No. 19-1591

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HERNAN PORTILLO-FLORES,
Petitioner,
v.

WILLIAM P. BARR, Attorney General,
Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals
Agency Case No. A 208-553-679

AMICUS CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR PANEL OR *EN BANC* REHEARING OF PETITIONER HERNAN PORTILLO-FLORES

Charles Shane Ellison
Katherine L. Evans
Amanda G. Dixon[1]
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Dr., Box 90360
Durham, NC 27708-0360
919-660-6956
Ellison@law.duke.edu
Evans@law.duke.edu
Amanda.G.Dixon@lawnet.duke.edu

Tyler A. Young
Martin J. Demoret
David Yoshimura
Robert C. Gallup
FAEGRE DRINKER BIDDLE & REATH LLP
801 Grand Ave., 33rd Floor
Des Moines, IA 50309
515-248-9000
Tyler.Young@faegredrinker.com
Martin.Demoret@faegredrinker.com
David.Yoshimura@faegredrinker.com
Robert.Gallup@faegredrinker.com

Counsel for American Immigration Lawyers Association

[1] Ms. Dixon, a law student, contributed to this brief under the supervision of Professor Ellison.

Rule 26.1 Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae submits the following corporate disclosure statement. Amicus curiae is a nonprofit corporation and has no other corporate parents. Amicus curiae is not publicly traded.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE[2]

Amicus curiae, the American Immigration Lawyers Association (AILA), is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA National seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals ("BIA" or "Board"), as well as before the United States District Courts, Courts of Appeals, and Supreme Court. AILA members, their clients, and the Government all benefit from having clear and predictable standards of law and standards of review in the Board's and the Courts' proceedings in these matters.

[2] This brief, proffered pursuant to Federal Rule of Appellate Procedure 29(b), was solely authored by counsel indicated on the cover page. No party, party's counsel, or any person other than amicus curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting the brief. Petitioner has consented to the filing of this brief, the government has indicated that it takes no position.

INTRODUCTION

The Court should grant en banc review and clarify the standard of review courts apply when making nonstate actor determinations in the context of asylum claims. The Panel's holding that this is a purely factual question creates tension within this Court's case law and that of its sister circuits.

As a minor fleeing persecution, Mr. Portillo-Flores did not avail himself of state protection because he believed doing so would be both futile and dangerous. The Immigration Judge ("IJ") found this testimony credible, and the facts surrounding his decision to flee without seeking police assistance were undisputed. Yet the IJ concluded those undisputed facts did not satisfy the nonstate actor requirement. The BIA affirmed, treating the IJ's nonstate actor determination as a purely factual one and holding the IJ's factual finding was not ***clearly erroneous***. The Board's only basis for this holding was that Mr. Portillo-Flores did not seek state protection, ignoring his testimony regarding futility and dangerousness. The Panel dismissed the petition for review, applying only a substantial evidence standard of review.

In treating the agency decision as a purely factual one, the Panel overlooked critical legal errors embedded in the agency's paltry nonstate actor analysis. The agency decision conflicts with the plain text of the Refugee Act, precedent from this Court and other courts of appeals, and the BIA's own case law and regulations.

Nonstate actor determinations turn upon whether the government is ***unable or unwilling*** to provide ***sufficient*** protection. Findings regarding what the government has done, is able to do, or will do in response to feared persecution are properly treated as fact questions. But whether the government's response to feared persecution constitutes ***sufficient*** protection under the nonstate actor test is fundamentally a legal determination. *See Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889-90 (4th Cir. 2019) (treating the analogous determination of whether the government will "acquiesce" in torture as a mixed question). The nonstate actor determination should therefore be treated as a mixed question of law and fact and the Court should review the BIA's legal conclusions de novo.

ARGUMENT

I. THE COURT SHOULD REVIEW NONSTATE ACTOR DETERMINATIONS UNDER A MIXED-QUESTION STANDARD OF REVIEW.

Both the Panel majority and dissent recognized that standards of review are critical because they often determine the outcome of an appeal.

This Court reviews the BIA's "factual findings under the substantial evidence standard," and reviews the BIA's legal conclusions—including the "application of . . . law to . . . facts" found by the agency—de novo. *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 948 (4th Cir. 2015); *Cruz-Quintanilla*, 914 F.3d at 889-90 (discussing mixed question standard of review).

The Fourth Circuit has not meaningfully addressed where the nonstate actor analysis should fall on this continuum. In a single sentence, the Panel majority reflexively characterized the nonstate actor inquiry as ***purely factual*** subject only to substantial evidence review. The Panel's conclusion is incorrect. To be sure, the agency's determinations about what the government has done or will do in response to feared persecution are factual findings that this Court reviews for substantial evidence. *Crespin-Valladares v. Holder*, 632 F.3d 117, 128-29 (4th Cir. 2011) (remanding to the agency to address what protection the Salvadoran government would provide). But determining whether those factual findings satisfy the statutory nonstate actor standard is *not* a purely factual finding. It is a mixed question of law and fact.

A. Nonstate Actor Determinations Involve the Interpretation and Application of Statutory Terms and Necessarily Involve Questions of Law.

The nonstate actor test comes directly from the Refugee Act's definition of a "refugee." 8 U.S.C. § 1101(a)(42)(A); *Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) ("This requirement . . . derives from the board's interpretation of" the statutory terms "refugee" and "persecution."); Ellison & Gupta, *Unwilling or Unable: The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, COLUMBIA HUMAN RIGHTS LAW REVIEW (forthcoming). Sufficiently severe harm is considered "persecution" if it is inflicted by a

government or by nonstate actors that the government is "unable or unwilling" to control. *Mulyani*, 771 F.3d at 198.

Additionally, the Refugee Act provides a guide for measuring the level of protection a state must provide. "[A] state is obligated . . . to provide sufficient protection to reduce the risk of persecution . . . below that of a well-founded fear." Deborah E. Anker, *Law of Asylum in the United States* § 4:8; 8 U.S.C. § 1101(a)(42)(A) (defining a refugee as one "who is unable or unwilling to avail himself . . . of [*state*] *protection* . . . because of . . . a well-founded fear.")[3]

This Court and others have likewise identified legal parameters and discrete rules for application of the nonstate actor test. Examples include:

- **"Unable" *or* "Unwilling" Are Alternative Requirements.** Because the test is phrased in disjunctive terms, the BIA cannot require a petitioner to prove both inability and unwillingness to protect." *Orellana v. Barr*, 925 F.3d 145, 152 (4th Cir. 2019); *Rosales Justo v. Sessions*, 895 F.3d 154, 162-63 (1st Cir. 2018).

- **Available Protection Must Be Sufficiently Effective.** A government is "unable or unwilling" to offer protection if it will only offer "nominal or ineffectual remedies" or "token assistance." *Orellana*, 925 F.3d at 152-53; *see also Rosales Justo*, 895 F.3d at 164 (police investigation does not demonstrate government ability or willingness to protect "if there is no record about the quality or effectiveness of the investigation").

- **There is No Per Se Reporting Requirement.** An applicant is not required to "seek[] government assistance when doing so (1) 'would have been futile' or (2) 'have subjected [him] to further abuse." *Orellana*, 925 F.3d

[3] *INS v. Cardoza-Fonseca*, 489 U.S. 421, 440 (1987) (explaining "an applicant" can have a well-founded fear even where he "has only a 10% chance of being…persecuted").

> at 153 (citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)); *Matter of S-A*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding the nonstate actor test satisfied even though applicant "did not request protection from the government"). Any requirement to the contrary would violate the plain text of the statute. 8 U.S.C. § 1101(a)(42)(A) (A refugee can simply be one "who is…*unwilling* to avail himself…of [state] protection.").[4]

As these principles make clear, the nonstate actor ***standard***—i.e., what degree of protection the state must be willing and able to provide—is fundamentally a legal one. *Orellana*, 925 F.3d at 152-53; *Grace v. Barr*, 965 F.3d 883, 899-900 (D.C. Cir. 2020); *Rosales Justo*, 895 F.3d at 162-63; *Ornelas-Chavez*, 458 F.3d at 1058.

B. The Court Should Clarify That Nonstate Actor Determinations Are Not Reviewed Exclusively Under the Substantial Evidence Standard of Review.

Because the nonstate actor test is legal, whether the evidence in any case satisfies this test is a mixed question of fact and law. *Cruz-Quintanilla*, 914 F.3d at 889–91; *see Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062, 1068-69 (2020); *U.S. Bank Nat. Ass'n v. Village at Lakeside*, 138 S.Ct. 960, 966 (2018) ("the application of law to settled facts" is a classic mixed question requiring de novo review).

In fact, this Court has clarified that several other elements of the refugee definition involve mixed questions because they require application of legal

[4] The determination of whether reporting is necessary requires application of legal standards as well. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1066 (9th Cir. 2017) (summarizing a five-part test for analyzing cases where no reporting occurred); *Orellana*, 925 F.3d at 153; *accord Hernandez-Avalos*, 784 F.3d at 951-53.

standards to historical facts. E.g., *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247, FN3 (4th Cir. 2017) (analysis related to severity of harm constituting persecution); *Crespin-Valladares*, 632 F.3d 117, 126-28 ("well-founded fear" and particular social group analyses). There is no principled reason to treat nonstate actor determinations differently.

Because this Court has at times been less than clear regarding the standard of review for nonstate actor determinations,[5] the en banc Court should resolve any tension by clarifying that the mixed question standard of review is the right one. *Rosales Justo*, 895 F.3d at 162-63 ("The BIA's application of the 'unwilling or unable' standard [to the facts] is a legal question that we review de novo."); *Ornelas-Chavez*, 458 F.3d at 1058 (The "BIA applied the wrong legal standard" by determining the nonstate actor test was not satisfied due the applicant's "failure to report").

On a strikingly similar issue, this Court recently clarified that "whether a petitioner has shown" the state will acquiesce in his "'torture' [] is a mixed question of law and fact under 8 C.F.R. § 1003.1(d)(3)." *Cruz-Quintanilla*, 914 F.3d at 889-

[5] *Compare Hernandez-Avalos*, 784 F.3d at 951-53, FN10. (noting the "Court is entitled to draw its own legal conclusions from the undisputed facts" and holding the unable-or-unwilling test was satisfied "as a matter of law"); Slip. Op. at 33 (Thacker, J. dissenting) ("[T]he application of [a per se reporting] requirement by the BIA was legal error") *with Crespin-Valladares*, 632 F.3d at 128 ("[w]hether a government is 'unable or unwilling to control' a private actor 'is a factual question'"); Slip. Op. at 11 (same).

90. The Court held that while an IJ's findings regarding "what would likely happen to the noncitizen if removed" is a "purely factual determination," "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.'" *Id.* at 890.

The same analysis applies here. The underlying facts were undisputed. The only issue is whether those undisputed facts satisfy the nonstate actor test. As such, the Panel erred in exclusively applying a substantial evidence standard. *See id.*; *Turkson v. Holder*, 667 F.3d 523, 528-29 (4th Cir. 2012); *Upatcha v. Sessions*, 849 F.3d 181, 184 (4th Cir. 2017); *Rosales Justo*, 895 F.3d at 162-63; *Madrigal v. Holder*, 716 F.3d 499, 506-07 (9th Cir. 2013).

Because the Panel failed to apply the correct standard of review here, it neglected to properly engage with the agency's legally erroneous analysis. *Martinez v. Holder*, 740 F.3d 902, 909 (4th Cir. 2014) (the Court reviews "the BIA's legal determinations…de novo."); *see Hernandez-Cartagena v. Barr*, --- F.3d ---, 2020 WL 6053322, at *2 (4th Cir. Oct. 14, 2020) (same); *Upatcha*, 849 at 184-85 (recognizing that the application of law to facts "entails a legal judgment" subject to de novo review).

II. THE BIA COMMITTED LEGAL ERROR BY APPLYING THE WRONG STANDARD OF REVIEW AND IMPOSING A PER SE REPORTING REQUIREMENT.

Once the Court concludes that nonstate actor determinations should be subject to a mixed-question standard of review, it is apparent that the BIA committed two reversible errors. *Menghesha v. Gonzalez*, 450 F.3d 142, 147 (4th Cir. 2006) (when the agency "misapplies the law in evaluating a request for asylum, the appropriate remedy is…remand").

First, the BIA applied the ***wrong standard of review*** to the IJ's nonstate actor determination. For mixed questions, the regulations require the BIA to bifurcate its review. The BIA reviews the IJ's factual findings for clear error. But the IJ's decisions on legal questions, including the application of legal standards to facts, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *see Upatcha*, 849 F.3d at 184. *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) ("[T]he Board . . . must examine *de novo* whether the facts found by the immigration judge satisfy all of the statutory elements of asylum as a matter of law."); *id.* at 88 (describing the "elements" of an asylum claim to include, *inter alia*, whether the "harm is inflicted by the government . . . or by persons the government is unwilling or unable to control"); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015).

This Court reviews de novo whether the BIA applied the correct standard of review. *Upatcha*, 849 F.3d at 184. The Board's failure to bifurcate its review of

mixed questions is reversible error, requiring remand. *Id.* at 184–85; *Turkson*, 667 F.3d at 530; *see Cruz-Quintanilla*, 914 F.3d at 889.

Second, the IJ applied a legally erroneous per se reporting requirement, which the BIA failed to correct.[6] This is evident from the BIA's and IJ's nonstate actor determination:

> [T]he Immigration Judge's finding that the respondent has not demonstrated that the harm he fears in El Salvador was or would be inflicted by the government or by individuals or groups that the government is unable or unwilling to control, is not clearly erroneous. Specifically, as noted by the Immigration Judge, the respondent testified that he never reported any threats or mistreatment by the gang members to the police or to any other government official in El Salvador.

Joint Appendix 11 (citations omitted). This Court has rejected a per se reporting requirement and instead held the BIA must assess whether the failure to report was justified. *Orellana*, 925 F.3d at 153. The agency's erroneous application of a per se reporting requirement warrants remand here, particularly since the agency ignored Portillo-Flores's ample evidence of futility and danger had he reported his abuse to police. *Id.*

[6] Ironically, three months earlier, a different IJ held that "the Salvadoran government is unable or unwilling to control the gangs in its country, such as MS-13." *Contreras-Mejia v. Barr*, 815 Fed.Appx. 694, 697 (4th Cir. 2020). That IJ's in this Circuit issued contradictory decisions a few months apart reinforces that the Agency is not consistently applying the same legal standards to similarly-situated petitioners—a textbook example of arbitrary and capricious decision-making. *Grace*, 965 F.3d at 900.

This Court's precedent and the BIA's regulations required the IJ to: (1) meaningfully engage with Portillo- Flores's evidence of the Salvadoran government's willingness and ability to protect him; (2) apply the correct nonstate actor legal standard; and (3) clearly explain how it applied that standard to the facts to reach its determination. The IJ did none of those things. The BIA did not identify these mistakes because it reviewed only for clear error instead of performing the bifurcated review its regulations require. The BIA then compounded that error by imposing its own legally erroneous per se reporting requirement contrary to the statute. *Cf.* 8 U.S.C. § 1101(a)(42)(A).

CONCLUSION

For these reasons, the Petition for Panel Rehearing or Rehearing *En Banc* should be granted.

Dated: October 26, 2020

Respectfully submitted,

/s/ C. Shane Ellison
Charles Shane Ellison
Katherine L. Evans
Amanda G. Dixon[7]
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive, Box 90360
Durham, North Carolina 27708

[7] Ms. Dixon, a law student, contributed to this brief under the supervision of Professor Ellison.

919-660-6956
Ellison@law.duke.edu
Evans@law.duke.edu
Amanda.G.Dixon@lawnet.duke.edu

Tyler A. Young
Faegre Drinker Biddle & Reath, LLP
220 Wells Fargo Center
90 S. Seventh St.
Minneapolis, MN 55402
612-766-7000
tyler.young@faegredrinker.com

Martin J. Demoret
David Yoshimura
Robert C. Gallup
Faegre Drinker Biddle & Reath LLP
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309
515-248-9000
martin.demoret@faegredrinker.com
david.yoshimura@faegredrinker.com
robert.gallup@faegredrinker.com

CERTIFICATE OF SERVICE

I certify that on this 26th day of October 2020, I served the foregoing *Amicus Curiae* Brief of the American Immigration Lawyers in Support of Petition for Panel or *En Banc* Rehearing of Hernan Portillo-Flores upon all counsel via the Court's ECF system.

/s/ C. Shane Ellison
Charles Shane Ellison
Counsel for *Amicus Curiae* AILA

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font, and

(ii) complies with the length requirement of Rule 29(b)(4) because it is 2592 words.

Dated: October 26, 2020

/s/ C. Shane Ellison
Charles Shane Ellison
Counsel for *Amicus Curiae* AILA