# ARTICLES

## THE TOLL PAID WHEN ADJUDICATORS ERR: REFORMING APPELLATE REVIEW STANDARDS FOR REFUGEES

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ABSTRACT

*Deep, variegated, and unresolved tensions run between and within the U.S. courts of appeals' standard of review classifications of the five core elements of the refugee definition. Several circuits have taken note of their dissonant jurisprudence, calling for either en banc or Supreme Court intervention. While existing scholarship raises cogent criticisms of excessive factual deference in U.S. immigration adjudications, very little attention has been paid to how the fact-law divide regarding the refugee definition maps onto review standards in the appellate context. This dearth of scholarly consideration is accompanied by the reality that standards of review often decide cases where the risk of erroneous denial involves the return of a putative refugee to persecution, torture, or death.*

*In this article, I provide the first comprehensive circuit-by-circuit study of each of the five core elements of the refugee definition to show the depth of disagreement related to standards of review. Notwithstanding the high stakes involved in reviewing asylum denials, and the inherent difficulty in obtaining remand when the deferential fact-based standard is applied, confusion prevails in how to catalog each discrete element. Given well-documented deficiencies in agency fact-finding, it is of paramount importance that asylum-seekers receive nondeferential review of their case denials as capaciously as*

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*the law permits. Yet, my original research reveals that U.S. appellate courts often vacillate over how to treat each element, or misclassify as factual issues that are actually legal.*

*The present state of affairs is unacceptably incongruous with the humanitarian ethos undergirding asylum and refugee law. Courts must not forget what is at stake each time they wrongly deny a meritorious asylum application. It is in light of this toll paid when courts err, that I advance an approach that could harmonize the courts of appeals' disparate case law. I posit that application of the plenary nondeferential, mixed-question standard of review—anchored in recent U.S. Supreme Court jurisprudence—offers a framework most likely to provide refugees with more searching review and thereby reduce the likelihood that bona fide claims are errantly rejected.*

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## INTRODUCTION

"Standards of review are critical to the business of judging, and can often be outcome-determinative."[1] This is especially true with regard to judicial review of agency determinations of claims for asylum and withholding of removal.[2] Notwithstanding the life-or-death nature of such adjudications,

1. Evans v. Sec'y, Dep't of Corrs., 703 F.3d 1316, 1336 (11th Cir. 2013).

2. Hernandez v. Garland, 66 F.4th 94, 104 (2d Cir. 2023) (Pooler, J., dissenting) ("Standards [of review] matter."); Palucho v. Garland, 49 F.4th 532, 533 (6th Cir. 2022) (describing in the asylum context just "how deferential [the factual-review] test is."); Gjetani v. Barr, 968 F.3d 393, 401 (5th Cir. 2020) (Dennis, J., dissenting) (arguing that had the majority applied *de novo* review instead of the substantial evidence standard of review, the applicant in that case would have "made a sufficient showing to establish past persecution under" Fifth Circuit precedent); Diallo v. Ashcroft, 381 F.3d 687, 697 (7th Cir. 2004) (noting in the context of an asylum that had it "review[ed] Diallo's claim *de novo*, [it] might" have reached a different outcome in regards to whether the applicant suffered "past persecution."). While a twenty-year-old study of standards of review called into question whether they matter generally, Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 693–95 (2002), recent scholarship has shown that standards of review can be quite consequential in the context of immigration adjudications. *See* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 593–94 (2013); Mary Hoopes, *Judicial Deference and Agency Competence:*

Congress has provided that "the administrative findings of fact [made by the Executive Office for Immigration Review or "Agency"] are *conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary*."[3] The Supreme Court has explained that this standard is not simply deferential, it is "*highly* deferential."[4] Referred to as the *substantial evidence* standard of review—it is applied by courts of appeals reviewing the factual components of immigration agency decisions.[5] In elaborating upon this standard, courts have explained they must affirm such decisions subject to substantial evidence review unless "no reasonable fact finder could make that finding on the administrative record."[6]

The Board of Immigration Appeals ("BIA" or "Board") similarly reviews findings of fact made by the Immigration Judge ("IJ") for *clear error*.[7] The Board will reverse a factual finding under the clear error standard only if it has a "definite and firm conviction" that an error has been made.[8] Or to put it more vividly, one court has explained that it "may not reverse a . . . factual finding under the deferential clear-error standard of review . . . unless it 'strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish.'"[9] Thus, if an asylum application is denied by the agency based upon the facts, whether under the substantial evidence or clear error standards, the probability of success on appeal remains low.

In contrast, pure questions of law receive *de novo* review.[10] Under this standard, the BIA analyzes the IJ's legal conclusions without any deference to the IJ's legal analysis.[11] If further appeal of the legal question is pursued,

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Federal Court Review of Asylum Appeals, 39 BERKLEY J. INT'L L. 161 (2021). And as noted above, Courts continue to believe that standards of review matter.

3. Immigration and Nationality Act ("INA") § 242(b)(4)(B), U.S.C. 8 § 1252(b)(4)(B) (emphasis added). The Executive Office for Immigration Review ("EOIR") is a federal agency made up of Immigration Judges and the Board of Immigration Appeals. Decisions issued by Immigration Judges are reviewable before the Board of Immigration Appeals. Together, these adjudicators decide all claims for asylum and withholding made by noncitizens in removal proceedings.

4. Garland v. Ming Dai, 593 U.S. 357, 365 (2021) (quoting Nasrallah v. Barr, —— U.S. ——, 140 S. Ct. 1683, 1692, 207 L.Ed.2d 111 (2020)); Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47 (2000) (standards of review "indicate[d] to the reviewing court the degree of deference that it is to give to the actions.").

5. Nasrallah v. Barr, 140 S. Ct. 1683,1692 (2020).

6. Dia v. Ashcroft, 353 F.3d 228, 249 (3d Cir. 2003).

7. 8 C.F.R. § 1003.1(d)(3)(i), (ii).

8. R–S–H–, 23 I. & N. Dec. 629, 637 (B.I.A. 2003) (quoting *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948)); accord United States v. Cox, 744 F.3d 305, 308 (4th Cir. 2014) (explaining a clear error occurs when there is a definite and firm conviction a mistake has been made).

9. Palucho v. Garland, 49 F.4th 532, 540 (6th Cir. 2022) (citing *Taglieri v. Monasky*, 907 F.3d 404, 409 (6th Cir. 2018) (en banc) (citation omitted), *aff'd* —— U.S. ——, 140 S. Ct. 719 (2020)). Some scholarship has analyzed whether there is any practical distinction between the factual review standards of clear error and substantial evidence. While some cases suggest that substantial evidence is even more deferential than clear error, it is difficult to conceive of a set of facts where it would make a difference. *See* Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101 (2012); *but see Palucho,* 49 F.4th at 540 (noting "the Supreme Court has described the clear-error standard as a more searching review than the substantial-evidence standard applied in the *agency* context") (citing *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999)).

10. R–A–F–, 27 I. & N. Dec. 778, 779 (Att'y Gen. 2020).

11. *Id.*

then the courts of appeals similarly review the agency's legal conclusions anew unless it regards the question as one in which the agency is entitled to *Chevron* or *Auer* deference.[12] Assuming *Chevron* or *Auer* deference does not apply, the court of appeals will affirm only if they agree with the decision below and will substitute their own judgement if not.[13] That is, *de novo* review requires "the result on appeal . . . [to] correspond precisely to what the appellate judge considers the most correct decision" without regard to the outcome reached by the Agency.[14]

In addition to deferential factual review and nondeferential legal review, there is mixed-question review. Most courts of appeals and the BIA agree in principle that the application of law to facts involves a mixed-question standard of review, where factual findings are to be parsed out and reviewed under the deferential substantial-evidence/clear-error standards, and legal conclusions are reviewed *de novo*.[15] However, in practice a number of courts have misconstrued what are in effect mixed-questions as those exclusively of fact.[16] And the Supreme Court's recent treatment of mixed-questions suggests there may be an even more nuanced framework for determining the appropriate standard of review on mixed-questions, where fact-leaning mixed-questions get deferential review and law-leaning mixed questions get *de novo* review.[17]

Consequently, this fact-law continuum—and where adjudicators land on classifying a given issue as primarily factual or legal—is vital to both the courts of appeals and the BIA in selecting the correct standard of review to apply. While conceptually clear, making fine distinctions between factual, legal, and mixed-questions can be elusive,[18] particularly in adjudications of claims for asylum and withholding of removal protection.

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12. The administrative deference doctrines of *Chevron* and *Auer* are applicable to certain legal determinations made by the Board. The Agency is more likely to prevail in the dispute if it is entitled to *Chevron* or *Auer* deference. This issue is discussed at greater length below. *See infra* Part III.A.

13. CHARLES H. KOCH JR., ADMINISTRATIVE LAW AND PRACTICE, 90–94 (3d ed. 2010).

14. Kagan, *supra* note 9, at 108.

15. R–A–F–, 27 I. & N. Dec. at 779 ("Although the Board reviews an [IJ]'s factual findings for clear error, it reviews *de novo* 'questions of law,' . . . including the application of law to fact."); Z–Z–O–, 26 I. & N. Dec. 586, 591 (B.I.A. 2015) ("[W]e will accept the underlying factual findings of the [IJ] unless they are clearly erroneous, and we will review *de novo* whether the underlying facts found by the [IJ] meet the legal requirements for relief from removal[.]"); Khouzam v. Ashcroft, 361 F.3d 161, 165 (2d Cir. 2004) (noting that although findings of fact are reviewed under the substantial evidence standard, "[t]he BIA's application of law to undisputed facts is reviewed *de novo*"); Blanco v. Att'y Gen., 967 F.3d 304, 310, 315 (3d Cir. 2020) (reviewing *de novo* "both pure questions of law and applications of law to undisputed facts").

16. *See generally infra* Part II.

17. *See* U.S. Bank Nat'l Ass'n *ex rel.* CW Capital Asset Mgmt. v. Village at Lakeridge, LLC, 583 U.S. 387, 395–96 (2018) ("Mixed questions are not all alike. . . . [T]he standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.").

18. Kagan, *supra* note 9, at 105 ("determining what is law and what is fact. . .are constantly unclear."); *see, e.g.*, Williams v. Garland, 59 F.4th 620, 636 (4th Cir. 2023), *as amended* (Feb. 10, 2023) (after describing standards of review generally, the court observed that "[t]he harder question is how exactly to characterize BIA . . . determinations" as factual, legal, or mixed); Wainwright v. Witt, 469 U.S. 412, 429 (1985) (observing that those inquiries are not always "easy to separate"); Joseph Blocher & Brandon Garrett, *Fact Stripping*, 73 DUKE L. J. 1, 17 (2023).

To be granted asylum, an applicant must satisfy the five core elements of the refugee definition: (1) their past or feared harm must be sufficiently severe to constitute persecution; (2) their fear of persecution must be well-founded; (3) their harm must have a nexus to (4) a protected characteristic; and (5) their persecution must be committed by the government, or those the government is unable or unwilling to control.[19] Claims for withholding of removal rely upon a similar set of elements.[20] Each element has been litigated at great length, resulting in an enormous and evolving body of refugee and asylum law. What remains less certain, however, is how the elements are presently classified as primarily factual, legal, or mixed.

Initially, a handful of courts of appeals—the de facto court of last resort for most asylum appeals[21]—treated such adjudications as almost exclusively factual.[22] Yet, as the case law in this space has become increasingly complex, numerous tensions have crystalized regarding how courts catalog individual elements of the refugee definition along the fact-law continuum.[23] To date, the law remains in a state of tremendous flux, and there is growing uncertainty with respect to the proper standard of review to apply to each facet of the refugee definition. Courts are frequently inconsistent in how they classify the foregoing elements for purposes of standards of review, and some elide the question altogether, opting to recite the standard and resolve the case without explaining which standard they applied in reaching their conclusion.[24]

The Tenth Circuit, for example, has openly questioned its own case law treating the persecution element of the refugee definition as one exclusively of fact,[25] suggesting that some of this confusion may flow from uncritical reliance upon the Supreme Court's thirty-plus-year-old decision in *INS v. Elias–*

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19. INA § 101(a)(42), 8 U.S.C. § 1101(42); INA § 208, 8 U.S.C. § 1158; Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 511–15 (2021). While there are many other requirements to be granted asylum, the five core elements enumerated above are most commonly litigated on appeal and thus are the focus of my study. *See* Dree Collopy, *Asylum Primer*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION PUBLICATIONS (2023) for a comprehensive treatment of the requirements to be granted asylum in the U.S. Because asylees must satisfy the refugee definition too, I use the terms asylee and refugee interchangeably in this paper.

20. INS v. Stevic, 467 U.S. 407, 429–30 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987). The primary eligibility differences for withholding of removal is that it is nondiscretionary and requires a clear probability of future harm to be granted. *Id.* In some circuits, its nexus analysis is construed as easier to satisfy. *See infra* note 126.

21. Hoopes, *supra* note 2, at 166. On average 5,400 petitions for review of BIA decisions are filed each year. *Table B.3, U.S. Courts of Appeals–Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2017, through 2021*, U.S. COURTS (last visited September 30, 2021), https://perma.cc/LR5A-LJYY. Given the jurisdictional preference in favor of review of asylum claims, INA § 242(a)(2)(B)(ii), 8 § U.S.C. 1252, many of those petitions for review involve asylum and related protections. An appeal to the courts of appeals can be taken as of right, but further appeal requires the Supreme Court to grant certiorari, which happens rarely.

22. *See, e.g.*, Xue v. Lynch, 846 F.3d 1099, 1105 n.11 (10th Cir. 2017). *See infra* notes 74–78 and accompanying text.

23. *See generally infra* Part II.

24. *See generally infra* Part II; *see also* Blocher & Garrett, *supra* note 18, at 6.

25. *Xue*, 846 F.3d at 1105 n.11

*Zacarias*.[26] The Ninth Circuit similarly has characterized its case law "on this subject [as] a bit of a mess,"[27] explicitly calling upon "the en banc court [to] take up these issues" if the Supreme Court does not do so first.[28] Given the deep and unresolved splits among and within the circuits, eventual Supreme Court review seems unavoidable.[29]

Thoughtful scholarship exists analyzing the origins of the substantial evidence standard in immigration adjudications and raising important criticisms of such excessive deference where the stakes of adjudication are so high.[30] However, very little attention has been paid to the fact-law continuum as applied to the foregoing five refugee elements despite the plethora of inter- and intra-circuit splits on each element.[31] The dearth of scholarly consideration is accompanied by the Supreme Court's recent recognition that in the context of judicial review of agency decisions applying law to fact, such mixed-questions are the kind of *legal questions* that are subject to review by courts.[32] Given that standards of review are increasingly being used to decide cases where the risk of erroneous denial involves the return of a refugee to persecution, torture, or death, the time is ripe to pay closer attention to the correct standard of review to apply to decisions involving such weighty consequences.[33] Moreover, given some courts' tendency to shoehorn agency adjudications into factual boxes[34] even when dealing with legal or quasi-legal

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26. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992).

27. Singh v. Garland, 48 F.4th 1059, 1074 (9th Cir. 2022) (Miller, J., concurring) (citing Fon v. Garland, 34 F.4th 810, 823 (9th Cir. 2022) (Collins, J., concurring)).

28. *Id.*

29. *See infra* Part II.A.1. A certiorari petition was filed before the Supreme Court on this issue last term in He v. Garland, 24 F.4th 1220 (8th Cir. 2022) available at https://perma.cc/72DD-WQSS. However, the case was settled and thus the issue remains unresolved.

30. Kim, *supra* note 2; Kagan, *supra* note 9; Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133 (2005).

31. Hoopes, *supra* note 2, at 161 (noting generally that "very few studies have examined the role that federal courts play in reviewing this system [of immigration adjudication of asylum decisions]" and "there has been very little . . . empirical work on asylum decision-making within the federal appellate courts.").

32. Whether this holding maps onto standards of review remains to be seen. *Compare* Alexis v. Barr, 960 F.3d 722, 730 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 845 (2020) ("The Supreme Court recently clarified that we have jurisdiction to consider mixed questions of law and fact . . . . Accordingly, we may review the application of legal standards for asylum, withholding of removal, or protection under CAT to the settled, undisputed facts in Alexis's case . . . *de novo*[.]") (citing Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1069 (2020)) *with* Williams v. Garland, 59 F.4th 620, 633 (4th Cir. 2023) (discussing *Guerrero-Lasprilla* and acknowledging that "there is some tension in characterizing a question as legal when determining jurisdiction but as factual or discretionary when choosing the standard of review," but holding that such a distinction is merited). Regardless of how that question is resolved, *Guerrero-Lasprilla* makes clear that the fact-law distinction likewise can be critically important for obtaining judicial review of certain immigration adjudications. *See also* Wilkinson v. Garland, ___ U.S. ___, 2024 WL 1160995, *6 (March 19, 2024).

33. Hoopes, *supra* note 2, at 195–96 (finding in an empirical comparison—between the First, Seventh, Ninth, and Eleventh Circuits remand decisions—that courts with more searching standards of review were more likely to remand).

34. Michael Kagan, Chevron's *Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119, 1149 (2021) ("Circuit courts often rely on [the substantial evidence standard], even in cases that could raise legal disputes").

determinations (a probable legacy of *Elias-Zacarias*), greater clarity on this issue is likely to provide putative refugees with more favorable review standards.[35]

In Part I of this article, I survey the origins of the standards of review as applied to agency asylum and withholding adjudications, demonstrating the troubling role that *Elias-Zacarias* has played in sowing confusion among the courts of appeals. I analyze agency case law for clues with respect to how it has treated each element of the refugee definition. Finally, I canvass both the underlying policy rationales—as well as the critiques—of deferential standards of review. In Part II, I undertake the first comprehensive study of the five core elements of the refugee definition for how the eleven courts of appeals have classified each element as primarily factual, legal, or mixed.[36] I give particular attention to both inter- and intra-circuit splits on each facet. Finally, in Part III, I present an argument for how best to resolve these tensions through application of plenary nondeferential mix-question review, in which careful attention to properly classifying the asylum elements leads to more capacious *de novo* review.

The current administrative state has been delegated extraordinary decision-making power.[37] While courts are entrusted with reviewing agency action, where unmerited deference is given, "how can we ensure that . . . administrative decisions are fair and reasonable?"[38] When those regulators make determinations that involve asylum and withholding protections, courts must "not forget . . . what is at stake . . . each time" they "wrongly deny a meritorious asylum application:" they "risk condemning an individual" to persecution or death.[39] It is in light of this "toll . . . paid if and when [courts] err,"[40] that standards of review must be situated.

## I. THE ORIGINS OF STANDARDS OF REVIEW IN ASYLUM ADJUDICATIONS

In this Part, I show how standards of review of agency asylum and withholding adjudications have been negatively impacted by an overly-expansive and flawed reading of the Supreme Court's decision in *Elias-Zacarias*.[41] Next, I trace the evolution of standards of review of protection decisions before the agency. Finally, I assess the underlying policy rationales for, and

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35. The reason less deference to underlying decisions results in disproportionate benefit to refugees litigating in the courts of appeals flows from the fact that when asylees are successful at the Board, there is no removal order and therefore no appeal. INA § 242(b)(9), 8 § U.S.C. 1252(b)(9). Thus, all asylum appeals to the courts of appeals involve challenges denial of relief. Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 145 (2014).

36. To conduct this analysis, my research assistants and I created an original dataset, involving 1,400 data points from across all eleven circuits from cases decided between 1992 and 2023.

37. Stephen Breyer, *The Executive Branch*, *Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190–92 (2011).

38. *Id*. at 2192.

39. Ming Shi Xue v. B.I.A., 439 F.3d 111, 113–14 (2d Cir. 2006).

40. *Id*.

41. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992).

critiques of, deferential standards of review in this arena. Part I sets the stage for my comprehensive review of the divided court of appeals decisions analyzed in Part II, and finally for my proposal to bring harmony to standards of review related to agency asylum and withholding decisions in Part III.

### A. Elias-Zacarias *and the Ratcheting Up of the Substantial Evidence Standard*

In its current form as applied to asylum claims, the factual review standard was first articulated by the U.S. Supreme Court in *Elias-Zacarias*[42] in 1992.[43] There, in a footnote, the Court stated that "[t]o reverse . . . BIA finding[s]," the Court "must find that the evidence not only *supports* [the petitioner's] conclusion, but *compels* it."[44] The issue in that case related to whether the applicant feared harm on account of a protected characteristic.[45] In its opinion, the Court held that even if the applicant possessed the requisite political opinion, he "still ha[d] to establish that the record . . . *compel[ed] the conclusion*" that his persecutor harmed him "on account of" that political opinion.[46] Since the agency found he had failed to satisfy this *on account of* nexus requirement, the Court explained that in "seek[ing] . . . judicial review," he "must show that the evidence . . . *was so compelling that no reasonable factfinder could fail to find*" the facts establishing nexus.[47]

Scholars have recognized that this posture of genuflection taken by the Supreme Court in *Elias-Zacarias* was a marked departure from past articulations of the substantial evidence standard.[48] While the substantial evidence standard has long been applied in the context of agency action[49] taken under the Administrative Procedures Act (APA),[50] it actually predates

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42. *Elias-Zacarias*, 502 U.S. at 478.

43. Knight, *supra* note 30 (noting that in "1992, in its *Elias-Zacarias* decision . . . the U.S. Supreme Court deployed different and far more deferential language to describe the longstanding 'substantial evidence' standard.").

44. *Elias-Zacarias*, 502 U.S. at 481 (emphasis in original).

45. *Id*.

46. *Id*. at 483 (emphasis added).

47. *Id*. at 483–84.

48. Knight, *supra* note 30 (citing Shayna S. Cook, *Repairing the Legacy of* INS v. Elias-Zacarias, 23 MICH. J. INT'L L. 223 (2002); Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MCH. J. INT'L L. 265, 287–88 (2002); Arthur C. Helton, *Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: a Comparative Perspective*, 29 SAN DIEGO L. REV. 581 (1992); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C.L. REV. 413 (1993); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH J. INT'L L. 1179 (1994); Karen Musalo, *Ruminations on* In Re Kasinga: *the Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357 (1998)); Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 154 (2014).

49. Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 414 (1971). During the "finality era," from 1891 to 1952, federal courts reviewed removal decisions under the "some evidence" standard. *Supra* note 18, Blocher & Garrett, at 34–35. In 1952, Congress extended the APA's substantial evidence test to judicial review of removal decisions. *Id*. at 35; 5 U.S.C. § 706(2)(E).

50. 5 U.S.C. §§ 556, 557.

the APA.[51] The standard can be traced back to disputes involving railroad regulation.[52] Michael Kagan has explained that "[t]o escape difficulties raised by turn-of-the-century railroad regulations cases, the Supreme Court transposed to administrative law the fact-law distinction originally rooted in the unique role of juries in our system of justice."[53] While courts had reviewed *de novo* decisions by the Interstate Commerce Commission (ICC), "popular backlash calling for stronger regulation of the railroads" led the Supreme Court to "begin deferring to the ICC's findings."[54] Hence, "the fact-law dichotomy" in review of administrative decisions was born.[55]

Prior to *Elias-Zacarias*, courts had long applied a different kind of substantial evidence standard to immigration decisions.[56] A leading treatise described the standard as follows:

> "[T]he reviewing court may not substitute its judgment for that of the agency, but *must evaluate the whole record*, taking account both the supporting and detracting evidence, to ascertain only whether there is evidence to sustain the agency's decision. . . . [M]ore than a mere scintilla of evidence is required. . . . *In the final analysis there must exist sufficient evidence as a reasonable mind would accept as adequate to form a conclusion."*[57]

That framing of the substantial evidence standard—requiring sufficient evidence a reasonable mind would accept as adequate to support the conclusion—derives from a 1938 case: *Consolidated Edison Co. of New York v. N.L.R.B.*[58] The *Consolidated Edison* substantial evidence standard was not toothless, clarifying that it could not justify findings "without a basis in evidence having rational probative force."[59]

Over time, however, courts began to construe *Consolidated Edison*'s standard in increasingly deferential terms; and in 1951, the Supreme Court intervened to reset the standard.[60] In *Universal Camera Corp. v. N.L.R.B.*,[61] the Court recognized that the heightened level of deference courts had

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51. *See* Kagan, *supra* note 9 (noting that the standard goes back "as far back as the Supreme Court's articulation of the substantial evidence standard in the pre-World War II case Consolidated Edison Co. v. NLRB," 305 U.S. 197 (1938)).

52. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 950–51 (2011).

53. *Id.*; Kagan, *supra* note 9, at 113–14.

54. Kagan, *supra* note 9.

55. *Id.*

56. *See* Knight, *supra* note 30 (citing Wong Wing Hang v. INS, 360 F.2d 715, 717 (2d Cir. 1966) ("[F]actual findings on which a discretionary denial of suspension [of deportation] is predicated must pass the substantial evidence test.")).

57. *See* Knight, *supra* note 30 at 135–36 (citing 6–51 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 51.01 (2005) at § 51.02 ("Judicial Review of Questions of Law and Facts") (emphasis added); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

58. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)

59. *Id.* at 230.

60. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

61. *Id.*

afforded agency decisions had engendered sharp criticism. Some asserted that courts were deferring even where the agency allowed for "irresponsible admission and weighing of . . . opinion, and emotional speculation in place of factual evidence."[62] Such obsequiousness, critics argued, led to "'shocking injustices' and intimations of judicial 'abdication.'"[63] The dissenting view of a committee commissioned by the Attorney General to consider the issue put it this way:

> "[L]ack of . . . judicial review [has] led to inconsistency and uncertainty. . . . [U]nder a prevalent interpretation of the substantial evidence rule[,] if . . . substantial evidence is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—*unless indeed the stage of arbitrary decision is reached*. Under this interpretation, the courts need to read only one side of the case and, if they find *any* evidence there, the administrative action is to be sustained and the record to the contrary . . . ignored.'"[64]

Responding to such criticisms, the Court in *Universal Camera* clarified the meaning of the substantial evidence standard. The Court reaffirmed the "requirement [to] canvass[] 'the whole record' in order to ascertain substantiality."[65] It also clarified that while the standard does not permit a court to "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo,"* that does not mean the "court is [] barred from setting aside a Board decision when it cannot conscientiously find [] the evidence supporting that decision is substantial, when viewed . . . in its entirety."[66] The *Universal Camera* Court thus concluded that "[t]he Agency's findings are entitled to respect; but they must nonetheless be set aside when the record . . . clearly precludes the . . . decision from being justified by a fair estimate of the [evidence]."[67]

Following passage of the Refugee Act of 1980, a majority of circuits incorporated *Universal Camera*'s understanding of the substantial evidence standard into asylum adjudications.[68] While a few courts reviewed asylum denials under an abuse of discretion standard, most employed the *Universal Camera* substantial evidence standard.[69] In fact, at the time *Elias-Zacarias* was decided, the statutory standard of review provided that "findings of fact, if supported by reasonable, substantial, and probative evidence on the record

62. *Id*. at 478.
63. *Id*.
64. *Id*. at 481 (cleaned up) (emphasis added).
65. *Id*. at 465.
66. *Id*.
67. *Id*. at 90.
68. Knight, *supra* note 30 at 136–38.
69. *Id*.

considered as a whole, shall be conclusive."[70] While a slightly different articulation, that statutory review standard largely tracked with the traditional substantial evidence standard of *Universal Camera*.[71]

However, that understanding of the substantial evidence standard changed with the advent of *Elias-Zacarias*. As noted above, the Court there reframed the standard of review such that an applicant "must show [] the evidence he presented *was so compelling that no reasonable factfinder could fail to find*" the disputed fact.[72] Perhaps even more problematically, the Court stated sweepingly that "[t]he BIA's determination that [an applicant] was *not eligible for asylum* must be upheld" unless he could satisfy that *compelling* evidence standard.[73] The Court's conclusion not only went beyond the prevailing understanding of the substantial evidence standard at that time, it also muddled the fact-law distinction by seemingly applying the standard broadly to asylum eligibility determinations writ large.[74]

After *Elias-Zacarias*, several courts of appeals began to treat this newly-minted substantial evidence standard as swallowing every aspect of an asylum appeal, not just factual determinations. For example, the Seventh Circuit explained that "[a]n applicant bears a heavy burden on appeal after the Board has *denied his application for asylum*" and that the court will reverse "the *Board's decision* . . . only if the evidence is 'so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.'"[75] Similarly, the Eighth Circuit held that it "must affirm *a decision denying asylum*" unless "the evidence . . . was so compelling that no reasonable fact-finder could fail to find" an element was satisfied.[76] The Fourth Circuit stated that "*BIA determinations concerning asylum eligibility or withholding of removal* are conclusive" unless an applicant "seek[ing] . . . judicial reversal. . . [can] show that the evidence . . . was so compelling that no reasonable factfinder could fail to find" persecution.[77] While the First Circuit acknowledged "[t]he Board's determination of statutory eligibility for" asylum and withholding is "a mixed question of law and fact," it still held that that determination is "conclusive" unless the "evidence . . . presented was so compelling that no reasonable factfinder could fail to find *the elements of statutory eligibility" were met*.[78] In all four of these cases, the courts did not limit *Elias-Zacarias*' articulation of the standard of review to just fact-finding regarding nexus

70. 8 U.S.C. § 1105a(a)(4) (1992).
71. Knight, *supra* note 30 at 136–38.
72. INS v. Elias-Zacarias, 502 U.S. 478, 483–84. (1992). Subsequent courts have understood this language as setting the bar high for applicants seeking reversal. *See, e.g.*, Ghebremedhin v. Ashcroft, 392 F.3d 241, 243 (7th Cir. 2004) ("[I]f the record evidence *compels* the result that we have reached, then no alternative determination is possible.").
73. *Id*. at 481 (emphasis added).
74. Knight, *supra* note 30 at 139.
75. Ahmad v. INS, 163 F.3d 457, 461 (7th Cir. 1999) (citing *Elias-Zacarias*) (emphasis added).
76. Alemu v. Gonzales, 403 F.3d 572, 574 (8th Cir. 2005).
77. Blanco De Belbruno v. Ashcroft, 362 F.3d 272 (4th Cir. 2004).
78. Gebremichael v. INS, 10 F.3d 28, 34 (1st Cir. 1993) (added brackets omitted) (emphasis added).

determinations; instead, they subjected the entire asylum decision to the exacting *compelling* evidence standard.

Nevertheless, a version of that standard of review articulated in *Elias-Zacarias* was eventually incorporated into the INA's judicial review provisions. The relevant statute currently provides that "the [agency's] administrative findings of fact are conclusive unless any reasonable adjudicator would be *compelled* to conclude to the contrary."[79] This codification—though troubling in some respects—was not all bad for would-be refugees on appeal. While Congress incorporated the more onerous language of *Elias-Zacarias*, it likewise cabined that standard to "administrative findings of fact," not questions of law or mixed-questions. Rather, in a neighboring provision, Congress reaffirmed that while courts may be barred from reviewing certain immigration cases, even in those cases they retain jurisdiction to "review [] constitutional claims" and "questions of law."[80] Read together, these provisions make clear that Congress contemplated review of both factual and legal questions and explicitly mentioned only factual questions when reciting the *compelling* evidence standard of review.

As detailed in Part II below, *Elias-Zacarias* has cast a long shadow, continuing to sow confusion in numerous court of appeals decisions grappling with the appropriate standard of review to apply to a given element of the refugee definition. Court of appeals rulings tending to elide the distinction between factual and legal elements only serve to exacerbate the muddle.

### B. *Evolution of Standards of Review Within the Board of Immigration Appeals*

Since at least 1969, "the Board [had] reviewed all aspects of IJ decisions *de novo*."[81] However, Attorney General John Ashcroft changed that in 2002, bifurcating the standard the Board would apply depending upon whether it was reviewing a factual finding or a legal conclusion.[82] Those regulations—which currently govern—provide "questions of law" are reviewed "*de novo*"

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79. INA § 242(b)(4)(B) (1996) (emphasis added).

80. INA § 242(a)(2)(D).

81. Andrew Patterson, Kristin Macleod-Ball, & Trina Realmuto, *Standards of Review Applied by the Board of Immigration Appeals*, Practice Advisory (April 22, 2020), https://perma.cc/GH7C-6XJF (citing *Matter of S-H-*, 23 I. & N. Dec. 462, 463–64 (B.I.A. 2002)); *In Re* Vilanova-Gonzalez, 13 I. & N. Dec. 399, 402 (B.I.A. 1969).

82. *Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002). To great criticism, the Ashcroft "reforms" also created a mechanism through which the Board could streamline its review with very little analysis by a single member. BIA remands figures plummeted, resulting in a sharp increase in the number of Board decisions appealed to the courts of appeal such that within five years, 18% of the total federal docket involved review of BIA decisions. The federal appellate bench responded by expressing deep misgivings regarding the quality of the agency's adjudication. Michael Kagan, *supra* note 9 at 101; Kim, *supra* note 2. As a consequence of this change and an accompanying purge of immigrant-friendly members of the Board, one scholar has calculated the impact of the "Ashcroft reforms" to be a 1,400% increase in the number of federal appeals. *See* Hoopes, *supra* note 2 at 169.

while "findings of fact" are reviewed for clear error.[83] The regulation drafters explained the IJ's "determination of 'what happened' . . . is a factual determination . . . reviewed under the clearly erroneous standard."[84] So-called historical facts found by the IJ are subject to deferential factual review by the Board. In contrast, the drafters explained the IJ's "determinations of whether these facts" satisfy a legal element "are questions . . . not [] limited [to] the 'clearly erroneous' standard."[85] Rather, those application-of-law-to-fact determinations are legal and subject to *de novo* review.[86] The rules are supposed to reflect the agency's "analytical approach to deciding cases," one in which the standard of review aligns with "the qualities of adjudication that best suit the different decisionmakers."[87]

The 2002 regulations also provide that the Board "will not engage in *de novo* review of findings of fact determined by an [IJ];" instead the BIA will "review[] only to determine whether the findings of the [IJ] are clearly erroneous."[88] Similarly, the regulations state that "[e]xcept for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals."[89] If a "party assert[s] that the Board cannot properly resolve an appeal without further factfinding," they "must file a motion for remand" and "[i]f further factfinding is needed," the Board should remand.[90]

In published decisions, the Board has elaborated upon these regulatory provisions to provide a mixed-standard of review, explaining that "[a]lthough [it] reviews an [IJ]'s factual findings for clear error, it reviews *de novo* 'questions of law' . . ., *including the application of law to fact*."[91] The Board "will review *de novo* whether the underlying facts found by the [IJ] meet the legal requirements for relief from removal."[92]

As applied to asylum, the Board has taken a relatively common sense approach to classifying elements. For example, the Board regards a persecutor's motive as a factual determination.[93] However, whether that motive satisfies the legal nexus requirement gets *de novo* review.[94] It reviews the question of whether an applicant merits a discretionary grant of asylum as a

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83. 8 C.F.R. § 1003.1(d)(3)(i) – (ii).
84. *Board of Immigration Appeals, supra* note 82.
85. *Id.*
86. Matter of Z–Z–O–, 26 I. & N. Dec. 591 (B.I.A. 2015); DOJ Guidance, 67 Fed. Reg. at 54,890; Umana-Escobar v. Garland, 69 F.4th 544, 550–51 (9th Cir. 2023).
87. Patterson, Macleod-Ball, & Realmuto, *supra* note 81.
88. 8 C.F.R. § 1003.1(d)(3)(i).
89. *Id.*
90. *Id.*
91. Matter of R–A–F–, 27 I. & N. Dec. at 779 (emphasis added).
92. Matter of Z–Z–O–, 26 I. & N. Dec. 591 (B.I.A. 2015).
93. Matter of N-M-, 25 I. & N. Dec. 526, 532 (B.I.A. 2011) ("A persecutor's actual motive is a matter of fact to be determined by the [IJ] and reviewed by [the BIA] for clear error.").
94. Umana-Escobar v. Garland, 69 F.4th 544, (9th Cir. 2023) ("In *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008), the BIA stated that the nexus determination is a legal determination subject to *de novo* review. *Id.* at 588 n.5"); *See* Matter of M-R-M-S-, 28 I. & N. Dec. 757, 758 (B.I.A. 2023).

legal determination.[95] Whether a particular social group is cognizable is a legal conclusion, but whether an individual applicant is a member of their group, is a factual question.[96] And firm resettlement determinations require application of a mixed-question standard of review.[97]

That is not to say, however, that the Board has always been a paragon of clarity in what it determines is a factual finding, a legal conclusion, or a mixed-question. For example, the Board once treated predictive findings regarding the harm a refugee is likely to confront in their country as a legal determination,[98] but now regards such findings as factual.[99] Nevertheless, the Board still holds that whether those predictive facts "establish[] an objectively reasonable fear of persecution" is a legal determination meriting *de novo* review.[100] Similarly, while the BIA has ostensibly recognized that an IJ can commit legal error in the course of making determinations related to nonstate persecutors,[101] it has more recently declared that this element of the refugee definition is one involving only factual determinations.[102]

Although the Board has provided some clarity as to how the five core elements of the refugee definition are reviewed, that clarity is belied by the fact that the Board is routinely reversed for failing to apply the correct standard.[103]

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95. Matter of A-H-, 23 I. & N. Dec. 774, 778–79 (Att'y Gen. 2005).

96. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 390–91 (B.I.A. 2014); *see also* Matter of A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

97. Matter of A-G-G-, 25 I. & N. Dec. 486, 488 (B.I.A. 2011) (employing a bifurcated standard of review to the question of whether an asylum applicant was "firmly resettled" in third country prior to entering United States).

98. Matter of A-S-B-, 24 I. & N. Dec. 493, 496 (B.I.A. 2008); see also Matter of V-K-, 24 I. & N. Dec. 500, 501 (B.I.A. 2008) (holding that findings related to the future probability of torture is not factual); Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMINISTRATIVE LAW REVIEW 283, 293–96 (2011).

99. Matter of Z–Z–O–, 26 I. & N. Dec. 591, 586, 589–90 (B.I.A. 2015) (overturning prior BIA precedent in light of contradictory decisions from several courts of appeals and "hold[ing] that an [IJ]'s predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review").

100. *Id*. at 590–91.

101. *See, e.g*., Portillo Flores v. Garland, 3 F.4th 615, 635 (4th Cir. 2021) (en banc) (holding that where the agency ignores the danger/futility exception to reporting nonstate actor violence, derived from Matter of S-A-, 22 I. & N. Dec. 1328 (B.I.A. 2000), it commits legal error) (citing Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1057 (9th Cir. 2006), which locates that test in *Matter of S-A-*)).

102. Matter of C-G-T-, 28 I. & N. Dec. 740, 743 (B.I.A. 2023) ("Whether a government is unable or unwilling to protect an individual from persecution is a question of fact that we review for clear error.").

103. *See supra* note 81 at 7 (citing *Garcia-Mata v. Sessions*, 893 F.3d 1107, 1110 (8th Cir. 2018) (remanding because the court could not 'discern from the Board's decision whether it followed the governing regulations on standards or review"); Sheriff v. Att'y Gen., 587 F.3d 584, 592–93 (3d Cir. 2009) (finding that "[i]t is difficult, if not impossible, to determine what standard of review the BIA applied, and to what determinations"); Tran v. Gonzales, 447 F.3d 937, 944 (6th Cir. 2006) (faulting the BIA for "lack of reference to any standard of review"); Zumel v. Lynch, 803 F.3d 463, 476–77 (9th Cir. 2015) (remanding where the BIA recited clear error standard in its decision, only to overturn several of the IJ's factual findings with nothing more than "conclusory statements"); Waldron v. Holder, 688 F.3d 354, 360–61 (8th Cir. 2012) (remanding where "BIA set forth the correct standard of review at the outset of its decision," but "deviated from this standard" in actual application); Hussam F. v. Sessions, 897 F.3d 707, 723 (6th Cir. 2018) (remanding where the Board recited the correct clear error standard of review, but engaged in independent factfinding); Rosales Justo v. Sessions, 895 F.3d 154, 161 (1st Cir. 2018) (stating that the BIA's selection of a standard of review "is not . . . an 'administrative finding of fact' subject to the substantial evidence standard . . . but a legal determination" subject to *de novo* review).

Additionally, confusion in this area is further compounded by some court of appeals decisions that depart from the classification the Board has assigned to the elements along the fact-law continuum, a theme which is examined in Part II.[104]

### C. *Critiques of the Underlying Policy Rationales for Deferential Standards of Review*

The justifications advanced for deferential review have included improved accuracy, reliance upon agency expertise, and efficiency in the division of labor between adjudicators. Arising out of the common law tradition, courts have made certain assumptions about the capacity of adjudicators to make factual findings accurately by hearing from a live witness, assessing their credibility, and physically handling pieces of evidence.[105] Additionally, the presumptively technocratic nature of the administrative state is often cited as a reason for granting deference to agency experts thought to be better equipped than judiciary generalists to make sound decisions regarding a record created within a complex legal context.[106] Finally, deference to factual findings ostensibly creates an efficient division of labor in which trial courts find facts, and appellate courts refrain from duplicating trial courts' work.[107]

Scholars have provided grounds on which to question the assumptions used to justify this level of deference.[108] For example, empirical research has produced a near consensus among social scientists that "assumption[s] long made by . . . courts about the value of observing demeanor is empirically false."[109] Indeed, "[i]n experiments that ask people to judge whether a speaker is telling the truth or lying by watching and listening to them, respondents are little better than chance at getting it right."[110] Although experiments involving detailed interviews can improve lie detection, "the primary cue to deceit in these experiments was the inconsistent content of answers, not nonverbal signals."[111] In other words, these "credibility assessment strategies rely on matters easily captured in a written record, they do not provide justification for an appellate court to defer to a first instance decision maker."[112]

Other empirical research has shown that because of biases, implicit and otherwise, witness observation in court may actually be less accurate than detached analysis of a written record.[113] Because "people are more likely to

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104. *See, e.g.*, Xue v. Lynch, 846 F.3d 1109, 1105 n.11; *see also* Lin v. Holder, 723 F.3d 300, 307 (1st Cir. 2013) (recognizing the BIA reviews *de novo* the IJ's persecution determination, but the Tenth Circuit nevertheless reviews that issue under the "deferential substantial evidence standard").

105. Kagan, *supra* note 9, at 102–03.

106. *Id.* at 117.

107. *Id.*

108. Kim, *supra* note 2, at 108; Kagan, *supra* note 9, at 101.

109. Kagan, *supra* note 9 at 129.

110. *Id.*

111. *Id.* at 134–35.

112. *Id.*

113. *Id.*

believe witnesses who are more physically attractive, more similar to themselves, or appear to have high social status by virtue of race, gender, clothing, grooming, and manner of speech," in person witness observation may impede accuracy related to credibility vis-à-vis review of a written transcript.[114]

In the context of immigration decisions, scholars likewise have raised important questions regarding the role expertise plays in these adjudications in light of extensive judicial criticisms of agency decision-making,[115] lack of institutional capacity to devote sufficient time to ensure accurate decisions are made,[116] a shortage of qualified attorneys to represent noncitizens in proceedings,[117] evidence of bias among immigration adjudicators,[118] and the existence of procedural shortcuts used by the Board to by-pass careful review of certain IJ decisions.[119] Assertions of expertise are likewise undermined by the dramatic and widespread disparities existing between IJs in asylum adjudications even of similar claims.[120]

While there are very persuasive reasons to doubt the underlying justification for deferential standards of review of immigration decisions,[121] there is little reason to expect the practice to change. Congress has been clear in regards to its delegation of authority to the agency in immigration adjudications to find facts, and in its mandate to courts to review those findings deferentially.[122] Unless and until Congress amends the law, the distinction

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114. *Id*. at 135.

115. Kim, *supra* note 2, at 608. Kim highlights the observation of Judge Richard Posner of the Seventh Circuit "that the adjudication of [asylum] cases at the administrative level has fallen below the minimum standards of legal justice." *Id*. Indeed, in 2005, the Seventh Circuit reversed the agency a "staggering" 40% of the time." *Id*. Numerous other panels have agreed. In Sali v. Gonzales, Judge Ripple commented that a "very significant [factual] mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case." 424 F.3d 556, 563 (7th Cir. 2005). The Third Circuit, in Qun Wang v. Att'y Gen, commented that "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding." 423 F.3d 260, 269 (3rd Cir. 2005). In Jin Chen v. U.S. Department of Justice, the Second Circuit lamented that the IJ's findings were "grounded solely on speculation and conjecture." 426 F.3d 104, 115 (2d Cir. 2005). The Ninth Circuit, in Lopez-Umanzor v. Gonzales, observed that "the IJ's assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture." 405 F.3d 1049, 1054 (9th Cir. 2005). Professor Hoopes has also documented searing treatment of agency incompetence in immigration decisions by the courts of appeals. *See* Hoopes, *supra* note 2 at 198–99.

116. Kim, *supra* note 2 at 610–11. Hoopes calculated that IJs had on average "72 minutes to consider each case" and BIA members render "a decision nearly every 10 minutes," a breakneck speed at which error is simply unavoidable. Hoopes, *supra* note 2, at 205.

117. Kim, *supra* note 2 at 616–17. Scholars have documented that asylum applicants are "five-and-half times more likely to obtain relief" with representation than without. *See also* Hoopes, *supra* note 2 at 166.

118. Kim, *supra* note 2 at 617–19.

119. *Id*. at 621–23; Hoopes, *supra* note 2 at 205 (calculating that "affirmance without opinion" decision from the BIA from 2006 to 2015 produced a 90% denial rate of appeals and that single member BIA decisions remanded only 7% of the time).

120. David Hausman, *The Failure of Immigration Appeals*, 1178 U. PENN. L. REV. 164 (2016) (finding that disparities among grant rates across IJs are large and statistically significant); Jaya Ramji–Nogales, Andrew I. Schoenholtz & Philip G. Schrag, 538 *Refugee Roulette: Disparities in Asylum Adjudication,* 60 STAN. L. REV. 295 (2007); Rosiles-Camarena v. Holder, 735 F.3d 534, 537–38 (7th Cir. 2013) ("[IJ]s display substantial disparity in evaluating claims for asylum or withholding of removal.").

121. Kagan, *supra* note 9 at 117.

122. INA § 242(b)(4)(B).

between classifying factual issues and legal issues will remain of critical importance to asylum-seekers, their attorneys, and appellate judges. Moreover, the justified skepticism scholars have engendered regarding the agency's accuracy in fact-finding only underscores the importance of cabining deferential review to those issues that are truly factual. Yet, as demonstrated in Part II, tremendous confusion dominates court of appeals decisions on the five core elements of the refugee definition, contributing to the significant extant disparities for how asylum-seekers fare in their requests for protection.[123]

## II. CATALOGING THE FIVE CORE ELEMENTS OF THE REFUGEE DEFINITION AS FACTUAL, LEGAL, OR MIXED

To succeed in a request for asylum, an applicant must demonstrate that they meet the legal definition of a refugee.[124] That definition contains five discrete components: (1) an applicant's past or feared harm must rise to the level of persecution (2) their fear of future persecution must be well-founded; (3) their past (or feared) harm must have a nexus to (4) at least one protected characteristic; and (5) their persecution must be committed by the government, or by those the government is unable or unwilling to control.[125] Withholding of removal relies upon the same set of elements, with the exception that a withholding applicant must establish their future probability of harm is more likely than not (i.e., a higher threshold than the well-founded fear test).[126]

In this Part, I analyze those five core asylum/withholding elements through the lens of how the courts of appeals have classified each element as primarily factual, legal, or mixed, with particular attention given to both inter- and intra-circuit splits. Overall, this original dataset[127] shows that most courts have been tremendously inconsistent in the standard of review they select to analyze agency asylum denials,[128] an outcome unacceptably incompatible with the Refugee Act's intent to provide safe harbor to those facing persecution in their country. Additionally, courts have been prone to misclassify as factual elements that are fundamentally legal in nature, a possible legacy of a

123. Some courts are more than four times more likely to remand than others based upon the standard of review that they apply. *See* Hoopes, *supra* note 2, at 200.

124. INA § 208(b)(1)(B)(i).

125. INA § 101(a)(42); Ellison & Gupta, *supra note* 22, at 511–15.

126. *Stevic*, 467 U.S. at 416; *Cardoza-Fonseca*, 480 U.S. at 431. While beyond the scope of this article, it is worth noting that the Sixth and Ninth Circuits have determined as a matter of statutory construction that the "because of" language from the withholding of removal statute is a different and more lenient standard than the "on account of" language of the asylum statute. *See* Guzman-Vazquez v. Barr, 959 F.3d 253 (6th Cir. 2020); Barajas Romero v. Lynch, 846 F.3d 351 (9th Cir. 2017); but see Matter of C-T-L-, 25 I. & N. Dec. 341 (B.I.A. 2010) (holding that the standards are the same).

127. The dataset consists of 1,400 data points drawn from 280 asylum/withholding-related case holdings across all eleven circuits from cases decided between 1992 (after *Elias-Zacarias*) and 2023. Case holdings were catalogued by asylum element, standard of review, and whether or not they relied upon *Elias-Zacarias* or its progeny, or *Chevron*/*Auer* or their progeny. Original dataset on file with author.

128. *See* Appendix at 205.

hermeneutically flawed reading of *Elias-Zacarias*.[129] In sum, every element of the refugee definition is subject to a circuit split and every circuit contains internal tension on at least one element as well.[130]

### A. *Persecution*

The statutory term persecution within the refugee definition relates to the severity of harm an applicant has suffered or fears.[131] The BIA and courts of appeals have long held that low-level harassment and discrimination alone are insufficiently severe to "rise to the level of persecution."[132] In contrast, most courts agree that severe physical harm, death threats, rape, torture and similar harms are sufficiently severe to constitute persecution.[133] When evaluating whether certain acts rise to the level of persecution, harm against children is weighted more heavily in a number of circuits.[134] Finally, harm must be considered "in the aggregate" when evaluating whether it rises to the level of persecution.[135]

Disputes on appeal about this element of the refugee definition rarely turn on any disagreement regarding the historical facts related to the actual harm suffered; rather the majority of cases focus on whether the undisputed facts regarding past harms are sufficiently serious to satisfy the legal concept of persecution.[136] As such, one would expect the courts of appeals to treat such questions as legal insofar as the facts are undisputed and the sole question is

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129. The data revealed that when courts relied upon *Elias-Zacaria,* they selected the deferential substantial evidence standard of review at twice the rate as cases that did not rely upon *Elias-Zacarias.* In the substantial evidence dataset, *Elias-Zacarias* was cited 60.2% of the time; whereas in the non-deferential dataset, *Elias-Zacarias* was cited only 30.5% of the time. Additionally, of the substantial evidence dataset relying upon *Elias-Zacarias*, only 18.1% involved the nexus element; the remaining cases addressed other asylum/withholding issues, supporting the hypothesis that courts were over-applying *Elias-Zacarias* beyond cases involving nexus.

130. *See* Appendix at 205.

131. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES, (THOMPSON WEST, 2018); Li v. Gonzales, 405 F.3d 171, 177 (4th Cir. 2005) ("Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom.").

132. *Li,* 405 F.3d at 177.

133. Courts have "expressly held that 'the threat of death qualifies as persecution.'" Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015); Tairou v. Whitaker, 909 F.3d 702,708 (emphasis added) ("[T]he threat of death *alone* constitutes persecution."). Courts have also recognized that rape and sexual assault rise to the level of persecution. *See, e.g.,* Hernandez-Cartagena v. Barr, 977 F.3d 316 (4th Cir. 2020); Zubeda v. Ashcroft, 333 F.3d 463, 472–73 (3d Cir. 2003) (noting that rape has been "recognized under the law of nations as torture" and "can constitute sufficient persecution to support a claim for asylum").

134. In *Portillo-Flores v. Garland*, the court held that "where a petitioner is a child at the time of the alleged persecution, the [IJ] must take the child's age into account in analyzing past persecution and fear of future persecution for purposes of asylum." 3 F.4th 615, 629 (4th Cir. 2021); *see also* Ordonez-Quino v. Holder, 760 F.3d 80, 91 (1st Cir. 2014) ("'[A]ge can be a critical factor' in determining whether a petitioner's experiences cross this threshold [of persecution]"); Kholyavskiy v. Mukasey, 540 F.3d 555, 570 (7th Cir. 2008) (remanding to the Board because age "may bear heavily on the question of whether an applicant was persecuted" (citation omitted)); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1045 (9th Cir. 2007) (explaining "a child's reaction to injuries . . . is different from an adult's. . . . [T]he trauma [is] apt to be lasting."); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 147–48 (2d Cir. 2006) (nothing that harm that occurred during childhood should be considered from the perspective of a child).

135. Matter of O–Z– & I–Z–, 22 I. & N. Dec. 23, 26 (B.I.A. 1998).

136. *See, e.g., supra* notes 133–134.

whether those historical facts satisfy the statutory term *persecution*. However, what we actually see is significant disagreement within and among the circuits as to whether agency determinations related to persecution are primarily factual, legal, or mixed.

While most circuits contain some internal disagreement regarding how to classify the persecution element, the Second, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits have all published decisions holding this issue requires application of legal principles and thus gets *de novo* review at least some of the time.[137] In contrast, the First, Fifth, Seventh, and Tenth Circuits mostly hold that determinations regarding persecution are factual and thus get substantial evidence review.[138] To make matters worse, many circuits have issued panel decisions in tension with other panel decisions in the same circuit, frequently without even recognizing the inconsistency.[139]

### 1. *Persecution As Fact*

The circuit most consistent in its treatment of the persecution element as purely factual is the Tenth Circuit,[140] although even in its consistency, the court has recognized its practice is anomalous.[141] While questioning the soundness of its resolution of this element as factual, the Tenth Circuit has reaffirmed it many times.[142] In doing so, the court has noted that "[t]he circuits are split as to the standard of review applicable to . . . whether an undisputed set of facts constitute[s] persecution."[143] It has also observed that "there is serious reason to question whether [it] should treat the BIA's ultimate

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137. *See infra* II.A.2.

138. *See infra* II.A.1.

139. *See infra* notes 190–96 and accompany text.

140. Nazaraghaie v. INS, 102 F.3d 460, 463 n.2 (10th Cir. 1996); Elzour v. Ashcroft, 378 F.3d 1143, 1150 (10th Cir. 2004); Sviridov v. Ashcroft, 358 F.3d 722, 727 (10th Cir. 2004); Estrada-Escobar v. Ashcroft, 376 F.3d 1042, 1046 (10th Cir. 2004); Sviridov v. Ashcroft, 358 F.3d 722, 727 (10th Cir. 2004); Niang v. Gonzales, 422 F.3d 1187, 1196 (10th Cir. 2005); Uanreroro v. Gonzales, 443 F.3d 1197, 1204 (10th Cir. 2006); Diallo v. Gonzales, 447 F.3d 1274, 1282 (10th Cir. 2006); Hayrapetyan v. Mukasey, 534 F.3d 1330, 1335 (10th Cir. 2008); Rivera-Barrientos v. Holder, 666 F.3d 641, 645 (10th Cir. 2012); Rodas-Orellana v. Holder, 780 F.3d 982, 990 (10th Cir. 2015); Igiebor v. Barr, 981 F.3d 1123, 1135 (10th Cir. 2020). The Seventh Circuit has also consistently treated this element as factual. Meraz-Saucedo v. Rosen, 986 F.3d 676, 684 (7th Cir. 2021) ("Whether a petitioner suffered past persecution . . . [is a] factual finding subject to the deferential 'substantial evidence' standard, requiring reversal only if the evidence compels a different result."); Chuchman v. Garland, 4 F.4th 483, 484 (7th Cir. 2021); Marquez v. Barr, 965 F.3d 561, 565 (7th Cir. 2020); N.Y.C.C. v. Barr, 930 F.3d 884, 888 (7th Cir. 2019); Sirbu v. Holder, 718 F.3d 655, 658 (7th Cir. 2013); Diallo v. Ashcroft, 381 F.3d 687, 697 (7th Cir. 2004).

141. *Ting Xue*, 846 F.3d at 1105–06.

142. Hayrapetyan v. Mukasey, 534 F.3d 1330, 1335 (10th Cir. 2008) ("In this circuit, the ultimate determination whether an [noncitizen] has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution.") *citing* Vicente-Elias v. Mukasey, 532 F.3d 1086 (10th Cir. 2008); *see also infra* note 145.

143. *Ting Xue*, 846 F.3d at 1105 n.11; *Fon*, 34 F.4th at 819 (Graber, J., concurring) (noting that "circuits have taken inconsistent positions" on this "important, recurring topic" and calling for the Supreme Court's intervention) (citing *Voci v. Gonzales*, 409 F.3d 607, 613 (3d Cir. 2005); Eduard v. Ashcroft, 379 F.3d 182, 187–88 (5th Cir. 2004); Borca v. INS, 77 F.3d 210, 214 (7th Cir. 1996); Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995). *But see* Chen v. Holder, 773 F.3d 396, 403 (2d Cir. 2014); Alavez–Hernandez v. Holder, 714 F.3d 1063, 1066 (8th Cir. 2013)).

determination as to the existence of persecution (i.e., whether a given set of facts amounts to persecution) as factual in nature," given that "the BIA itself has concluded [it] is legal in nature," but that has been the court's holding since 2008 when it decided *Vicente-Elias*.[144,145] The Tenth Circuit has suggested that some of this confusion may flow from an "uncritical[] [reliance upon] the Supreme Court's" three-decade-old "decision in *INS v. Elias–Zacarias*."[146] Nevertheless, the Tenth Circuit has explained that until its en banc court or the Supreme Court holds otherwise, it must continue to treat this element as factual.[147]

Like the Tenth Circuit, but with less reflection, the First Circuit treats this element of the refugee definition as primarily factual.[148] The First Circuit in *Moreno v. Holder* explained that it will "review the agency's findings concerning the presence or absence of persecution 'through the prism of the substantial evidence rule,'"[149] a conclusion in accord with the weight of past First Circuit decisions.[150] Yet, the First Circuit has issued a recent decision in *Aguilar-Escoto v. Garland*, potentially creating an unrecognized and unresolved tension on this question.[151] In *Aguilar-Escoto*, the court explained the BIA should have applied *de novo* review rather than deferential review in

144. Vicente-Elias v. Mukasey, 532 F.3d 1086 (10th Cir. 2008).

145. Matumona v. Barr, 945 F.3d 1294, 1300 n.5 (10th Cir. 2019).

146. *Ting Xue*, 846 F.3d at 1105 n.11. In *Ting Xue*, the Tenth Circuit explained that in "*Elias–Zacarias*, the Court was confronted with a decision of the Ninth Circuit holding that 'conscription by a nongovernmental group constitute[d] persecution on account of political opinion.'" *Id.* at 480, 112 S. Ct. 812. The Tenth Circuit noted that the Supreme "Court ultimately reversed the Ninth Circuit, concluding the record did not compel the conclusion that (1) Elias-Zacarias's opposition to recruitment into the guerrilla group was based on political motivation or (2) the guerrillas erroneously believed political motivations drove Elias-Zacarias's refusal to join." *Id.* Importantly, the Tenth Circuit observed:

> "[T]he question of persecution in *Elias–Zacarias* turned on disputed facts, not on the ultimate question of whether a given set of facts amounted to persecution. In any event, and most importantly, *Elias–Zacarias* was decided well before the BIA propounded its own regulations, which regulations unambiguously (1) preclude the BIA from making factual findings on review of an IJ's asylum decision and (2) establish that the ultimate question regarding the existence of persecution is a question of law subject to *de novo* review by the BIA." *Id.*

147. *Matumona*, 945 F.3d at 1300 n.5.

148. Montoya-Lopez v. Garland, 80 F.4th 71, 79 (1st Cir. 2023); Chen v. Lynch, 814 F.3d 40, 45, 47 (1st Cir. 2016); Decky v. Holder, 587 F.3d 104 (1st Cir. 2009); Abdelmalek v. Mukasey, (1st Cir. 2008); Sompotan v. Mukasey, 533 F.3d 63, 68 (1st Cir. 2008) (describing the issue of whether the established harm "experienced by a petitioner amount[s] to persecution . . . [as a] question[] of fact"); Jorgji v. Mukasey, 514 F.3d 53 (1st Cir. 2008) (When reviewing a finding that harm did not rise to the level of past persecution, the First Circuit has stated that "[r]eview of legal rulings is *de novo* but is deferential as to findings of fact and the determination as to whether the facts support a claim of persecution."); Gebremichael v. INS, 10 F.3d 28, 34 (1st Cir. 1993).

149. Moreno v. Holder, 749 F.3d 40, 44 (1st Cir. 2014). In reaching that decision, it is worth noting that the court relied in part upon *Lopez de Hincapie v. Gonzales*, 494 F.3d 213 (1st Cir. 2007), though *Lopez de Hincapie* addressed the separate and distinct nexus element. *Id.* (stating that the court will review "the question of whether persecution is on account of one of the five statutorily protected grounds . . . through the prism of the substantial evidence rule"). As discussed above, the question as to the appropriate standard of review of the nexus element is a question likely foreclosed by *Elias-Zacarias*, but it is a mistake to read *Elias–Zacarias* as imposing the same substantial evidence standard of review on every element of the refugee definition. *See supra* Part I.A. As such, *Moreno*'s conclusion may well rest on shaky grounds.

150. *See supra* note 148.

151. Aguilar-Escoto v. Garland, 59 F.4th 510, 519 (1st Cir. 2023).

determining whether the past threats and harm Aguilar experienced rose to the level of past persecution.[152] The court stated:

> "The Board has held . . . the determination of whether [] facts [found] meet the legal definition of 'past persecution' is reviewed *de novo* . . . . In applying de novo review, the BIA should have completed its own assessment of whether the documentary evidence provided rose to the level of past persecution."[153]

However, the First Circuit has yet to explain why it reviews as a factual question a legal element of the refugee definition it has recognized the Board must review de novo.

A similar anomaly exists within the Fifth Circuit. That court in many decisions has clearly characterized the BIA's persecution determinations as a "factual conclusion" subject to the "substantial evidence" standard of review.[154] However, in at least one published decision, it has held that where "the facts are undisputed, '[w]hether [past harm] . . . rises to the level of past-persecution is a question of law . . . review[ed] *de novo*.'"[155] Relatedly, in a dissenting opinion, Fifth Circuit Judge Dennis has asserted that it is error to characterize this element, where the facts are undisputed, as a "factual conclusion."[156] Judge Dennis reasoned that the Fifth Circuit's past conclusion on the issue "was abrogated by the Supreme Court's [] affirmance of the basic principle that 'the application of a legal standard to undisputed or established facts' is a 'question of law' within the meaning of the Immigration and Nationality Act."[157] The Fifth Circuit also has recognized in another panel decision that application of legal standards to historical and predictive facts is a legal question that gets *de novo* review.[158] However, the Fifth Circuit has yet to recognize in a published decision its own doctrinal inconsistency in regards to this issue, let alone take steps to resolve it.

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152. *Id*. at 517–18 (citing *Matter of Z-Z-O-*, 26 I. & N. Dec. at 590–91); Matter of A-S-B-, 24 I. & N. Dec. at 496).

153. *Aguilar-Escoto*, 59 F.4th at 517–18 (citing *DeCarvalho v. Garland*, 18 F.4th 66, 73 (1st Cir. 2021) for the proposition that "the BIA reviews *de novo* an IJ's determinations of how the law applies to facts," that is "whether [a particular] harm rises to the level of" persecution).

154. Gjetani v. Barr, 968 F.3d 393, 396 (5th Cir. 2020) (stating "our circuit precedents . . . make clear that we use the 'substantial evidence' standard, even when the agency determines the [noncitizen] is credible and accepts his version of the facts" in the context of a persecution analysis); Tesfamichael v. Gonzales, 469 F.3d 109, 114 (5th Cir. 2006) (same); *but see* Mingming Li v. Lynch, 656 F. App'x 694, 698 (5th Cir. 2016) ("The question of whether an asylum petitioner's evidence (if presumed credible) meets the burden of proof to demonstrate past persecution can be construed as a mixed question of law and fact, but we repeatedly have reviewed such questions under the substantial evidence standard.") (citing Gharti–Magar v. Holder, 551 F. Appx. 197, 198–99 (5th Cir. 2014); *Tesfamichael*, 469 F.3d at 117; Ozdemir v. INS, 46 F.3d 6, 8 (5th Cir. 1994)).

155. Morales v. Sessions, 860 F.3d 812, 816 (5th Cir. 2017).

156. *Gjetani*, 968 F.3d at 400 (Dennis, J., dissenting).

157. *Id*. at 401 n.1 (quoting *Guerrero-Lasprilla*, 140 S. Ct. at 1068).

158. Alexis v. Barr, 960 F.3d 722, 730 (5th Cir. 2020) (noting that the Court "review[s] the application of legal standards for asylum, withholding of removal, or protection under CAT to the settled, undisputed facts" *de novo*).

### 2. *Vacillating Between Persecution as Fact and Law*

The Ninth Circuit has recognized there is considerable confusion on this subject and has issued calls for additional clarity in the course of noting its own tendency to vacillate between treating the persecution element as factual sometimes and other times legal.[159] Judge Miller has described the Ninth Circuit's case law "on this subject [as] a bit of a mess."[160] He explained the court has "sometimes treated [a] determination [as to whether the harm suffered constitutes persecution] as a factual finding and sometimes as a legal conclusion."[161] Judge Graber has likewise noted that in a number of cases, both published and unpublished, the Ninth Circuit has held that it "review[s] for substantial evidence the BIA's [] determination that a petitioner's past harm 'do[es] not amount to past persecution.'"[162] And in other cases, the court has held that it "review[s] *de novo* '[w]hether particular acts constitute persecution for asylum purposes.'"[163] Nevertheless Judge Graber believes that "no true inconsistency exists" provided one properly parses the decisions based upon whether there was a factual dispute or not, essentially concluding that the element is best reviewed under a mixed-standard of review.[164] Judge Korman agrees, explaining that "[a]lthough we owe deference under the substantial evidence standard to 'the administrative findings of fact,' . . . [w]hether particular acts constitute persecution for asylum purposes is a legal question reviewed *de novo*."[165] Yet, given the ongoing unresolved tension in the Ninth Circuit, Judge Miller, Judge Collins, and Judge Graber have explicitly called upon "the en banc court [to] take up these issues in an appropriate case" if the Supreme Court does not do so first.[166]

Like Judges Graber and Korman in the Ninth Circuit, the Second Circuit has taken the position that the persecution element of the refugee definition is best reviewed as a mixed-question involving both fact and law.[167] In *Mirzoyan v. Gonzales*,[168] the petitioner challenged "the IJ's conclusion that she did not suffer past persecution," which the court explains was a

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159. *Singh*, 48 F.4th at 1074 (citing *Fon*, 34 F.4th at 823 (Collins, J., concurring)).

160. *Id.*

161. *Id.*

162. Sharma v. Garland, 9 F.4th 1052, 1061 (9th Cir. 2021) ("We also review for substantial evidence the BIA's particular determination that a petitioner's past harm 'do[es] not amount to past persecution.'").

163. Kaur v. Wilkinson, 986 F.3d 1216, 1221 (9th Cir. 2021); Accord Boer-Sedano v. Gonzales, 418 F.3d 1082, 1088 (9th Cir. 2005).

164. *Fon*, 34 F.4th at 817.

165. Molina v. Garland, 37 F.4th 626 640 (9th Cir. 2022) (citing *Kaur v. Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021) (alterations adopted) (quoting *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005)); *see also* Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997) ("The meaning of 'persecution' . . . is a legal question reviewed *de novo*."); Mendoza-Alvarez v. Holder, 714 F.3d 1161, 1163 (9th Cir. 2013) (similar)).

166. *Singh*, 48 F.4th at 1074 (citing *Fon*, 34 F.4th at 823).

167. Mirzoyan v. Gonzales, 457 F.3d 217, 220 (2d Cir. 2006); Kyaw Zwar Tun v. U.S. INS, 445 F.3d 554, 563 (2d Cir. 2006); Khouzam v. Ashcroft, 361 F.3d 161, 165 (2d Cir. 2004); Huang v. Holder, 677 F.3d 130 136 (2d Cir. 2012); Feitosa v. Lynch, 651 Fed. Appx. 19, 21 (2d Cir. 2016).

168. *Mirzoyan*, 457 F.3d at, 220.

"conclusion rest[ing] solely on legal grounds because the IJ found that Mirzoyan's testimony was credible. . . [and] Mirzoyan had in fact experienced the mistreatment she described."[169] The court acknowledged that those historical "factual finding[s], like all factual findings, [are] entitled to deference."[170] However, the IJ's determination "that the mistreatment [petitioner] suffered was not 'persecution,' i.e., that the facts did not meet the legal definition of persecution in the INA. . . is a mixed question of law and fact, which [the court] review[s] *de novo*."[171] While analytically clear and substantively consistent with the agency's stated approach to this legal element, the Second Circuit has not always been consistent in its own application of the mixed-question standard. For example, more recently the Second Circuit in *Scarlett v. Barr,* affirmed the "agency's decision to deny" because it was "supported by substantial evidence that *the past conduct did not rise to the level of 'persecution.'*"[172] However, the court in *Scarlett* does not acknowledge its departure from the long-standing mixed standard recited in *Mirzoyan*.

The Third Circuit likewise has applied a mixed-question standard of review to the persecution element, where application of law to undisputed facts is reviewed *de novo*.[173] Yet, like the Second Circuit, the Third Circuit has issued conflicting panel decisions as well.[174] Recently, the Third Circuit made some effort in *Thayalan v. Attorney General*, to reconcile this tension by explaining that in its earlier decision *Herrera-Reyes*, the court "applied *de novo* review to the question of whether the BIA misapprehended the legal methodology . . . prescribed for assessing persecution."[175] There the panel "concluded that it was legal error for the agency to examine incidents of alleged past persecution in isolation from each other rather than cumulatively

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169. *Id.*

170. *See* 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. . . ."); *Kyaw Zwar Tun*, 445 F.3d, at 563.

171. *See Khouzam* 361 F.3d, at 165. (noting that although findings of fact are reviewed under the substantial evidence standard, "[t]he BIA's application of law to undisputed facts is reviewed *de novo*").

172. Scarlett v. Barr, 957 F.3d 316, 328 (2d Cir. 2020) (emphasis added); *see also Mendoza-Mira v. Garland*, 2021 U.S. App. LEXIS 21221 6 (2d Cir. 2021) (finding in the course of denying a motion to reopen that "the record provided *substantial evidence* to support the BIA's finding that threats and physical harm did not rise to the level of persecution") (emphasis added).

173. *Blanco v. Att'y Gen.*, 967 F.3d 304, 310, 315 (3d Cir. 2020) (reviewing *de novo* "both pure questions of law and applications of law to undisputed facts" and reversing the agency's conclusion of no past persecution where "[n]either party dispute[d] the facts underlying [the petitioner's] past-persecution claim" and the BIA misapplied the Circuit's "past-persecution standard.")); Huang v. Att'y Gen., 620 F.3d 372, 382–83 (3d Cir. 2010) (holding that the question of "whether [a noncitizen] possesses a well-founded fear of persecution," like the question of whether "what [the noncitizen] is likely to suffer amounts to torture," is "a mixed question of fact and law . . . that requires application of a legal standard to a particular set of circumstances").

174. *See, e.g.*, Thayalan v. Att'y Gen., 997 F.3d 132, 137 n.1 (3d Cir. 2021) ("[W]e apply the substantial evidence standard to an agency determination that a [noncitizen] did not suffer harm rising to the level of persecution *even where the underlying facts . . . are undisputed.*") (emphasis added); Voci v. Gonzales, 409 F.3d 607, 613 (3d Cir. 2005). ("Whether an asylum applicant has demonstrated past persecution . . . is a factual determination reviewed under the substantial evidence standard.")

175. *Thayalan,* 997 F.3d, at 137 n.1 (citing *Herrera-Reyes,* 952 F.3d at 108–09).

and to restrict qualifying harm to that inflicted on the petitioner herself, excluding harm to family members or close associates."[176] However, the *Thayalan* court explained that "where the agency does not misapprehend applicable law," the Third Circuit applies "the substantial-evidence standard to an agency determination that an [noncitizen] did not suffer harm rising to the level of persecution *even where the underlying facts about how [a noncitizen] was mistreated are undisputed*."[177] The court states that the underlying policy rationale for employing this standard is because "the question of whether a particular fact pattern rises to the level of persecution is largely fact-driven."[178]

Subsequent to *Thayalan*, Third Circuit Judge Jordan in a concurring opinion, wrote separately solely to take issue with the confusion inserted into the court's jurisprudence regarding the standard of review applicable to the persecution element through cases like *Thayalan*.[179] Judge Jordan emphasized that "[p]ast persecution is a mixed question of law and fact because the determination of 'past persecution' involves two distinct questions, either or both of which may be disputed in a given case."[180] "The question of what events occurred or may occur 'is factual in nature and is subject to clearly erroneous review by the BIA and substantial evidence review by this Court; while the question of 'whether those events meet the legal definition of persecution [] is reviewed *de novo* because it is plainly an issue of law.'"[181]

He then linked that conclusion directly to Supreme Court case law, stating that as the High Court "has repeatedly . . . described" a question "which has both factual and legal elements, as a mixed question of law and fact," and courts should "treat the application of a legal standard to undisputed or established facts as a question of law."[182] He admonished the Third Circuit to "be more consistent in acknowledging that past persecution is a mixed question and more explicit in identifying which component, factual or legal, is under review."[183] He explained that this process of breaking down the two components is critical to applying the proper standard of review consistent with

176. *Herrera-Reyes,* 952 F.3d, at 101, 108–111(emphasis added).

177. *Thayalan,* 997 F.3d at 137 n.1 (citing *See Jarbough v. Att'y Gen.*, 483 F.3d 184, 191–92 (3d Cir. 2007); *Al-Fara v. Gonzales*, 404 F.3d 733, 738–40 (3d Cir. 2005); *Chen v. Ashcroft*, 381 F.3d 221, 234–35 (3d Cir. 2004) (Alito, J.); *Abdille v. Ashcroft*, 242 F.3d 477, 483, 492–95 (3d Cir. 2001)).

178. *Id.*

179. Cha Liang v. Att'y Gen., 15 F.4th 623, 626–627 (3d Cir. 2021) (Jordan, A., concurring) (explaining his "*Thayalan* . . . can be understood to hold that past persecution is a pure question of fact or that a misapprehension of law by the BIA is a prerequisite to assessing *de novo* whether the facts in a given case amount to persecution," but such a conclusion would be "contrary to preexisting precedent").

180. *Id.*

181. *Id.*

182. *Id.* (citing *Guerrero-Lasprilla v. Barr*, 140 S. Ct. at 1069) (internal quotation omitted)).

183. *Id.*

Supreme Court law.[184] He additionally reasoned that the two separate inquiries involved in a past persecution determination "is highlighted by the division of labor within the Department of Justice."[185] While IJs first determine "what happened (which is the fact question)" and then whether that "sequence of events meets the legal definition for persecution (which is the legal question)," the Board is confined "to deciding whether the facts [] found by an [IJ] justify a particular legal conclusion about persecution."[186] He lamented that while the court "should bring that same analytical clarity to the question of past persecution when" considering a BIA asylum decision, the Third Circuit has "let ambiguity creep into [its] case law," leading "to confusion about [its] standard for review."[187] Such imprecision has created "tension in [the court's] precedents," even though "it should be apparent that persecution is *not purely a question of fact*."[188] Whether *Thayalan's* primarily factual approach or Judge Jordan's mixed-question approach prevails in future cases remains to be seen. At a minimum, it is clear that there is an emerging inter-circuit tension in the Third Circuit.

The Fourth, Sixth, Eighth, and Eleventh Circuits are similar to the Second Circuit insofar as they have clearly applied a mixed-question framework to the element of persecution, while also issuing conflicting panel decisions without recognizing the tension. For example, the Fourth Circuit has applied a *de novo* standard of review in the context of determining whether harm is sufficiently severe to constitute persecution, reasoning that it "is entitled to draw its own legal conclusions from the undisputed facts in the record . . . created by the Board of Immigration Appeals."[189] And it has reaffirmed that conclusion more recently, stating that the "maltreatment a noncitizen suffers amount[ing] to past persecution is a question of law."[190] However, in other cases the Fourth Circuit has applied a factual standard of review.[191]

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184. *Id.* (citing *Google LLC v. Oracle Am., Inc.*, —— U.S. ——, 141 S. Ct. 1183, 1199 (2021); *U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, —— U.S. ——, 138 S. Ct. 960, 967 (2018))).

185. *Id.*

186. *Id.* (citing *Z-Z-O-*, 26 I. & N. Dec. at 590–91 ("[W]hether an asylum applicant has established an objectively reasonable fear of persecution based on the events that the [IJ] found may occur upon the applicant's return to the country of removal is a legal determination that remains subject to *de novo* review.")).

187. *Id.*

188. *Id.*

189. Zavaleta-Policiano v. Sessions, 873 F.3d 241, 247, n.3 (4th Cir. 2017) (citation omitted).

190. Sorto-Guzman v. Garland, 42 F.4th 443, 448 (4th Cir. 2022); *see also* Portillo Flores v. Garland, 3 F.4th 615, 625–27 (4th Cir. 2021) (en banc) (Because the "agency rejected Petitioner's persecution argument solely because the injuries did not require medical attention," "[t]his was legal error.")

191. *See, e.g.*, Lin-Jian v. Gonzales, 489 F.3d 182, 192 (4th Cir. 2007) (concluding that "the denial of [applicant's] claim of past persecution is *not supported by substantial evidence*"); Mirisawo v. Holder, 599 F.3d 391, 397–98 (4th Cir. 2010) (holding in the context of undisputed facts that the BIA's persecution determination related to "deprivation of a basic necessity" or "severe economic disadvantage" was "supported by substantial evidence" and that the court could not "conclude that an objective adjudicator would be *compelled to* disagree with the BIA's findings"). The Fourth Circuit also frequently cites an entirely different standard of review when reviewing Board decisions. That court often states that it "will uphold the BIA's decision 'unless it is manifestly contrary to law and an abuse of discretion.'" *See, e.g.*, Portillo Flores v. Garland, 3 F.4th 615, 625–27 (4th Cir. 2021) (en banc). Part of this rule statement

Similarly, the Sixth Circuit has explained at times that when courts review the agency's "application of legal principles to undisputed facts, rather than its underlying determination of those facts . . ., the review . . . is *de novo*."[192] Yet in other panel decisions, it has stated it will review the "ultimate conclusion [of past persecution] as resolving a factual question subject to deferential review."[193] The Eighth Circuit—which has engaged in the same vacillation[194]—has even had this tension directly brought to its attention through a petition for en banc rehearing; however, it declined to take up the issue, leaving in place the panel decision treating this element as factual in heavy reliance upon *Elias-Zacarias*.[195] Finally, the Eleventh Circuit has likewise issued dueling decisions apparently oblivious to the conflict.[196]

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In sum, nearly every circuit in the country has issued conflicting decisions on whether the persecution analysis is factual, legal, or mixed. While the Tenth Circuit resolutely treats the element as factual, it has acknowledged that its approach is dubious. Circuits that overuse the substantial evidence

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ostensibly stems from INA § 242(b)(4)(D), which provides that "the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless *manifestly contrary to the law and an abuse of discretion*." *Id.* (emphasis added). However, section 242(b)(4)(D) should only apply to a discretionary denial of asylum, not questions of law or fact. *See Denial as Matter of Discretion*, 2 Immigration Law Service 2d § 10:229 ("[A]n [IJ] may . . . deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under . . . [8 U.S.C.A. § 1101(a)(42)]"). When the BIA has exercised this discretion to deny asylum, a court of appeals may reverse only if the denial was "manifestly contrary to the law and an abuse of discretion.") However, it is arguably erroneous to apply this standard to non-discretionary asylum determinations. Nevertheless, because the Fourth Circuit explains that the BIA abuses its discretion when is commits legal error, it is unclear whether or how this standard is actually different from the legal *de novo* review.

192. *Mapouya v. Gonzales*, 487 F.3d 396, 405 (6th Cir. 2007).

193. Damus v. Garland, 2023 U.S. App. LEXIS 246 22 (6th Cir. 2023); *see also* Hernandez-Hernandez v. Garland, 15 F.4th 685 688 (6th Cir. 2021); Gilaj v. Gonzales, 408 F.3d 275, 285 (6th Cir. 2005) ("[T]he IJ's decision that the incidents described by petitioners do not rise to the level of persecution is not supported by substantial evidence."); Klawitter v. INS, 970 F.2d 149 (6th Cir. 1992).

194. The Eighth Circuit has held that the BIA erred in determining that conditions were not "severe enough to constitute past persecution," stating that "[t]his is a question of law we review *de novo*." Alavez-Hernandez v. Holder, 714 F.3d 1063, 1066 (8th Cir. 2013) (same); Njong v. Whitaker, 911 F.3d 919, 923 (8th Cir. 2018) (same); Padilla-Franco v. Garland, 999 F.3d 604, 606 (8th Cir. 2021) (same); *but see He v. Garland*, F.4th 1220 1224 (8th Cir. 2022) (claiming that "the majority of Eighth Circuit opinions have recognized" the standard of review for persecution is substantial evidence, regardless of the BIA's use of *de novo* review for this element); Wanyama v. Holder, 698 F.3rd 1032 (8th Cir. 2012) (substantial evidence); Martin v. Barr, 916 F.3d 1141 (8th Cir 2019) (same).

195. *He*, 24 F.4th at 1224. There the court states "in *Elias-Zacarias*, the [Supreme] Court expressly adopted the substantial evidence standard of review for both of the asylum eligibility standards identified in *Cardoza Fonseca*, 'persecution or well-founded fear of persecution.'" *Id.* The court reasoned that *Elias-Zacarias* "determined that the ultimate question of past persecution . . ., as well as the findings underlying that determination, are judicially reviewed under the substantial evidence standard that applies to agency findings of fact." *Id.* As discussed above in Part I.A., I believe this is an errantly expansive reading of *Elias-Zacarias* and incompatible with INA § 242's text and structure. *See also infra* Part III. B. 3.

196. *Compare* Mejia v. Att'y Gen., 498 F.3d 1253, 1257 (11th Cir. 2007) (reviewing *de novo* "whether, as a matter of law, what [the applicant] endured constitutes past persecution" and concluding that it did) *with* Martinez v. Att'y Gen., 992 F.3d 1283, 1292 (11th Cir. 2021) ("Substantial evidence supports the BIA's conclusion that the cumulative mistreatment to which [applicant] testified did not rise to . . . persecution[.]"); Sepulveda v. Att'y Gen., 401 F.3d 1226 (11th Cir. 2005) (same); Nreka v. Att'y Gen., 408 F.3d 1361 (11th Cir. 2005) (same).

standard tend to adopt an errantly overbroad reading of *Elias-Zacarias*. In contrast, decisions taking the most careful look at the issue, and which survey recent Supreme Court law, conclude the persecutor element should be subject to a mixed-question standard of review where application of law to undisputed fact is subject to *de novo* review.

### B. *Well-Founded Fear*

In order to be granted asylum, an applicant must establish that they have a well-founded fear of persecution—either presumed or actual. An applicant is presumed to have a well-founded fear once they prove they have suffered past persecution on account of a protected characteristic inflicted by their government or by a nonstate actor the government is unable or unwilling to control.[197] Once an applicant is presumed to have a well-founded fear, the burden shifts to the agency to rebut the presumption by showing either (1) conditions in the applicant's country of nationality have changed such that there is no longer an objectively reasonable fear of future harm, or (2) the applicant could reasonably relocate to another part of the country safely.[198] If the agency is unable to meet that burden, then the applicant may be granted asylum.[199] If, on the other hand, the agency is able to meet its burden on either prong, then the applicant can still be granted humanitarian asylum if the applicant can show that they suffered particularly atrocious past persecution or face a reasonable possibility of other serious harm (regardless of whether it is linked to a protected characteristic) in their country of nationality.[200] It is important to note the applicant can only establish eligibility for humanitarian asylum if they had already established the presumption of a well-founded fear of future persecution owning to their past persecution and had that presumption rebutted.

Yet, it is not simply those who have suffered past persecution who may be granted asylum. An applicant can also show—independent of any past experience of harm—that their fear of future harm is well-founded.[201] The Supreme Court has explained this standard is more lenient than the standard for withholding of removal and even an applicant who faces a mere ten percent chance of future harm may have a subjective fear that is objectively reasonable.[202] Put another way, if an applicant can show there is a *reasonable possibility* of being persecuted in the future, their fear is well-founded.[203] The

197. 8 C.F.R. § 1208.13(b)(1); Naizgi v. Gonzales, 455 F.3d 484, 486 (4th Cir. 2006).
198. Matter of Y-T-L-, 23 I. & N. Dec. 601, 604 (B.I.A. 2003).
199. Rios v. Ashcroft, 287 F.3d 895, 901 (9th Cir. 2002). Relief may be granted at this stage provided there are no bars to relief. *See* INA § 208(b)(2).
200. 8 C.F.R. § 1208.13(b)(1)(i)(A)–(B), (ii).
201. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b) ("The applicant may qualify as a refugee *either* because . . . she has suffered past persecution *or* because . . . she has a well-founded fear of future persecution."); *Tang v. Lynch*, 840 F.3d 176, 181 (4th Cir. 2016).
202. INS. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).
203. 8 C.F.R. § 1208.13(b)(2)(i)(B).

regulations and agency precedent provide that there are two separate tests an applicant may satisfy to demonstrate an objectively reasonable fear: the *Mogharrabi* test and the *pattern or practice* test.[204]

The four-part *Mogharrabi* test provides that an applicant can establish a well-founded fear if: (1) they possess a protected characteristic; (2) a persecutor is aware or could reasonably become aware of their protected characteristic; (3) a persecutor is capable of harming them; and (4) a persecutor is inclined to harm them.[205] If an applicant satisfies each of these four prongs—possession, awareness, capability, and inclination—then under *Mogharrabi* they have a well-founded fear of persecution. By contrast, under the *pattern or practice* test, an applicant need not show they would be individually singled out for persecution if they can show (1) there is a pattern or practice of persecution in their country of nationality against (2) individuals similarly situated to them.[206]

Unlike the persecutor element of the refugee definition, the weight of circuit authority favors treating the well-founded fear element as a mixed question—where the predictive factual findings are reviewed for clear error/substantial evidence, and whether those facts legally satisfy one of the foregoing well-founded fear tests is reviewed *de novo*. In the circuits where this version of the mixed-question analysis prevails, courts have largely deferred to the Board's analysis in *Matter of Z-Z-O-*.[207] However, as shown below, disagreement between the circuits still exists.

### 1. *Mixed-Standard Review of Well-Founded Fear Determinations*

In *Matter of Z-Z-O-*, the BIA provided that "an [IJ]'s predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review."[208] However, "whether an asylum applicant has established an objectively reasonable fear of [future] persecution based on the events [] the [IJ] found may occur upon the applicant's return to the country of removal is a legal determination that remains subject to *de novo* review."[209] The Board grounded this mixed-question analysis in part on decisions from the First, Second, and Third Circuits."[210]

Two years before *Z-Z-O-* was decided, the First Circuit explained that "the question of whether 'the possibility of . . . events occurring gives rise to a well-founded fear of persecution under the circumstances of the [noncitizen's]

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204. Matter of Mogharrabi, 19 I& N Dec. 430 (B.I.A.1987); *see also* 8 C.F.R. § 208.13(b)(2)(iii)(A)–(B) (providing that an applicant's fear is also well-founded where there is a *pattern or practice* of persecution against *similarly situated individuals*).

205. *Matter of Mogharrabi*, 19 I& N Dec. at 430.

206. 8 C.F.R. § 208.13(b)(2)(iii)(A)–(B).

207. Matter of Z-Z-O-, 26 I. & N. Dec. 586, 590 (B.I.A. 2015).

208. *Id*.

209. *Id*. at 590–91.

210. *Id*. (citing *Liu Jin Lin v. Holder*, 723 F.3d 300, 307 (1st Cir. 2013); *Hui Lin Huang v. Holder*, 677 F.3d 130, 135 (2d Cir. 2012); *Huang v. Att'y Gen*., 620 F.3d 372, 382–83 (3d Cir. 2010); *Kaplun v. Att'y Gen*., 602 F.3d 260, 269–72 (3d Cir. 2010)).

case' is a conclusion that the [Board] reviews *de novo*."[211] And since *Z-Z-O-*, the First Circuit has reaffirmed that conclusion.[212] Like the First Circuit, the Second has likewise long held that "*de novo* review applies to the ultimate question of whether the applicant['s] ... subjective fear of persecution is objectively reasonable."[213] While a "determination of what will occur in the future and the degree of likelihood ... has been regularly regarded as fact-finding subject to only clear error review," the "law's legal construct of [what] a reasonable person would believe ... under the particular circumstances of a case is normally a question of law ... reviewed *de novo*."[214] In reaching this conclusion, the Second Circuit relied heavily on the Third Circuit case*, Huang v. Attorney General*.[215]

In *Huang*, the Third Circuit held the well-founded fear element presents a mixed question calling for *de novo* review.[216] The court explained that this ultimate question of whether an applicant has an objectively reasonable fear of persecution rests upon three subsidiary issues to which different standards of review apply.[217] The first subsidiary issue relates to "what may ... happen to the asylum applicant if she returns home."[218] Such predictive findings of fact are subject to clear error review.[219] The second issue is whether the predicted harm "is serious enough to meet the legal test of persecution."[220] The court in *Huang* held that this "is an issue of law [] to which *de novo* review applies."[221] The final subsidiary issue turns on "whether the possibility of those events occurring gives rise to a well-founded fear of persecution under the circumstances of the [applicant's] case."[222] This final question is mixed,[223] and *de novo* review applies.[224]

Notwithstanding the care and rigor applied to this element by the Third Circuit in *Huang*, subsequent decisions from the Third Circuit have muddied the water. In *Thayalan*, the court oversimplified the analysis to state that "[w]hether an asylum applicant has demonstrated ... a well-founded fear of

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211. Liu Jin Lin v. Holder, 723 F.3d 300, 307 (1st Cir. 2013).
212. *Id.*; Aguilar-Escoto v. Garland, 59 F.4th 510, 518 (1st Cir. 2023) (citing 8 C.F.R. § 1003.1 (d)(3)(i)).
213. Huang v. Holder, 677 F.3d 130, 135 (2d Cir. 2012).
214. *Id.* at 134–35.
215. Huang v. Att'y Gen., 620 F.3d 372 (3d Cir. 2010).
216. *Id.* at 382–83.
217. *Huang v. Holder*, 677 F.3d at 135–36 (discussing *Huang*, 620 F.3d 372 (3d Cir. 2010)).
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 135–36. In its analysis of *Huang*, the Second Circuit stated that it has "characterized this second issue as a mixed question of law and fact" that it reviews *de novo*. *Id.* (citing *Mirzoyan,* 457 F.3d at 220; *Edimo–Doualla v. Gonzales,* 464 F.3d 276, 283 (2d Cir. 2006); *Kambolli v. Gonzales,* 449 F.3d 454, 457 (2d Cir. 2006)).
222. *Huang,* 620 F.3d at 383.
223. *Id.* at 384.
224. *Id.* at 387. *See also* Kaplun v. Att'y Gen., 602 F.3d 260, 269–72 (3d Cir. 2010) (finding that the BIA should review factual components of a CAT claim—such as "historical events" and the "present probability of a future event"—for clear error, while "the legal consequences of those underlying facts" should be reviewed *de novo* under 8 C.F.R. § 1003.1(d)(3)(i) – (ii)).

future persecution *is a factual determination reviewed under the substantial evidence standard*."[225] However, the court added the caveat that it "will not . . . defer to a factual finding [] 'based on a misunderstanding of the law.'"[226] As discussed in the persecution section above, the overly reductive approach of *Thayalan* has garnered criticism from subsequent decisions of the Third Circuit.[227]

The Fourth Circuit has yet to deeply engage with this particular issue, but has held that "whether a petitioner has shown" the state will acquiesce in his "'torture' [] is a mixed question of law and fact" in the analogous context of protection under the Convention Against Torture.[228] The court agrees that an IJ's findings regarding "what would likely happen to the noncitizen if removed" is a "purely factual determination," but "whether that predicted outcome" constitutes state acquiescence of torture is a "legal judgment subject to *de novo* review" as it "necessarily involves 'applying the law to decided facts.'"[229] There is no reason to think a different approach should apply to the issue of whether an applicant has demonstrated an objectively reasonable fear of future persecution, but the Fourth Circuit has not yet made that result plain though it has come close. For example, on the one hand, the Fourth Circuit has held that agency conclusions related to "well-founded fear" are subject to legal limitations.[230] On the other hand, the court has explained more recently that agency determinations "that the future-threat presumption was rebutted" due to a fundamental change in circumstances is a "factual finding[] which [it] must accept unless any reasonable adjudicator would be compelled to conclude to the contrary," reciting the modified substantial evidence standard.[231] Yet, it has also cabined that deferential factual review in a different recent case, holding the Board can commit legal errors in the context of making a changed circumstance finding, which should be reviewed *de novo*.[232]

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225. *Thayalan*, 997 F.3d at132.

226. *Id*. (citing *Doe v. Att'y Gen*., 956 F.3d 135, 141 (3d Cir. 2020).

227. Cha Liang v. Att'y Gen., 15 F.4th 623, 626–627 (3d Cir. 2021) (Jordan, J., concurring) (explaining his "concerns that *Thayalan* . . . can be understood to hold that" certain asylum elements are "pure question[s] of fact or that a misapprehension of law by the BIA is a prerequisite to assessing *de novo* whether the facts in a given case" satisfy a legal element, "contrary to preexisting precedent"); *see also supra* notes 179–188.

228. *Cruz-Quintanilla*, 914 F.3d at 889–90.

229. *Id*. at 890; *but see* Ibarra Chevez v. Garland, 31 F.4th 279, 290 (4th Cir. 2022) (applying the substantial evidence standard); Rodriguez-Arias v. Whitaker, 915 F.3d 968, 972 (4th Cir. 2019) (same); *Ponce-Flores v. Garland*, 80 F.4th 480, 484 (4th Cir. 2023) (affirming *Cruz-Quintanilla*'s review standard framework, but also strangely elevating the substantial evidence standard over the entire probability of harm analysis).

230. Crespin-Valladares v. Holder, 632 F.3d 117, 127 (4th Cir. 2011) (holding the BIA's determination related to "a reasonable possibility . . . of future persecution" was "manifestly contrary to law").

231. Ullah v. Garland, 72 F.4th 597, 602 (4th Cir. 2023); Ortez-Cruz v. Barr, 951 F.3d 190, 198 (4th Cir. 2020).

232. Chen v. Garland, 72 F.4th 563, 568–69 (4th Cir. 2023) (explaining that "categorically exclud [ing] from 'changed circumstances' any new episodes of the same kind of persecution suffered in the past" would constitute legal error); *see also* Williams v. Garland, 59 F.4th 620, 636 (explaining that the reasonable person analysis is a legal one to be reviewed *de novo*).

Similar to the Fourth Circuit, the Tenth Circuit regards the agency's conclusions related to "well-founded fear" as subject to legal limitations and has applied a mixed-question analysis in analogous contexts.[233] While it has yet to fully embrace *Z-Z-O-'s* mixed-question approach to determinations made regarding the well-founded fear element, the Tenth Circuit's approach in related asylum determinations suggests it is open to the mixed-question standard when evaluating the reasonableness of an applicant's fear of future harm.

The Seventh, Eighth, Ninth, and Eleventh Circuits have all issued decision in large part agreeing with the Board's approach in *Z-Z-O-*, though not without internal tension.[234] Of these four circuits, the Ninth has most clearly adopted the mixed-standard review of well-founded fear determinations.[235] However, as discussed in the next subsection, not every circuit has embraced the mixed-question standard of review for well-founded fear determinations.

### 2. *Substantial Evidence Review of Well-Founded Fear Determinations*

In contrast to the decisions discussed above, the Fifth and Sixth Circuits have primarily adopted a substantial evidence standard of review for this element of the refugee definition, and have not engaged much with *Z-Z-O-*. However, they do waiver in their treatment of the standard, sometimes holding the element as wholly subject to substantial evidence review and other

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233. Wiransane v. Ashcroft, 366 F.3d 889, 899 (10th Cir. 2004) (holding the agency's determination that Petitioner came to the U.S. before he feared persecution to be "*legally* irrelevant" and remanding for the agency to reconsider its well-founded fear determination) (emphasis added). The Tenth Circuit has likewise rejected the agency's firm resettlement determinations as inconsistent with regulation. Elzour v. Ashcroft, 378 F.3d 1143, 1150–52 (10th Cir. 2004) (noting "*de novo*" review of "legal questions" and "substantial evidence" review of "findings of fact" while holding the IJ's reasons for applying the firm resettlement bar to the "undisputed" facts were "inadequate" and inconsistent with binding regulations). Without specifically holding what standard of review to apply to the firm resettlement question, the Court noted that "[c]omitting a legal error or making a factual finding [] not supported by substantial record evidence is necessarily an abuse of discretion." *Id.* at 1151, n.9.

234. *Rosiles-Camarena v. Holder*, 735 F.3d 534, 538–39 (7th Cir. 2013) (mixed-question); Estrada-Martinez v. Lynch, 809 F.3d 886, 889 (7th Cir. 2015) (same); *but see* Borca v. INS, 77 F.3d 210, 214 (7th Cir. 1996) (substantial evidence); Diallo v. Ashcroft, 381 F.3d 687, 697695 (7th Cir. 2004) (substantial evidence); Rosiles-Camarena v. Holder, 735 F.3d 534, 537536–38 (7th Cir. 2013) (substantial evidence); Uzodinma v. Barr, 951 F.3d 960, 965 (8th Cir. 2020) (mixed-question); Lemus-Arita v. Sessions, 854 F.3d 476, 480 (8th Cir. 2017) (same); *but see* Martin v. Barr, 916 F.3d 1141, 1141 (8th Cir 2019) (substantial evidence); Alemu v. Gonzales, 403 F.3d 572, 574 (8th Cir. 2005) (same); Castillo-Gutierrez v. Lynch, 809 F.3d 449, 452 (8th Cir. 2016) (same); Vitug v. Holder, 723 F.3d 1056, 1063 (9th Cir. 2013) (describing the factual aspects of a mixed-question to include "past events," "states of mind such as intentions and opinions," and "expressions of likelihood," and the legal aspects to include "the application of a particular standard of law to a set of facts"); Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1058–59 (9th Cir. 2006) (holding that whether torture has occurred with the "consent or acquiesces" of the government is a legal determination); Ridore v. Holder, 696 F.3d 907, 915912 (9th Cir. 2012) (same); *but see* Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995) ("[W]hether an applicant has demonstrated a 'well-founded fear of persecution,' [is] reviewed for substantial evidence."); Enriquez-Cortez v. Att'y Gen., 861 F. Appx 406, 410 (11th Cir. 2021) (mixed-question); Zhou Hua Zhu v. Att'y Gen., 703 F.3d 1303, 1314 (11th Cir. 2013) (same); *but see* Martinez v. Att'y Gen., 992 F.3d 1283, 1292 (11th Cir. 2021) (substantial evidence); Nreka v. Att'y Gen., 408 F.3d 1361 (11th Cir. 2005) (same); Sepulveda v. Att'y Gen., 401 F.3d 1226 (11th Cir. 2005) (same); Mendoza v. Att'y Gen., 327 F.3d 1283 (11th Cir 2003) (same).

235. *See cases cited supra* note 234.

times suggesting that legal errors can be made in the course of conducting the well-founded fear analysis.

The Fifth Circuit's sole published interaction with *Z-Z-O-* consists of reversing the Board where the Board engaged in *do novo* review and rejected an IJ's factual finding that the applicant was likely to suffer torture in her home country, rather than the deferential factual review mandated by regulation.[236] In unpublished decisions citing *Z-Z-O-*, the court has affirmed the agency's denial of protection, at times suggesting that the entire asylum decision—including the well-founded fear component—is subject to substantial evidence review.[237] The Fifth Circuit has also repeatedly issued published decisions—in reliance upon *Elias-Zacarias*—that ostensibly sweep in every aspect of the asylum adjudication under the substantial evidence standard.[238]

Nonetheless, in another case, the court has recognized generally that several elements of the refugee definition involve mixed questions, but it did not reach the specific question of whether that standard of review applies to the well-founded fear analysis.[239] In at least one case, the Fifth Circuit has specifically held that the agency's conclusions related to "well-founded fear" are subject to important legal limitations.[240] Ultimately, however, the Fifth Circuit has yet to clearly articulate a mixed-standard of review of the well-founded fear analysis in line with the Board in *Z-Z-O-*, and the weight of decisions in that circuit skew towards substantial evidence review.[241]

Like the Fifth Circuit, the Sixth Circuit has broadly applied the substantial evidence standard to determinations involving future harm in the analogous

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236. *Morales-Morales v. Barr*, 933 F.3d 456, 465 (5th Cir. 2019) ("The BIA's focus on whether country conditions were different between 2002 and 2004 ignores significant record evidence relied upon by the IJ in determining that Morales-Morales faced likely torture from gang members in El Salvador in 2016. This constitutes *de novo* review and is legal error by the BIA." Additionally, the court "conclude[d] the BIA's decision to 'subtract' [] evidence was legal error because the regulations explicitly require consideration of 'all evidence relevant to the possibility of future torture.'").

237. *See, e.g.,* Osman v. Garland, No. 21-60893, 2022 WL 17352570, at *2 (5th Cir. 2022) ("Ultimately, then, the agency's denial of the petitioners' claims for asylum and [withholding of removal] is supported by substantial evidence.").

238. *Bertrand v. Garland*, 36 F.4th 627, 631 (5th Cir. 2022) ("We use the substantial evidence standard to review . . . conclusion that an [noncitizen] is not eligible for asylum. . . . Under this deferential standard, we will grant a petition for review only when the record evidence 'compels' a conclusion contrary to the agency's determination."); Gjetani v. Barr, 968 F.3d 393, 396 (5th Cir. 2020) (stating "our circuit precedents . . . make clear that we use the 'substantial evidence' standard, even when the agency determines the [noncitizen] is credible and accepts his version of the facts" in the context of a well-founded fear analysis (citing INS v. *Elias–Zacarias*, 502 U.S. 478, 481 n.1 (1992)); Zhao v. Gonzales, 404 F.3d 295, 306 (5th Cir. 2005); (same); Wang v. Holder, 569 F.3d 531, 536–37 (5th Cir. 2009) (same).

239. *Alexis v. Barr*, 960 F.3d 722, 730 (5th Cir. 2020) (noting that the Court "review[s] the application of legal standards for asylum, withholding of removal, or protection under CAT to . . . undisputed facts" *de novo*. (citing *Guerrero-Lasprilla* v. *Barr,* 140 S. Ct. 1062, 1069 (2020)).

240. *Eduard v. Ashcroft*, 379 F.3d 182, 188191 (5th Cir. 2004) (holding that the agency "misstated the legal standard to establish a 'reasonable' fear of persecution" by misapplying the *Mogharrabi* test and thus committed legal error) (citing *Mikhael v. INS,* 115 F.3d 299, 304 (5th Cir. 1997)).

241. *Tabora Gutierrez v. Garland*, 12 F.4th 496, 503 (5th Cir. 2021) ("[Petitioner] argues the BIA applied the wrong standard in reviewing the IJ's finding that officials would not acquiesce in his torture. Citing out-of-circuit decisions, [Petitioner] contends that this is a mixed question of law and fact and that the BIA should have reviewed the ultimate question of state acquiescence *de novo* instead of for clear error. . . . We lack jurisdiction to consider this argument.")

context of the Convention Against Torture ("CAT").[242] Further, the Sixth Circuit has explicitly applied the substantial evidence standard to affirm the Board's conclusion that the facts did not support a well-founded fear of persecution in the context of an argument related to changed circumstances.[243] However, it is worth noting that in regards to other applications for relief, the Sixth Circuit has applied the mixed-question standard of review from *Z-Z-O-*, and thus there are grounds for urging the court to adopt that analysis in the asylum context as well.[244]

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In sum, most circuits have embraced the mixed-question standard of review of the well-founded fear element of the refugee definition where application of law to fact is reviewed *de novo*, but a number of panel decisions waiver in their analysis. Additionally, some circuits are prone to overapply the substantial evidence standard on this element, with the Fifth Circuit being one of the worst offenders. Much of this overreliance upon the substantial evidence standard stems from an expansive reading of *Elias-Zacarias*.

### C. *Nexus*

The nexus element of the refugee definition relates to the requirement to establish an applicant's harm is *on account of* their protected characteristic.[245] Persecution occurs "on account of" a protected ground if that ground serves as "at least one central reason for" the persecution.[246] This "one central reason" legal test stems from an amendment to the asylum statute through the 2005 REAL ID Act.[247] Under that modified nexus rule, an applicant is not required to show that the protected characteristic is the sole or dominant motivation for the persecution, as more than one reason may, "and often does, motivate a persecutor's actions."[248] While motive is relevant, punitive

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242. *Petros v. Garland*, No. 21-3826, 2023 WL 3035217, at *5 (6th Cir. Apr. 21, 2023). In *Petros*, the petitioner "argued that whether '[the facts found] amount to torture' is a question of law that should be reviewed *de novo* . . . [and thus] the BIA erred when it applied clear error to whether the acts described in Iraq 'amount to torture.'" *Id.* However, the Court elided this distinction by holding that "the BIA never analyzed whether all the conditions in Iraq would amount to torture [and instead] . . . held that, based on the facts as found by the IJ, Petros had not shown a *particularized risk* of torture—a factual claim the BIA reviews for clear error." *Id.* As such, the Court concluded that petitioner's "standard-of-review argument fail[ed]." *Id.*

243. *Mbonga v. Garland*, 18 F.4th 889, 897 (6th Cir. 2021); Klawitter v. INS, 970 F.2d 149, 151 (6th Cir 1992).

244. *Singh v. Rosen*, 984 F.3d 1142, 1151 (6th Cir. 2021), *reh'g denied* (Feb. 11, 2021) (acknowledging that the "Board's own precedent treats [the cancellation of removal] hardship decision as a legal question," characterizing it as a "mixed question") (citing *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 591 (B.I.A. 2015)).

245. 8 U.S.C. § 1158; Canales-Rivera v. Barr, 948 F.3d 649, 654 (4th Cir. 2020).

246. 8 U.S.C. § 1158; Crespin-Valladares v. Holder, 632 F.3d 117, 127 (4th Cir. 2011).

247. 8 U.S.C. § 1158; H.R. Rep. No. 109–72 at 163 (2005) (Conf. Rep. on the REAL ID Act). Adjudicators must focus on all the reasons for the past or feared harm—rather than exclusively on motive.

248. *Cruz v. Sessions*, 853 F.3d 122, 127–28 (4th Cir. 2017), as amended (Mar. 14, 2017).

intent is not required.[249] Moreover, "[a]n applicant does not bear the unreasonable burden of establishing the exact motivation of the persecutor where different reasons for the action are possible."[250] Instead, it is enough that the protected ground be "one central reason, perhaps intertwined with others, why [the applicant], and not another person, was threatened."[251] Thus, the nexus analysis is fundamentally about causation.

As discussed above, this element was at issue in the Supreme Court case, *Elias-Zacarias*, and it was there that the Court ratcheted up the substantial evidence standard.[252] As a result, all the circuits have held that at least the factual component of the nexus analysis is subject to deferential factual review.[253] Nevertheless, a number of courts have correctly read *Elias-Zacarias* to be limited to factual disputes and have identified discrete legal errors that can occur in the course of conducting the nexus analysis that merit *de novo* review.

For example, the First Circuit recently noted that while a factual dispute regarding the actual motive of the persecutor is reviewed deferentially, the court reviews claims of error *de novo* when considering whether the agency misapplied the "one central reason" test.[254] The Third Circuit has articulated a similar rule, explaining that while substantial evidence applies to a factual dispute involving nexus, the court "will not . . . defer to a factual finding [] 'based on a misunderstanding of the law.'"[255]

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249. Matter of Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

250. Matter of J-B-N- & S-M, 24 I. & N. Dec. 208, 211 (B.I.A. 2007); Matter of S-P-, 21 I. & N. Dec. 486, 489–490 (B.I.A. 1996) ("Proving the actual, exact *reason* for persecution or feared persecution may be impossible in many cases. . . . Rather, an asylum applicant bear[s] the burden of establishing facts on which a reasonable person would fear that the danger arises on account of" a protected ground).

251. *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (internal citations and quotations omitted); *but see* Matter of M-R-M-S-, 28 I. & N. Dec. 757 (B.I.A. 2023).

252. *See supra* Part I.A.

253. Lopez de Hincapie v. Gonzales, 494 F.3d 213, 218 (1st Cir. 2007) (holding that "the question of whether persecution is on account of one of the five statutorily protected grounds is fact-specific"); Guerra-Galdamez v. Wilkinson, 834 Fed. Appx. 682, 682–683 (2d Cir. 2021) (stating that "[w]hether someone has been persecuted on account of [a protected trait] is a factual finding we review under the substantial evidence standard"); Thayalan v. Att'y Gen., 997 F.3d 132 (3d Cir. 2021) (same) (citing *INS v. Elias-Zacarias*, 502 U.S. at 481 & n.1 (1992)); Gonzalez-Posadas v. Att'y Gen., 781 F.3d 677, 686 (3d Cir. 2015); Garcia v. Garland, 73 F.4th 219, 232 (4th Cir. 2023) (holding the "'nexus' . . . represents a factual determination that we . . . treat as 'conclusive unless the evidence . . . was such that any reasonable adjudicator would have been compelled to conclude to the contrary'"); Vazquez-Guerra v. Garland, 7 F.4th 265, 271 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1228 (2022) (same)); Juan-Pedro v. Sessions, 740 F. App'x 467, 473 (6th Cir. 2018) (same) (citing *Mandebvu*, 755 F.3d at 424); Klawitter v. INS, 970 F.2d 149 (6th Cir 1992); Meraz-Saucedo v. Rosen, 986 F.3d 676, 685 (7th Cir. 2021) (same); Silvestre-Giron v. Barr, 949 F.3d 1114, 1119 (8th Cir. 2020) (same); Baltti v. Sessions, 878 F.3d 240 (8th Cir. 2017) (same); Umana-Escobar v. Garland, 69 F4th 544, 551–52 (9th Cir. 2023) (same); Orellana-Recinos v. Garland, 993 F.3d 851, at 855–858 (10th Cir. 2021) (same); Rodriguez v. Att'y Gen., 735 F.3d 1302, 1311 (11th Cir. 2013) (same); Sepulveda v. Att'y Gen., 401 F.3d 1226 (11th Cir. 2005) (same); Nreka v. Att'y Gen., 408 F.3d 1361 (11th Cir. 2005) (same); Sanchez-Castro v. Att'y Gen., 998 F.3d 1281 (11th Cir. 2021) (same); Perez-Sanchez v. Att'y Gen., 935 F.3d 1148 (11th Cir. 2019) (same).

254. *Jimenez-Portillo v. Garland*, 56 F.4th 162, 166 (1st Cir. 2022) ("The petitioners [argue] that the agency misapplied a legal standard by failing to allow for the possibility of a mixed-motive persecution. This plaint presents a question of law and, therefore, engenders *de novo* review.")

255. *Thayalan* 997 F.3d at 138 (citing *Doe v. Att'y Gen.*, 956 F.3d 135, 141 (3d Cir. 2020)).

The Fourth Circuit also has rejected certain nexus determinations by the Board as legally erroneous.[256] In *Marvin A.G. v. Garland*, for example, the court explained that "under our well-established case law, an IJ commits legal error when [he] centers his analysis on the reasons why the gang threatened and persecuted the petitioner's *family*, rather than on the reasons why the gang threatened the *petitioner himself*."[257] Upon determining that the IJ committed this very legal error, the court "conclude[d] [] the IJ . . . appl[ied] an incorrect standard in the nexus analysis, and [] the Board . . . compounded the [] error by failing to recognize it."[258]

Similarly, the Fifth and Tenth Circuits have recognized the bifurcated nature of nexus determinations as involving application of law to facts.[259] In one case, the Fifth Circuit held the IJ committed legal error by concluding that "a fear of persecution based on a protected . . . characteristic is negated simply because the applicant also fears general civil violence."[260] The Tenth Circuit has also identified legal error in agency determination of whether an asylum applicant experienced harm on account of political opinion.[261] And as noted above, the Fifth Circuit has accepted generally the proposition that some elements of the refugee definition involve mixed questions because they require application of legal standards to historical facts.[262]

The circuit with perhaps the most well-developed case law regarding mixed-question standard of review of nexus determinations is the Ninth Circuit. That court has long recognized "the application of established legal principles to undisputed facts" in the nexus contexts merits *de novo* review.[263] In *Umana-Escobar v. Garland*,[264] the Ninth Circuit explicitly held "the BIA should have reviewed the IJ's nexus determination *de novo*, not for clear error."[265] The

256. *Oliva v. Lynch*, 807 F.3d 53, 59–60 (4th Cir. 2015) (noting prior Fourth Circuit decisions disapproving of the BIA's "'excessively narrow reading' of the nexus requirement" as "manifestly contrary to law" even though the factual components of a nexus determination are reviewed for substantial evidence).

257. *Marvin A.G. v. Garland*, 72 F.4th 22, 28 (4th Cir. 2023) (citing *Perez Vasquez v. Garland*, 4 F.4th 213, 223 (4th Cir. 2021)).

258. *Id.*

259. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 348349 (5th Cir. 2002) (noting the Court has "found that the nexus requirement is not an 'either-or' proposition" and that "it was error for the BIA to categorically prevent [applicant] from showing political persecution through other evidence"); Orellana-Recinos v. Garland, 993 F.3d 851, at 855–58 (10th Cir. 2021) (After providing a "recitation of the governing law" in regards to nexus, the Court noted that Petitioners "dispute only the BIA's factual findings . . ., not the legal framework it applied" and thus utilized a substantial evidence standard of review).

260. *Eduard v. Ashcroft*, 379 F.3d 182, 90 (5th Cir. 2004); Argueta-Hernandez v. Garland, 87 F.4th 698, 708 (5th Cir. 2023).

261. *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008) ("Because the IJ applied *the wrong legal standard* in determining Ms. Hayrapteyan failed to prove past political persecution, and because this record would support a determination to the contrary under the correct standard, we reverse the IJ's determination and remand," implicitly applying *de novo* review) (emphasis added).

262. *Alexis v. Barr*, 960 F.3d 722, 730 (5th Cir. 2020). In *Alexis*, the criminal noncitizen bar applied and thus jurisdiction to review was also at issue in the case. Because *Alexis* assignment of error focused "on disputed or unestablished facts," the court found the arguments unreviewable. *Id.*

263. *Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995).

264. Umana-Escobar v. Garland, 69 F.4th 544, 544 (9th Cir. 2023).

265. *Id.* at 551–52.

court grounded its conclusion in Board case law, explaining that in *Matter of S-E-G-*, "the BIA stated that the nexus determination is a legal determination subject to *de novo* review."[266] In so concluding, the Board relied upon "among other authorities: (1) 8 C.F.R. § 1003.1(d)(3), the [2002] regulation setting forth the BIA's standards for reviewing an IJ's decision; and (2) the Department of Justice's commentary on the regulation, which discusses the interplay between the clearly erroneous standard of review applicable to an IJ's factual findings and the BIA's *de novo* authority."[267] The court points out that even "[t]he DOJ Guidance explains [] the nexus determination is not [simply] a factual determination subject to clear error review."[268] Rather, the "[IJ]'s determination of 'what happened' to the individual is a factual determination that will be reviewed under the clearly erroneous standard."[269] However, the court explains that:

> "The [IJ]'s determination[] of whether these facts demonstrate . . . the harm inflicted was 'on account of' a protected ground, [is a] question[] that will not be limited by the 'clearly erroneous' standard. Thus, the BIA reviews the IJ's underlying factual findings, such as what a persecutor's motive may be, for clear error. But the BIA must review *de novo* whether a persecutor's motives meet the nexus legal standards, i.e., whether a protected ground was 'one central reason' (for asylum) or 'a reason' (for withholding of removal) for the past or feared harm."[270]

* * * *

In sum, *Elias-Zacarias* may foreclose any argument that nexus determinations are wholly subject to *de novo* review, and thus factual findings related to the motivation of the persecutor and the historical or predicted cause of the harm will remain subject to deferential review on appeal. However, *Elias-Zacarias* need not be read beyond that context. As a number of courts have recognized, application of law to undisputed fact can constitute a legal determination that merits *de novo* review. As I will explore in the Part III, the mixed-question standard of review provides a promising pathway forward.

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266. *Id*. at 551 ("The record before us is adequate to allow us to perform *de novo* review of the legal issues presented, specifically, whether the respondents established that they were persecuted 'on account of' a protected ground.") (quoting *Matter of S-E-G-*, 24 I. & N. Dec. 579, 588 n.5 (B.I.A. 2008)).

267. *Id*. at 552. (citing *Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002)). The court also noted that "[i]n *Matter of S-E-G-*, 24 I. & N. Dec. at 588 n.5, the BIA also cited *Matter of V-K-*, 24 I. & N. Dec. 500 (B.I.A. 2008), and *Matter of A-S-B-*, 24 I. & N. Dec. 493 (B.I.A. 2008)," cases which "have been overruled only to the extent that they held that 'predictive findings of what may or may not occur in the future' are not factual findings. *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 590 (B.I.A. 2015)." The Court thus concludes that "*Matter of V-K-* and *Matter of A-S-B-* remain good law for the proposition that the IJ's nexus determination is a legal question subject to *de novo* review by the BIA." *Id* at 552 n.4.

268. *Id*. at 552.

269. *Id*.

270. *Id*. (internal citations omitted).

### D. *Protected Characteristic*

To establish a nexus—as discussed in the subsection above—between one's past or feared harm and a protected characteristic, one must also prove they have a recognized protected characteristic. The refugee definition enumerates five such characteristics: race, religion, nationality, particular social group, and political opinion.[271] An applicant may either prove that they possess one of these protected characteristics or that their feared persecutor will attribute such a characteristic to them.[272]

Of the five covered grounds, particular social group has received the most attention. The characteristics of race, religion, nationality, and political opinion are generally construed quite broadly.[273] By contrast, social group is increasingly construed narrowly. To establish a cognizable social group, an applicant must satisfy a three-part subtest by demonstrating that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[274] The Board has stated an immutable characteristic is one that a person "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'"[275] Such an immutable characteristic "might be an innate one such as sex, color . . ., kinship ties, or . . . shared past experiences . . . ."[276] The standard for particularity requires that the social group have "discrete" and "definable boundaries" so that it is sufficiently clear who is in and out of the group.[277] At its core, the question of particularity revolves around whether "the proposed description is sufficiently particular or is too amorphous to create a benchmark for determining group membership."[278] Finally, "[t]o have [] 'social distinction' . . ., there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."[279] An applicant may look to "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like" to establish social distinction.[280] This requirement

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271. INA § 101(a)(42).

272. *Matter of S-P-*, 21 I. & N. Dec. at 497; *Uwais v. Att'y Gen.,* 478 F.3d 513, 517 (2d Cir. 2007).

273. ANKER, *supra* note 131.

274. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014); Canales-Rivera v. Barr, 948 F.3d 649, 654 (4th Cir. 2020) (citing *Lizama v. Holder*, 629 F.3d 440, 446–47 (4th Cir. 2011)); Matter of W-Y-C-, 27 I. & N. Dec. 189 (B.I.A. 2018).

275. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (overruled on other grounds by Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987)); Martinez v. Holder, 740 F.3d 902, 910–11 (4th Cir. 2014).

276. *Id*. (emphasis added).

277. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237; Amaya v. Rosen, 986 F.3d 424, 427 (4th Cir. 2021).

278. Alvarez Lagos, 927 F.3d at 253; Lizama, 629 F.3d at 446–47 (rejecting "young, Americanized, well-off Salvadoran[s] . . . who oppose gangs" because such characteristics are "amorphous" in that they lack adequate benchmarks); Matter of A-M-E & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007) (holding "wealthy Guatemalans" is not a PSG as it is "simply too subjective").

279. Matter of W-G-R-, 26 I. & N. Dec. 208, 217 (B.I.A. 2014).

280. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 244.

asks the adjudicator to assess whether an applicant's home society makes meaningful distinctions based on their common immutable characteristics.[281]

Because it is typically undisputed whether a person possesses a claimed protected characteristic of race, religion, nationality, or political opinion, there is not a significant body of case law on this question. However, legion are the decisions addressing the social group analysis, and there is broad agreement across the circuits that this analysis is quintessentially a legal one subject to *de novo* review.[282] The primary area in which there is disparate treatment regarding the standard of review to apply to the social group analysis relates to the social distinction prong. Some courts parse out this subcomponent as being subject to deferential factual review. For example, while the Fourth Circuit has held the immutability and particularity requirements are subject to *de novo* review,[283] some panels have held that social distinction is a factual subcomponent subject to substantial evidence review,[284] and others have treated social distinction as a legal determination subject to *de novo review*.[285]

The Third Circuit had previously classified the social group analysis writ large as legal and thus subject to *de novo* review.[286] More recently, however, it has treated this element as being subject to a mixed-question standard of review. In *S.E.R.L.*, the court explained "the existence of a cognizable particular social group presents a mixed question of law and fact, since the ultimate legal question of cognizability depends on underlying factual questions concerning the group and the society of which it is a part."[287] Thus the court

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281. *See W-G-R-*, 26 I. & N. Dec. at 217.

282. The First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have held that the particularity, immutability, and social distinction components of the particular social group analysis involve questions of law that the court review *de novo*. *See, e.g.,* Reyes-Ramos v. Garland, 57 F.4th 367, 371 (1st Cir. 2023) (holding that a "conclusion regarding the definition and scope of the statutory term 'particular social group' is a purely legal determination that we review *de novo*"); Hernandez-Chacon v. Barr, 948 F.3d 94, 101 (2d Cir. 2020) (same); Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330, 339 (3d Cir. 2008) (same); *Crespin-Valladares*, 632 F.3d at 124–26 (4th Cir. 2014) (same); Sanchez-Robles v. Lynch, 808 F.3d 688, 691 (6th Cir. 2015) (same); Ngugi v. Lynch, 826 F.3d 1132, 1137–39 (8th Cir. 2016) (same); Pirir-Boc v. Holder, 750 F.3d 1077, 1081 (9th Cir. 2014) (same); Cruz-Funes v. Gonzales, 406 F.3d 1187, 1191 (10th Cir. 2014) (same); Gonzalez v. Att'y Gen., 820 F.3d 399, 403 (11th Cir. 2016) (same). The Seventh Circuit has yet to defer to the agency's three-part social group test, but adheres to the *Acosta* immutability test; however, it too reviews *de novo* the agency's social group determinations. Lozano-Zuniga v. Lynch, 832 F.3d 822, 828 (7th Cir. 2016) ("Whether a group constitutes a particular social group . . . is a question of law that we review *de novo*.").

283. *Amaya*, 986 F.3d at 429, 434 (holding that "[w]hether a PSG satisfies the particularity requirement is question of law, which we review *de novo*" and "[p]articularity is a definitional inquiry that, like immutability, by its very nature is a question of law").

284. Nolasco v. Garland, 7 F.4th 180, 189 (4th Cir. 2021) ("Whether Salvadoran society views former MS-13 members or former MS-13 members who left for moral reasons as socially distinct is a question of fact we review only for substantial evidence."); *see also Amaya*, 986 F.3d at 434 (noting that the "social distinction prong requires a 'case-by-case evidentiary inquiry'").

285. Garcia v. Garland, 2023 WL 4443404, at *6–7 (4th Cir. July 11, 2023) (holding that "the BIA's 'social distinction' analysis hinged entirely on the Attorney General's vacated *L-E-A-II* decision, which . . . was flatly inconsistent with our clear and conclusive ruling that 'the family satisfies the BIA's visibility criterion'").

286. Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330, 339 (3d Cir. 2008).

287. S.E.R.L. v. Att'y Gen., 894 F.3d 535, 543 (3d Cir. 2018).

"review[s] *de novo* the ultimate legal conclusion as to the existence of a particular social group, while . . . review[ing] the underlying factual findings for 'substantial evidence[.]'"[288] The court added that "[w]hether a petitioner has established membership in a particular social group also involves agency fact-finding" where "administrative findings of fact are 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'"[289]

The Fifth Circuit has issued internally inconsistent panel decisions. In an unpublished decision in 2010, the Fifth Circuit observed "[t]here is some question as to whether the agency's construction of what constitutes a 'social group' is . . . a determination of law or fact."[290] Since that time, it has both held that the social group analysis is a legal one reviewed *de novo*[291] and that at least the particularity and social distinction prongs are reviewed for substantial evidence.[292]

* * * *

Although there is a general consensus among the circuits that the social group analysis (and by extension the other protected characteristics) should not be reduced to mere factual findings subject to deferential review, and that important legal questions are embedded in these determinations, there is still divergence in how the courts approach the standard of review on this element. Just as with the other elements of the refugee definition, consistency here is important to fairly assessing an applicant's claim for protection. As discussed further in Part III, nondeferential mixed-question review offers a framework for both greater uniformity and more searching review.

### E. *Government/Nonstate Persecutor*

The final element of the refugee definition in this study is the requirement that an applicant establish they have suffered or fear persecution from their government or a nonstate actor their government is either unwilling or unable to control. This test is most naturally derived, in my view, from the Refugee Act's definition of refugee as a person "who is . . . *unable or unwilling to avail himself . . . of the protection of* [*his country of nationality*] because of

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288. *Id.*; Lukwago v. Ashcroft, 329 F.3d 157, 167 (3d Cir. 2003) (reviewing the BIA's statutory interpretation of "particular social group" in accordance with *Chevron* principles, and stating, "[o]n the other hand, we must treat the BIA's findings of fact as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary'" (quoting 8 U.S.C. § 1252(b)(4)(B))").

289. S.E.R.L. v. Att'y Gen., 894 F.3d at 543.

290. Sorto-De Portillo v. Holder, 358 F. App'x 606, 607 (5th Cir. 2010).

291. Alvarado-Ruiz v. Garland, 845 F. App'x 355, 356 (5th Cir. 2021) ("Whether a proposed group qualifies as a particular social group for asylum purposes is a legal question . . . reviewed *de novo*.") (citing *Orellana-Monson v. Holder,* 685 F.3d 511, 517–21 (5th Cir. 2012)).

292. Jaco v. Garland, 24 F.4th 395, 407 (5th Cir. 2021) ("Substantial evidence supports the BIA's conclusion that her group is neither particularized nor distinct.").

persecution or a well-founded fear of persecution."[293] Historically, courts have stated, by contrast, that harm "by non-state actors is 'inherent'" in the statutory term *persecution* as used "in the 1951 Convention and the Refugee Act of 1980."[294] Yet, regardless of the source of the test, it is well established in U.S. law.[295]

Additionally, there have been numerous decisions construing this test and recognizing it to have discrete legal parameters and rules for application. For example, the IJ must analyze whether the persecuting agent is a government or nonstate actor; only where the persecutor is a nonstate actor may the IJ require the additional showing that the applicant's government was unable or unwilling to give protection.[296] Additionally, if an applicant has suffered persecution by a nonstate actor, the IJ must determine whether the persecution could or would have been controlled at *a local/regional level*—not simply a national level.[297] When there is some available government protection for the applicant, the IJ must also consider whether such protections are sufficiently meaningful and effective to satisfy the government's obligation to provide safety vis-à-vis nonstate persecution.[298]

Conversely, courts have proscribed the agency from imposing requirements on the nonstate actor test contrary to the text or established constructions of the statute. For example, an IJ may not require an applicant to demonstrate both that the government was unable *and* unwilling to control the persecution, as they are disjunctive requirements; an applicant need only prove one or the other.[299] An IJ may not require that the persecuting nonstate actor be part of

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293. INA § 101(42)(A) (emphasis added); Ellison & Gupta, *supra* note 19, at 511–15 (arguing that the nonstate actor test is anchored in the statute's reference to the "avail[ability] . . . of [state] protection").

294. Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1060–62 (9th Cir. 2017) (emphasis added).

295. *Ellison & Gupta*, *supra* note 19.

296. *See* Ramos v. Lynch, 636 Fed. Appx. 710 (9th Cir. 2016) (holding that it was legal error for BIA to require petitioner to satisfy nonstate actor test when persecutors were police officers) (citing *Boer–Sedano v. Gonzales,* 418 F.3d 1082, 1088 (9th Cir. 2005)); Baballah v. Ashcroft, 367 F.3d 1067, 1078 (9th Cir. 2004).

297. *Bringas-Rodriguez*, 850 F.3d at 1063 (citing *Mashiri v. Ashcroft*, 383 F.3d 1112, 1122 (9th Cir. 2004)) (rejecting the government's reliance on a State Department report to counter the petitioner's evidence of local police unwillingness to protect her and her family and holding that "an asylum applicant may meet her burden with evidence that the government was unable or unwilling to control the persecution in the applicant's *home city or area*.") (emphasis added); *see also* Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1055–58 (9th Cir. 2006) (finding petitioner's credible testimony that the government was unwilling or unable to control *his* persecutors sufficient to overcome country condition reports suggesting "improvements" generally for persons in petitioner's situation).

298. *See* J.R. v. Barr, 975 F.3d 778, 782 (9th Cir. 2020); Madrigal v. Holder, 716 F.3d 499, 506 (9th Cir. 2013); Rahimzadeh v. Holder, 613 F.3d 916, 923 (9th Cir. 2010); Navas v. INS., 217 F.3d 646, 656 n.10 (9th Cir. 2000) ("[A]rrests by police, without more, may not be sufficient to rebut claims that the government is unable or unwilling to stop persecutors, . . . especially where the punishment may amount to no more than a 'slap on the wrist.'") (citations omitted); *see also* ANKER, *SUPRA* NOTE 131.

299. *J.R.* 975 F.3d at 782 (holding evidence showing "that the police were willing to protect [him] . . . says little if anything about whether they are able to do so"); Rahimzadeh v. Holder, 613 F.3d 916, 921–23 (9th Cir. 2010) (stating the legal question is whether the government both "*could and would* provide protection" (emphasis added)).

an organized group.[300] Additionally, an IJ may not apply a *per se* requirement that the applicant have reported the persecution to government authorities.[301] Some scholars have argued the statutory text of the Refugee Act provides a mechanism for measuring the level of protection from persecution a government must provide: "a state is obligated . . . to provide sufficient protection to reduce the risk of persecution . . . below that of a well-founded fear."[302]

On this element, similar to the persecution element, there are deep and unresolved inter- and intra-circuit tensions regarding whether courts classify the nonstate actor analysis as factual, legal, or mixed. The First, Second, Fourth, Ninth, Tenth, and Eleventh Circuits have all recognized at least on some occasions that agency denials based on this element get mixed-question or *de novo* review. Whereas the Third, Fifth, Sixth, Seventh, and Eighth Circuits are broadly consistent in reviewing this element under the substantial evidence standard of review.

### 1. *State Actor Analysis as a Mixed-Question*

In *Rosales Justo v. Sessions*,[303] the First Circuit has stated "[t]he BIA's application of the 'unable or unwilling' standard is a legal question that [it] review[s] *de novo*."[304] The court held the Board committed legal error by misapplying the "unable or unwilling standard," specifically by "conflating unwillingness and inability," treating it as one element rather than separately examining the government's unwillingness and its inability to protect.[305] It reasoned "unwillingness and inability are distinct issues, and that an applicant may be able to prove inability without proving unwillingness where the government's willing efforts to protect its citizens fall short."[306] Additionally, the court found the Board erred in applying a per se reporting

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300. *Singh v. INS*, 94 F.3d 1353, 1356 (9th Cir. 1996) (holding persecution does not need to be "committed by an 'organized or quasi-governmental group'").

301. *Ornelas-Chavez* 458 F.3d at 1058. In *Bringas-Rodriguez*, 850 F.3d 1051, the en banc court elaborated a five-part analysis for nonstate actor determinations where the applicant did not seek state protection. The Court explained that reporting is not necessary where: (1) "a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection;" (2) "[p]rior interactions with authorities" reveal governmental inability or unwillingness to protect; (3) "others have made reports of similar instances to no avail;" (4) "private persecution of a particular sort is widespread and well-known, but not controlled by the government;" or (5) reporting "would have been futile or would have subjected the applicant to further abuse." *Id.* at 1066–67 (citing cases).

302. *See, e.g.*, Ellison & Gupta, *supra* note 19 (arguing that the statutory language "*unable or unwilling to avail . . . of [state] protection*" in § 1101(a)(42)(A) is explicitly linked to the "well-founded fear" analysis and the latter must therefore serve as the lodestar for nonstate actor determinations). The former administration's efforts to re-frame the "unable or unwilling" standard as the "condone or complete helplessness" standard has also been recognized as a quintessentially legal debate. *Id.*

303. Rosales Justo v. Sessions, 895 F.3d 154 (1st Cir. 2018).

304. *Id.* at 162–63 (1st Cir. 2018). In fact, the court specifically rebuffed the government's effort to "avoid *de novo* review of the [BIA] decision . . . [by] transform[ing] [it] . . . into something it is not—a factual finding by the BIA that Rosales failed to show that the Mexican government was either unwilling or unable to protect him . . ., a finding that [] must [be] review[ed] under the deferential substantial evidence standard." *Id.* at 161. While the BIA likewise erred in applying the wrong standard of review of the IJ's factual findings, it is clear that the court faulted the BIA's *legal* analysis regarding this element.

305. *Id.*

306. *Id.* at 163.

requirement contrary to its case law.[307] While acknowledging that "factual findings" made by the IJ are reviewed for "substantial evidence," the Court reviewed the BIA's legal conclusions on this element *de novo*.[308] However, in another panel decision, the First Circuit has held that "the question whether [a] government . . . is unwilling or unable to control [feared] potential persecutors is a question of fact [] review[ed] under the highly deferential substantial evidence standard."[309] Nevertheless, even in that case, the court recognized that such a factual analysis was subject to legal parameters.[310]

Like the First Circuit, the Ninth, Tenth, and Eleventh Circuits have also recognized in some decisions that because the nonstate actor test requires the application of law to settled facts, it involves legal determinations that should be reviewed *de novo*.[311] In a number of other decisions, however, these same courts have held that the element receives substantial evidence review.[312]

Like other circuits, while the Second Circuit has endorsed the use of the mixed-question standard generally,[313] it has, on occasion, elided the precise standard it has applied to the nonstate actor element.[314] In some decisions, it has clearly applied only the substantial evidence standard.[315] In another decision, it has applied the *de novo* standard.[316] Yet in others, the court has implicitly recognized the nonstate actor element is subject to both factual and legal considerations

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307. *Id*. at 165–66 (citing *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017)).

308. *Id*. at 161–62.

309. Ortiz-Araniba v. Keisler, 505 F.3d 39, 42 (1st Cir. 2007).

310. *See id*. at 42.

311. *See* Madrigal v. Holder, 716 F.3d 499, 503, 506–07 (9th Cir. 2013) (holding that misapplication of "unwilling or unable" standard was legal error); Ornelas-Chavez v. Gonzalez, 458 F.3d 1052, 1058 (9th Cir. 2006) (The "BIA applied the wrong legal standard" by determining the nonstate actor test was not satisfied due the applicant's "failure to report"); Batalova v. Ashcroft, 355 F.3d 1246, 1253, n.9 (10th Cir. 2004) (evaluating whether the BIA "applied an improper legal standard" or did in fact utilize the "proper" "'unwilling or unable to control' standard"); De la Llana-Castellon v. INS., 16 F.3d 1093, 1097 (10th Cir. 1994) (treating as legal error the BIA's imposition of a requirement that harm be inflicted by a government); Lopez v. Att'y. Gen., 504 F.3d 1341, 1345 (11th Cir. 2007) (holding to the extent the BIA ruled "the failure to seek protection without more is enough to defeat a claim for asylum," that would be inconsistent "with *In re S–A–*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000)" and remanding).

312. *See* Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1072 (9th Cir. 2017) (applying substantial evidence standard); Aguilar v. Garland, 29 F.4th 1208, 1211–12 (10th Cir. 2022) (same); Ba v. Mukasey, 539 F.3d 1265, 1269–71 (10th Cir. 2008) (reviewing generally the question of changed circumstances in regards to, *inter alia*, Mauritania's ability to offer protection as a factual inquiry reviewed under the substantial evidence standard); Bwika v. Holder, 527 F. App'x 772, 777 (10th Cir. 2013) (applying a substantial evidence standard to the agency's nonstate actor determination); Sanchez-Castro v. Att'y Gen., 998 F.3d 1281, 1288 (11th Cir. 2021) (same); Mazariegos v. Att'y Gen., 241 F.3d 1320, 1327 (11th Cir. 2001) (same).

313. *See* Hui Lin Huang v. Holder, 677 F.3d 130, 135–37 (2d Cir. 2012) (holding "*de novo* review applies to the ultimate question" of whether the facts satisfy the legal element in question).

314. *See, e.g*., Pan v. Holder, 777 F.3d 540, 543–46 (2d Cir. 2015) (reciting both the substantial evidence and *de novo* standards and reversing the Board without announcing which standard applied).

315. Babar v. Mukasey, 305 F. App'x 778, 781 (2d Cir. 2009) ("The BIA's finding that Babar had not shown that the government of Pakistan was unwilling or unable to protect him was supported by substantial evidence in the record such that we cannot say that "any reasonable adjudicator would be compelled to conclude to the contrary."); Zelaya de Ceron v. Lynch, 648 F. App'x 78, 79 (2d Cir. 2016) (same).

316. Mekheel v. Holder, 361 F. App'x 236, 238 (2d Cir. 2010) (holding the BIA "was entitled to review *de novo* the question of whether Mekheel established that his fear" related to "groups that the Egyptian government was unable or unwilling to control").

with respect to how to properly interpret, construe, and apply the nonstate actor test.[317]

The Fourth Circuit long held that "[w]hether a government is 'unable or unwilling to control' private actors . . . is a factual question that must be resolved based on the record in each case."[318] However, it has more recently recognized in an *en banc* decision that the agency can commit legal errors in the course of making factual findings regarding this element, and such errors are reviewed *de novo*.[319] As such, earlier Fourth Circuit cases purporting to review every aspect of this element as factual are arguably abrogated. That said, the Fourth Circuit has yet to conclusively apply a mixed-question standard to the nonstate actor element.

### 2. *State Actor Analysis as a Factual Question*

By contrast, the Third, Fifth, Sixth, Seventh, and Eighth Circuits have been more resolute in classifying the nonstate actor element as primarily factual.[320] Nevertheless, both the Third and Fifth circuits have recognized, on occasion, the nonstate actor element can involve embedded legal questions as well.[321] As noted above, the Fifth Circuit has held several other elements of the refugee definition involve mixed-questions because they require an

317. *See* Scarlett v. Barr, 957 F.3d 316, 329–34 (2d Cir. 2020); Alfaro Perez v. Garland, 2023 WL 3083189, at *1 (2d Cir. Apr. 26, 2023).

318. Crespin-Valladares v. Holder, 632 F.3d 117, 128 (4th Cir. 2011). *See also* Rodriguez-Amaya v. Garland, No. 22-1215, 2022 WL 17716897, at *1 (4th Cir. 2022) (same).

319. *See* Portillo Flores v. Garland, 3 F.4th 615, 634 (4th Cir. 2021) ("The agency rejected Petitioner's government control argument, in essence applying a per se rule that a petitioner is required to seek out the police or else sit on his asylum rights. This was legal error."). *See also* Orellana v. Barr, 925 F.3d 145, 152–53 (4th Cir. 2019).

320. Fiadjoe v. Att'y Gen., 411 F.3d 135, 153 (3d Cir. 2005) (describing the finding of whether a government is "either unable or unwilling to control" a persecutor as "factual" and thus subject to substantial evidence review); *Cardozo v. Att'y Gen.*, 505 F. Appx. 135, 138–39 (3d Cir. 2012) (same); Huang v. Att'y Gen., 620 F.3d 372, 382–83 (3d Cir. 2010) (same); Sanchez-Amador v. Garland, 30 F.4th 529, 533 (5th Cir. 2022) (same); Gonzales-Veliz v. Barr, 938 F.3d 219, 224 (5th Cir. 2019) (same); Khalili v. Holder, 557 F.3d 429, 436 (6th Cir. 2009) (same); K. H. v. Barr, 920 F.3d 470, 478 (6th Cir. 2019) (same); *Vahora v. Holder*, 707 F.3d 904, 908–10 (7th Cir. 2013) (same); Osorio-Morales v. Garland, 72 F.4th 738, 742–43 (7th Cir. 2023) (same). *See also* Ngengwe v. Mukasey, 543 F.3d 1029, 1035–36 (8th Cir. 2008) (holding that substantial evidence did not support the IJ's finding that Cameroon was able and willing to protect a nonreporting petitioner, where petitioner's credible testimony explaining that the police do not protect women from domestic violence, the State Department country reports, and a relative's affidavit evidenced that Cameroon would "not do anything" to protect her); Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005) ("Whether a government is 'unable or unwilling to control' private actors . . . is a factual question that must be resolved based on the record in each case."); Martin v. Barr, 916 F.3d 1141, 1145 (8th Cir 2019) (same). *See also* Jimenez Galloso, 954 F.3d 1189, 1192 (8th Cir. 2020) (same).

321. Herrera-Reyes v. Att'y Gen., 952 F.3d 101, 112 n.2 (3d Cir. 2020) (noting that "the record is replete with undisputed facts showing the Nicaraguan government cannot or will not control the Sandinistas. . . . So on *de novo* review . . ., we conclude that Petitioner was mistreated by forces the Nicaraguan government cannot control."); Bertrand v. Garland, 36 F.4th 627, 631 (5th Cir. 2022) (recognizing the issues in the case as "whether: (1) the BIA applied the correct legal standard in determining that Bertrand had not shown the Haitian government to be unable or unwilling to protect him; and (2) substantial evidence supported its conclusion.").

application of legal standards to historical and predictive facts.[322] Nonstate actor determinations involve a similarly bifurcated analysis. However, to date, the Fifth Circuit has stopped short of adopting this reasoning in the nonstate actor test context.

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In short, just like the other elements of the refugee definition, there is profound disagreement regarding how to classify the nonstate actor element. While the case law demonstrates the nonstate actor test requires IJs to make a number of legal determinations, those determinations are often inextricably tied up in the underlying factual findings, eluding straightforward classification of this element as primarily factual or legal. In Part III, I posit my proposed solution to bring clarity and unity in the case law related to standards of review of each of the five core elements of the refugee definition discussed above.

## III. CHARTING A PATHWAY TO CLEAR STANDARDS OF REVIEW IN THE ASYLUM AND WITHHOLDING OF REMOVAL CONTEXT

Notwithstanding the high stakes involved in reviewing asylum denials by the courts of appeal and the inherent difficulty in obtaining remand when the highly deferential fact-based substantial evidence standard is applied, dissonance prevails in the case law regarding how to categorize discrete asylum elements as factual, legal, or mixed. Given the well-documented deficiencies in agency fact-finding and credibility determinations,[323] it is of paramount importance that putative refugees receive plenary nondeferential review of their asylum denials as capaciously as the law permits. Yet, as shown above, courts often vacillate over how to treat certain elements, or misclassify as factual, issues that are in fact legal, dramatically increasing the risk of erroneous denials of bona fide claims to asylum. That state of affairs is unacceptably incongruous with the humanitarian ethos that is supposed to undergird U.S. asylum and refugee law. Moreover, it is not adjudicators that will pay the toll when they err, but those upon whom they sit in judgement. As such, it is past time for courts to carefully assess how the core elements of the refugee definition should be reviewed.

In this part, I present arguments for how best to resolve the previously discussed splits and tensions by increased application of the nondeferential mixed-question standard of review, in which the asylum subcomponents that are truly legal get *de novo* review. My goal is to advance a framework that

322. *See* Alexis v. Barr, 960 F.3d 722, 730 (5th Cir. 2020); Alvarado de Rodriguez v. Holder, 585 F.3d 227, 234 (5th Cir. 2009) (holding that the "'predicate legal question of whether the IJ properly applied the law to the facts in determining the [noncitizen's] eligibility for discretionary relief' is a question of law"); Sharma v. Holder, 729 F.3d 407, 411 (5th Cir. 2013); Arif v. Mukasey, 509 F.3d 677, 679–80 (5th Cir.2007); Zhao v. Gonzales, 404 F.3d 295, 306 (5th Cir. 2005); Carbajal–Gonzalez v. INS, 78 F.3d 194, 197 (5th Cir.1996); Rivas-Martinez v. INS., 997 F.2d 1143, 1146 (5th Cir. 1993).

323. *See supra* Part I.C.

provides refugees with more searching review of their case denials in an effort to reduce the likelihood that meritorious claims are errantly rejected. Fundamentally, the normative imperative to protect refugees should militate in favor of applying *de novo* rather than deferential review.

Before advancing that framework, however, it is first necessary to address one additional problem related to deference. The preexisting doctrines of deference owed to certain legal determinations, rendered by the BIA as a result of *Chevron* and *Auer*,[324] present one final hurdle to careful *de novo* review. An informed reader may understandably wonder why persuading a court to classify an element as legal is actually likely to produce more searching review given administrative law principles of deference to the Board's legal interpretations. That is, if a factual determination is subject to deferential substantial evidence review, and if a legal determination is subject to deferential *Chevron*/*Auer* review, either way, the agency is owed deference. Thus, how does it help refugees to convince a court to review an element as legal? In the first subsection of this part, I will endeavor to answer that question.

In the second subsection, I will describe several possible pathways to resolve the extant tensions and reconcile the cacophony of case law on this subject in a manner most protective of vulnerable asylum-seekers. At the end of the day, I argue that greater use of the plenary nondeferential mixed-question standard in light of recent Supreme Court case law—as opposed to a thirty-year-old footnote of *Elias-Zacarias*—makes the most sense. This approach is most likely to produce increased *de novo* review of agency asylum denials.

### A. *Litigating Legal Questions Beyond the Pale of Chevron and Auer*

While *Chevron* or *Auer* deference undoubtedly present problems for asylum-seekers challenging legal interpretations of the Refugee Act, it is important to note that even deferential legal review may be preferable to factual review.[325] Perhaps more importantly, not all legal questions get *Chevron*/*Auer* deference. In this section, I briefly explore several strategies for sidestepping administrative deference to the Board's legal determinations in individual cases.

Under the doctrine of *Chevron* deference, a court will first determine whether Congress has clearly expressed its intent with regard to "the precise question at issue" by employing the "traditional tools of statutory

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324. *See infra* notes 326–329 and accompanying text.

325. When comparing deferential factual review to deferential legal review, some courts regard the former as more deferential than the later. *See, e.g.*, Jimenez-Portillo v. Garland, 56 F.4th 162, 165–66 (1st Cir. 2022) ("When conducting this analysis, we review the agency's answers to questions of law *de novo*, giving 'some *deference to the agency's reasonable interpretation of statutes and regulations that fall within its purview*'. . . *We afford greater deference to the agency's factual determinations*, applying the venerable 'substantial evidence rule.'") (emphasis added). Thus, it may still be preferable to advocate for legal, rather than mere factual review, where possible.

construction."[326] Where a statute is ambiguous or possesses "gaps," courts will defer to any reasonable or permissible agency interpretation of law even where that interpretation is contrary to a previous judicial construction (referred to as *Brand X* deference).[327] This two-step framework also applies to an agency's legal interpretation of its own regulations (referred to as *Auer* deference).[328] In their combination, these doctrines provide significant power to the agency to craft legal tests construing each element of the refugee definition.[329] However, there are a number of important limiting principles applicable to administrative deference.[330]

First, not every legal determination made by the Board is entitled to *Chevron*/*Auer* deference.[331] For example, unpublished decisions do not carry the force of law and thus are not per se entitled to *Chevron* deference.[332] Instead, they typically stand only to the extent that they have the power to persuade.[333] Because published three-judge panel BIA decisions are very rare,[334] the vast majority of BIA decisions issued annually are not automatically eligible for *Chevron* deference.[335] Indeed, of the nearly 32,000 appeals decided in 2022[336] by the 23 members of the Board,[337] just 23 decisions were

326. Charles Ellison & Anjum Gupta, *Dismantling the Wall*, 120 MICH. L. REV. ONLINE 1, 16 (2022) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 843 n.9 (1984)). Such tools include text-based interpretive canons (i.e., fixed meaning, plain text, etc.,) statutory context canons (i.e., negative implication, associated words, presumption of consistent usage, rule against surplusage), and legislative practice canons. *See* Emma Winger, Suchita Mathur, Seiko Shastri, Mollie Ahsan & Nadia Anguiano, *Common Tools of Statutory Construction for Criminal Removal Grounds,* AMERICAN IMMIGRATION COUNCIL 7–19 (Nov. 28,2023), https://perma.cc/DN2F-LDBX.

327. Ellison & Gupta, *supra* note 326 (citing United States v. Mead Corp., 533 U.S. 218, 229, 237 (2001) and Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005)).

328. *Id*. (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019)).

329. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

330. *See* Amaya v. Rosen, 986 F.3d 424, 429–31 (4th Cir. 2021), as amended (Apr. 12, 2021).

331. Some have dubbed this *Chevron* Step Zero, the step to assess whether *Chevron's* framework applies at all. Cass Sunstein, *Chevron Step Zero*, UNIVERSITY OF CHICAGO PUBLIC LAW & LEGAL THEORY WORKING PAPER NO. 91 (2005).

332. Portillo Flores v. Garland, 3 F.4th 615, 625 (4th Cir. 2021) ("We review the BIA's legal conclusions *de novo* . . . . We generally give *Chevron* deference to interpretations of statutes the BIA administers . . . if the BIA's interpretation carries the force of law . . . . But significantly, when the BIA issues a single-member, nonprecedential opinion . . ., that opinion does not carry the force of law and is not entitled to *Chevron* deference.") (citations omitted)).

333. *Id*. ("We may still rely on the BIA's interpretation of the INA as a 'body of experience and informed judgment to which we may properly resort for guidance;' however, 'even that modest deference depends upon the thoroughness evident in the BIA's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'")

334. 8 C.F.R. § 1003.1(e)(6) (2024); 8 C.F.R. § 1003.1(g)(3) (2024) (describing the conditions for the BIA to issue a three-judge decision).

335. *See* Portillo Flores, *supra* note 332.

336. BIA STATISTICS, *All Appeals Filed, Completed, Pending*, https://perma.cc/M2HF-NVQM (In 2022, 31,764 appeals were decided).

337. *BIA Practice Manual*, Chapter 1.3(a)(1) (noting that there are 23 members of the Board, and the majority of cases are decided by a single member). Last year, each Board member decided just under 1,400 cases apiece. Board members hit these numbers because they often simply affirm the IJ's decision without opinion. When they do, no *Chevron* deference is owed. *See, e.g*., Khouzam v. Ashcroft, 361 F.3d 161, 165 (2d Cir. 2004) (While the Second Circuit "defer[s] to the BIA's reasonable constructions of the immigration laws . . ., [it does] not apply *Chevron* deference to statutory construction by an" IJ.)).

published in the same period.[338] Put another way, published BIA decisions represented a paltry .07 % of the total Board decisions issued in 2022.

Additionally, even where *Chevron* does apply to the creation of a legal test, there may be other ways to resist deference in individual unpublished decisions. To the extent that a single-member unpublished decision applies a published one to resolve a given issue, many circuits give those decisions *Chevron* deference insofar as they rely on the published decision.[339] But even in this context, courts should distinguish between the Board's constructions of an ambiguous statute (e.g., creating the three part test for a particular social group) and the application of that test in an individual case (e.g., holding a given group lacks particularity). This particular manifestation of the application-of-law-to-fact scenario arguably may be immune from what has essentially turned into "double-layered *Chevron* deference," defined in further detail below.[340]

For example, the Fourth Circuit has held that although the BIA's reasonable construction of a test construing an ambiguous statute is an exercise of authority over which the court must afford *Chevron* deference, the as-applied use of that test may not be subject to an additional layer of *Chevron* deference.[341] In *Amaya v. Rosen*, the Fourth Circuit stated "[w]hether a [social group] satisfies the particularity requirement is question of law, which [the court] review[s] *de novo*."[342] The court acknowledged that it had already deferred to the BIA construction of the ambiguous statutory term *social group* in a prior case by adopting the Board's three part test (discussed above).[343] Nevertheless, the *Amaya* court identified an ideological step between the Board's creation of the three part test, on the one hand, and its subsequent application of that test to a given set of facts on the other. The court explained:

> [A]lthough it is established that appellate courts should afford the BIA *Chevron* deference to define vague statutory terms like 'particular social group,' . . . it is less clear we should afford the same deference to legal questions that arise from the application of the . . . requirements the BIA promulgated in defining 'particular social group.' Specifically, while *Chevron* deference applies to the BIA's articulation of the particularity requirement, *we are less certain that it applies to case-by-case*

338. *See* BIA PRECEDENT DECISIONS VOLUME 28.

339. Courts afford *Chevron* deference when "an agency's interpretation is rendered in the exercise of its authority to make rules carrying the force of law." Martinez v. Holder, 740 F.3d 902, 909 (4th Cir. 2014). A Board rule carries the force of law only when issued in a published opinion by a three-member panel or en banc. *See* 8 C.F.R. § 1003.1(g). Nevertheless, if a single-member BIA opinion relies on a precedential panel decision, courts afford the underlying interpretation *Chevron* deference. Espinal-Andrades v. Holder, 777 F.3d 163, 167 (4th Cir. 2015).

340. *See infra* notes 341–54 and accompanying text.

341. *See Amaya*, *supra* note 330.

342. *Id*. at 429.

343. *Id*. at 430 (recognizing that Lizama v. Holder, 629 F.3d 440, 446–67 (4th Cir. 2011), applied *Chevron* deference to the BIA's interpretation of "particular social group"); *see also supra* Part II.D.

> *applications [of] that requirement, which is a step removed from filling in the gaps of the statute*.[344]

While the court in *Amaya* assumed without deciding to apply *Chevron's* framework in that case (as the court found the Board's conclusion to be unreasonable),[345] its analysis raises an important question about the outer limits of the deference to which the agency is entitled. Indeed, to apply *Chevron* deference not only to the Board's construction of a test arising from an ambiguous statute, but also to the Board's subsequent application of that test, is to provide compounding deference (i.e., double-layered *Chevron* deference). Such judicial obsequiousness can lead to absurd results.

To find a salient example of such absurdity, one need look no further than the Board's treatment of its own particularity test. As noted above, the Board has held for a social group to be particular, it must be defined with sufficient clarity such that one can determine whether a given person falls within the group.[346] The touchstone of particularity is definitional clarity, which seems simple enough.[347] However, the Board has left scholars and jurists alike scratching their heads in individual applications of this test. For example, the Board has held in many unpublished decisions that a group composed of women from a particular country is not *particular* without identifying precisely why groups such as *Honduran women* is unclear in definition.[348] Gender and nationality are clear enough categories that U.S. immigration forms presume one can indicate their membership simply by checking a box and filling in a blank.[349] How then can it be true that such gender and nationality groups fail the particularity test?

Similarly, the BIA has in published opinions held *former gang members* are not particular[350] without providing any reasonable explanation as to what about the group's definition is ambiguous.[351] Does the Board honestly believe there are people wandering around a given country uncertain as to whether they joined a gang and then left? Yet, a number of courts have not only deferred to the BIA's creation of the particularity rule, but also to its confounding as-applied use of that rule rejecting what appear to be clearly

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344. *Id.* at 431 (citing Reyes v. Lynch, 842 F.3d 1125, 1137 (9th Cir. 2016) and expressing uncertainty as to whether *Chevron* deference applied to the application of the PSG test); *cf.* Amos v. Lynch, 790 F.3d 512, 519–20 (4th Cir. 2015) (affording *Chevron* deference to the BIA's ultimate case-specific holding without addressing the validity of the standard itself or the application to that standard).

345. *See id.*

346. *Matter of M-E-V-G-*, *supra* note 274, at 240, 244.

347. *See Amaya*, 986 F.3d at 431.

348. *See, e.g.,* Chavez-Chilel v. Att'y Gen., 20 F.4th 138, 146 (3d 2021).

349. *See, e.g.*, Page 1 of Form I-589—the form the government requires applicants for asylum and withholding of removal to use. Interestingly, the form instructions do not apparently deem those categories unclear insofar as they do not provide any additional guidance on their meaning.

350. *See, e.g., Matter of W-G-R-*, *supra* note 279.

351. *Amaya*, 986 F.3d at 431.

defined groups.[352] Even if the Board's creation of a rule is afforded deference, it does not necessarily follow that the Board's subsequent application of that rule in a particular case should be afforded additional deference. Such double-layered deference is neither merited nor prudent. Instead, the application of a settled legal test to undisputed facts should get the sort of *de novo* review typical of application-of-law-to-fact decisions.[353] That approach both makes room for *Chevron* while also preserving space for a true *de novo* review of as-applied legal determinations.[354]

Additionally, it is possible that *Chevron* deference can be waived by the litigating parties. While a number of courts have held as a standard of review *Chevron* cannot be waived,[355] others maintain it can.[356] Though beyond the scope of this article, scholars, jurists, and practitioners should consider this as a third avenue for sidestepping deference when seeking *de novo* review of the agency's legal assertions otherwise subject to *Chevron*.[357]

Lastly, every circuit to reach the question agrees that whether the BIA has applied the correct standard of review in its analysis of the underlying IJ decision is a separate and discrete legal issue subject to *de novo* review before the court of appeals.[358] Courts tend not to provide deference to the Board in how it classifies a given issue under review as primarily factual or legal.[359] Thus,

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352. *See, e.g.,* Chavez-Chilel v. Att'y Gen., 20 F.4th 138, 146 (3d 2021); Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016).

353. *See generally infra* Section III.B.

354. In the study results described in Part II above, most cases (59.8%) that recite and apply the non-deferential mixed-question standard make no mention of *Chevron* or *Auer* deference. This indirectly supports the theory that courts were less likely to be deferential to the agency when applying the agencies own rules to settled facts. While it is unclear why exactly those decisions omitted any reference to *Chevron* or *Auer*, it may be that courts have intuited the need to eschew what I call double-layered *Chevron* deference.

355. *Amaya*, 986 F.3d at 429 ("Normally, we deem a non-jurisdictional argument not raised in one's briefs either waived or forfeited. But this Court . . . [has] suggested that standards of review cannot be waived and that *Chevron* deference is such a standard of review.").

356. *Id.* at n.4 ("Courts and scholars continue to grapple with the circumstances in which *Chevron* deference can be forfeited or waived"). *See, e.g.,* Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1, 21–23 (D.C. Cir. 2019) (holding an agency cannot waive *Chevron* deference); Lubow v. U.S. Dep't of State, 783 F.3d 877, 884 (D.C. Cir. 2015) (holding that a party challenging an agency's interpretation could forfeit an objection to *Chevron* deference); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1146 (10th Cir. 2010) (en banc) (holding an agency can waive *Chevron* deference); *Kikalos v. C.I.R.*, 190 F.3d 791, 796 (7th Cir. 1999) (same); Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Envtl. Prot., 31 F.3d 18, 25–26 (1st Cir. 1994) (same); *Amaya*, 986 F.3d at n.4 (stating "[m]ost circuits have assumed that '*Chevron* deference is not jurisdictional' and therefore can be waived or forfeited."); James Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183, 185 (2019).

357. I also support the scholarly efforts to chip away at *Chevron* and *Auer* deference in the refugee law space more broadly. *See, e.g.,* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059 (2011); Maureen Sweeny: *Enforcing Protection: The Danger of Chevron in Refugee Cases*, 71 ADMIN. L. REV. 127, 134–35 (2019); Michael Kagan, *Chevron's Asylum: Judicial Deference in Refugee Cases*, 58 HOUSTON L. REV. 1119, 1149 (2021).

358. *See, e.g.*, Pinel-Gomez v. Garland, 52 F.4th 523, 528 (2d Cir. 2022) ("We review questions of law *de novo*, including whether the BIA applied the correct standard in its review of an IJ decision."); *Rosales Justo*, 895 F.3d at 162–63 (same); Rosiles-Camarena v. Holder, 735 F.3d 534, 536 (7th Cir. 2013) (same); Soto-Soto v. Garland, 1 F.4th 655, 659 (9th Cir. 2021) (same); Kabba v. Mukasey, 530 F.3d 1239, 1244–45 (10th Cir. 2008) (same). *See also supra* note 102.

359. *See generally supra* Part II.

where it appears the Board has selected an incorrect standard of review, this alone may be a basis for securing remand from the courts of appeals while simultaneously sidestepping *Chevron*.

Alternatively, in cases where a lack of deference to the Board's classification of a particular element as legal—arising within a circuit that maintains it is factual—inures to the detriment of an asylum applicant, it may be worth exploring arguments grounded in *Auer* deference to encourage the court to reconsider. For example, inasmuch as the Tenth and First Circuits continue to review the persecution element as factual even though they recognize the Board deems that element to be legal, those courts may be amenable to arguments for reversing their prior position based upon *Auer*/*Brand X* deference on the theory that the Board has authoritatively construed its own regulations. In those instances, it might behoove a practitioner to invoke *Auer* deference as a weapon to assert that the court is obliged to defer to the Board's interpretation of its own regulation demarcating legal and factual elements.[360]

In sum, there are a host of legal issues and applications-of-law-to-settled-fact scenarios in which neither *Chevron* nor *Auer* deference is apposite. Thus, even if *Chevron* continues to live on,[361] a clear majority of asylum denial decisions issued by the Board subsequently reviewed in the courts of appeals will turn on whether a more or less deferential appellate standard of review is applied depending upon where it falls on the fact-law continuum.

### B. *Securing Capacious* de novo *Review for Refugees*

There are several possible pathways to reconcile the immensely dissonant case law in the courts of appeals related to standards of review of agency asylum denials. One approach is based upon the Supreme Court's decision in *Guerrero-Lasprilla*; a second is grounded in the Supreme Court's *U.S. Bank* decision. In this section, I will describe both pathways to lay the foundation for advancing my argument in subsection three below for a plenary nondeferential standard of review of asylum and withholding denials.

#### 1. *Guerrero-Lasprilla Approach*

In *Guerrero-Lasprilla v. Barr*,[362] the Supreme Court was confronted with the question of how to construe the jurisdiction stripping clause of INA § 242 (a)(2)(C), related to noncitizens with certain serious criminal convictions.

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360. *See, e.g.,* Turkson v. Holder, 667 F.3d 523, 527 (4th Cir. 2012) ("The BIA's interpretation of its own governing regulations is "controlling unless plainly erroneous or inconsistent with the regulation.") (citing Auer v. Robbins, 519 U.S. 452, 461 (1997) (citations omitted)). In the dataset compiled for the study described in Part II above, *Auer* was only invoked in 3.1% of case holdings applying either *de novo* or mixed-question standards, a surprising result given that the BIA has standard of review regulations and presumably is interpreting those regulations whenever it selects a standard from 8 C.F.R. § 1003.1(d)(3)(i)–(ii).

361. *See* Amy Howe, *Supreme Court will consider major case on power of federal regulatory agencies,* SCOTUS BLOG (May 1, 2023, 11:54am), https://perma.cc/88C7-2DRJ.

362. Guerrero-Lasprilla v. Barr,140 S. Ct. 1062 (2020).

While that provision bars judicial review of such cases, the savings clause of § 242(a)(2)(D) preserves the court's jurisdiction to review questions of law and constitutional questions.[363] The specific issue presented in that case was whether the term "question of law" includes the application of law to undisputed facts.[364] The Court held that the statutory term "question of law" used in that savings clause does include "the application of law to undisputed or established facts" and thus jurisdiction remains notwithstanding the so-called criminal noncitizen bar to review.[365]

While *Guerrero-Lasprilla* pertained to jurisdiction, a number of courts have recognized it would be anomalous to hold that although federal courts have *jurisdiction* to review questions involving application of law to fact as *legal* questions, those same *legal* questions should be reviewed under a purely *factual* standard of review. Indeed, as noted above, the Fifth and Third Circuits have already found *Guerrero-Lasprilla* instructive and held in individual cases involving the refugee definition that applications of law to undisputed facts present the kinds of questions that should receive nondeferential *de novo* review.[366]

However, not every circuit agrees this is an appropriate use of *Guerrero-Lasprilla*.[367] In *Williams v. Garland*, the Fourth Circuit specifically rejected the use of *Guerrero-Lasprilla* in the context of standards of review.[368] The *Williams* court had to address the question of which standard of review to apply to the Board's denial of a motion to reconsider in the context of equitable tolling.[369] *Williams* acknowledged the Supreme Court in *Guerrero-Lasprilla* held "that all mixed questions of law and fact present questions of law for purposes of the jurisdictional bar."[370] However, the court in *Williams* explained, "the Court predicated [that] decision" in light of "traditional understandings and basic principles[] that executive determinations generally are

363. *Id.* at 1068–69.
364. *Id.* at 1067.
365. *Id.*
366. Alexis v. Barr, 960 F.3d at 730 (5th Cir.) (citing Guerrero-Lasprilla v. Barr, 589 U.S, 140 S. Ct. 1062, 1069 (2020); Cha Liang v. Att'y Gen., 15 F.4th 623, 626–627 (3d Cir. 2021) (Jordan, A., concurring) (explaining that while "[t]he question of past persecution is indeed largely fact-driven, in the sense that there is always a factual component to the question," that does not mean it is "always a factual dispute." Instead, "'the application of law to undisputed or established facts' . . . is: a 'question of law.'") (citing *Guerrero-Lasprilla*, 140 S. Ct. at 1069)).
367. Singh v. Rosen, 984 F.3d at 1150, 1154 (6th Cir. 2021) (interpreting *Guerrero-Lasprilla* as setting to one side "mixed question[s] about whether the facts found by the [IJ] [satisfy] the legal test," where courts must choose between *de novo* and some version of substantial-evidence review, and to the other side "discretionary question[s]," which call for the abuse-of-discretion standard); Mejia-Espinoza v. Att'y Gen., 846 F. App'x 140, 143 n.5 (3d Cir. 2021) (distinguishing "a mixed question of law and fact" considered in *Guerrero-Lasprilla* from a "discretionary determination" (citation omitted)); *cf.* In re EuroGas, Inc., 755 F. App'x 825, 831 (10th Cir. 2019) (Legal, factual, mixed, and discretionary decisions pose "distinct" questions and require courts to "apply[] the appropriate standard of review to each."); Dor v. Garland, 46 F.4th 38, 43–44 (1st Cir. 2022); Silva v. Garland, 27 F.4th 95, 105 (1st Cir. 2022); U.S. v. Cotto-Flores, 970 F.3d 17, 33 (1st Cir. 2020); Williams v. Garland, 59 F.4th at 636 (4th Cir. 2023).
368. *Williams*, 59 F.4th at 636.
369. *Id.*
370. *Id.*

subject to judicial review."[371] Given the "uniquely jurisdictional concerns" animating *Guerrero-Lasprilla*, *Williams* declined to treat the Supreme Court's analysis as dispositive with respect to standards of review.[372]

*Williams* highlighted that the Supreme Court "expressly declined to answer what its [jurisdictional] holding means for 'the proper standard for appellate review of [an] . . . agency decision that applies a legal standard to underlying facts."[373] In speaking to that apparent paradox, *Williams* noted:

> Admittedly, there is some tension in characterizing a question as legal when determining jurisdiction but as factual or discretionary when choosing the standard of review. But [Fourth Circuit] precedent . . . has drawn this distinction. *Cruz-Quintanilla v. Whitaker*, for example, concluded [] government acquiescence in torture is a legal question when determining the standard of review but a factual one for purposes of federal-court jurisdiction. . . . [T]he different outcomes [are] possible because the two inquiries pursue different aims: The standard of review concerns competency and expertise, it asks, in essence, how prudent it would be to defer to the decisionmaker below, but [242(a)(2)(C)] speaks to 'the division of authority between the Executive and the judiciary.' . . . A jurisdictional ruling does not mechanically translate into the standard of review; we must determine for ourselves which standard governs.[374]

Ultimately, while declining to use *Guerrero-Lasprilla* as a blanket pathway for getting to the *de novo* standard of review, the court in *Williams* concluded that was the correct standard for different reasons. First, the court observed that it "must separate out the subsidiary factual or legal or mixed factual and legal determinations to understand why the Board denied the motion [to reconsider]."[375] Then, it held that selecting the "proper standard of review" will "turn on . . . whether the question primarily requires courts to expound on the law . . . or [be] immerse[d] . . . in case-specific factual issues."[376] By zeroing in on the fact that diligence in equitable tolling decisions involves "elaborating on a broad legal standard" and "developing auxiliary legal principles of use in other cases," the court concluded *de novo* was the correct standard for that issue.[377] That is, the court in *Williams* looked to the Supreme Court's decision in *U.S. Bank*.[378]

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371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 891 (discussing *Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889 (4th Cir. 2019)).
375. *Id.* at 633.
376. *Id.* at 636.
377. *Id.* at 637–39.
378. *Id.* at 633–34 *(citing U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge LLC,* U.S. 138 S. Ct. 960, 967 (2018). Given the Supreme Court's recent decision in *Wilkinson*, it is probable that the court in *Williams* was correct to look to *U.S. Bank* for guidance in

### 2. *U.S. Bank Approach*

In *U.S. Bank N.A. v. Village at Lakeridge*,[379] the Supreme Court had to decide the appropriate standard of review to be applied to lower court determinations related to "non-statutory insider" status for purposes of approving certain bankruptcy plans. The Court explained that "[t]o decide whether a particular creditor is a non-statutory insider, a bankruptcy judge must tackle three kinds of issues—the first purely legal, the next purely factual, the last a combination of the other two."[380] In *U.S. Bank*, "only the standard [of review] for the final, mixed question [was] contested."[381]

In determining how to assess a given mixed-question along the fact-law continuum, the Court stated that not all mixed questions are alike and prescribed a two-part inquiry for selecting whether to review a given question deferentially or not: (1) "What is the nature of the mixed question[?]" and (2) "[W]hich kind of court ([lower] or appellate) is better suited to resolve it?"[382] Elaborating on this inquiry, the Court explained that where the issue presented "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," or "when applying the law involves developing auxiliary legal principles of use in other cases," the *de novo* standard is the correct one.[383] What is paramount in selecting the correct standard of review is determining whether the issue is such that "appellate review . . . will [] much clarify legal principles or provide guidance to other courts resolving" similar disputes.[384] If so, the matter should get *de novo* review.[385] Conversely, "mixed questions" that "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'multifarious, fleeting, special, narrow facts that utterly resist generalization'"—should be reviewed with deference.[386] In sum, the appropriate standard of review for a mixed question will turn on "whether answering it entails primarily legal or factual work."[387] Ultimately, the standard selected should reflect "which judicial actor is better positioned to make the decision."[388]

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selecting the correct standard of review. 2024 WL 1160995, *8 (March 19, 2024) ("That a mixed question requires a court to immerse itself in facts does not transform the question into one of fact. It simply suggests a more deferential standard of review.")

379. *Id.* (citing *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC* 138 S. Ct. 960).

380. *Id.* at 965.

381. *Id.* at 966–67 (quoting *Miller v. Fenton,* 474 U.S. 104, 114 (1985) (When an "issue falls somewhere between a pristine legal standard and a simple historical fact," the standard of review often reflects which "judicial actor is better positioned" to make the decision).

382. *Id.*

383. *Id.* at 967.

384. *Id.* at 968.

385. *Id.*

386. *Id.* at 967; *see also* Yu v. Ashcroft, 364 F.3rd 700 (6th Cir. 2004) (applying substantial evidence to credibility determinations); Yousif v. Lynch, 796 F.3d 622 (6th Cir 2015) (same); D-Muhumed v. Att'y Gen., 388 F.3d 814 (11th Cir. 2004) (same).

387. U.S. Bank Nat'l Ass'n ex rel., 1138 S. Ct. at 967.

388. *Id.* at 967.

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As described in the next section, I maintain that the *U.S. Bank* approach, as applied to the Refugee Act, leads to the same result as the *Guerrero-Lasprilla* approach: application-of-law-to-fact is the kind of mixed-question that merits nondeferential *de novo* review of asylum and withholding denials.

### 3. *Arguments for a Nondeferential Mixed-Question Standard As a Proposed Solution*

The nondeferential mixed-question standard—in which the application of legal rules to undisputed facts are reviewed *de novo*—is the best path forward for untangling the web of conflicting decisions described above in Part II. Credibility determinations, findings on the extent of applicant's harm, how an applicant is likely to be treated in the future, why the applicant was (or will be) targeted, how similarly situated people are treated, whether the applicant reported their persecution to the police, what happened in response, and what the government is likely to do in the future, are unavoidably factual and thus subject to the deferential standard of review.[389] However, I maintain that whether those facts found are sufficient to satisfy any of the five core elements of the refugee definition should constitute the sort of application-of-law-to-fact scenario that nearly always merits *de novo* review given the myriad tests and significant body of law that has developed surrounding each element.[390]

The proposed solution I advance here flows naturally from (1) application of the *U.S. Bank* two-part test related to guidance and expertise, (2) the text and structure of the INA's judicial review provisions, (3) policy considerations regarding the weighty interests at stake in asylum adjudications, and (4) international refugee law. Finally, I believe this solution can serve as an administrable framework for bringing greater coherence to standards of review in the courts of appeals while properly situating *Elias-Zacarias* in that analysis.

#### *a. Guidance and Expertise Test*

As noted above, *U.S. Bank* provides that the *de novo* standard of review should be applied to mixed questions that call for the ongoing development of legal guidance, a task best suited for appellate courts who possess such expertise.[391] While it is understandable that some of the early decisions interacting with the Refugee Act in its infancy classified an element of the refugee

389. Matter of Z–Z–O–, 26 I. & N. Dec. 591 (B.I.A 2015); Bedoya v. Barr, 981 F.3d 240, 245 (4th Cir. 2020).

390. *See* Matter of R–A–F–, 27 I. & N. Dec. at 779; *Matter of Z–Z–O–*, 26 I. & N. Dec. at 591.

391. *U.S. Bank*, 138 S. Ct. at 967. While some litigants in individual cases may have an incentive to advance a substantial evidence standard in immigrant-friendly circuits when the error below is blatant—given the superior remedy that accompanies a circuit court determination that substantial evidence does not support the agency—overall I believe that standard harms more noncitizens than it helps.

definition as primarily factual, over time each element has received extensive treatment from the agency and courts and thus those elements can no longer be deemed purely factual. For example, one leading treatise runs nearly 1,900 pages in its discussion of the substantive and procedural facets to the refugee definition and the associated process for seeking asylum in the U.S.[392] Rarely do asylum cases on appeal involve "facts that utterly resist generalization."[393] Rather, given the complexity and ever-growing need to "develop[] auxiliary legal principles of use in other cases," "clarify legal principles," and "provide guidance to other courts"[394] related to the scope of each element of the refugee definition, under *U.S. Bank*, the BIA should review *de novo* the IJ's application of law to established fact and the courts of appeals should do the same.

For example, the *persecution* element has specific tests and rules related to weighing past instance of harm through a child-friendly calibration, evaluating psychological abuse in the course of aggregating harms, considering economic harms and violations of fundamental human rights, assessing the imminence and specificity of death threats, classifying certain kinds of harms as per se persecution, and prohibiting categorical rules requiring lasting physical injuries, to name a few.[395] The *well-founded fear* element looks to what a reasonable person would objectively fear and provides at least two different multi-pronged legal tests for satisfying this element.[396] The *nexus* element possesses three interlocking statutory provisions along with a host of accompanying case law construing the statutory test and creating rules related to mixed-motives, punitive intent, and the reasonable person standard.[397] The *protected characteristic* element, especially the social group subcomponent, is subject to a dizzying array of legal tests, including the complex three-part immutability, social distinction, and particularity tests, within which there are a subset of rules.[398] Finally, the *state actor* element possesses legal parameters related to determining whether the unable-or-unwilling requirement applies at all, the geographic scope of protection to be considered, mechanisms for measuring the quantum of available state protection, and sub-tests applicable when an applicant declines to seek protection.[399] Application of each of the foregoing rules and tests in individual cases will undoubtedly lead to developing additional auxiliary legal principles that will help guide future adjudications in the direction of greater uniformity.[400] As described by the

392. Dree Collopy, *Asylum Primer*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION PUBLICATIONS (2023).
393. *U.S. Bank*, 138 S. Ct. at 967.
394. *Id.* at 968.
395. *Supra* notes 131–135 and accompanying text.
396. *Supra* notes 197–206 and accompanying text.
397. *Supra* notes 245–251 and accompanying text.
398. *Supra* notes 271–282 and accompanying text.
399. *Supra* notes 293–302 and accompanying text.
400. *U.S. Bank*, 138 S. Ct. at 967; Ornelas v. U.S., 517 U.S. 690, 697 (1996) (holding that de novo review is merited where it is important for legal tests to be applied in a consistent manner).

Supreme Court in a different context, the "content of [a] rule is not [always] revealed simply by its literal text," it is also "given meaning through the evolutionary process of common-law adjudication."[401] In light of the complex set of rules this "evolutionary process" has produced regarding the core elements of asylum, none of them can be regarded any longer as purely factual. Thus, *de novo* review should be applied to disputes involving these elements to continue providing consistent guidance.

Relatedly, when it comes to applying such legal principles to historical facts, there is no reason to think IJs are "better positioned" to conduct that analysis than the courts of appeals.[402] Whatever advantage an IJ may have in making credibility determinations, assessing demeanor and finding facts, no such advantage remains when the facts are undisputed, and the only question is whether the facts found satisfy an element of the refugee definition. Courts of appeals routinely engage in such decision-making. Because appellate judges are just as ably equipped—if not more so—to consider application-of-law-to-settled-fact issues, it makes little sense for them to defer to the agency here,[403] particularly in light of the documented challenges discussed above in regards to agency decision-making.[404] Additionally, clearly delimiting responsibility to the courts of appeals to engage in searching review of all such decision is more likely to promote consistency in the recurring questions presented in refugee claims, furthering the uniform-guidance objective discussed in the paragraph above.[405] These general features of appellate decision-making give the courts of appeals an "institutional advantage" in reviewing asylum denials, militating in favor of nondeferential *de novo* review under the guidance and expertise prongs of the *U.S. Bank* test.

### *b. Text and Structure of INA's Judicial Review Provisions*

Careful adherence to the mixed-standard in which application of law to fact receives *de novo* review is likewise most faithful to the text and structure of the INA's judicial review provisions[406] as recently construed by *Guerrero-Lasprilla*. As noted above, while the statute, in a nod to *Elias-Zacarias*, requires the evidence to *compel* a contrary conclusion on appeal to reverse the agency's fact-finding, it limits that standard to "administrative findings of

401. Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 502 (1984).

402. *U.S. Bank*, 138 S. Ct. at 967.

403. *Id. at 967* (citing Salve Regina College v. Russell, 499 U.S. 225, 231–233 (1991), which discusses appellate courts' "institutional advantages' in giving legal guidance")); Miller v. Fenton, 474 U.S. 104, 114 (1985) (noting that "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question").

404. *See supra* Part I.C.

405. Mucha v. King, 792 F.2d 602, 605–06 (7th Cir. 1986) (noting that appellate courts' "main responsibility is to maintain the uniformity and coherence of the law, a responsibility not engaged if the only question is the legal significance of a particular and nonrecurring set of historical events.")

406. INA § 242.

fact."[407] In a neighboring provision of the same section, Congress reaffirms that courts retain jurisdiction to "review [] constitutional claims" and "questions of law" in immigration appeals.[408] Read together, these judicial review provisions make clear that Congress contemplated review of both factual and legal questions and explicitly mentions only factual questions when reciting the substantial evidence standard of review of *Elias-Zacarias*.[409]

To continue to apply that factual standard of review to questions of law, which the court in *Guerrero-Lasprilla* clarified includes application-of-law-to-fact, is to ignore the explicit balance Congress struck in the relevant statute. A straightforward and simple application of the *espressio unius est excluisio alterius* canon of statutory construction supports that Congress did not intend for the INA's factual standard of review to be applied to questions that include application of law to fact.[410] Had congress wished for courts to apply the deferential factual standard to mixed questions, it knew how to accomplish that. But it did not write the statute that way. Instead, Congress provided that the deferential standard of review applies to "administrative findings of fact." As such, the *espressio unius* canon strongly suggests that Congress' omission was deliberate.

### *c. Weighty Interests at Stake*

While the INA's statutory review provisions discussed in the subsection above foreclose *de novo* review of purely factual findings within agency asylum denials, the weighty interests at stake in refugee claims should at a minimum tip the balance in favor of *de novo* review in the context of all mixed-questions. The grave consequences of an erroneous asylum denial weigh heavily in favor of plenary nondeferential review. Scholars have recognized the Supreme Court's practice of engaging in *de novo* appellate review of even factual findings where weighty constitutional interests are at stake.[411] While there is no constitutional right to asylum in the U.S., the interests are clearly analogous.[412] The Supreme Court has acknowledged the seriousness

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407. INA § 242(a)(2)(D).

408. *Id.*

409. INA § 242 also abrogates any language of *Elias-Zacarias* suggesting application of its *compelling* evidence standard to agency asylum decisions writ large. *Cf. supra* notes 74–78 and accompanying text.

410. Collins v. Yellen, 141 S. Ct. 1761, 1782 (2021) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Polselli v. I.R.S., 143 S. Ct., 1231, 1237 (2023) ("And here the provision in question is not just in the 'same Act'—it is in the adjacent section, having been enacted in the same Public Law.")

411. Blocher & Garrett *supra* note 18, at 51 (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 502 (1984) ("[T]he constitutional values protected by the rule make it imperative that judges … make sure that it is correctly applied"); Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1239 (1996); Henry Monaghan, *Constitutional Fact Review*, 85 COL. L. REV. 229, 258 (2001).

412. Steve Meili, *Asylum Under Attack: Is it Time for a Constitutional Right*, 26 BUFF. HUM. RTS. L. REV. 147, 156 (2020).

of deportation from the U.S. for asylum-seekers, holding that "ambiguities in deportation statutes" should be construed "in favor of the [noncitizen]."[413]

When a noncitizen faces removal back to a country where they fear persecution, torture, or death, the stakes of a legally flawed decision reach their zenith. Especially in an appeal where the facts are settled and the only question is whether those historical facts satisfy the legal requirements for protection, careful analysis can make the difference between life and death. As such, any ambiguity related to where a given mixed-question lands on the fact-law continuum should be resolved in favor of plenary nondeferential review.[414]

*d. International Refugee Law*

Providing plenary nondeferential review of asylum denials is most consonant with the weight of authority relating to refugee status determinations internationally.[415] While the Refugee Convention "does not include any [specific] procedural requirements," scholars have recognized that it imposes an "implicit duty to establish administrative or judicial mechanisms that are able to deal meaningfully with applications for asylum."[416] To aid in filling gaps related to procedures, UNHCR has adopted "minimum recommended standards," which includes "a right to appeal" and underscores the "importance of national procedures" related to asylum adjudications "to implement the Refugee Convention."[417]

In assessing regional and national procedures states have developed, Alvaro Botero and Jens Vedsted-Hansen conclude that one such minimum procedural safeguard is the "right to an 'effective remedy'" in refugee status determinations, which includes a right to a fair trial, appeal, and judicial protections of due process.[418] They maintain that "[e]nforcing international standards in domestic law is crucial to the effective procedural protection of asylum seekers."[419]

Scholars have further noted that "procedures . . . established by each State serve the crucial purpose of identifying a person who falls within the [refugee definition] of the Convention."[420] Although "individual States will differ" in their procedural approach, selected "procedures *must be designed . . . in a such a way as to ensure compliance with the obligations*" under "the Refugee

413. *Cardoza-Fonseca*, 480 U.S. at 449 (collecting cases); *see also* INS v. St. Cyr, 533 U.S. 289, 320 & n.45 (2001).

414. *See St. Cyr*, 533 U.S. at n.45.

415. ALVARO BOTERO, JENS VEDSTED-HANSEN, THE OXFORD HANDBOOK OF INT'L REFUGEE LAW 588–89, Cathryn Costello, Michelle Foster, Jane McAdam eds., 2021). *See also Cardoza-Fonseca*, 480 U.S. at 437 (canvassing the Refugee Act's legislative history and noting the "many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with" the Refugee Convention).

416. ALVARO BOTERO, JENS VEDSTED-HANSEN, THE OXFORD HANDBOOK OF INT'L REFUGEE LAW 589 (2021).

417. *Id.* at 592–93.

418. *Id.* at 598–99.

419. *Id.* at 606.

420. *Id.* at 590.

Convention[] in accordance with the" requirement "to perform treaty obligations in good faith . . . as generally recognized in international law."[421] Put another way, appellate review standards should be crafted such that bona fide refugees actually receive protection, a principle that counsels against the sort of deference likely to result in varied and inconsistent results.

In Canada, legal scholars have argued that the appropriate standard of review of refugee status determinations should be the nondeferential "correctness" standard rather than deferential "reasonableness" standard.[422] They assert that "[i]nterpretations of the scope of the Refugee Convention . . . raise questions of law of central importance" that "warrant uniform and consistent answers that can ultimately only be provided by national courts."[423] Additionally, "given the serious impact of refugee protection decisions on the claimants' life, liberty, and security[,] . . . tolerating divergent interpretations of basic human rights through . . . [deferential] review is arbitrary and contrary to the rule of law."[424] Canadian courts have wrestled with when and where to afford deference in such decisions. However, the Supreme Court of Canada recently affirmed that *de novo* review is merited for, inter alia, questions "of central importance" whose answers require consistency.[425]

Similarly, New Zealand applies a *de novo* standard of review in appeals of refugee status determinations. The reasons provided include that the review tribunal is the court of last resort, where "only the highest standards of fairness will suffice in this unique" context, and such a standard comports with "the basic refugee law principle that the appropriate date at which the well-foundedness of the fear of persecution is to be assessed is the date of determination," rather than at some earlier date at which the decision below was reached.[426]

The logic employed by courts in Canada and New Zealand should apply with equal force in selecting the most appropriate standard of review in the U.S. courts of appeals, which are likewise the effective court of last resort for asylum-seekers appealing their case denials. Given the need for uniformity and fairness in cases involving matters of life and death, U.S. courts of appeals should engage in plenary review of all mixed-questions arising in the context of the refugee definition.

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421. *Id.* (emphasis added).

422. Gerald Heckman, Amar Khoday, *Once More unto the Breach: Confronting the Standard of Review (Again) and the Imperative of Correctness Reviews when Interpreting the Scope of Refugee Protection* 42 DALHOUSIE L. J. 51, 52 (2019).

423. *Id. at 51.*

424. *Id. See also* Mark Hurley, *Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions*, 41 MCGILL L. J. 319, 330 (noting that human rights tribunals in Canada "have been situated at the 'correctness' [nondeferential] end of the spectrum" in regards to judicial standards of review).

425. Kent Barnett & Lindsey Vinson, *Chevron Abroad*, 96 NOTRE DAME L. REV. 621, 672 (2020) (citing Canada (Minister of Citizenship & Immigr. v. Vavilov, 2019 SCC 65, para. 17).

426. Refugee Status Appeals Authority, New Zealand, Refugee Appeal No. 523/92 (1995).

*e. Harmonizing Review Standards*

Finally, nondeferential mixed-question review may be employed as a strategy for harmonizing at least some of the myriad inter- and intra-circuit tensions that have developed in this space. As noted above, individual Ninth and Third Circuit judges have asserted in concurring opinions that a mixed-question framework could accommodate past precedents employing the various standards.[427] Moreover, if it is correct that the evolutionary process of case adjudications can morph what were originally factual elements into legal elements through the incremental development of increasingly complex rules, then perhaps disparate case outcomes can be understood as data points along a timeline. While en banc or Supreme Court review is likely to be needed eventually to resolve all of the tensions,[428] the nondeferential mixed-question approach for which I advocate here would provide the most space for courts to reconcile past decisions.

For individual courts yet to fully confront the issue of the appropriate standard of review of a given element of the refugee definition, *U.S. Bank* should be the starting point. Instead of looking to dicta in a footnote of the thirty-year-old *Elias-Zacarias* decision as the lodestar for determining standards of review of agency asylum decisions, courts should apply the Supreme Court's recent case law that actually addresses appellate review standards. *Elias-Zacarias* pre-dated both the existing judicial review provisions of the INA and the current regulatory regime related to standards of review.[429] It was addressing a purely factual dispute related to the nexus element alone, and it devoted no serious consideration to the larger question of standards of review specific to asylum and withholding decisions.[430] Consequently, it makes little sense to continue to use *Elias-Zacarias* to determine standards of review—especially outside the context of nexus—following subsequent amendments to the relevant portions of the INA and recent decisions like *U.S. Bank*.

* * * *

The approach I describe here eschews the erroneous overuse of the substantial evidence standard to questions that call for careful analysis and application of statutory, regulatory, and multiple and varied past agency and judicial precedents construing the Refugee Act. It provides a path to resolving the numerous inter- and intra-circuit tensions by retaining all three standards of review and clearly assigning each to the issues corresponding to the adjudicator best matched to the issue. This approach better aligns the courts

427. *Fon*, 34 F.4th at 817 (Graber, S., concurring); Cha Liang v. Att'y Gen., 15 F.4th 623, 626–27 (3d Cir. 2021) (Jordan, A., concurring).

428. *Lynch*, 846 F.3d at 1105–06 & n.11.

429. *See generally* INS v. *Elias-Zacarias*, 502 U.S. 478 (1992); INA § 242(b)(4)(B) (1996); Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (August 26, 2002).

430. *Elias-Zacarias*, 502 U.S. 478.

of appeals with the agency's published decisions generally opting for the nondeferential mixed-question approach. In addition, it cabins deferential fact review to questions that are truly only factual, and importantly so, given the well-documented errors that frequently manifest within the agency's fact-finding.[431] It likewise provides a framework for resisting application of compounding double-layered *Chevron* deference.[432] Finally, it is responsive to the normative preference for ensuring more capacious review over determinations in which the stakes of an erroneous denial are so grave. In sum, it provides a needed and logical outer limit to the hegemonic authority of the agency to dispose of claims for protection under the INA.

## CONCLUSION

Standards of review determine who must pay the "toll . . . when [adjudicators] err."[433] In the context of determinations that involve refugee, asylum, and withholding protections, the courts of appeals are effectively the courts of last resort.[434] Thus, the toll paid each time the courts of appeals wrongly deny a meritorious asylum application is the return of a refugee to persecution or death.[435] Given the high barrier erected by the substantial evidence standard, and the profound level of dissonance existing within and between the courts of appeals in determining when to afford that deferential review, the status quo is simply unacceptable. Courts can and must carefully engage with their past precedents in this space to ensure more capacious and careful standards of review are employed as a critically important safeguard against erroneous denials of humanitarian protection.

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431. *See supra* Part I.C. I echo and support past scholarly calls to curb substantial evidence review even in questions of pure fact. *See, e.g.*, *Kagan*, *supra* note 9 (arguing that the substantial evidence standard should exist on a sliding scale similar to the *Matthews v. Eldridge* test, where there is a balance of factors that dictate how much deference should be afforded in a particular factual dispute); Kim *supra* note 2 at 643–46 (arguing for a reformed substantial evidence standard of review akin to *hard look* review). Yet, as long as that substantial evidence standard remains, the approach I advance here would at least ensure that that deferential standard does not escape its intended factual confines.

432. *See supra* notes 341–54 and accompanying text.

433. *Ming Shi Xue*, 439 F.3d at 114.

434. *See supra* note 21.

435. *Ming Shi Xue*, 439 F.3d at 114.

## APPENDIX: SUMMARY OF RESULTS OF STANDARD OF REVIEW STUDY

| | Standards of Review[436] | | | | |
|---|---|---|---|---|---|
| | **Persecution** | **Well-founded Fear** | **Nexus** | **Protected Characteristic** | **Government/ Nonstate Actor** |
| **First Circuit**[437] | S.E. (T) | M. | S.E. & D.N. | D.N. | D.N. (T) |
| **Second Circuit**[438] | M. (T) | M. | S.E. | D.N. | D.N. & M. (T) |
| **Third Circuit**[439] | M. (T) | M. (T) | S.E. & D.N. | D.N. & S.E.(T) | S.E. (T) |
| **Fourth Circuit**[440] | D.N. (T) | Likely M. (T) | S.E. & D.N. | D.N. & S.E.(T) | D.N. (T) |
| **Fifth Circuit**[441] | S.E. (T) | S.E. | S.E. & D.N. | D.N. & S.E.(T) | S.E. (T) |

436. The de novo standard of review is represented as D.N., mixed-question review as M., and substantial evidence review as S.E. Intra-circuit tensions are represented as (T).

437. *See e.g.*, Chen v. Lynch, 814 F.3d 40 (1st Cir. 2016) (Persecution); Aguilar-Escoto v. Garland, 59 F.4th 510 (1st Cir. 2023) (Well-founded fear); Lopez de Hincapie v. Gonzales, 494 F.3d 213 (1st Cir. 2007) (Nexus); Reyes-Ramos v. Garland 57 F.4th 367 (1st Cir. 2023) (Protected characteristic); Rosales Justo v. Sessions, 895 F.3d 154 (State/nonstate persecutor).

438. *See e.g.*, Mirzoyan v. Gonzales, 457 F.3d 217 (2nd Cir. 2006) (Persecution); Hui Lin Huang v. Holder 677 F.3d 130 (2d Cir. 2012) (Well-founded fear); Guerra-Galdamez v. Wilkinson, 834 Fed. Appx. 682 (2nd Cir. 2021) (Nexus); Hernandez-Chacon v. Barr, 948 F.3d 94 (2d Cir. 2020) (Protected characteristic); Pan v. Holder, 777 F.3d 540 (2d Cir. 2015) (State/nonstate persecutor).

439. *See e.g.*, Blanco v. Att'y Gen., 967 F.3d 304 (3d Cir. 2020) (Persecution); Huang v. Att'y Gen, 620 F.3d 372 (3d Cir. 2010) (Well-founded fear); Gonzalez-Posadas v. Att'y Gen., 781 F.3d 677 (3d Cir. 2015) (Nexus); Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330 (3d Cir. 2008) (Protected characteristic); Fiadjoe *v*. Att'y Gen., 411 F.3d 135 (3d Cir. 2005) (State/nonstate persecutor).

440. *See e.g.*, Portillo Flores v. Garland, 3 F.4th 615 (4th Cir. 2021) (Persecution); Cruz-Quintanilla v. Whitaker, 914 F.3d 889 (Future torture); Garcia v. Garland, 73 F.4th 219 (4th Cir. 2023) (Nexus); Crespin v. Holder, 632 F.3d 117 (Protected characteristic); *Portillo Flores*, 3 F.4th at 634 (State/nonstate persecutor).

441. *See e.g.*, Gjetani v. Barr, 968 F.3d 393 (5th Cir. 2020) (Persecution); Bertrand v. Garland, 36 F.4th 627 (5th Cir. 2022) (Well-founded fear); Vazquez-Guerra v. Garland, 7 F.4th 265 (5th Cir. 2021) (Nexus); Jaco v. Garland, 24 F.4th 395 (5th Cir. 2021) & Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012) (Protected characteristic); Gonzales-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019) (State/nonstate persecutor).

| CONTINUED | | | | | |
|---|---|---|---|---|---|
| | **Standards of Review**[436] | | | | |
| | **Persecution** | **Well-founded Fear** | **Nexus** | **Protected Characteristic** | **Government/ Nonstate Actor** |
| **Sixth Circuit**[442] | D.N. (T) | S.E. | S.E. | D.N. | S.E. |
| **Seventh Circuit**[443] | S.E. | M. (T) | S.E. | D.N. | S.E. |
| **Eighth Circuit**[444] | D.N. (T) | M. (T) | S.E. | D.N. | S.E. |
| **Ninth Circuit**[445] | M. (T) | M. (T) | S.E. & D.N. | D.N. | M. (T) |
| **Tenth Circuit**[446] | S.E. | Likely M. (T) | S.E. & D.N. | D.N. | M. (T) |
| **Eleventh Circuit**[447] | D.N. (T) | M. (T) | S.E. | D.N. | M. (T) |

442. *See e.g.*, Mapouya v. Gonzales, 487 F.3d 396 (6th Cir. 2007) (Persecution); Petros v. Garland, 2023 WL 3035217 (6th Cir. 2023) (Well-founded fear); Mandebvu v. Holder, 755 F.3d at 424 (Nexus); Sanchez-Robles v. Lynch, 808 F.3d 688 (6th Cir. 2015) (Protected characteristic); Khalili v. Holder, 557 F.3d 436 (6th Cir. 2009) (State/nonstate persecutor)

443. *See e.g.*, Meraz-Saucedo v. Rosen, 986 F.3d 676 (7th Cir. 2021) (Persecution); Estrada-Martinez v. Lynch, 809 F.3d 886 (7th Cir. 2015) (Well-founded fear); *Meraz-Saucedo*, 986 F.3d at 685 (Nexus); Lozano-Zuniga v. Lynch, 832 F.3d 822 (7th Cir. 2016) (Protected characteristic); Osorio-Morales v. Garland, 2023 WL 4339685 (7th Cir. 2023) (State/nonstate persecutor).

444. *See e.g.*, Alavez-Hernandez v. Holder, 714 F.3d 1063 (8th Cir. 2013) (Persecution); Uzodinma v. Barr, 951 F.3d 960 (8th Cir. 2020) (Well-founded fear); Silvestre-Giron v. Barr, 949 F.3d 1114 (8th Cir. 2020) (Nexus); Ngugi v. Lynch, 826 F.3d 1132 (8th Cir. 2016) (Protected characteristic); Ngengwe v. Mukasey, 543 F.3d 1029, 1035–36 (8th Cir. 2008) (State/nonstate persecutor).

445. *See e.g.*, Singh v. Garland, 57 F.4th 643 (9th Cir. 2022) (Persecution); Vitug v. Holder, 723 F.3d 1056 (9th Cir. 2013) (Well-founded fear); Umana-Escobar v. Garland, 69 F.4th 544 (9th Cir. 2023) (Nexus); Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014) (Protected characteristic); Madrigal v. Holder, 716 F.3d 499 (9th Cir. 2013), *but see* Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (State/nonstate persecutor).

446. *See e.g.*, Igiebor v. Barr, 981 F.3d 1123 (10th Cir. 2020) (Persecution); Wiransane v. Ashcroft, 366 F.3d 889 (10th Cir. 2004) (Future harm); Orellana-Recinos v. Garland, 993 F.3d 851 (10th Cir. 2021) (Nexus); Cruz-Funes v. Gonzales, 406 F.3d 1187 (10th Cir. 2014) (Protected characteristic); Batalova v. Ashcroft, 355 F.3d 1246 (10th Cir. 2004) (State/nonstate persecutor).

447. *See e.g.*, Mejia v. Att'y Gen., 498 F.3d 1253 (11th Cir. 2007) (Persecution); Zhou Hua Zhu v. Att'y Gen., 703 F.3d 1303 (11th Cir. 2013) (Well-founded fear); Rodriguez v. Att'y Gen., 735 F.3d 1302 (11th Cir. 2013) (Nexus); Gonzalez v. Att'y Gen., 820 F.3d 399 (11th Cir. 2016) (Protected characteristic); Lopez v. Att'y Gen., 504 F.3d 1341 (11th Cir. 2007 (State/nonstate persecutor).