) (alteration in original).

111 *Id.* at 1678.

112 *Id.* at 1677.

113 *Id.* at 1679.

114 Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 474 (2016).

115 *See* Shrestha v. Holder, 590 F.3d 1034, 1040 (9th Cir. 2010) (explaining that an immigration judge's "cherry pick[ing] solely facts favoring an adverse credibility determination

does not permit immigration judges to render adverse credibility determinations without considering the totality of the circumstances would be the correct interpretation. However, the Seventh Circuit's assertion that the *falsus in uno* doctrine is a "discredited doctrine" would likely be overturned unless Congress revises the Act and expressly renounces the doctrine.[116]

When the Supreme Court considered "totality of the circumstances" language, albeit in the context of probable cause, it explained that determinations based on such language are "not readily, or even usefully, reduced to a neat set of legal rules."[117] The suggested approach to "totality of the circumstances" language involves an analysis where "a deficiency in one may be compensated for, in determining the overall reliability of [a witness], by a strong showing as to the other, or by some other indicia of reliability."[118] As the Supreme Court explained in a case where it overruled the panel majority:

> "[T]he panel majority viewed each fact 'in isolation, rather than as a factor in the totality of the circumstances.' This was 'mistaken in light of our precedents.' The 'totality of the circumstances' requires courts to consider 'the whole picture.' Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. . . . The totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'"[119]

Here, the Supreme Court champions a holistic view of all the evidence; it does not advocate for, or even tolerate, allowing one factor to justify the ultimate outcome. Within an adverse credibility determination, some factors may be worthy of more weight than others. The Supreme Court allowed for that possibility within reasonable suspicion analyses, which is another area that relies upon the "totality of the circumstances."[120] However, it would seem that the Supreme Court believes a fact-finder must at least acknowledge the "totality of the circumstances" language and ex-

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while ignoring facts that undermine that result" does not justify an adverse credibility determination); Xiu Xia Lin v. Mukasey, 534 F.3d 162, 167 (noting that minor omissions may not solely justify an adverse credibility determination, but rather the "cumulative effect" of any inconsistencies must be evaluated).

116 *Id.*

117 Illinois v. Gates, 462 U.S. 213, 232 (1983).

118 *Id.* at 233.

119 District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018) (citations omitted).

120 *See* U.S. v. Aviles-Vega, 783 F.3d 69, 72 (1st Cir. 2015) ("[U]nder appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" (alteration in original) (quoting Alabama v. White, 496 U.S. 325, 330 (1990))).

plain a factor's relative weight if a single one is meant to justify an adverse credibility finding.

This interpretation would translate to a holistic view of all of the indicia of reliability when evaluating an applicant's adverse credibility claim. Thus, it is unlikely that the Supreme Court would eradicate the *falsus in uno* doctrine from an immigration judge's adverse credibility analysis or determination. This is because an adverse credibility determination inherently involves using at least one aspect of an applicant's testimony to discredit the entire testimony,[121] and the Act did expand immigration judges' bases for such findings.[122] However, it is unlikely that adverse credibility determinations based on some of the bases listed in the Act, such as the applicant's demeanor, would be permitted without any further corroboration for the applicant's lack of credibility. This is because when an analysis involves balancing various "indicia of reliability," one factor cannot justify an adverse credibility finding; it especially cannot do so if nearly every other aspect of the applicant's credibility is believable or corroborated.

In some contexts involving "totality of the circumstances" language, the Supreme Court has enumerated various considerations that may influence fact-finders' determinations but need not be dispositive.[123] For instance, §2 of the Voting Rights Act includes "totality of the circumstances" language,[124] and an important consideration is the proportionality inquiry, which "compares the percentage of total districts that are [underrepresented group] opportunity districts with the [underrepresented group's] share of the citizen voting-age population."[125] However, the proportionality inquiry cannot be analyzed and emphasized to the point that other relevant considerations, which in total comprise the totality of the circumstances, are not given adequate weight.

Similarly, the Supreme Court should provide guiding factors for immigration judges to consider when evaluating an applicant's credibility.

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121 *See* discussion *supra* Section I.B.

122 *See* discussion *supra* Section I.B.

123 *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 426 (2006) ("The general terms of the statutory standard 'totality of circumstances' require judicial interpretation.").

124 *See* 52 U.S.C. § 10301:

> [I]f, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

125 *League of United Latin Am. Citizens*, 548 U.S. at 403; *contra* Johnson v. De Grandy, 512 U.S. 997, 998 (1994) ("While such proportionality is not dispositive, it is a relevant fact in the totality of circumstances to be analyzed when determining whether minority voters have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (quoting 42 U.S.C. § 1973(b))).

For instance, as the Ninth Circuit has recognized, the relative probative value of omissions and inconsistencies should be a factor.[126] Such a factor would afford immigration judges more latitude to render an adverse credibility determination where the applicant changed some aspects of his story than if he merely forgot to mention an aspect of his story. Further, the Seventh Circuit already recognized that even when an aspect of an applicant's case supports an adverse credibility determination, the entire record must be considered.[127] Accordingly, the Supreme Court should echo that sentiment rather than placing too much weight on certain enumerated factors.

Importantly, however, a factor placing more weight on an inconsistency would not provide immigration judges an unchecked opportunity to find an applicant not credible whose story was inconsistent; rather, the judge must provide him with an opportunity to explain the inconsistency.[128] Again, the Ninth Circuit recognized the importance of this caveat and noted that "ignor[ing] a petitioner's explanation for a perceived inconsistency and relevant record evidence would be to make a credibility determination on less than the total circumstances in contravention of the Act's text."[129] In fact, the Ninth Circuit has held that an immigration judge must allow an applicant an opportunity to explain any discrepancy, including omissions.[130] It follows that another relevant factor for immigration judges to consider when deciding whether an applicant is credible, and for appellate judges when evaluating immigration judges' opinions, would be the extent to which the judge allowed the applicant to explain. An obvious corollary to this inquiry is whether the applicant's explanation resolved any remaining doubts as to his credibility. Importantly, this inquiry is supported by the Act, which acknowledges that corroborating evidence is not required if the applicant "cannot reasona-

126 *See* Lai v. Holder, 773 F.3d 966, 971 (9th Cir. 2014) ("In general, however, omissions are less probative of credibility than inconsistencies created by direct contradictions in evidence and testimony. It is well established that 'the mere omission of details is insufficient to uphold an adverse credibility finding.'" (quoting Singh v. Gonzales, 403 F.3d 1081, 1085 (9th Cir. 2005))); *see also* Fleszar, *supra* note 95, at 3 (explaining that "[d]espite the seeming rise of 'wide-open' credibility decisions" after the Act, "some circuits' limitations on the use of this discretionary adjudicative tool indicate that not all inconsistencies, implausibilities, or omissions are treated equally").

127 Hanaj v. Gonzales, 446 F.3d 694, 700 (7th Cir. 2006) ("The IJ cannot selectively examine evidence in determining credibility, but must present a reasoned analysis of the evidence as a whole.").

128 Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010) ("[T]he REAL ID Act does not give a blank check to the [immigration judge] enabling him or her to insulate an adverse credibility determination from our review of the reasonableness of that determination.").

129 *Id.* at 1044.

130 Lizhi Qiu v. Barr, 944 F.3d 837, 846 (9th Cir. 2019) (reversing an immigration judge's adverse credibility claim, in part, because the applicant "was entitled to notice and an opportunity to produce corroborating evidence or explain why it was unavailable," but the immigration judge did not allow either).

bly obtain [such] evidence," which can only be evaluated through the applicant's opportunity to explain *why* such evidence is unavailable.[131]

CONCLUSION

Ultimately, it seems that the First, Second, Ninth, and Seventh Circuits' interpretations of the Act are more consistent than they initially seem. Despite endorsing the *falsus in uno* doctrine, the First, Second, and Ninth Circuits have also placed limitations on its use.[132] In general, these circuits have justified these restrictions with the "totality of the circumstances" language within the legislation. Further, these interpretations appear to also comport with the Supreme Court's previous treatment of such language.

Thus, an immigration judge's adverse credibility finding must always be rooted in the totality of the applicant's circumstances, rather than being solely based upon one aspect of his claim. However, even though the *falsus in uno* doctrine has fallen out of favor in every other context, the Act also seems to preserve its use in the immigration context, albeit in a limited capacity. Fortunately, the "totality of the circumstances" language within the legislation also provides an opportunity to limit immigration judges' seemingly unlimited authority in rendering adverse credibility determinations. While one aspect of an applicant's testimony or record may result in his entire testimony being discredited, that aspect must carry significant weight in light of the entire record; the immigration judge's inquiry cannot stop one she encounters an inconsistency.

Regardless, the American immigration system is broken[133]—it has been for a long time[134]—and creating a humane and equitable system requires creative solutions to perennial and pervasive problems, such as the unpredictability of adverse credibility determinations. Luckily, there are ways to resolve this particular problem that do not require the Su-

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131 REAL ID Act § 1158 (b)(1)(B)(ii).

132 *See* Anker, *supra* note 6; *see also* Daoliang Cao v. Holder, 571 F. App'x 3, 4 (2d Cir. 2014) (quoting Rui Ying Lin v. Gonzales, 445 F.3d 127, 133 (2d Cir. 2006)).

133 Daniella Silva, *Family of Salvadoran Migrant Dad, Child who Drowned say He 'Loved His Daughter So Much'*, NBC NEWS (June 26, 2019), https://www.nbcnews.com/news/latino/family-salvadoran-migrant-dad-child-who-drowned-say-he-loved-n1022226#:~:text=Latino,Family%20of%20Salvadoran%20migrant%20dad%2C%20child%20who%20drowned%20say%20he,the%20dead%20man's%20mother%20said. (reporting that a father and 23-month-old daughter drowned in the Rio Grande while migrating to the United States "in search of a better life for [his] daughter").

134 Ruxandra Guidi, *How the U.S. Immigration System has Grown Increasingly Cruel*, HIGH COUNTRY NEWS (Apr. 1, 2020), https://www.hcn.org/issues/52.4/south-immigration-how-the-us-immigration-system-has-grown-increasingly-cruel (explaining that in 1994, "the Border Patrol laid out its first national strategy . . . known as 'prevention through deterrence,' which was motivated by the idea that 'if you increase the stress, harm and suffering that unauthorized migrants are exposed to, so it reaches a point where it has a deterrent effect").

preme Court's intervention. For instance, there is still an opportunity for circuits that have yet to confront this question to eradicate, or at least deemphasize, the doctrine's significance in this context. The Seventh Circuit has already paved the way for circuit courts to discredit the doctrine, even after the Act. Further, Congress could revise the Act and explicitly outline various factors that immigration judges must consider, rather than merely listing factors that may support an adverse credibility determination.