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## Reconciling Expectations with Reality: The Real ID Act's Corroboration Exception for Otherwise Credible Asylum Applicants

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NOTE

RECONCILING EXPECTATIONS WITH REALITY: THE REAL ID ACT’S CORROBORATION EXCEPTION FOR OTHERWISE CREDIBLE ASYLUM APPLICANTS

Alexandra Lane Reed\*

The international community finds itself today in the throes of the largest refugee crisis since World War II. As millions of refugees continue to flee violence and persecution at home, the immediate concern is humanitarian, but in the long-term, the important question becomes: What are our obligations to those who cannot return home? U.S. asylum law is designed not only to offer shelter to legitimate refugees, but also to protect the country from those who seek asylum under false pretenses. Lawmakers and policymakers have struggled to calibrate corroboration requirements for asylum claims with the reality that many legitimate asylum seekers may not be able to obtain such corroboration. Prior to Congress’s passage of the REAL ID Act (“REAL ID”) in 2005, no single standard governed the circumstances in which an immigration judge (IJ) could require an asylum applicant to provide extrinsic evidence to corroborate credible testimony. Though REAL ID established that asylum applicants usually must provide corroborating evidence whenever an IJ decides to require it, Congress created an exception for otherwise credible applicants who do not have such evidence and cannot reasonably obtain it. The circuits disagree, however, as to whether IJs must tell asylum applicants, before a decision is rendered, if they will be required to provide corroborating evidence and what sort of evidence they will need to provide. This Note argues that 8 U.S.C. § 1158(b)(1)(B)(ii) reveals an unambiguous congressional intent to require an IJ to give asylum applicants advance notice of the evidence deemed necessary to corroborate otherwise credible testimony. It further contends that this advance notice must specify the type of corroboration expected, in order to give applicants who cannot reasonably obtain corroborating evidence a meaningful opportunity to avail themselves of the corroboration exception.

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#### INTRODUCTION

*[O]ne who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration to support a subsequent claim for asylum. . . . [O]ne who flees torture at home will rarely have the foresight or means to do so in a manner that will enhance the chance of prevailing in a subsequent court battle in a foreign land. Common sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution.<sup>1</sup>*

Faced with a large-scale refugee crisis in the aftermath of World War II, the international community developed the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol (collectively, the Refugee Convention) to articulate all states' obligations toward refugees fleeing persecution at home.<sup>2</sup> The Refugee Convention classified as refugees all individuals who cannot return to their countries of origin due to "a well-founded fear of persecution" based on one of the following protected characteristics: race, religion, nationality, membership of a particular group, or

1. *Senathirajah v. INS*, 157 F.3d 210, 215–16 (3d Cir. 1998).

2. GUY S. GOODWIN-GILL, UNITED NATIONS, CONVENTION RELATING TO THE STATUS OF REFUGEES, AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 1 (2008), [http://legal.un.org/avl/pdf/ha/prsr/prsr\\_e.pdf](http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf) [<https://perma.cc/GEW7-UH2X>].

political opinion.<sup>3</sup> The Refugee Convention also articulated the principle of *non-refoulement*, which prohibits states from returning refugees to any country where they would be at risk of persecution.<sup>4</sup>

Although the United States ratified the 1967 Protocol in 1968, the United States had no specific asylum law to govern adjudication of refugee claims until Congress enacted the Refugee Act in 1980.<sup>5</sup> Congress expressly intended the Refugee Act to ensure that domestic asylum law accurately reflected the United States' international obligations under the Refugee Convention.<sup>6</sup> Congress has revised asylum law and procedures several times since 1980,<sup>7</sup> but the essence of the protection remains the same: asylum is a form of discretionary immigration relief available to foreign individuals within the United States<sup>8</sup> who qualify as refugees and are otherwise admissible to the United States.<sup>9</sup>

U.S. asylum law places the burden of proof to establish her status as a refugee on the asylum seeker.<sup>10</sup> In order to qualify as a refugee for asylum purposes, an applicant must establish an unwillingness or inability to return to her home country due to past persecution or a well-founded fear of future persecution.<sup>11</sup> Such persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>12</sup> An asylum applicant seeking to establish a well-founded fear of persecution must demonstrate both subjective fear and a reasonable possibility that she would be subject to persecution if sent back to her home country.<sup>13</sup> An applicant's demonstration that she has suffered past persecution creates a rebuttable presumption of a well-founded fear of future persecution.<sup>14</sup>

Because of the circumstances under which they have fled their home countries, many legitimate asylum applicants are unable to produce documentary evidence to corroborate their claims of persecution.<sup>15</sup> To accommodate this reality, U.S. asylum law allows an immigration judge (IJ) to find an

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3. *Id.* at 3.

4. *Id.* at 4.

5. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 1:1, :3 (8th ed. 2015).

6. *Id.*

7. For example, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) contained significant asylum reforms. *Id.* § 1:3.

8. This includes foreign individuals who present at the U.S. border. *Id.* § 1:2.

9. Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 *TEX. INT'L L.J.* 185, 190 (2008). An asylum seeker may either affirmatively file a Form I-589 Application for Asylum and Withholding of Removal with the U.S. Citizenship and Immigration Services (USCIS) or seek asylum from an Immigration Judge during removal proceedings. ANKER, *supra* note 5, §§ 1:8–:9, A2:5.

10. 8 U.S.C. § 1158(b)(1)(B) (2012).

11. *Id.* § 1101(a)(42)(A).

12. *Id.*

13. 8 C.F.R. § 1208.13(b)(2)(i) (2016); e.g., *Chukwu v. Att'y Gen.*, 484 F.3d 185, 188 (3d Cir. 2007).

14. 8 C.F.R. § 1208.13(b)(1).

15. Rempell, *supra* note 9, at 191.

asylum seeker's testimony sufficient to sustain her burden of proof without additional corroboration.<sup>16</sup> This accommodation is reserved for cases in which the IJ is satisfied that "the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."<sup>17</sup> The current corroboration provision, passed as part of the 2005 REAL ID Act Amendments to the Immigration and Nationality Act (INA),<sup>18</sup> makes it clear that this accommodation is optional.<sup>19</sup> An IJ may still require an asylum seeker to provide corroborating evidence in order to sustain her burden of proof, despite finding the applicant's testimony credible, persuasive, and specific.<sup>20</sup>

Pursuant to the REAL ID Act's corroboration provision, codified at 8 U.S.C. § 1158(b)(1)(B)(ii),<sup>21</sup> if an IJ chooses to require additional evidence to corroborate otherwise credible testimony, the applicant must provide it.<sup>22</sup> The only exception to this rule is if "the applicant does not have the evidence and cannot reasonably obtain the evidence."<sup>23</sup> If the applicant fails to establish that she does not have and cannot reasonably obtain the required evidence, the IJ may deny her asylum claim for lack of corroboration.<sup>24</sup> Courts disagree, however, as to whether Section 1158(b)(1)(B)(ii) requires an IJ to provide an otherwise credible asylum applicant with advance notice of the corroboration required and an opportunity to explain why such evidence is not reasonably available.<sup>25</sup>

The asylum seekers for whom this corroboration exception is likely to matter most are those who must represent themselves in Immigration Court

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16. 8 U.S.C. § 1158(b)(1)(B)(ii).

17. *Id.*

18. See REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302 (codified at 8 U.S.C. § 1158(b)(1)(ii) (2014)).

19. 8 U.S.C. § 1158(b)(1)(B)(ii).

20. See *id.* ("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.").

21. This provision amended Section 208(b)(1)(B)(ii) of the INA. For that reason, it is sometimes referred to as Section 208(b)(1)(B)(ii).

22. 8 U.S.C. § 1158(b)(1)(B)(ii).

23. *Id.* I will refer to this exception as "the corroboration exception."

24. See 8 U.S.C. § 1158(b)(1)(B)(ii).

25. Compare *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011) (finding that an IJ must provide an asylum applicant with notice and an opportunity to either produce evidence or explain why it is unavailable), and *Chukwu v. Att'y Gen.*, 484 F.3d 185 (3d Cir. 2007) (finding that an IJ must give an applicant notice of what corroboration is expected and an opportunity to explain why she may be unable to produce it), with *Gaye v. Lynch*, 788 F.3d 519 (6th Cir. 2015) (finding that federal law does not entitle an applicant to notice from an IJ as to what corroborating evidence is required to meet the burden of proof), and *Rapheal v. Mukasey*, 533 F.3d 521 (7th Cir. 2008) (finding that an IJ need not give additional notice and an opportunity to provide corroborative evidence).

because they lack the resources to hire an attorney.<sup>26</sup> Pro se asylum seekers make up approximately one-third of the total number of asylum applicants.<sup>27</sup> For applicants who are represented by counsel, the importance of receiving advance notice of expected corroboration is diminished. Experienced attorneys are likely to anticipate the aspects of their clients' claims for which corroboration may be expected.<sup>28</sup> An attorney also will appreciate the importance of providing such corroborating evidence or a convincing explanation as to why it is not reasonably available.<sup>29</sup> Most pro se asylum seekers, on the other hand, are ill equipped to navigate this process alone.<sup>30</sup> For example, an applicant may have corroborating evidence, but she may not understand the importance of presenting it at her hearing.<sup>31</sup> Or, an applicant may have a valid explanation for why she cannot obtain a particular piece of corroboration, but she may not provide that explanation if she is not asked for it. For an otherwise credible applicant, having an IJ take the time to identify the expected corroboration and provide an explicit opportunity to present such corroboration, or explain why it is not reasonably available, may mean the difference between deportation and a grant of asylum. The stakes could not be higher for pro se asylum seekers.<sup>32</sup>

This Note argues that 8 U.S.C. § 1158(b)(1)(B)(ii) unambiguously requires an IJ to provide an asylum applicant with specific notice of the evidence deemed necessary to corroborate her otherwise credible testimony. In addition, the IJ must give the applicant an opportunity to provide that corroboration or explain why it is not available before the IJ issues a decision.<sup>33</sup> Part I traces the development of corroboration standards in asylum law and

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26. See ANKER, *supra* note 5, § 3:5. Although asylum seekers who can afford it may be represented by counsel, they, unlike criminal defendants, do not have the right to an attorney. See 8 U.S.C. § 1229a(b)(4)(A).

27. JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE 33 (2009).

28. See NAT'L IMMIGRANT JUSTICE CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 31–32 (2016), [immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual\\_03%202016%20final.pdf](https://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual_03%202016%20final.pdf) [<https://perma.cc/F4CX-RUNA>]; IMMIGRATION EQUALITY, IMMIGRATION EQUALITY ASYLUM MANUAL 42–43 (2014), [http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality\\_Asylum\\_Manual.pdf](http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf) [<https://perma.cc/GYA3-LR4V>].

29. See Sabrineh Ardan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1034 (2015); Melanie A. Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 31 (2009).

30. See Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers*, 26 PENN ST. INT'L L. REV. 383, 437 (2007).

31. See Ardan, *supra* note 29, at 1020.

32. Most such denials will never be appealed. For Fiscal Year 2014, only 10 percent of IJ decisions were appealed to the Board of Immigration Appeals. Office of Planning, Analysis, and Tech., *FY 2014 Statistics Yearbook*, U.S. DEP'T OF JUST. EXECUTIVE OFF. FOR IMMIGR. REV., at V1 (March 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf> [<https://perma.cc/5AET-TKXW>]. Less than 25 percent of the appeals completed by the BIA involved pro se applicants. *Id.* at T1.

33. The shorthand phrase “notice and opportunity” will be used to describe these twin requirements throughout this Note.

outlines the current disagreement over the existence of a notice-and-opportunity requirement within the REAL ID Act's corroboration standard. Part II demonstrates that the Act unambiguously expresses Congress's intent to require advance notice and an opportunity to respond in the corroboration context. Finally, Part III contends that Congress intended for such notice and opportunity to be specific, in order to give legitimate asylum applicants who qualify for the corroboration exception a meaningful opportunity to establish, on the record, that they cannot reasonably obtain corroborating evidence.

#### I. CORROBORATION STANDARDS FOR ASYLUM CLAIMS: A HISTORY OF TENSION AND INCONSISTENCY

Identifying and denying fraudulent asylum claims while honoring the United States' legal and humanitarian obligations to genuine refugees is no easy task; decisionmakers have long struggled to strike an appropriate balance when it comes to corroboration requirements. Courts, agencies, lawmakers, and scholars of immigration law all recognize that obtaining evidence to corroborate an asylum claim will sometimes be impossible, even for legitimate applicants.<sup>34</sup> On the other hand, adjudicators need a principled way to weed out false claims.<sup>35</sup> The tension created by these competing goals is evident not only in individual asylum determinations, but also in the evolution of the corroboration standards themselves. Prior to the REAL ID Act, asylum law corroboration standards lacked clarity and consistency. Despite Congress's attempt to clarify such standards in the REAL ID Act,<sup>36</sup> the federal circuits are split over the existence of a notice-and-opportunity requirement within REAL ID's corroboration provision.

Part I explores the ongoing disagreement among the federal courts and the Board of Immigration Appeals over whether REAL ID's corroboration standard includes a notice-and-opportunity requirement. Section I.A provides a broad overview of the inconsistent common law corroboration standards that agency decisionmakers and federal courts applied prior to the REAL ID Act. Section I.B describes the most salient modifications that the REAL ID Act made to asylum law—chief among them the codification of a general corroboration standard at 8 U.S.C. § 1158(b)(1)(B)(ii). Section I.C outlines the principal differences in the approaches taken by the Board of

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34. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (“Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.”); *Dass*, 20 I. & N. Dec. 120, 124 (B.I.A. 1989) (“[I]n determining whether an asylum applicant has met his burden of proof, we have recognized the difficulties that may be faced by aliens in obtaining documentary or other corroborative evidence to support their claims of persecution.”); 151 CONG. REC. 9025 (2005) (statement of Sen. Brownback) (“[T]hose who flee a country often times don’t have time to gather up the proper documentation they may later need in an American immigration court.”); Rempell, *supra* note 9, at 191–92 (describing the difficulties many asylum applicants have obtaining evidence to corroborate their claims).

35. See Rempell, *supra* note 9, at 186.

36. See 151 CONG. REC. 8522 (2005).

Immigration Appeals and the circuits that have addressed how the newly codified corroboration standard should be applied in practice.

A. *Corroboration Standards Before the REAL ID Act*

Until Congress passed the REAL ID Act, the INA did not contain a specific standard governing when an IJ could require evidence to corroborate an asylum applicant's credible testimony.<sup>37</sup> Instead, a basic common law corroboration standard developed over time through various BIA and federal circuit court decisions.<sup>38</sup> While the standard was not entirely consistent, the BIA and federal courts all agreed that, under certain circumstances, an asylum applicant's credible testimony alone would be sufficient to meet her burden of proof.<sup>39</sup> The BIA and federal circuit courts that examined the issue could not reach agreement, however, as to the specific circumstances under which credible testimony alone would be sufficient to meet the burden of proof.<sup>40</sup>

The BIA's corroboration standard developed over the course of several agency decisions in the late 1980s to 1990s.<sup>41</sup> The BIA articulated its initial corroboration standard in *Mogharrabi*. *Mogharrabi* explicitly recognized that, in some cases, an asylum applicant might not be able to provide corroborating evidence.<sup>42</sup> *Mogharrabi* stipulated that an applicant's uncorroborated testimony could be found sufficient to meet the burden of proof when it was "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."<sup>43</sup> The Board later clarified in *Dass* that the *Mogharrabi* standard should not be taken to mean that most asylum applicants do not need to provide supporting evidence for their claims; *Dass* emphasized that, as a general rule, asylum applicants should present corroborating evidence where available.<sup>44</sup> *S-M-J-* further elaborated the BIA's corroboration standard.<sup>45</sup> *S-M-J-* limited corroboration requirements to only those parts of an applicant's testimony for which it was *reasonable* to expect corroborating evidence.<sup>46</sup> For cases in which such

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37. MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., RL 32754, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 3 (2005).

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id.*

41. The BIA is "the highest administrative authority interpreting asylum law." Conroy, *supra* note 29, at 5.

42. *Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

43. *Id.*

44. *Dass*, 20 I. & N. Dec. 120, 124 (B.I.A. 1989).

45. *S-M-J-*, 21 I. & N. Dec. 722, 725–26 (B.I.A. 1997).

46. See Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 127 (2006). *S-M-J-* confirmed that an asylum applicant's uncorroborated testimony could be found sufficient to sustain the applicant's burden of proof. 21 I. & N. Dec. at 725. *S-M-J-* further noted, however, that applicants should



supporting evidence is in fact unavailable, *S-M-J-* provided that “the applicant must explain its unavailability, and the Immigration Judge must ensure that the applicant’s explanation is included in the record.”<sup>47</sup> If the applicant fails to provide a satisfactory explanation for her inability to obtain the expected corroboration, *S-M-J-* explicitly stated that an IJ may deny the applicant’s claim for failure to meet the burden of proof, even if her testimony is otherwise credible.<sup>48</sup>

While some circuits adhered to the corroboration standard laid out in the trilogy of BIA cases described above,<sup>49</sup> in *Ladha v. INS* the Ninth Circuit expressly rejected the notion that an IJ could require an asylum applicant to corroborate credible testimony.<sup>50</sup> In that case, the court held that, where an asylum seeker’s testimony was “unrefuted and credible, direct and specific,” it was per se sufficient to meet the applicant’s burden of proof without additional corroboration.<sup>51</sup> This circuit split persisted until Congress enacted the REAL ID Act.<sup>52</sup>

### B. *The Corroboration Standard After the REAL ID Act*

The REAL ID Act—signed into law by President George W. Bush in May 2005—expanded the number and type of possible bases for finding an asylum applicant not credible,<sup>53</sup> set in place a more expansive corroboration requirement,<sup>54</sup> and clarified the standard of judicial review for corroboration determinations.<sup>55</sup> Proponents of REAL ID framed the Act’s asylum provisions as necessary to protect the United States’ asylum system from abuse by

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provide evidence of material facts that are central to their claims and “easily subject to verification.” *Id.*

47. *Id.* at 724.

48. *Id.* at 725–26. *S-M-J-* also noted, however, that “[a]lthough . . . the burden of proof in asylum and withholding of deportation cases is on the applicant, we do have certain obligations under international law to extend refuge to those who qualify for such relief.” *Id.* at 723. To that end, *S-M-J-* warned that decisionmakers were responsible for “ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant’s claim.” *Id.*

49. See, e.g., *Diallo v. INS*, 232 F.3d 279, 285–86 (2d Cir. 2000) (holding that an asylum applicant’s credible testimony may not always be sufficient to meet the burden of proof).

50. 215 F.3d 889, 899–901 (9th Cir. 2000).

51. *Ladha*, 215 F.3d. at 901.

52. The REAL ID Act’s corroboration provision explicitly contemplates situations in which an IJ may require corroborating evidence from otherwise credible applicants. As such, the REAL ID Act superseded *Ladha*, *Aden v. Holder*, 589 F.3d 1040, 1044–45 (9th Cir. 2009), and essentially codified the standard laid out in *S-M-J-*. Cianciarulo, *supra* note 46, at 126.

53. 8 U.S.C. § 1158(b)(1)(B)(iii) (2012); see also Gregory Laufer & Stephen Yale-Loehr, *Straining Credibility: Recent Developments Regarding the Impact of the REAL ID Act on Credibility and Corroboration Findings in Asylum Cases*, 12 BENDER’S IMMIGR. BULL. 74, 78 (2007) (“The REAL ID Act expanded the grounds on which an asylum adjudicator could make an adverse credibility finding.”).

54. See Cianciarulo, *supra* note 46, at 116.

55. GARCIA ET AL., *supra* note 37, at 13. See *infra* Section II.B for further discussion of the standard of review for corroboration determinations under the REAL ID Act. The REAL

terrorists.<sup>56</sup> Many members of Congress nonetheless voiced concern that the Act's asylum provisions would result in more frequent rejections of legitimate asylum claims without appreciably reducing terrorist threats against the United States.<sup>57</sup> Despite these misgivings, Congress ultimately passed the REAL ID Act as part of a much larger emergency appropriations bill.<sup>58</sup> Prior to the bill's passage, however, the asylum provisions were redrafted to reduce the barriers they might pose to legitimate asylum seekers.<sup>59</sup>

The final version of the REAL ID Act's corroboration provision for asylum applicants rejected the Ninth Circuit's more applicant-friendly approach, largely codifying the BIA standard as articulated in *S-M-J*.<sup>60</sup> As previously noted, Section 1158(b)(1)(B)(ii) stipulates that an asylum applicant's uncorroborated testimony may satisfy the burden of proof when such testimony is credible, persuasive, and specific.<sup>61</sup> Section 1158(b)(1)(B)(ii) further specifies that "[w]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."<sup>62</sup> The language in this provision therefore establishes that, contrary to the Ninth Circuit's holding in *Ladha*, even a credible applicant is expected to provide corroborating evidence if an IJ determines that it is necessary to sustain the applicant's burden of proof.<sup>63</sup> This standard allows IJs to request corroborating evidence in

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ID Act also imposed the requirement that an asylum applicant establish that her "race, religion, nationality, membership in a particular social group, or political opinion" is "at least one central reason" for her alleged past or future persecution, among other things. 8 U.S.C. § 1158(b)(1)(B)(i).

56. The Act's sponsor, Congressman Jim Sensenbrenner, asserted that "[t]he REAL ID Act will reduce the opportunity for immigration fraud so that we can protect honest asylum seekers and stop rewarding the terrorists and criminals who falsely claim persecution." 151 CONG. REC. 1908 (2005). While it is unsurprising that Congress would single out noncitizens as potential terrorists, immigration law scholars have questioned the logic of the REAL ID Act's focus on the asylum system, which "already was a difficult and unattractive means of gaining legal status in the United States." Cianciarulo, *supra* note 46, at 103.

57. See 151 CONG. REC. 9010 (2005) (statement of Sen. Feingold) ("Those seeking asylum in the United States already undergo the highest level of security checks of all foreign nationals who enter this country, and the provisions in this bill will result, I am sure, in the rejection of legitimate applications without making us any safer."); 151 CONG. REC. 2027 (2005) (statement of Rep. Jackson-Lee) ("The approach taken by the REAL ID Act is to raise the bar on the burden of proof for everyone who applies for asylum, which would result in a denial of relief to bona fide asylum seekers without any assurance that the changes would discourage terrorists from seeking asylum.").

58. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, 119 Stat. 231.

59. See 151 CONG. REC. 9025 (2005) (statement of Sen. Brownback) (thanking Chairman Specter for "soften[ing] some of the harsher language" in REAL ID's asylum provisions).

60. See 151 CONG. REC. 8522 (2005); see also *supra* note 52.

61. 8 U.S.C. § 1158(b)(1)(B)(ii) (2012).

62. *Id.*

63. See GARCIA ET AL., *supra* note 37, at 7.

more circumstances.<sup>64</sup> But the built-in exception for asylum seekers that do not have and cannot reasonably obtain such evidence serves to temper what is otherwise an extremely rigid and potentially unreasonable requirement by excusing those who truly cannot obtain corroboration.<sup>65</sup>

C. *Conflicting Interpretations of the REAL ID Act's Corroboration Exception*

It will take years to develop a sufficiently comprehensive body of post-REAL ID case law to meaningfully assess the Act's practical impact on asylum procedures.<sup>66</sup> As more recent asylum claims make their way through the appeals process, however, it has become clear that the federal courts are not applying the REAL ID Act's corroboration standard in a uniform manner.<sup>67</sup> In particular, circuits that have addressed the issue disagree over whether the REAL ID Act's corroboration provision requires IJs to give otherwise credible applicants advance notice of the need for corroborating evidence and an opportunity to provide it or explain its absence. While the Ninth and Third Circuits require advance notice and opportunity under the REAL ID Act, the Sixth and Seventh Circuits have rejected the notion that the corroboration provision requires an IJ to give notice and opportunity before denying an asylum applicant's claim for failure to provide corroborating evidence.<sup>68</sup>

In *Ren v. Holder*,<sup>69</sup> the Ninth Circuit held that Section 1158(b)(1)(B)(ii) unambiguously requires an IJ to provide otherwise credible applicants with

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64. See Laufer & Yale-Loehr, *supra* note 53, at 78.

65. This new corroboration provision applies only to asylum applications filed on or after May 11, 2005. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(h)(2), 119 Stat. 301, 305.

66. See Rempell, *supra* note 9, at 187-88.

67. Margot Kniffin, U.S. Dep't of Justice, Exec. Office for Immigration Review, *Corroboration Requirements Under the REAL ID Act: Notice and Reasonably Obtainable Evidence*, 9 IMMIGR. L. ADVISOR, Apr. 2015, at 1, [https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/05/01/vol9no4\\_final.pdf](https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/05/01/vol9no4_final.pdf) [<https://perma.cc/K2UZ-D6WR>]

68. See *supra* note 25. It is unclear where the Second Circuit stands on this issue. For example, in *Liu v. Holder*, the court stated in dicta that asylum applicants bear the burden of presenting required evidence "without prompting from the IJ." 575 F.3d 193, 198 (2d Cir. 2009). In *Chen v. Holder*, however, the court suggested that Second Circuit precedent may in fact require an IJ to give "adequate and meaningful notice" regarding expected corroboration prior to denying an asylum claim for lack of corroboration. 658 F.3d 246, 252-53 (2d Cir. 2011) (quoting *Ming Shi Xue v. BIA*, 439 F.3d 111, 122 (2d Cir. 2006)). The First Circuit initially declined to address the issue. See *Guta-Tolossa v. Holder*, 674 F.3d 57, 65 (1st Cir. 2012) (raising, but not deciding, the question of whether there is "a notice requirement implicit in section 1158(b)(1)(B)(ii)"). In a single subsequent case, *Gurung v. Lynch*, 618 F. App'x 690, 695 (1st Cir. 2015), the First Circuit noted that its precedents did "not specifically require that notice of reasonably available corroborating evidence be given to the petitioner." *Id.* *Gurung* interpreted First Circuit precedent to require only that "there . . . be [an] explicit finding[ ] that (1) it was reasonable to expect the applicant to produce corroboration[,] and (2) the applicant's failure to do so was not adequately explained," but did not elaborate further. *Id.* (third alteration in the original) (quoting *Soeung v. Holder*, 677 F.3d 484, 488 (1st Cir. 2012)).

69. 648 F.3d 1079 (9th Cir. 2011).

notice and opportunity regarding expected corroboration.<sup>70</sup> Based on its finding that Congress clearly and unambiguously intended the REAL ID Act's corroboration standard to include an advance notice-and-opportunity requirement, *Ren* concluded its analysis of Section 1158(b)(1)(B)(ii) at *Chevron* Step One, foreclosing the need for deference to a later, contrary BIA interpretation of the statute.<sup>71</sup> According to *Ren*, the statute's use of "future directed," imperative language like "should provide" (instead of the past tense "should have provided") clearly communicates Congress's intent for an applicant to be given notice and a future opportunity to provide expected corroboration or explain its unavailability.<sup>72</sup> Because the statute specifically contemplates a situation in which an applicant cannot reasonably obtain evidence to corroborate her claim, *Ren* observed that "[i]t would make no sense to ask whether the applicant can obtain [corroboration] unless [s]he is to be given a chance to do so."<sup>73</sup> Post-*Ren*, the Ninth Circuit has continued to require that IJs provide asylum applicants with advance notice and opportunity under Section 1158(b)(1)(B)(ii).<sup>74</sup>

In *Chukwu v. Attorney General of the United States*, the Third Circuit aligned itself with the Ninth Circuit on this issue, albeit for a different reason.<sup>75</sup> Section 1158(b)(1)(B)(ii) itself did not apply in *Chukwu* because the asylum application in question was filed prior to the statute's May 11, 2005 effective date.<sup>76</sup> Nonetheless, the court specifically held that the REAL ID Act did not alter Third Circuit rules governing an IJ's responsibility to develop

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70. *Ren*, 648 F.3d at 1090–93. *Ren*'s notice-and-opportunity analysis could technically be considered dicta because the court ultimately found that the asylum applicant had been given "adequate notice and opportunity to respond to the IJ's request for corroborative evidence" in this particular case. *Id.* at 1094. Regardless, subsequent Ninth Circuit decisions clearly consider themselves bound by the notice-and-opportunity requirement set forth in *Ren*. See, e.g., *Zhi v. Holder*, 751 F.3d 1088, 1095 (9th Cir. 2014).

71. *Ren*, 648 F.3d at 1091–92. Even though courts must typically defer to a reasonable agency interpretation of an ambiguous statute, that is only the case when Congress's intent with respect to a particular statutory provision is unclear. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Under the *Chevron* doctrine, when a court decides that a statute is unambiguous, the matter is settled, even if the relevant agency has a reasonable, alternative interpretation of the statute. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005). Step One of the *Chevron* doctrine provides that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842–43. Because *Ren* found Congress's intent to be clear at *Chevron* Step One, *Ren*, 648 F.3d at 1091–92, the Ninth Circuit is not bound to follow the contrary interpretation of Section 1158(b)(1)(B)(ii) subsequently articulated by the BIA in *L-A-C-*, 26 I. & N. Dec. 516 (B.I.A. 2015). Indeed, the Ninth Circuit has continued to require advance notice and opportunity in cases that postdate *L-A-C-*. See *Frumusachi v. Lynch*, 625 F. App'x 796, 797–98 (9th Cir. 2015).

72. 648 F.3d at 1091.

73. *Ren*, 648 F.3d 1091.

74. E.g., *Zhi*, 751 F.3d 1088.

75. 484 F.3d 185, 192 (3d Cir. 2007).

76. *Chukwu*, 484 F.3d at 191 n.3.

applicant testimony.<sup>77</sup> *Chukwu* further observed that a court tasked with reviewing an IJ's corroboration determination would be unable to "ascertain whether the trier of fact would be compelled to find the evidence unavailable unless the applicant is given a chance to explain why he thinks it is unavailable."<sup>78</sup> Accordingly, *Chukwu* concluded that, under the REAL ID Act, an IJ is required to provide notice to the applicant of the required corroborating evidence, as well as an explicit opportunity for the applicant to explain that she cannot provide the expected corroboration.<sup>79</sup>

In contrast, the Seventh and Sixth Circuits have rejected the notion that the REAL ID amendments to the INA require advance and specific notice and opportunity regarding expected corroborating evidence. In *Rapheal v. Mukasey*, the Seventh Circuit observed that the text of Section 1158(b)(1)(B)(ii) itself places asylum applicants on notice regarding the need to provide corroborating evidence.<sup>80</sup> Finding this built-in notice sufficient, *Rapheal* dismissed the notion that an asylum seeker must receive additional notice and opportunity from the IJ prior to a decision.<sup>81</sup> Likewise, in *Gaye v. Lynch*, the Sixth Circuit expressly stated that the REAL ID Act does not impose any requirement on courts to give asylum applicants advance notice of the evidence they must provide in order to meet their burden of proof.<sup>82</sup> Under the Seventh and Sixth Circuits' approach, an IJ need not raise the issue of missing corroboration or consider its reasonable availability until she issues the opinion denying an asylum seeker's claim for failure to provide adequate corroboration.<sup>83</sup>

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77. *Id.* at 191–93. According to *Chukwu*, the REAL ID Act did nothing to change the Third Circuit's requirement that an IJ develop an asylum applicant's testimony according to the steps laid out in *Abdulai v. Ashcroft*. *Id.*; see also *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001) (describing a three-part inquiry that involves (1) identification of the facts for which corroboration may reasonably be expected, (2) consideration of whether the applicant has provided such corroboration, and (3) evaluation of whether the applicant has sufficiently explained any failure to provide corroboration).

78. *Chukwu*, 484 F.3d at 192 (emphasis added) (citing *Toure v. Att'y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006)). *Chukwu* noted that 8 U.S.C. § 1252(b)(4)(D) (2014), the REAL ID Act provision governing judicial review of corroboration determinations, became effective upon enactment and was therefore applicable to the case at hand. *Id.*

79. *Id.* Subsequent Third Circuit cases interpreting the REAL ID Act have followed *Chukwu*'s lead on this point. See, e.g., *Solodovnikova v. Att'y Gen.*, 555 F. App'x 136, 142–43 (3d Cir. 2014) (remanding an asylum seeker's withholding of removal claim because the IJ failed to provide notice and opportunity regarding expected corroboration). *Chukwu* does not describe how specific this advance notice needs to be, however. 484 F.3d at 192. I argue in Section III.A that such notice must specify the type of corroboration expected in a given case.

80. 533 F.3d 521, 530 (7th Cir. 2008).

81. *Rapheal*, 533 F.3d at 530. Although this part of the opinion is merely dicta (the court specifically noted that it lacked jurisdiction over the issue because it had not been raised before the BIA), *id.*, subsequent Seventh Circuit opinions have adopted *Rapheal*'s reasoning in holding that the REAL ID Act does not require that an otherwise credible applicant be given specific notice of the need for corroboration. See *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015).

82. 788 F.3d 519, 523 (6th Cir. 2015).

83. See, e.g., *Darinchuluun*, 804 F.3d at 1216–17; *Gaye*, 788 F.3d at 523.

The Board of Immigration Appeals did not weigh in with its interpretation of the REAL ID Act's corroboration provision until 2015, when it explicitly rejected the existence of an advance notice-and-opportunity requirement in *L-A-C*.<sup>84</sup> According to *L-A-C*-, while the language of Section 1158(b)(1)(B)(ii) "clearly states that an [IJ] may require the submission of corroborating evidence even where an applicant's testimony is credible, it is ambiguous with regard to what steps must be taken when the applicant has not provided such evidence."<sup>85</sup> Emphasizing that the applicant bears the burden of proof in asylum proceedings, *L-A-C*- concluded that the REAL ID Act does not entitle an asylum applicant to advance notice and opportunity.<sup>86</sup> In reaching this conclusion, the Board relied on the relevant conference report's assertion that Congress intended for the REAL ID corroboration provision to codify the standard laid out in *S-M-J*.<sup>87</sup> According to *L-A-C*-, because the *S-M-J*- corroboration framework did not explicitly require an IJ to identify the expected corroboration prior to issuing a final decision—or to grant an automatic continuance to allow the applicant to present corroboration at a later date—no such requirements exist under the REAL ID Act.<sup>88</sup> *L-A-C*- conceded that, "as a matter of good practice," IJs should remind applicants that they bear the burden of establishing their asylum claim, which includes providing corroboration "where it is reasonable to do so."<sup>89</sup> The BIA maintained, however, that such a practice is a far cry from a rigid requirement that an IJ specify at the merits hearing the evidence that a particular applicant would need to meet her burden of proof.<sup>90</sup>

Whether the REAL ID Act requires an IJ to give otherwise credible asylum applicants advance notice and opportunity is an unresolved issue. As a consequence of the current split, IJs in some jurisdictions must provide advance notice and opportunity, whereas IJs in other circuits, such as the Sixth and Seventh Circuits, are not subject to the same requirement.<sup>91</sup> Credible

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84. 26 I. & N. Dec. 516, 520–21 (B.I.A. 2015).

85. *L-A-C*-, 26 I. & N. Dec. at 518.

86. *Id.* at 523–24.

87. *Id.* at 519.

88. *Id.* at 519–20.

89. *Id.* at 521 n.3.

90. *Id.* The Board's reasoning in *L-A-C*- reflects its concerns about the procedural consequences of reading a notice-and-opportunity requirement into the REAL ID Act's corroboration provision. Finding that the language of Section 1158(b)(1)(B)(ii) provided sufficient notice to applicants, *L-A-C*- concluded that an IJ need not provide additional notice of the specific corroboration expected in a given case prior to issuing a decision. *Id.* at 519–20, 523. Moreover, *L-A-C*- suggested that a specific, advance notice-and-opportunity requirement would be inconsistent with normal immigration court procedures. *Id.* at 520–21.

91. Agency officials are bound by circuit court precedent within their particular jurisdiction. U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., RAI0 COMBINED TRAINING COURSE: READING AND USING CASE LAW 15 (2012), <https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/Case%20Law%20LP%20%28RAIO%29.pdf> [https://perma.cc/S3FM-C4CS]. Pursuant to *Chevron*, courts must only defer to a reasonable agency interpretation of an ambiguous statute

asylum seekers who are legitimately unable to corroborate their claims with extrinsic evidence should be treated uniformly across jurisdictions; their chances of obtaining relief should not depend on where they happen to bring their claims.<sup>92</sup>

## II. INTERPRETING REAL ID'S CORROBORATION EXCEPTION: THE ADVANCE NOTICE-AND-OPPORTUNITY REQUIREMENT

The text of the relevant provisions of the REAL ID Act unambiguously reveals a congressional intent to require IJs to give otherwise credible asylum applicants advance notice regarding expected corroboration and an opportunity to explain whether such corroboration is reasonably available. Section II.A argues that the plain text and legislative history of Section 1158(b)(1)(B)(ii) establish Congress's clear intent to provide otherwise credible asylum applicants who do not have, and cannot reasonably obtain, expected corroborating evidence with a meaningful opportunity to establish that fact. Section II.B contends that, under 8 U.S.C. § 1252(b)(4)(D), an IJ must provide advance notice and opportunity in order to facilitate judicial review of corroboration determinations.

### A. *The Text and Legislative History of the Corroboration Exception Reveal Congress's Intent to Require Advance Notice and Opportunity*

A close reading of Section 1158(b)(1)(B)(ii), in light of the surrounding provisions, unambiguously establishes that Congress intended for IJs to provide otherwise credible asylum applicants with advance notice and opportunity regarding expected corroborating evidence.<sup>93</sup> Even if the statute were ambiguous with respect to notice, however, the pertinent legislative history makes it unreasonable to conclude that notice and opportunity are not required.

The future-oriented language in Section 1158(b)(1)(B)(ii) establishes that an IJ must give an applicant notice of the corroborating evidence required and a chance to provide it prior to denying the applicant's claim.

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when Congress's intent with respect to a particular statutory provision is unclear. *See supra* note 71 and accompanying text. Because the Ninth Circuit held in *Ren* that Congress's intent to require advance notice and opportunity was unambiguous, agency officials—including Immigration Judges—within the Ninth Circuit are bound by the advance notice-and-opportunity requirement, despite the BIA's contrary construction of the corroboration provision. *Cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

92. *Cf. Ortiz-Franco v. Holder*, 782 F.3d 81, 93 (2d Cir. 2015) (Lohier, J., concurring). (“[T]he state of play today is that noncitizens with criminal convictions who appeal the Government's denial of deferral of removal under the CAT will have access to federal court in a wide geographic swath of the Nation . . . while similarly situated men and women in other parts of the country . . . will not.”), *cert. denied sub nom. Ortiz-Franco v. Lynch*, 136 S. Ct. 894 (2016).

93. *See generally Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

Section 1158(b)(1)(B)(ii) is framed in the present tense,<sup>94</sup> rather than in backward-looking past tense:<sup>95</sup> “[w]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.”<sup>96</sup> This present-tense construction should not be dismissed as merely accidental.<sup>97</sup> If Congress intended for the provision in question to be a backward-looking inquiry, hinging merely on whether the asylum applicant had *already* provided the required corroboration or an explanation for its absence, Congress could have communicated that intent by employing the past tense.<sup>98</sup> Instead, as *Ren* explains, the controlling clause of the provision in question “focuses on conduct that *follows* the IJ’s determination, not *precedes* it, as the phrase ‘*must have been provided*’ would do.”<sup>99</sup>

In addition, Section 1158(b)(1)(B)(ii) specifically excuses a failure to provide corroborating evidence in cases in which the applicant does not have and cannot reasonably obtain such evidence.<sup>100</sup> If an IJ does not inform an otherwise credible asylum applicant of the necessity of a particular type of corroborating evidence, the applicant has no real opportunity either to provide that evidence or to establish that she does not have and cannot reasonably obtain it.<sup>101</sup> Courts are reluctant to interpret statutory provisions in a way that renders other parts of the same statute surplusage,<sup>102</sup> even if those other parts were enacted years earlier.<sup>103</sup> Accordingly, the REAL ID

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94. See *Ren v. Holder*, 648 F.3d 1079, 1091 (9th Cir. 2011).

95. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

96. 8 U.S.C. § 1158(b)(1)(B)(ii) (2012) (emphasis added).

97. The agencies and courts tasked with interpreting statutory provisions recognize as instructive Congress’s consistent use of a particular verb tense throughout statutory text. See, e.g., *United States v. Wilson*, 503 U.S. 329, 333 (1992); see also *United States v. Am. Sugar Ref. Co.*, 202 U.S. 563, 579 (1906) (“Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other.”).

98. Such a provision would read something like: Where the trier of fact determines that the applicant *should have provided* evidence that corroborates otherwise credible testimony, such evidence *must have been provided* unless the applicant *did not have* the evidence and *could not have reasonably obtained* the evidence. See *Ren*, 648 F.3d at 1091.

99. *Id.*

100. 8 U.S.C. § 1158(b)(1)(B)(ii).

101. *Ren*, 648 F.3d at 1091.

102. The presumption against surplusage requires that a statute be interpreted to give effect to “every word and every provision in [the] legal instrument,” if at all possible. *Surplusage Canon*, BLACK’S LAW DICTIONARY (10th ed. 2014).

103. See, e.g., *Ark. Best Corp. v. Comm’r*, 485 U.S. 212, 218 (1988) (declining to read a particular provision of a statute in a way that renders a prior statutory exclusion mere surplusage in the absence of a clearly expressed congressional intent to do so).



Act's corroboration provision should not be interpreted so as to render meaningless the exception that Congress intentionally built into it.<sup>104</sup>

The contrast between the phrasing of the corroboration exception and the language used in the rest of Section 1158(b)(1)(B)(ii) further evinces Congress's intent to require advance notice and opportunity. Instead of emphasizing the applicant's role in convincing the IJ of a particular set of circumstances, the corroboration exception focuses on the applicant's *objective ability* to reasonably obtain the evidence. The first part of Section 1158(b)(1)(B)(ii) stipulates that an applicant's testimony by itself may be sufficient to meet the burden of proof without additional 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."<sup>105</sup> In contrast, the exception provided for otherwise credible asylum seekers that do not have and cannot reasonably obtain required corroboration contains no such language.<sup>106</sup> Even though the asylum applicant ultimately bears the burden of proof in all cases,<sup>107</sup> the omission of the phrase "only if the applicant satisfies the trier of fact" suggests a more active role for the fact finder with respect to determinations regarding the availability of corroborating evidence.<sup>108</sup> In the context of the corroboration exception, it is an IJ's responsibility as a fact finder to give an asylum applicant an explicit opportunity either to provide the expected corroborating evidence or to explain its absence.

The contrast between the language used in the corroboration exception and the surrounding provisions reinforces the conclusion that advance notice and opportunity is required. The omission of certain phrases regarding the applicant's burden of proof from the corroboration exception stands out even more in the context of Section 1158(b)(1)(B)(i), which focuses heavily on that burden. Section 1158(b)(1)(B)(i) expressly provides that "[t]he burden of proof is on the applicant to establish" her refugee status and that "the applicant must establish" that her membership in a protected category<sup>109</sup> is the central reason for her persecution.<sup>110</sup> Similar language is notably absent from Section 1158(b)(1)(B)(ii), which simply reads: "Where the trier of fact determines that the applicant should provide evidence that corroborates

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104. *Ren*, 648 F.3d at 1091. For further discussion of this issue, see Sections III.A and III.C.

105. 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added).

106. *Id.*

107. *Id.* § 1158(b)(1)(B). Indeed, Section 1158(b)(1)(B) is entitled "Burden of Proof."

108. This language is consistent with the general understanding that an IJ has an obligation to help develop the record in an asylum case, even though the ultimate burden of proof rests on the applicant. See *Toure v. Att'y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *Jacinto v. INS*, 208 F.3d 725, 733–34 (9th Cir. 2000). Even *S-M-J*, which the REAL ID Act corroboration provision was intended to codify, acknowledges that "the presentation of evidence is a proper function of an Immigration Judge." 21 I. & N. Dec. 722, 727 (B.I.A. 1997); accord *infra* text accompanying notes 149–153.

109. 8 U.S.C. § 1158(b)(1)(B)(i).

110. *Id.*

otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”<sup>111</sup> Where particular language is included in one section of a statute but omitted in another section, “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>112</sup> By intentionally omitting phrases like “the applicant must establish” from the corroboration exception, Congress shifted the emphasis away from the applicant’s burden of proof and toward a more objective inquiry into whether a given applicant has the corroborating evidence or can reasonably obtain it.

A textual comparison of the exception for applicants seeking alternative relief from removal and Section 1158(b)(1)(B)(ii)—which is only applicable to asylum seekers—underscores Congress’s deliberate choice to emphasize the objective availability of corroborating evidence over the applicant’s burden of proof. For individuals applying for relief or protection from removal, the relevant provision stipulates that applicants *must* corroborate otherwise credible testimony when an IJ determines that they should, “unless *the applicant demonstrates* that the applicant does not have the evidence and cannot reasonably obtain the evidence.”<sup>113</sup> Congress’s omission of the phrase “the applicant demonstrates” in Section 1158(b)(1)(B)(ii)—when that phrase is expressly included in the otherwise near-identical provision for applicants for relief from removal—must be assumed to be deliberate.<sup>114</sup> The same Congress drafted both provisions as part of the REAL ID Act, making it especially appropriate to ascribe a congressional intent to distinguish between provisions that are otherwise so similar.<sup>115</sup> The text of Section 1158(b)(1)(B)(ii) and its surrounding provisions therefore compel the conclusion that Congress intended for otherwise credible asylum applicants to receive advance notice and opportunity regarding expected corroborating evidence.<sup>116</sup>

It is unnecessary to turn to the legislative history of the REAL ID Act because the statutory text evinces Congress’s unambiguous—albeit largely

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111. *Id.* § 1158(b)(1)(B)(ii).

112. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

113. 8 U.S.C. § 1229a(c)(4)(B) (emphasis added).

114. See text accompanying note 112.

115. See REAL ID Act of 2005, Pub. L. No. 109–13, § 101(a)(3)(B)(ii), 119 Stat. 302 (codified at 8 U.S.C. § 1158(b)(1)(ii) (2014)); *id.* § 101(d)(2)(B) (codified at 8 U.S.C. § 1229a(c)(4)(B) (2014)).

116. Even if the provision in question were ambiguous, *Ren v. Holder* suggests that the constitutional avoidance canon would compel the same result. 648 F.3d 1079, 1092–93 (9th Cir. 2011). Failure to provide advance notice and opportunity in this context would raise substantial due process concerns regarding an asylum applicant’s established due process right to a “full and fair hearing.” *Ren*, 648 F.3d at 1092–93 (quoting *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), *superseded by statute on other grounds*, REAL ID Act of 2005, Pub. L. No. 109–13, § 101(a)(3)(B)(iii), 119 Stat. 302, 303)).

implicit—intent to require advance notice and opportunity in the corroboration context.<sup>117</sup> But, if the language of the corroboration exception were ambiguous, the BIA's assertion that Section 1158(b)(1)(B)(ii) does not include a notice-and-opportunity requirement is unreasonable in light of the existing legislative history, and therefore undeserving of *Chevron* deference.<sup>118</sup>

Not only is the BIA's interpretation of the corroboration provision in *L-A-C* unsupported by the statutory text, but the legislative history that does exist also fails to support it.<sup>119</sup> While the conference report described the REAL ID Act as an attempt to “respond[ ] to terrorist abuse of our asylum laws by amending the INA to limit fraud,”<sup>120</sup> the report specifically acknowledged that many legitimate asylum seekers—not just fraudulent ones—are unable to provide documentary evidence to corroborate their claims.<sup>121</sup> The report described the relevant clause in Section 1158(b)(1)(B)(ii) as providing an exception to corroboration requirements so that “a lack of extrinsic or corroborating evidence will not necessarily defeat an asylum claim where such evidence is not reasonably available to the applicant.”<sup>122</sup> After explaining that the corroboration provision was modeled on the standard articulated by the BIA in *S-M-J*, the conference report quoted the relevant language from that case, including the requirement that an asylum applicant's explanation of why corroborating evidence is unavailable be included in the record.<sup>123</sup> In order to ensure that there is an explanation in the record, however, an IJ will have to give an applicant notice of the corroborating evidence deemed necessary and an actual opportunity to explain the availability of that evidence.<sup>124</sup> Thus, Congress's intent to require specific notice and opportunity is evident not only from the statutory text, but also from the legislative history of the corroboration exception.

Both the text of the statute and the existing legislative history compel the conclusion that Section 1158(b)(1)(B)(ii) unambiguously requires an IJ

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117. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

118. Cf. *id.* at 843 (explaining that courts must defer to reasonable agency interpretations where the “statute is silent or ambiguous with respect to the specific issue” in question).

119. The legislative history for Section 1158(b)(1)(B)(ii) is sparse, because, as previously noted, the REAL ID Act passed without significant floor debate as part of a large emergency appropriations bill. Cianciarulo, *supra* note 46, at 115.

120. H.R. REP. NO. 109-72, at 161 (2005) (Conf. Rep.).

121. The Conference Report characterized the corroboration exception as a recognition of—and necessary accommodation for—the fact that “[m]any aliens validly seeking asylum arrive in the United States with little or no evidence to corroborate their claims.” *Id.* at 165.

122. *Id.*

123. *Id.* at 166.

124. Most asylum applicants, especially those without counsel, will not be able to anticipate what corroborating evidence an IJ may decide to require. See *infra* Section III.A.

to provide an otherwise credible asylum applicant with notice of the corroborating evidence deemed necessary to sustain her burden of proof prior to issuing a denial of asylum. In the absence of specific notice and opportunity, the safety net that Congress designed for legitimate asylum seekers who cannot reasonably obtain corroborating testimony may fail to catch those who need it most.

B. *The Corresponding Review Provision Presupposes an Advance Notice-and-Opportunity Requirement*

The REAL ID Act's provision for judicial review of corroboration determinations further indicates that Congress intended for IJs to provide otherwise credible asylum applicants with advance notice and opportunity. Under the REAL ID Act standard, which is codified at 8 U.S.C. § 1252(b)(4), a reviewing court may reverse an IJ's determination regarding the availability of corroborating evidence only where a reasonable trier of fact would be "compelled to conclude that such corroborating evidence is unavailable."<sup>125</sup> Although this review standard is quite deferential to the agency, it nonetheless permits a reviewing court to assess the validity of an IJ's determination that an asylum applicant could reasonably have obtained additional corroborating evidence. In cases where the record actually indicates that, contrary to the IJ's determination, such corroboration is not in fact reasonably available, the court may reverse or remand the case to the agency.<sup>126</sup> This safeguard is an important one. Asylum cases are by their very nature high-stakes proceedings, and as the Ninth Circuit pointed out in *Ren v. Holder*, "serious errors in decisions issued by overworked immigration judges . . . are not unusual."<sup>127</sup> If there is going to be any possibility of correcting such mistakes on appeal, the record must be complete enough to facilitate meaningful judicial review pursuant to the standard laid out in Section 1252(b)(4)(D).<sup>128</sup>

It is impossible for a reviewing court to assess a fact finder's determination regarding the availability of corroborating evidence if the record is silent on that point. As the Third Circuit has noted repeatedly, "the availability of judicial review . . . necessarily contemplates *something* for us to review."<sup>129</sup> For example, in *Toure v. Attorney General*, because the IJ did

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125. 8 U.S.C. § 1252(b)(4) (2014). In contrast to the corroboration provision, this judicial-review provision became effective immediately upon the REAL ID Act's enactment, making it applicable to pre-2005 asylum claims. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(h)(3), 119 Stat. 231, 305.

126. For example, in *Sibanda v. Holder*, 778 F.3d 676, 677 (7th Cir. 2015), the court issued a remand where the record compelled the conclusion that additional corroborating evidence was not reasonably available to the asylum applicant.

127. 648 F.3d 1079, 1084–85 (9th Cir. 2011).

128. See *Toure v. Att'y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006) ("[A]s a logical predicate to appellate review, the BIA must adequately explain the reasons for its decisions." (citing *Abdulai v. Ashcroft*, 239 F.3d 542, 555 (3d Cir. 2001)).

129. *Abdulai*, 239 F.3d at 555; see also *Toure*, 443 F.3d at 325.

not indicate that she expected corroborating evidence prior to issuing an oral decision on the applicant's claim, the court found it necessary to vacate and remand the case for a new corroboration determination.<sup>130</sup> *Toure* explained that "it is impossible for us to determine whether 'a reasonable trier of fact [would be] compelled to conclude that . . . corroborating evidence is unavailable' unless a petitioner is given the opportunity to testify as to its availability."<sup>131</sup>

Even within circuits that have held that the REAL ID corroboration provision contains no advance-notice requirement, meaningful judicial review is often predicated on such notice. In *Rapheal v. Mukasey*, the Seventh Circuit based its review of the IJ's corroboration determination on an exchange that occurred between the IJ and the asylum applicant.<sup>132</sup> This exchange took place only because the IJ specifically asked the applicant if she had any evidence to corroborate her contention that her father was well known in Liberia.<sup>133</sup> After analyzing that exchange pursuant to the review standard laid out in 8 U.S.C. § 1252(b)(4)(D), the court concluded that, under the circumstances, a reasonable trier of fact was not compelled to find that such corroboration was unavailable.<sup>134</sup> Had the IJ not prompted the applicant to attempt to explain why she did not have corroborating evidence, the reviewing court would not have been able to assess whether a reasonable fact finder was compelled to find that the evidence was unavailable.

Meaningful review of an IJ's determination that an asylum applicant could reasonably have obtained corroboration is predicated on the existence of a record that speaks to the availability of such evidence. The REAL ID Act's provision for judicial review of corroboration determinations thus lends further support to the conclusion that Section 1158(b)(1)(B)(ii) unambiguously requires an IJ to provide advance notice and an opportunity for an otherwise credible asylum applicant to testify regarding the availability of expected corroboration.

### III. GIVING PRACTICAL EFFECT TO REAL ID'S CORROBORATION EXCEPTION: THE SPECIFIC NOTICE-AND-OPPORTUNITY REQUIREMENT

Congress did not pass the REAL ID Act's corroboration exception in a vacuum. Congress intended this exception to do work in a context in which

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130. 443 F.3d at 324–25.

131. *Toure*, 443 F.3d at 325 (alteration in original) (citation omitted).

132. 533 F.3d 521, 529 (7th Cir. 2008).

133. *Rapheal*, 533 F.3d at 529.

134. *Id.*; see also *Yan Juan Chen v. Holder*, 658 F.3d 246, 252–53 (2d Cir. 2011) (concluding that substantial evidence supported the IJ's determination that an asylum applicant failed to submit reasonably available corroboration, but only after noting that the IJ "specifically identified the type of corroborating evidence that Chen should have presented" and allowed her "an opportunity to secure her husband's testimony or explain why it was not available").

the governing law is notoriously complex<sup>135</sup> and in which nearly one-third of asylum applicants do not have a lawyer to help them navigate the process.<sup>136</sup> In light of these realities, the corroboration exception must be read to require IJs to provide otherwise credible applicants with *specific* notice regarding the corroborating evidence required to sustain their burden of proof. Part III explains how IJs must implement the notice requirement in order to afford qualified asylum applicants a meaningful opportunity to avail themselves of the corroboration exception. Section III.A contends that Congress must have intended the required notice and opportunity to be specific, in order to counter the unpredictability of corroboration requirements in the post-REAL ID Act era. Section III.B argues that specific notice is further justified by the risk that an IJ may make inaccurate assumptions regarding the reasonable availability of corroborating evidence in a given case. Lastly, Section III.C illustrates why a lack of specific notice and opportunity would disproportionately harm pro se asylum seekers—especially women, children, sexual minorities, and members of other particularly vulnerable populations.

A. *Specific Notice Is Required to Provide Applicants with a Meaningful Opportunity to Invoke the Corroboration Exception*

Many asylum applicants will have no way of knowing that they need to give an explanation for the absence of corroboration, unless they receive specific notice regarding which parts of their testimony the IJ expects them to corroborate.<sup>137</sup> In light of the unpredictable nature of corroboration requirements, in order to give effect to the corroboration exception, IJs must provide otherwise credible asylum applicants with nothing less than specific and advance notice. Generic, boilerplate notice—of the kind included within the REAL ID Act itself—does not provide applicants with a meaningful opportunity to explain why they might not reasonably be able to obtain corroborating evidence.<sup>138</sup> Lastly, not only are the principal procedural objections to a specific notice-and-opportunity requirement overstated, but they are also insufficient to override congressional intent to include such a requirement in the corroboration context.

Because it can be difficult to anticipate when an IJ, in her discretion, will require corroboration of otherwise credible testimony, specific and advance notice is necessary to give effect to the corroboration exception.<sup>139</sup> The

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135. See Cianciarulo, *supra* note 46, at 110; see also Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 391 (2011).

136. RAMJI-NOGALES ET AL., *supra* note 27, at 33.

137. See, e.g., *Toure v. Att’y Gen.*, 443 F.3d 310, 324 (3d Cir. 2006).

138. See ANKER, *supra* note 5, § 3:7.

139. Brief for the National Immigrant Justice Center and the American Immigration Lawyers Association as *Amici Curiae* in Support of Petitioner at 3, *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (No. 08–71478) [hereinafter Brief in Support of Petitioner]; see Cianciarulo, *supra* note 46, at 116.

mere statutory assertion in Section 1158(b)(i)(B)(ii) that “[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided”<sup>140</sup> is insufficient to give asylum applicants a sense of when IJs will expect them to corroborate their testimony.<sup>141</sup> An IJ’s decision to require corroborating evidence for a particular aspect of an asylum seeker’s claim can be nearly impossible to predict.<sup>142</sup> “Given the nearly limitless universe of potential corroboration” that an IJ may decide to require for an asylum claim, the National Immigrant Justice Center notes that “[a] general notice standard essentially makes asylum applicants strictly liable for not having corroborated any point a judge . . . might identify as potentially amenable to corroboration, resulting in denial of the claim without further notice.”<sup>143</sup> Without an advance-notice requirement, it is equally difficult to predict whether an IJ will provide specific notice and opportunity to asylum applicants prior to denying their claims for failure to present (or explain the absence of) required corroboration.<sup>144</sup>

Requiring all IJs across the United States to provide otherwise credible asylum applicants with specific and advance notice and opportunity would mitigate the negative effects that the unpredictability of corroboration expectations may have on legitimate asylum seekers. In drafting the REAL ID Act, Congress specifically indicated that it intended to “bring clarity and consistency to evidentiary determinations” in asylum cases.<sup>145</sup> The only way to ensure some measure of consistency in the application of REAL ID’s corroboration exception, however, is to provide specific, advance notice so that all asylum applicants who qualify for the exception have an opportunity to avail themselves of it. Despite the BIA’s rejection in *L-A-C-* of the notion that the corroboration provision requires specific, advance notice, the BIA continued to underscore the importance of affording asylum applicants an explicit opportunity to explain the unavailability of corroborating evidence.<sup>146</sup> *L-A-C-* conceded that “[p]ermitt[ing] the applicant to state the reasons why the corroborating evidence could not be obtained is consistent with both the language of the REAL ID Act” and the longstanding practice

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140. 8 U.S.C. § 1158(b)(1)(B)(ii) (2012).

141. Brief in Support of Petitioner, *supra* note 139, at 5–6.

142. *Id.*

143. *Id.* at 3.

144. Compare *Gaye v. Lynch*, 788 F.3d 519, 530 (6th Cir. 2015) (noting that the IJ continued the proceeding several times “expressly for the purpose” of allowing the applicant the opportunity to obtain certain documents), and *Rapheal v. Mukasey*, 533 F.3d 521, 529 (7th Cir. 2008) (reproducing an exchange between the IJ and the applicant in which the IJ specifically asked for evidence corroborating the applicant’s claim that her father was well known in Liberia), with *Darinchuluun v. Lynch*, 804 F.3d 1208, 1214, 1217 (7th Cir. 2015) (holding that the IJ did not err by failing to give the applicant specific notice of the need to corroborate otherwise credible testimony prior to denying his claim).

145. 151 CONG. REC. 8523 (2005) (emphasis added).

146. *L-A-C-*, 26 I. & N. Dec. 516, 523–24 (B.I.A. 2015).

of the Board.<sup>147</sup> However, *L-A-C-* went on to assert that it did not need to consider whether, in another case, the absence of corroboration could be “so glaring that no explicit opportunity to explain its absence needs to be given.”<sup>148</sup> Insofar as it suggests that an IJ generally must afford an asylum applicant an explicit opportunity to explain the absence of corroborating evidence, this clarification is at odds with *L-A-C-*’s insistence that no advance notice regarding corroboration expectations is required. Without advance notice of the required corroboration, no such explicit opportunity exists; the asylum applicant will necessarily only have a generic, implicit opportunity to explain why such evidence may not be reasonably available.

A requirement that IJs provide otherwise credible asylum applicants with specific and advance notice and opportunity regarding corroboration expectations is consistent with contemporary understandings of an IJ’s role within asylum proceedings.<sup>149</sup> Title 8 of the U.S. Code § 1229a(b)(1) requires IJs to “administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.”<sup>150</sup> Accordingly, even though the ultimate burden of proof rests on the asylum applicant, IJs are expected to play an active role in developing the record.<sup>151</sup> In *S-M-J-*, the BIA specifically noted that “[a]lthough not binding on Immigration Judges, various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator.”<sup>152</sup> Providing specific, advance notice to applicants who are expected to corroborate their otherwise credible testimony is the best way for an IJ to discharge her duty to ensure that explanations regarding the unavailability of corroborating evidence are included in the record.<sup>153</sup>

The deferential standard of judicial review for corroboration determinations makes successful appeals of such determinations very unlikely.<sup>154</sup> Because this restrictive standard of review renders an appellate court powerless to overturn all but the most indefensible corroboration determinations, the importance of ensuring that asylum applicants get a fair shake the first time around is difficult to overstate. Title 8 of the U.S. Code § 1252(b)(4) confines appellate review to the narrow question of whether the reviewing court is “compelled to conclude” that an IJ’s determination regarding the reasonable availability of additional corroboration was incorrect.<sup>155</sup> This limited

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147. *Id.* at 521 n.4.

148. *Id.*

149. See Rempell, *supra* note 9, at 219.

150. 8 U.S.C. § 1229a(b)(1) (2012).

151. Linda Kelly Hill,  *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 100 (2007).

152. 21 I. & N. Dec. 722, 729 (B.I.A. 1997).

153. See *supra* text accompanying notes 125–126.

154. See Conroy, *supra* note 29, at 30.

155. 8 U.S.C. § 1252(b)(4); see *Liu v. Holder*, 575 F.3d 193, 197 (2d Cir. 2009).



standard of review has been dismissed by advocates as weak and overly deferential to agency adjudicators.<sup>156</sup> By exclusively focusing on the reasonableness of the determination regarding the *availability* of expected corroboration, Section 1252(b)(4) does not allow for consideration of the reasonableness of an IJ's expectations of corroboration.<sup>157</sup> As such, Section 1252(b)(4)'s failure to address the reasonableness of the underlying corroboration expectation effectively guarantees that "unreasonable demands for corroboration will survive judicial review."<sup>158</sup> The resulting likelihood of an applicant's failure on appeal significantly raises the stakes in initial asylum adjudications, making notice and opportunity regarding expected corroboration all the more important in the first instance.<sup>159</sup>

The principal procedural arguments against recognizing a specific notice-and-opportunity requirement do not form a sufficient basis for rejecting it in the face of contrary congressional intent. The Board of Immigration Appeals and circuits that have declined to read a notice-and-opportunity requirement into Section 1158(b)(i)(B)(ii) express concern that mandating additional notice and opportunity beyond the language in the provision itself is not only unnecessary, but also "imprudent" from a procedural standpoint.<sup>160</sup> Such concerns are overstated.<sup>161</sup> In *Rapheal*, the Seventh Circuit suggested that requiring additional notice and opportunity prior to an adverse ruling would necessitate two hearings, unacceptably increasing

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156. Conroy, *supra* note 29, at 30.

157. Whereas *S-M-J* stipulated that IJs may only request corroborating evidence when it is reasonable to do so, 21 I. & N. Dec. at 725, an explicit reasonableness requirement is missing from the REAL ID Act. See REAL ID Act of 2005, Pub. L. No. 109-13 § 101(a)(3)(B)ii), 119 Stat. 302, 303. Professor Cianciarulo has warned that "failure on the part of appellate courts and immigration judges to read a reasonableness requirement into the Act could lead to abuse of discretion, inconsistent application of the law, and the denial of valid asylum claims." Cianciarulo, *supra* note 46, at 127.

158. Conroy, *supra* note 29, at 30. At least one court has used this standard to remand a case where it found that the record compelled the conclusion that additional corroborating evidence was not reasonably available. *Sibanda v. Holder*, 778 F.3d 676, 679 (7th Cir. 2015).

159. See Brief in Support of Petitioner, *supra* note 139, at 6. This is especially the case for pro se applicants, who are unlikely to have the resources or knowledge necessary to mount a successful appeal of their case. Even if such an applicant did manage to exhaust administrative remedies and appeal her case, however, the deferential review standard becomes a nearly insurmountable obstacle to success.

160. *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008); see also *Gaye v. Lynch*, 788 F.3d 519, 529 (6th Cir. 2015); L-A-C-, 26 I. & N. Dec. 516, 523 (B.I.A. 2015).

161. Moreover, concerns about administrative efficiency do not justify circumventing Congress's unambiguous intent for otherwise credible asylum applicants to be provided with notice and opportunity prior to a denial of their claims for lack of corroboration. See *supra* Section II.A. An IJ may not simply abdicate her statutory duty under the REAL ID Act to provide notice and opportunity for the sake of expediency. See *Poradisova v. Gonzales*, 420 F.3d 70, 82 (2d Cir. 2005) ("[T]he asylum application process requires a good-faith *inquiry* into whether an applicant is entitled to this country's protection . . . ."); *Anganu v. Ashcroft*, 85 F. App'x 590, 592 n.1 (9th Cir. 2004) ("We recognize the difficult work performed by immigration judges, as well as the sheer number of cases they face, but the stakes are simply too high in asylum cases for expediency to be the paramount norm.").

the burden on the “already overburdened” immigration courts.<sup>162</sup> According to *Rapheal*, after an IJ decides, based on the first hearing, that corroborating evidence is needed in a particular case, the IJ will have to grant a second hearing after a recess in order to give the applicant time to obtain the required corroboration.<sup>163</sup> *Rapheal* overstates the necessity of a second hearing in at least two respects. First, *Rapheal* appears to overlook the fact that the notice-and-opportunity requirement applies only to the subset of *otherwise credible* asylum applicants, not to all applicants found by an IJ not to have met their burden of proof.<sup>164</sup> Second, even within this subset of otherwise credible asylum applicants, it is not necessarily the case that an IJ will need to grant a continuance for another hearing after identifying the expected corroborating evidence.

At the time the IJ provides notice to the applicant of the expected corroborating evidence, the applicant may already know that she is unable to provide such corroboration and have a ready explanation as to why she cannot reasonably obtain it. In such a case, the IJ will either find the applicant’s explanation satisfactory or she will find it insufficient.<sup>165</sup> In the event that the IJ is unsatisfied by the explanation for the unavailability of corroborating evidence, there will be no need for the IJ to issue a continuance for another hearing, since the applicant already has asserted that she is unable to obtain the expected evidence.<sup>166</sup> If, on the other hand, the applicant *does* believe she can obtain corroboration of a particular aspect of her asylum claim upon receiving notice that the IJ expects such corroboration, the IJ *should* grant a continuance in order to give the applicant an opportunity to obtain and present that evidence. This is consistent with the Board’s recognition in *L-A-C-* that “a continuance would typically be warranted where the Immigration Judge determines that that [sic] the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof.”<sup>167</sup>

The related concern that asylum applicants should bear the burden of introducing corroborating evidence “without prompting from the IJ”<sup>168</sup> is likewise insufficient to override congressional intent to include a specific notice-and-opportunity requirement in REAL ID’s corroboration provision.

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162. *Rapheal*, 533 F.3d at 530. By the end of Fiscal Year 2014, there were 418,861 cases pending before immigration courts across the United States, compared to 262,681 pending cases at the end of Fiscal Year 2010. Office of Planning, Analysis, and Tech., *supra* note 32, at W1.

163. *Rapheal*, 533 F.3d at 530.

164. *Ren v. Holder*, 648 F.3d 1079, 1092 n.13 (9th Cir. 2011).

165. *Cf. Ming Shi Xue v. BIA*, 439 F.3d 111, 126 (2d Cir. 2006) (“[T]o give the applicant an *opportunity* to explain does not mean that the explanation proffered (if any) will be deemed valid or convincing.”).

166. *Cf. El Harake v. Gonzales*, 210 F. App’x 482, 490 (6th Cir. 2006) (holding that the IJ’s denial of motion for continuance of removal proceeding was “not irrational” where the applicant had presented “no evidence” that his pending I-130 petition to avoid deportation would be successful).

167. 26 I. & N. Dec. 516, 522 (B.I.A. 2015).

168. *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009).

As previously noted, the REAL ID Act does not relieve IJs of their general duty to develop applicants' testimony on issues that they may find dispositive.<sup>169</sup> If an IJ denies an otherwise credible applicant's asylum claim without first providing notice that additional corroboration is expected of her, the applicant will have been "deprived of the opportunity to meet . . . her burden by producing the corroborating evidence expected or explaining its absence."<sup>170</sup> Such an outcome—which effectively nullifies the corroboration exception—runs counter to Congress's purpose for including the exception in the first place.<sup>171</sup>

In light of the foregoing, IJs must be required to give asylum seekers specific notice when they expect corroboration of otherwise credible testimony and an opportunity to either provide such corroboration or explain its absence. Specific and advance notice and opportunity is the only way to guarantee that deserving asylum applicants who cannot reasonably obtain required corroborating evidence will have a meaningful opportunity to take advantage of REAL ID's corroboration exception.

B. *The Likelihood that Immigration Judges Will Make Inaccurate Assumptions About the Availability of Corroboration Further Warrants Specific Notice and Opportunity*

Specific notice and opportunity also reduces the risk that IJs will deny legitimate asylum claims based on unrealistic expectations as to what corroborating evidence should be available to individuals who have fled persecution abroad. Both adjudicators and lawmakers have long recognized—at least in theory—that, in many cases, asylum applicants will not be able to support their testimony with corroborating evidence.<sup>172</sup> As the Seventh Circuit observed in *Dawoud v. Gonzales*:

Many asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives and have to abandon their families, friends, jobs, and material possessions without a word of explanation. They often have nothing but the shirts on their backs when they arrive in this country. To expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.<sup>173</sup>

Likewise, as previously noted, in the portion of the May 2005 House conference report that addresses the REAL ID Act's corroboration provision,

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169. ANKER, *supra* note 5, § 3:7 (citing *Toure v. Att'y. Gen.*, 443 F.3d 310, 335 (3d Cir. 2006)); *see also supra* text accompanying notes 150–151.

170. ANKER, *supra* note 5, § 3:7.

171. *See supra* text accompanying notes 94–104.

172. *See supra* note 34.

173. 424 F.3d 608, 612–13 (7th Cir. 2005).

Congress expressly acknowledged the reality that “many aliens validly seeking asylum arrive in the United States with little or no evidence to corroborate their claims.”<sup>174</sup> The report characterized the exception for when corroboration is not reasonably available as an accommodation for this reality.<sup>175</sup> Unfortunately, despite widespread recognition of how difficult it is for asylum applicants to obtain evidence corroborating their testimony, there remains a significant risk that IJs will lose sight of this reality when adjudicating specific cases.<sup>176</sup> In such cases, unless the IJ provides the asylum applicant with specific notice and an opportunity to explain why the expected corroboration is not reasonably available, the IJ’s determination as to the availability of corroboration may be based on pure speculation.

An IJ’s own cultural background often will shape her expectations as to when and what types of corroborating evidence should be reasonably available to an asylum applicant.<sup>177</sup> This inherent cultural bias has the potential to create unrealistic expectations regarding the ability of asylum applicants who often come from very different backgrounds to obtain corroborating evidence.<sup>178</sup> For example, an IJ who has lived her entire life in the United States may expect that medical records documenting an asylum applicant’s alleged injuries due to past persecution will be stored in a safe place by the treating facility for a certain period of time following treatment. This IJ may therefore assume that the applicant should be able to request and obtain past medical records for corroboration purposes. Such an assumption—generally a valid one as applied to the United States and other developed nations—may be entirely inaccurate with respect to certain countries with markedly less formal and developed healthcare systems.<sup>179</sup>

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174. H.R. REP. NO. 109-72, at 165 (2005) (Conf. Rep.); see also *supra* text accompanying note 123.

175. See *id.*

176. See Ardalan, *supra* note 29, at 1014. The Seventh Circuit has warned of the “distinct danger that, in practice, the corroboration requirement can slip into ‘could have-should have’ speculation about what evidence the applicant could have brought in a text-book environment.” *Balogun v. Ashcroft*, 374 F.3d 492, 502 (7th Cir. 2004).

177. See Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT’L MIGRATION REV. 230, 239 (1986).

178. An IJ will often rely on common sense in determining whether corroborating evidence should be available to an asylum applicant. The problem with overreliance on common sense is that, far from being a universal concept, common sense itself is “culturally determined.” *Id.* at 236. Culturally determined notions of common sense are “not an effective means for judging the possibility and probability of events in societies different from one’s own.” *Id.*

179. See *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008) (“Countries that oppress their citizens may be disordered in other ways—so that, for example, medical records are unreliable, and victims cannot use them to demonstrate injuries received at the hands of police . . .”); see also *Balogun*, 374 F.3d at 502 (“[C]onditions in another country . . . may render unreasonable what might be considered very reasonable and therefore expected in typical domestic civil litigation.”).

Immigration law scholars have warned that “cultural filters” such as the one described above “can have an unreasonably detrimental impact on asylum seekers’ claims if left unchecked.”<sup>180</sup> IJs should therefore be required to check the validity of their culturally filtered assumptions about the availability of corroborating evidence. And they can do this by providing otherwise credible asylum applicants with a specific opportunity to explain why such evidence may not be available. Many applicants will likely be unable to convince the IJ that it is unreasonable to expect them to obtain the required corroboration.<sup>181</sup> But advance notice and opportunity safeguards against the unwarranted denial of asylum claims in cases in which the applicant does in fact have a valid reason for her inability to corroborate otherwise credible testimony. It also preserves at least the possibility of reversal of an especially erroneous corroboration determination on appeal.<sup>182</sup> Without advance notice and opportunity, any incorrect assumptions that the IJ makes regarding the availability of corroboration are likely to stand uncorrected, unless an applicant anticipates which parts of her claim the IJ expects to be corroborated and spontaneously offers an explanation for why she cannot reasonably obtain that corroboration. Most applicants will remain unaware of an IJ’s expectations for corroboration until the IJ issues a final denial of their asylum claims for insufficient corroboration. As a consequence, certain asylum seekers who do in fact qualify for the corroboration exception may not be able to avail themselves of the exception in practice.

Without the safeguard of specific notice and opportunity, “erroneous and unfair” denials of asylum based on inaccurate assumptions regarding the reasonable availability of corroborating evidence are likely to become more common.<sup>183</sup> Miscarriages of justice are always troubling, but they are especially upsetting in the asylum context, in which unsuccessful applicants face deportation to countries where they may be tortured or killed.<sup>184</sup> This prospect is more distressing still when one considers that denials based on unrealistic corroboration expectations are likely to disproportionately affect some of the most vulnerable groups of asylum seekers.

C. *Lack of Specific Notice and Opportunity Will Disproportionately Harm the Most Vulnerable Pro Se Asylum Applicants*

The applicants that are most likely to be prejudiced by an IJ’s failure to give effect to the corroboration exception by providing specific notice and

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180. Carla Pike, *The Human Condition and Universality in Credibility Determinations: How Cultural Assumptions Skew Asylum Decisions*, 10 BENDER’S IMMIGR. BULL. 804, 813 (2005).

181. See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 14 IMMIGR. & NAT’LITY L. REV. 227, 273–74 (1992) (describing the frequency with which IJs disbelieve asylum applicants’ explanations for not being able to produce expected corroboration).

182. See *supra* note 129 and accompanying text.

183. See Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 417 (2011).

184. Conroy, *supra* note 29, at 23.

opportunity are pro se asylum seekers.<sup>185</sup> As previously noted, approximately one-third of asylum applicants who appear in immigration court do so without any representation.<sup>186</sup> It comes as no surprise that pro se asylum seekers are nearly five times less likely to win their cases in immigration court than are those represented by counsel.<sup>187</sup> While an experienced attorney may succeed in convincing an IJ that corroborating evidence is “unavailable and unreasonable to expect” in a particular case,<sup>188</sup> the odds are heavily stacked against pro se asylum applicants faced with the same task.<sup>189</sup> Among such applicants, women, children, sexual minorities, and members of traditionally marginalized populations are at a particular disadvantage, because it is often more difficult for them to obtain corroboration than it is for more traditional asylum seekers.<sup>190</sup>

Because they are especially likely to qualify for the corroboration exception, women, children, and sexual minorities would seem to stand the greatest risk of losing their cases for failure to provide corroborating evidence in the absence of an advance notice-and-opportunity requirement. For many of these especially vulnerable applicants,<sup>191</sup> either their membership in a particular social group or the type of persecution they have experienced (or both) is extremely private and personal, and thus nearly impossible to corroborate with extrinsic evidence.<sup>192</sup> For example, a sexual minority asylum applicant who has gone to great lengths to hide her sexual orientation, even from close friends and family, may be forced to flee her country immediately upon discovery.<sup>193</sup> In such a case, the applicant’s prior efforts to conceal her sexual identity—or rejection by friends and family who would otherwise be in a position to help the applicant collect corroborating evidence—provides a compelling explanation for why corroboration of her membership in a sexual minority group cannot reasonably be obtained.<sup>194</sup> Gender-based asylum

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185. See Ardalan, *supra* note 29, at 1014.

186. RAMJI-NOGALES ET AL., *supra* note 27, at 33.

187. Ardalan, *supra* note 29, at 1003.

188. Conroy, *supra* note 29, at 31.

189. In addition to navigating the notoriously complex world of immigration law and procedure, unrepresented asylum applicants must also contend with the significant “costs of properly documenting and corroborating an asylum case.” Uchimiya, *supra* note 30, at 437. Additional obstacles for pro se applicants include “linguistic and cultural differences” and the lasting effects of trauma. *Id.*; see also Ardalan, *supra* note 29, at 1013 (“Obstacles like language barriers, past trauma, limited legal knowledge, and restricted access to basic social services often impede asylum seekers from effectively telling their stories. These obstacles may also prevent asylum applicants from gathering the evidence necessary to carry their burden of proof.”).

190. See Cianciarulo, *supra* note 46, at 139–42; Conroy, *supra* note 29, at 7–11; Stephanie Robins, Note, *Backing It Up: Real ID’s Impact on the Corroboration Standard in Women’s Private Asylum Claims*, 35 WOMEN’S RTS. L. REP. 435, 442–44 (2014).

191. See, e.g., Cianciarulo, *supra* note 46, at 136.

192. See Cianciarulo, *supra* note 46, at 136–37; Conroy, *supra* note 29, at 8–11; Robins, *supra* note 190, at 444–54.

193. See Conroy, *supra* note 29, at 10–11.

194. See *id.* at 10–11, 31–32; Hazeldean, *supra* note 183, at 412–13.

claims, such as those relating to state-tolerated domestic violence or female genital mutilation, are similarly difficult to prove due to the private nature of the persecution at issue.<sup>195</sup> Lastly, children—especially those who are not in contact with their families—are less likely than adults to possess documentation related to past or future persecution or their membership in a particular social group.<sup>196</sup> Pro se asylum applicants that fall into these categories may therefore often have an explanation as to why they do not have and cannot reasonably obtain extrinsic evidence to corroborate their claims. In these cases, failure to afford applicants advance notice and the opportunity to provide such an explanation will likely result in the denial of legitimate asylum claims.

The disproportionate effect that lack of specific notice and opportunity would have on minority pro se asylum seekers is especially troubling because they are the very applicants that are most vulnerable and, for that reason, most deserving of protection. If an IJ does not provide such applicants with specific, advance notice of what corroboration she expects from them, they may have no meaningful opportunity to explain why they cannot reasonably obtain that corroboration. A specific notice-and-opportunity requirement ensures that the very people for whom Congress presumably included the corroboration exception are, in fact, capable of availing themselves of that exception.

#### CONCLUSION

It is essential to the integrity of U.S. asylum law that decision makers have the tools necessary to weed out fraudulent claims. Equally essential, however, is honoring our nation's longstanding legal and humanitarian obligations by extending protection to legitimate refugees. In this age of global insecurity, striking such a balance is more challenging than ever. A widespread and deeply felt desire to protect the United States from further acts of terrorism has proven extremely difficult to balance with a humane and legally principled response to the growing crisis of refugees fleeing Syria and elsewhere. By unambiguously, albeit implicitly, requiring IJs to provide asylum applicants with specific notice of the evidence deemed necessary to corroborate otherwise credible testimony, the REAL ID Act's corroboration provision balances these competing concerns. The exception in Section 1158(b)(1)(B)(ii) for asylum applicants who do not have and cannot reasonably obtain expected corroboration requires IJs to provide applicants a specific opportunity to explain why corroboration is not available prior to

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195. See Robins, *supra* note 190, at 447–51, 457.

196. See Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, to Asylum Officers, Immigration Officers, Headquarters Coordinators, Guidelines for Children's Asylum Claims 27 (Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> [http://perma.cc/2BPA-KY7S].

issuing a decision. Both the text of the REAL ID Act and Congress's expressed intent compel such a reading of the corroboration provision. Moreover, providing otherwise credible asylum applicants with advance, specific notice and opportunity will help ensure that the United States' asylum system does not fail to protect the most vulnerable among those who arrive at our borders seeking refuge from persecution.