

MIXED MOTIVES AND MIXED RESULTS: CONTEMPORARY ISSUES WITH THE NEXUS REQUIREMENT IN ASYLUM LAW

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INTRODUCTION

There are currently over 108 million people forcibly displaced globally because of conflict, authoritarian regimes, and environmental safety concerns.¹ Yet of those 108 million, only 453,600 refugees were successfully resettled or able to return to their home in the first six months of 2022.² Asylum and immigration issues remain contentious debates in the U.S. political sphere.³ The past year has seen record numbers of crossings at the United States' Southwest border, including refugees seeking asylum.⁴ Because of the political and legal barriers surrounding the asylum process, however, most asylum claims in the United States are rejected, and applicants are returned to their country of origin, despite the harm that may await them.⁵

Immigration courts and adjudicatory agencies are flooded with asylum applications and appeals, with each case presenting a unique and poignant tale of a person's choice to leave his or her home.⁶ In addition to the overloaded dockets, the asylum process is further complicated by

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¹ See *Refugee Data Finder*, UNHCR, <https://www.unhcr.org/refugee-statistics/> (June 14, 2023).

² *Id.*

³ See Claire Klobucista, et al., *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/us-immigration-debate-0> (June 6, 2023, 1:35 PM).

⁴ See *Southwest Land Border Encounters (By Component)*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component> (June 14, 2023).

⁵ See *Asylum Denial Rates Continue to Climb*, TRANSACTIONAL ACCESS RECS. CLEARINGHOUSE (Oct. 28, 2020) <https://trac.syr.edu/immigration/reports/630/>.

⁶ See AM. IMMIGR. LAWS. ASS'N, AILA DOC. NO. 21050334, FEATURE ISSUE: IMMIGRATION COURT BACKLOG AND REPRIORITIZATION (2022) (stating there is a 1.3 million case backlog in immigration courts); IMMIGRATION LEGAL RESOURCE CENTER, COMMUNITY GUIDANCE: YOUR DAY IN COURT 3 (2019) (stating that one may present evidence concerning their individual situation at an immigration court hearing).

ambiguous legal standards and forced reliance on anecdotal evidence.⁷ Following international asylum law standards, an applicant must prove their status as a refugee to obtain asylum.⁸ This requires proof that the applicant faced persecution in his or her home country because of a direct association with a protected group.⁹

The nexus requirement under federal asylum law requires applicants to prove that their affiliation with a particular social group served as “one central reason” for persecution in their country of origin.¹⁰ In countries riddled with gang violence and organized crime, members of certain families often find themselves targeted.¹¹ Although family units may constitute a protected social class under federal law,¹² courts lack a uniform standard to determine whether a proper nexus for persecutorial motive exists.¹³ The broad discretion and disparity among court nexus standards infringes on the rights of asylum seekers and violates the spirit of international asylum law.¹⁴ The courts should adopt an analysis that identifies an appropriate source of persecution based on both an applicant-focused review of persecutorial targeting

⁷ The Fourth, Ninth, and Eleventh Circuits each employ different standards to evaluate adequate motive in asylum cases. See *Garcia v. Wilkinson*, 988 F.3d 1136, 1144–45 (9th Cir. 2021) (closely scrutinizing tangential motives); *Sanchez-Castro v. U.S. Att’y Gen.*, 998 F.3d 1281, 1285 (11th Cir. 2021) (not allowing a protected trait to be a “means to an end”); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (4th Cir. 2015) (employing a victim-centered approach).

⁸ See 8 U.S.C. § 1158(b)(1)(B)(i).

⁹ See *id.*

¹⁰ See *id.*

¹¹ See, e.g., Gabriela Reardon, *A Long Walk From Honduras to Escape Gang Vengeance*, CITY LIMITS (Nov. 26, 2007) <https://citylimits.org/2007/11/26/a-long-walk-from-honduras-to-escape-gang-vengeance/>.

¹² Immediate family currently can constitute a particular social group for asylum protection. The Board of Immigration Appeals (BIA) recognized this potential social group in 2017. In 2019, the Trump administration overruled this holding, finding that families lacked inherent social distinction. But that decision was vacated under the Biden administration in 2021. See *Matter of L-E-A- (L-E-A- III)*, 28 I. & N. Dec. 304, 304–05 (Att’y Gen. 2021) (vacating *L-E-A- II*); *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 581, 581 (Att’y Gen. 2019) (holding that family is not inherently socially distinct); *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 40, 42 (B.I.A. 2017) (finding the respondent’s immediate family could be a particular social group).

¹³ See *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (acknowledging the fine line between nexus and tangential harm); *Sanchez-Castro v. U.S. Att’y Gen.*, 998 F.3d 1281, 1285 (11th Cir. 2021) (strictly scrutinizing tangential harm); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (4th Cir. 2015) (victim centric standard).

¹⁴ See *Garcia*, 988 F.3d at 1145; *Sanchez-Castro*, 998 F.3d at 1285; *Hernandez-Avalos*, 784 F.3d at 949–50; Convention Relating to the Status of Refugees, pmbl., adopted July 28, 1951, 189 U.N.T.S. 137.

and a fact-based analysis of other similarly targeted individuals in the applicant's protected group.

This Comment seeks to identify the root causes and fundamental failures of the current nexus evaluation, especially for asylum seekers fleeing gang violence. Part I of this Comment explains the roots and spirit of international and domestic immigration and asylum law and outlines the necessary elements for proving asylum status. Part II describes the development of the nexus requirement in the Federal circuit courts in relation to familial particular social groups and identifies the circuit split that has formed. Part III analyzes the circuit split and its constitutional ramifications. Part III also proposes a more uniform standard for analyzing nexus in familial social groups, rooted in the spirit of international asylum law, that can apply to the various protected groups.

BACKGROUND

I. INTRODUCTION TO IMMIGRATION AND ASYLUM LAW AND POLICY

International law provides the foundation of asylum law, which is governed by the United Nations High Commission for Refugees (UNHCR).¹⁵ Since its creation in the wake of World War II, the UNHCR has led several efforts to assist and resettle refugees and has influenced how humanitarian organizations address refugee crises.¹⁶ Notably, through its 1951 Convention and subsequent 1967 amendment, the UNHCR recognized the right of persons to seek asylum in foreign states.¹⁷ These Conventions, which form the centerpiece of international refugee protection,¹⁸ have been adopted by over 147 countries, including

¹⁵ See Brief for United Nations High Commissioner for Refugees as Amicus Curie in Support of Respondents at 6, *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212), 2021 WL 294293, at *6.

¹⁶ See *History of the UNHCR*, UNHCR, <https://www.unhcr.org/en-us/history-of-unhcr.html> (last visited July 2, 2023).

¹⁷ See Off. of the United Nations High Comm'n for Refugees, *Introduction to CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2* (2010) [hereinafter CONVENTION INTRODUCTORY NOTE].

¹⁸ See *The 1951 Refugee Convention*, UNHCR, <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention> (last visited July 2, 2023).

the United States.¹⁹ The heavy influence of international refugee law grounds the United States refugee policy and guides the courts and procedures of immigration law.²⁰

A. *International Roots and Spirit of Asylum Law*

The UNHCR primarily governs and oversees the protection of international refugee rights through its Executive Commission, which has protected the rights of refugees for over seventy years.²¹ Following the Second World War, the agency consolidated previous instruments of refugee procedures and codified the rights of refugees at the international level.²² Prior to this codification, no uniform or broad protections for refugees existed.²³ Instead, refugee law comprised a series of international instruments that applied only to specific groups of refugees—primarily those displaced by World War II.²⁴ The agency, through its Conventions, created and developed international protocols and standards for asylum protection and continues to summit and set guidelines for the development of modern refugee and human rights law.²⁵

1. The UNCHR 1951 Convention Relating to the Status of Refugees

In 1951, the United Nations held the Convention Relating to the Status of Refugees (Convention), which sought to unify the mixed definitions of refugees and address the global refugee crisis.²⁶ The Convention sought to protect the inherent rights and dignity of asylum

¹⁹ CONVENTION INTRODUCTORY NOTE, *supra* note 17, at 5; *States Parties, Including Reservations and Declarations, to the 1967 Protocol Relating to the Status of Refugees*, UNHCR, <https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1967-protocol-relating-status-refugees> (last visited July 2, 2023) [hereinafter *States Parties*].

²⁰ See H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 426 (1999) (noting that Congress's primary purpose in passing the Refugee Act was to implement the principles of the 1967 United Nations Protocol Relating to the Status of Refugees).

²¹ See *Governance and Oversight*, UNHCR, <https://www.unhcr.org/en-us/governance.html> (last visited July 2, 2023).

²² CONVENTION INTRODUCTORY NOTE, *supra* note 17, at 2–3.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.* at 2–4.

²⁶ See *id.* at 1.

seekers displaced after World War II under the fundamental principles of “non-discrimination, non-penalization, and non-refoulment.”²⁷ Individual states could decide whether to accede to the provisions of the Convention and conform to its minimum standards for the protection and treatment of refugees.²⁸

Though limiting the scope of its definitional refugee to include only those who were displaced as a result of World War II,²⁹ the Convention sought to secure “refugees the widest possible exercise of [] fundamental rights and freedoms.”³⁰ The Convention defined a refugee as an individual, who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a political social group or political opinion, is outside the country of his nationality and is unable or . . . unwilling to avail himself of the protection of that country.”³¹ The Convention further designated the rights states should award refugees, including unbiased, free access to all courts of law on the territory of the contracting state.³² This right of access assumed the right to legal assistance and exemption from legal fees to avoid discriminatory adjudications.³³

The Convention set limits, however, on the extent to which a person falling facially under the definition may be considered a refugee.³⁴ For example, the Convention does not compel protection of individuals who have committed war crimes, serious nonpolitical crimes outside the country of refuge, or acts “contrary to the purposes and principles of the United Nations.”³⁵ Further, the Convention allows states to limit grants of asylum in times of war or other “grave and exceptional circumstances.”³⁶ A grant of refugee status under the 1951 Convention,

²⁷ See *id.* at 3.

²⁸ See CONVENTION INTRODUCTORY NOTE, *supra* note 17, at 3–4.

²⁹ See Convention Relating to the Status of Refugees, *supra* note 14, art. 1(A)(2).

³⁰ *Id.* at pmbl.

³¹ *Id.* at art. 1(A)(2).

³² *Id.* at art. 16(1).

³³ See *id.* at art. 16(2).

³⁴ An individual who voluntarily re-avails himself to the protection of his home country or requires his nationality, acquires protection from a third country, or loses the circumstances in connection with his well-founded fear, ceases to be considered a refugee under Article 1(A). *Id.* at art. 1(C).

³⁵ Convention Relating to the Status of Refugees, *supra* note 14, art. 1(F).

³⁶ *Id.* at art. 9.

however, protects an individual from being returned to his or her country of origin so long as a viable threat still exists there.³⁷

2. The UNCHR 1967 Protocol and Other Developments

This cornerstone Convention for international refugee protection has undergone only one major change since its enactment in 1951.³⁸ In 1967, the UNHCR amended the Convention by expanding the eligible class of refugees as global crises became more frequent and the post-World War II displacements continued to grow.³⁹ Although the substantive properties of the Convention remained the same, the new refugee definition eliminated the previous temporal and geographic limitations.⁴⁰ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) in 1984 further expanded the international protections guaranteed to individuals experiencing “severe pain or suffering, whether physical or mental,” unlawfully instigated, inflicted, or accepted by government officials.⁴¹ This provision, although not a direct protection of refugees per se, furthered the international goal to affirm and promote the human rights and fundamental freedoms of global citizens and effectively combat severe degrading treatment and oppression propagated by the government.⁴²

B. *United States Adoption and Application of International Refugee Standards and Current Immigration Climate*

Although not one of the original 145 state parties of the 1951 Convention, the United States refugee protection adheres closely to the

³⁷ *Id.* at art. 33(1); Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 149 (2002).

³⁸ See CONVENTION INTRODUCTORY NOTE, *supra* note 17, at 2.

³⁹ See Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1067 (2011); Protocol Relating to the Status of Refugees, pmble., art. I, adopted Dec. 16, 1966, 606 U.N.T.S. 268.

⁴⁰ See Protocol Relating to the Status of Refugees, *supra* note 39, art. I(2)–(3) (allowing people displaced after 1951 and outside the periphery of World War II to qualify as refugees).

⁴¹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), adopted Dec. 10, 1984, 1465 U.N.T.S. 85.

⁴² Compare *id.* (protecting from torture), with Convention Relating to the Status of Refugees, *supra* note 14, art. 1 (establishing a definition for refugees to be given asylum).

international standards.⁴³ The United States acceded to the expanded 1967 Protocol in 1968 which, having the same substantive properties as the original Convention, bound the United States to the Convention's substantive provisions.⁴⁴ The United States later explicitly availed itself to the international obligations of the Convention and Protocol through the Refugee Act of 1980, an amending document to the primary US source of refugee law, the Immigration and Nationality Act (INA).⁴⁵ Noted in the extensive legislative history, Congress passed the Refugee Act with the intent to conform American refugee law with the international standard.⁴⁶ The Refugee Act itself revised the admission procedure for refugees and, following the spirit of the Convention, sought to promote resettlement and offer transitional assistance to refugees in the United States.⁴⁷

The first major change that the Refugee Act made to domestic asylum law was its adoption of international asylum definitions.⁴⁸ The Refugee Act adopted a refugee definition substantively identical to that of the 1967 Protocol.⁴⁹ Following its international predecessor, the Refugee Act's definitional refugee does not include those who had incited or otherwise participated in the persecution of any person who might otherwise qualify as a refugee.⁵⁰ The INA and its subsequent revision additionally distinguish the protocol for asylum seekers and refugees protected under the Convention Against Torture (CAT).⁵¹

⁴³ See *States Parties*, *supra* note 19; Farbenblum, *supra* note 39.

⁴⁴ Protocol Relating to the Status of Refugees, *supra* note 39, art. I(1); Farbenblum, *supra* note 39.

⁴⁵ See Farbenblum, *supra* note 39, at 1068.

⁴⁶ See H.R. REP NO. 96-781, at 20 (1980) (Conf. Rep.); 8 U.S.C. § 1101(a)(42).

⁴⁷ Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102, 102.

⁴⁸ See H.R. REP NO. 96-781, at 19 (1980) (Conf. Rep.).

⁴⁹ The Refugee Act of 1980 amended the previous Immigration and Nationality Act adding that the term refugee means "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Pub. L. No. 96-212, § 201, 94 Stat. 102, 102.

⁵⁰ *Id.* at 102-103.

⁵¹ The United States offers several avenues for an individual seeking protection as a refugee. An individual may apply for Asylum with USCIS affirmatively or defensively before an Immigration Judge. An individual may also apply for withholding from removal, either before an immigration judge or under the UN's Convention Against Torture (CAT). CAT, which is implemented through federal regulations allows individuals who would not otherwise qualify for asylum to obtain the temporary and less certain protection from removal called Withholding from Removal. Withholding from removal under CAT regulations are mandatory protections.

Asylum, a more concrete protection, may be obtained either affirmatively by applying directly to the U.S. Citizenship and Immigration Services (USCIS) or defensively appearing before an immigration judge in the Department of Justice Executive Office of Immigration Review.⁵²

Individuals seeking affirmative asylum grants must apply through the USCIS, a branch of the U.S. Department of Homeland Security.⁵³ Following its international roots, the application for the asylum process includes certain procedural limitations, even for individuals who may facially qualify as refugees.⁵⁴ For example, federal asylum law allows procedural denials of asylum application where a bilateral agreement exists to remove the individual to a safe, third party country.⁵⁵ Additional provisions place time limits for filing for asylum and prohibit repetitive filing following denied protection.⁵⁶ For both the procedural and substantive requirements for asylum the burden remains on the applicant to demonstrate credibility to the trier of fact and to prove, by a preponderance of the evidence, that the necessary elements are met.⁵⁷

Once the perfunctory requirements of the asylum process are met, the applicant may proceed to demonstrate his or her status as a refugee under the INA.⁵⁸ The process of proving refugee status requires the satisfaction of four related elements.⁵⁹ An applicant must demonstrate that he or she has suffered or will suffer persecution from a perpetrator that the government is unable or unwilling to control.⁶⁰ Additionally, the applicant must prove that the harm suffered was on account of a protected characteristic: race, religion, national origin, membership in a particular

See AM. IMMIGR. COUNCIL & NAT'L IMMIGRANT JUST. CTR., *THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL* 1-3 (2020); 8 C.F.R. § 208.16(a); 8 U.S.C. § 1101(a).

⁵² *THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL*, *supra* note 51; *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> (May, 25, 2023).

⁵³ *The Affirmative Asylum Process*, *supra* note 52.

⁵⁴ See 8 U.S.C. § 1158(a)(2); AM. IMMIGR. COUNCIL, *FACT SHEET: ASYLUM IN THE UNITED STATES* (2022) (available at <https://www.americanimmigrationcouncil.org/research/asylum-united-states>).

⁵⁵ 8 U.S.C. § 1158(a)(2)(A).

⁵⁶ 8 U.S.C. §§ 1158(a)(2)(B)-(C).

⁵⁷ 8 U.S.C. § 1158(b)(1)(B); see *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (defining the "more likely than not" standard as greater than fifty percent probability of something occurring).

⁵⁸ See 8 U.S.C. § 1101(a)(42); AM. IMMIGR. COUNCIL, *supra* note 54.

⁵⁹ See 8 U.S.C. § 1101(a)(42) ("[T]he term 'refugee' means (A) any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social group, or political opinion.").

⁶⁰ 8 U.S.C. § 1101(a)(42).

social group, or political opinion.⁶¹ Following the same formula rooted in international law,⁶² the Refugee Act and its substantive requirements for asylum protection—that is to prove refugee status—have remained substantively unchanged since its adoption.⁶³ The evolving international political climate,⁶⁴ however, has led to divisive developments in the policies surrounding U.S. immigration and asylum.⁶⁵

C. *Latin American Gang Violence and Current Immigration-Asylum Trends*

Asylum and immigration issues remain contentious debates in the U.S. political sphere.⁶⁶ Central American immigrants comprise an increasing rate of immigration and asylum applications at the southern U.S. border,⁶⁷ and criminal violence, including gang violence, remains a driving force for migration to the United States.⁶⁸ By the end of 2019, over 800,000 people from El Salvador, Guatemala, and Honduras had sought protection from escalating gang violence, often by crossing borders and seeking asylum.⁶⁹ The increased border crossings into the United States and a scarcity of immigration judges have strained immigration processing.⁷⁰

⁶¹ *Id.*

⁶² See Protocol Relating to the Status of Refugees, *supra* note 39, art. 1; 8 U.S.C. § 1101(a)(42).

⁶³ Compare 8 U.S.C. § 1101(a)(42), with Protocol Relating to the Status of Refugees, *supra* note 39, art. 1 (the 1967 Protocol, which based the 1980 Refugee Act, uses nearly identical language to the current US refugee definition).

⁶⁴ See Klobucista et al., *supra* note 3.

⁶⁵ See, e.g., *Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022) (determining the constitutionality of executive immigration orders).

⁶⁶ See Klobucista et al., *supra* note 3.

⁶⁷ *Id.*

⁶⁸ Michael Paarlberg, *Gang Membership in Central America: More Complex than Meets the Eye*, MIGRATION POL'Y INST. (Aug. 26, 2021), <https://www.migrationpolicy.org/article/complexities-gang-membership-central-america>. In a survey conducted by the UNHCR and UNICEF, nearly twenty percent of migrants identified violence, including threats and extortion by gang members, as a central reason for their migration to the United States. *Death Threats and Gang Violence Forcing More Families to Flee Northern Central America—UNHCR and UNICEF Survey*, UNICEF (Dec. 17, 2020), <https://www.unicef.org/press-releases/death-threats-and-gang-violence-forcing-more-families-flee-northern-central-america> [hereinafter *Death Threats and Gang Violence*].

⁶⁹ *Death Threats and Gang Violence*, *supra* note 68.

⁷⁰ See Alicia A. Caldwell, *Immigration Judges Are Moving Fast but Case Backlog Keeps Growing*, WALL ST. J. (Mar. 1, 2023, 9:00 AM), <https://www.wsj.com/articles/immigration-judges-are-moving-fast-but-case-backlog-keeps-growing-c8cc6922> (explaining that the United States has

Under the INA the President is charged with establishing the refugee admission ceiling.⁷¹ Under the Trump administration the refugee-cap reached an all-time low and the administration ultimately admitted fewer than 12,000 refugees.⁷² Although the Biden administration initially increased the admission cap by over triple what the Trump administration had set,⁷³ the end of the pandemic has challenged his pledge to temper immigration policies.⁷⁴

Changes in administrations has resulted in several shifts in processing for Central American migrants.⁷⁵ In 2022, the Supreme Court upheld Biden's termination of Trump's controversial Migration Protection Protocol,⁷⁶ which mandated that individuals caught crossing the southern land border be detained in Mexico until their case was heard—regardless of country of origin.⁷⁷ The Court held that under the INA, the government is not mandated to return non-Mexican nationals to Mexico and may permit such migrants to remain in the United States under prescribed conditions.⁷⁸ Although this ruling opened the door for Biden's projected pro-immigration administration,⁷⁹ in spring 2023, the

hired more immigration judges to address the growing backlog in the immigration system and that in 2022 U.S. Border Patrol made 2.2 million arrests along the southern border).

⁷¹ See Ryan Baugh, *Annual Flow Report: Refugees and Asylees: 2021*, DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATS. (Sept. 2022), https://www.dhs.gov/sites/default/files/2022-10/2022_0920_ply_refugees_and_asylees_fy2021.pdf.

⁷² *Id.*

⁷³ See *id.*; *Fact Sheet: Biden-Harris Administration Announces New Border Enforcement Actions*, OFF. OF THE WHITE HOUSE PRESS SEC'Y (Jan. 5, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

⁷⁴ See Rebecca Morin & Dan Keemahill, *Biden Pledged to Fix a Broken US Refugee Program. Two Years, Later He's Nowhere Near his Goal*, USA TODAY (Mar. 2, 2023, 2:46 PM), <https://www.usatoday.com/story/news/politics/2023/02/27/biden-us-refugee-cap-not-met-2022/11112116002/>.

⁷⁵ See *Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022).

⁷⁶ *Id.* at 2541-43. The Trump Administration relied on the vague discretionary language of the INA to pass the Migration Protection Protocol. Cf. 8 U.S.C. § 1225(b)(2)(C) ("In the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1129a.").

⁷⁷ *Biden v. Texas*, 142 S. Ct. 2528, 2531, 2534 (2022).

⁷⁸ See *id.* at 2543-44 (holding that under on the INA, the Attorney General's authority to return migrants to the contiguous territory from which they arrived is discretionary); 8 U.S.C. § 1158(d)(5)(A) (granting the Attorney General discretion to parole asylum seekers and allow them to remain in the United States under prescribed conditions).

⁷⁹ See *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022); *Fact Sheet: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System*, OFF. OF THE WHITE HOUSE PRESS SEC'Y, (Jul. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/>.

administration unveiled its plans to aggressively limit asylum eligibility after the expiration of Title 42, which would subsequently limit the number of admitted refugees and again change admission protocols.⁸⁰ The increased regulations on asylum eligibility comes in anticipation of “a potential surge of migration” at the southern border,⁸¹ though the Biden Administration maintains that these new policies still leave migration paths open.⁸² Others have argued, however, that the policies severely limit immigration flow and will not be enough to alleviate the backlog in the immigration system.⁸³

The shifting policies and immigration procedure as administrations change,⁸⁴ along with these impending backlogs, present significant procedural hurdles for asylum applicants just to get in front of an adjudicator.⁸⁵ Divisions among federal circuits and administrative jurisdictions in determining the merits of an applicant’s case and refugee

⁸⁰ See Adam Isacson, *10 Things to Know About the End of Title 42*, WASHINGTON OFFICE ON LATIN AMERICA (May 09, 2023) <https://www.wola.org/analysis/end-title-42/>. The Biden Administration has recently been criticized for implementing these restrictions. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, (proposed May 16, 2023) (to be codified as 8 C.F.R. 208, 8 C.F.R. 1003, 8 C.F.R. 1208); See e.g., *US: Biden ‘Asylum Ban’ Endangers Lives at the Border*, HUMAN RIGHTS WATCH (May 11, 2023), <https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border>; At Liberty Podcast, *Biden’s Asylum Policy is From Trump’s Playbook*, ACLU (May 4, 2023), <https://www.aclu.org/podcast/bidens-asylum-policy-is-from-trumps-playbook>. The plan bears some resemblance to the Title 42 restrictions and other Trump Era policies by restricting asylum eligibility to individuals “passing through” Mexico to reach the U.S. border, creating a “rebuttable presumption” of ineligibility for asylum. See Rebecca Santana, *How New Biden Asylum Rule Affects Immigration Compared to Trump*, PBS (Feb. 22, 2023, 7:13 PM), <https://www.pbs.org/newshour/politics/how-new-biden-asylum-rule-affects-immigration-compares-to-trump>.

⁸¹ Circumvention of Lawful Pathways, 88 Fed. Reg. at 31314.

⁸² Unlike the Trump-era restrictions, Biden’s Policy is only supposed to run for two years and allows exceptions to the limited eligibility presumption. See Santana, *supra* note 80.

⁸³ See Diana Roy, *Can Biden’s New Asylum Policy Help Solve the Migrant Crisis?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/in-brief/can-bidens-new-asylum-policy-help-solve-migrant-crisis> (Mar. 7, 2023 12:08 PM).

⁸⁴ See *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (discussing the previous administration immigration orders); *Fact Sheet: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System*, OFF. OF THE WHITE HOUSE PRESS SEC’Y (Jul. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system/>.

⁸⁵ See Santana, *supra* note 80.

status⁸⁶ make the substantive process equally as daunting,⁸⁷ especially in proving the nexus requirement for refugee status.⁸⁸

II. ASYLUM ADJUDICATION: STATUTORY REQUIREMENTS AND NEXUS CASELAW

A. *Adjudication of Asylum Claims: Substantive Requirements Under the Refugee Act*

Once an applicant overcomes the political and procedural hurdles of an asylum claim⁸⁹ the individual may have their claim substantively adjudicated.⁹⁰ Following the international standard and federal statutory definition, the substantive award of asylum requires the satisfaction of four distinct elements. First, the applicant must prove that he or she has (1) a well-founded fear of persecution that is (2) based on past persecution.⁹¹ Second, the persecution has to be harm (3) that the government in the applicant's home country is unable or unwilling to control.⁹² Finally, (4) the persecution the applicant experienced must be because of membership to a protected class.⁹³ As the introductory agency in the asylum process—at least theoretically—the USCIS outlines the basic satisfactory circumstances for each of these elements.⁹⁴

⁸⁶ Compare *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (remanding for further review), with *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1283 (11th Cir. 2021) (denying asylum), and *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 953–54 (4th Cir. 2015) (granting asylum).

⁸⁷ See *Alvarez-Largos v. Barr*, 927 F.3d 236, 249–50 (4th Cir. 2019) (showing the difficult process across adjudication levels of determining whether the petitioner's status as an unmarried mother satisfied the nexus requirement).

⁸⁸ See Anjum Gupta, *Nexus Redux*, 90 INDIANA L.J. 465, 471–74 (2015) (identifying issues with the lack of uniformity in the current nexus requirements for asylum).

⁸⁹ See overview of asylum procedure *supra* Section I(B).

⁹⁰ See U.S. Citizenship and Immigr. Servs., *Chapter 5 - Adjudication Procedures*, USCIS POLICY MANUAL, <https://www.uscis.gov/policy-manual/volume-7-part-m-chapter-5> (June 8, 2023).

⁹¹ 8 U.S.C. § 1101(a)(42).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See U.S. CITIZENSHIP AND IMMIGR. SERVS., *RAIO COMBINED TRAINING PROGRAM: DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION 11* (2019) [hereinafter *DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION*].

1. Well-Founded Fear of Persecution Based on Past Persecution

The first two elements of demonstrating status as a refugee require the applicant to prove fear of persecution in his or her home country based on past persecution or risk of future persecution.⁹⁵ These elements require the applicant to satisfactorily demonstrate factual evidence of harm amounting to persecution.⁹⁶ General factors, including severity of harm, motivation, identity of the perpetrator, and location of harm are considered to determine whether the harm crossed the line to persecution.⁹⁷ Once past persecution is established, the adjudicator may determine if the fear of future persecution is well-founded.⁹⁸

The federal courts have held that to amount to persecution the harm inflicted must be objectively serious or based on an individual's perceived characteristic.⁹⁹ The nonbinding guidelines of the UNHCR further explain that significant threats to life or freedom, or other serious violations of human rights, always amount to persecution.¹⁰⁰ Other types of harm, however, should be analyzed on a case-by-case basis.¹⁰¹ Based on an individual assessment of an applicant's case, considering the applicant's age, beliefs, and mental or physical attributes, an adjudicator may find the harm rises above the level of mere discrimination or harassment—even in a singular instance—so long as it is objectively severe.¹⁰²

The Seventh Circuit has distinguished harassment from persecution, analogizing them to the difference “between nasty and barbaric.”¹⁰³ The effects of the harm experienced and feared by the individual should be

⁹⁵ 8 U.S.C. § 1101(a)(42).

⁹⁶ See DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION, *supra* note 94, at 11.

⁹⁷ See *id.*

⁹⁸ See *Dandan v. Ashcroft*, 339 F.3d 567, 574 (7th Cir. 2003).

⁹⁹ See *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000) (stating that actions less severe than threats to life may amount to persecution so long as those actions rise above the level of mere harassment); see also *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 647 (9th Cir. 1997).

¹⁰⁰ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION: UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 21 (2019) [hereinafter UNHCR HANDBOOK].

¹⁰¹ *Id.*

¹⁰² DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION, *supra* note 94, at 15–16.

¹⁰³ *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011).

viewed in totality and evaluated in terms of their prejudicial nature.¹⁰⁴ In *Stanojkova v. Holder*, the Seventh Circuit noted that persecution requires the use of significant physical force against a person, the use of comparable physical harm without the use of force, or nonphysical harm of equal gravity.¹⁰⁵ The court's definition requires harm that is so incredible that an individual crosses the line between wishing to be in another country to being so desperate that she has to "flee without any assurance of being given refuge in any other country."¹⁰⁶ In *Stanojkova* the court noted that it required "little. . . imagination" to find that after a family was robbed, beaten, sexually assaulted, and unable to prevent future attacks because of socio-economic status that the line of persecution was crossed.¹⁰⁷ Once the presumption of persecution is found, the court need only determine if the evidence support a genuine, reasonable, and well-founded fear of future persecution.¹⁰⁸

2. Persecution by the Government or an Entity the Government is Unwilling or Unable to Control

It is not enough that the individual's treatment rises to the level of persecution.¹⁰⁹ The persecution must stem from either a government-controlled actor or an actor that the government will not or cannot stop.¹¹⁰ In cases where the alleged abuser is a government or government agent, the court's task is relatively simplistic and the court need not

¹⁰⁴ "Where discriminatory practices or instances of harassment accumulate or increase in severity to the extent that they lead to consequences of a substantially prejudicial nature, adverse actions that would themselves constitute only discrimination or harassment may, cumulatively, rise to the level of persecution." DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION, *supra* note 94, at 18 (citing *Ivanishvili v. USDOJ*, 433 F.3d 332, 342 (2d Cir. 2006)).

¹⁰⁵ *Stanojkova*, 645 F.3d at 948.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 949 (remanding to the B.I.A. to determine if the conditions surrounding the petitioner's persecution sufficiently changed to mitigate the well-founded fear); *Dandan v. Ashcroft*, 339 F.3d 567, 575 (7th Cir. 2003) (reviewing the Country Report for the petitioner's home country to find that the ending of a civil war sufficiently restored physical security to parts of the state); *Roman v. I.N.S.*, 233 F.3d 1027, 1035 (7th Cir. 2000) (requiring a genuine and reasonable fear of persecution).

¹⁰⁹ *See* 8 U.S.C. § 1101(a)(42) (persecution is only one element of proving refugee status).

¹¹⁰ *See* UNHCR HANDBOOK, *supra* note 100, para. 22–23 (stating that where discriminatory or offensive acts committed by the populace are tolerated by the local authorities a persecution claim may exist.)

consider if or where the applicant sought protection.¹¹¹ Essentially, if the persecutor is the government or its agent, the element is “satisfied without further analysis” because an applicant cannot be expected to solicit protection from his persecutor.¹¹² Where the alleged persecutor operates outside the purview of the government, however, the analysis becomes more complex.¹¹³ In such instances, the applicant must show either a failed attempt to procure assistance from the proper authorities or evidence that the government failed to prevent the acts.¹¹⁴

Evidence of governmental inaction could come from explanations of the victim’s circumstances,¹¹⁵ evidence that the government previously failed to provide a remedy under similar circumstances,¹¹⁶ evidence that seeking protection would have increased the applicant’s risk,¹¹⁷ or other relevant evidence about the country’s conditions.¹¹⁸ For example, in the case *In re S-A-*, the BIA found that an applicant was eligible for asylum when she suffered abuse at the hand of her father.¹¹⁹ The board relied on evidence of domestic violence remedies in her home country of Morocco and the increased threat the victim might face for reporting the violence, determining that the government would be unable or unwilling to control her abuser’s conduct.¹²⁰ In a separate domestic violence

¹¹¹ See *Baballah v. Ashcroft*, 367 F.3d 1067, 1077–78 (9th Cir. 2004) (holding that seeking protection from a government responsible for persecution is not necessary for asylum).

¹¹² See *id.*

¹¹³ See DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION, *supra* note 94, at 28–32.

¹¹⁴ *Roman v. I.N.S.*, 233 F.3d 1027, 1034 (7th Cir. 2000) (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (finding that although persecution does not require the government itself to perpetrate an attack, the petitioner must show that the government actor “condoned it or at least demonstrated a complete helplessness to protect the victims”)).

¹¹⁵ See *In Re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (finding that the respondents corroborated testimony of her education level and strict religious background, as well as the domestic nature of her persecution demonstrated that the abuse would not have stopped even if she had turned to the government for help).

¹¹⁶ See *id.* at 1330 (the respondent did not consider requesting police protection or other governmental intervention because “her mother’s previous efforts in that regard had proven unproductive”).

¹¹⁷ See *id.* at 1335 (finding seeking protection could increase the victim’s risk of harm).

¹¹⁸ See *Kamalyan v. Holder*, 620 F.3d 1054, 1056–57 (9th Cir. 2010) (using reports from the United States’ State Department for aggregate, but not conclusive evidence to assess changes in government protection conditions); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (holding that the mere existence of crime in a locality, even if unchecked, does not inherently mean that the government is unwilling or unable to control it).

¹¹⁹ *In Re S-A-*, 22 I. & N. Dec. at 1335.

¹²⁰ See *id.*

case, the Sixth Circuit found that even where the government issued a restraining order, because the persecutor did not fear the police or consequences, the applicant could not reasonably expect the assistance of the government for protection.¹²¹ In cases where the persecutor is not a government actor, the applicant need show only that the government was unwilling or unable to control the actor—not both.¹²²

3. Persecution on Account of Membership to a Protected Class

A critical element of an asylum claim requires the applicant to prove that he or she faced persecution as a result of race, religion, nationality, political opinion, or membership in a particular social group.¹²³ This element requires proof that: (1) the applicant is a member of a protected group—race, religion, nationality, political opinion, or membership in a particular social group—and (2) the persecution claimed came as a result of that membership.¹²⁴ The evaluation of the protected classes are to be construed broadly and with understanding of the context and perspective of the applicant's country of origin.¹²⁵ For this claim to be successful, the applicant must reasonably identify with or establish a reasonably perceived association with a protected group.¹²⁶ In cases of race, religion, or nationality, the applicant may need only meet a definitional requirement for the group—for example holding a certain religious belief.¹²⁷ Proving political opinion or membership to a particular social group, however, requires a more complex analysis.¹²⁸

An applicant claiming persecution for membership in a particular social group must first identify the group with whom he or she is associated.¹²⁹ The applicant then must establish that the group is (1) composed of members who share a common, immutable characteristic,

¹²¹ See *Juan Antonio v. Barr*, 959 F.3d 778, 793–94 (6th Cir. 2020).

¹²² See *id.* at 794.

¹²³ See 8 U.S.C. § 1101(a)(42).

¹²⁴ U.S. CITIZENSHIP AND IMMIGR. SERVS., *RAIO COMBINED TRAINING PROGRAM: NEXUS AND THE PROTECTED GROUNDS* 10–11 (2019) [hereinafter *NEXUS AND THE PROTECTED GROUNDS*].

¹²⁵ See *id.* at 19.

¹²⁶ See U.S. CITIZENSHIP AND IMMIGR. SERV., *RAIO COMBINED TRAINING PROGRAM: NEXUS — PARTICULAR SOCIAL GROUP* 11 (2021) [hereinafter *NEXUS — PARTICULAR SOCIAL GROUP*].

¹²⁷ See *NEXUS AND THE PROTECTED GROUNDS*, *supra* note 124, at 23.

¹²⁸ *NEXUS — PARTICULAR SOCIAL GROUP*, *supra* note 126, at 11.

¹²⁹ See *id.* at 11–12.

(2) socially distinct, and (3) particularly defined.¹³⁰ This three-part test does not require the group to self-identify as such, nor does it require the applicant to voluntarily associate with the group.¹³¹ Further, a particular social group does not have any size requirements so long the group remains discrete and definable.¹³² Once membership is recognized, the factfinder must determine whether the applicant's persecution occurred on account of individual's association with the established social group.¹³³

Developing precedents and USCIS guidelines have recognized certain characteristics that create a presumption of protection consistent with the spirit of refugee law and definition of particular social groups.¹³⁴ For example, the U.S. Attorney General's decision in the *Matter of L-E-A-III* affirmed that nuclear families could qualify as a particular social group for refugee status.¹³⁵ Circuit courts have also recognized kinship ties as a "prototypical example" of a social group as they represent a fundamental affiliation.¹³⁶ Even such general findings, however, require a case-by-case analysis.¹³⁷ Individual analyses ensure that the identified group shares a fundamental and discrete relationship¹³⁸ such that "would-be persecutors could identify them as members of the purported group."¹³⁹

The core of this element compels an applicant to demonstrate that the persecution occurred "on account of" the claimed association with a protected group.¹⁴⁰ The nexus inquiry requires an applicant to

¹³⁰ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237–241 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 212–18 (B.I.A. 2014).

¹³¹ See *Matter of W-G-R-*, 26 I. & N. Dec. at 217 (acknowledging that efforts to hide group membership does not prevent constitution of a cognizable social group); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that members of a particular social group are not required to share a voluntary association).

¹³² NEXUS — PARTICULAR SOCIAL GROUP, *supra* note 126, at 20.

¹³³ See *id.* at 11; 8 U.S.C. § 1101(a)(42).

¹³⁴ For example, family or clan membership, age, gender, sexuality, domestic violence victims, people with disabilities, unions, and students may constitute particular social groups. See NEXUS — PARTICULAR SOCIAL GROUP, *supra* note 126, at 22–51 (listing court protected social groups).

¹³⁵ *Matter of L-E-A- (L-E-A- III)*, 28 I. & N. Dec. 304, 305 (Att'y Gen. 2021) (vacating *L-E-A- II* and holding that immediate family could constitute a particular social group).

¹³⁶ See *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993) (noting that affiliation need not be limited to traits, but can also include shared experiences or other identifiable group dynamic).

¹³⁷ See *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (explaining the dynamics of a recognizable social group).

¹³⁸ See *Gebremichael*, 10 F.3d at 36; *Crespin-Valladares v. Holder*, 632 F.3d 117, 125–26 (4th Cir. 2011).

¹³⁹ *Gomez*, 947 F.2d at 664.

¹⁴⁰ See 8 U.S.C. § 1101(a)(42); NEXUS AND THE PROTECTED GROUNDS, *supra* note 124, at 10–11.

establish evidence of persecutorial motive stemming from his or her protected status.¹⁴¹ Motive may be sufficiently established for nexus if the applicant demonstrates that association with the protected class constitutes at least “one central reason” for persecution—although this does not require direct proof of the explicit motive of the persecutor.¹⁴² This standard allows nexus fulfillment in cases where the protected class is not the singular motive for the applicant’s persecution or where the specific motive is not easily ascertained.¹⁴³ So long as the proposed motive is plausibly central to the targeting, assuming the other elements are met, an applicant may be granted asylum protection.¹⁴⁴

B. Important Case Law Regarding the Nexus Requirement

When an applicant eventually begins proving refugee status to an adjudicator, connecting persecution and association with a protected class presents a significant hurdle for both the petitioner and the courts.¹⁴⁵ The nexus requirement, following the Spirit of the UN Convention,¹⁴⁶ requires analysis from the perspective of the victim-applicant.¹⁴⁷ Although holding that family, for example, may constitute a particular social group, the Board of Immigration Appeals (BIA) has held that membership in a group “does not necessarily establish nexus to a ground protected under the Act.”¹⁴⁸ The applicant still must demonstrate to the adjudicator that the relationship is at least “one central reason” for the persecution to receive protection on that basis.¹⁴⁹

¹⁴¹ NEXUS AND THE PROTECTED GROUNDS, *supra* note 124, at 10–11.

¹⁴² See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that an applicant only needs provide some evidence of motive which could be direct or circumstantial); *Perez Vasquez v. Garland*, 4 F.4th 213, 221 (4th Cir. 2021) (explaining the “one central reason” requirement).

¹⁴³ See *Perez Vasquez*, 4 F.4th at 221.

¹⁴⁴ See NEXUS AND THE PROTECTED GROUNDS, *supra* note 124, at 11–12.

¹⁴⁵ The ill-defined definition of nexus and “one central reason” has masked the purpose and standard of the adjudicator’s analysis, creating a circuit split and unequal evidentiary standards across jurisdictions. See *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (acknowledging the thin line between nexus and personal retribution); *Sanchez-Castro v. U.S. Att’y Gen.*, 998 F.3d 1281, 1286–87 (11th Cir. 2021) (focusing on the persecutor’s goal); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (4th Cir. 2015) (looking at applicant’s persecution as opposed to someone else).

¹⁴⁶ Convention Relating to the Status of Refugees, *supra* note 14.

¹⁴⁷ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482–83 (1992) (acknowledging that the motive of political persecution should be based on the views of the victim rather than the alleged persecutor).

¹⁴⁸ *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 40 (B.I.A. 2017).

¹⁴⁹ *Id.*

The BIA's holding in *L-E-A- I*,¹⁵⁰ as affirmed in the Attorney General's decision in *L-E-A- III*,¹⁵¹ serves as a baseline for establishing nexus to be followed in immigration proceedings.¹⁵²

Under *L-E-A- I*, the establishment of nexus depends on the satisfaction of a two part test.¹⁵³ The applicant must demonstrate that (1) the persecutor would have treated the applicant differently if the protected characteristic did not exist, and (2) that the membership in the protected group was at least "one central reason" for the treatment.¹⁵⁴ The first prong requires a type of but-for causation linking the claimed protected trait and the harm.¹⁵⁵ Whether the persecutor would have treated the applicant similarly without the protected factor requires an individualized analysis based on the specific facts and evidence of the case, making all reasonable inferences based on the record.¹⁵⁶ Mere references to the protected characteristic made by the persecutor or evidence demonstrating the protected trait served as the applicant's reason for resisting the persecutor are insufficient to satisfy the first prong.¹⁵⁷ In cases where the persecutor has demonstrated animus towards the protected group itself, the first prong would be satisfied.¹⁵⁸

The "one central reason" requirement dictates that the protected group—here family—"cannot play a minor role" in the targeting.¹⁵⁹ If the protected trait is found to be incidental or tangential to another reason for the harm, the applicant has failed to establish nexus.¹⁶⁰ Cases of animus per se towards a family may clearly meet the one central reason

¹⁵⁰ *Id.* at 47.

¹⁵¹ *Matter of L-E-A- (L-E-A- III)*, 28 I. & N. Dec. 304, 304 (Att'y Gen. 2021).

¹⁵² *See id.* at 305 (rejecting the holding of *L-E-A- II* and instructing that *L-E-A- I* be used when evaluating asylum claims).

¹⁵³ *See L-E-A- I*, 27 I. & N. Dec. at 43–44.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*; *Matter of N-M-*, 25 I. & N. Dec. 526, 531 (B.I.A. 2011) (holding that an applicant "must demonstrate that the persecutor would not have harmed the applicant if the protected trait did not exist.").

¹⁵⁶ *See L-E-A- I*, 27 I. & N. Dec. at 43–44; *Matter of N-M-*, 25 I. & N. Dec. at 531–32.

¹⁵⁷ *See Nicolas-Sebastian v. Barr*, 769 Fed. App'x 248, 251–53 (6th Cir. 2019) (finding that neither the persecutor's belittlement of the respondent's religion nor that the respondent resisted gang recruitment because it violated his religious beliefs demonstrated that the respondent was targeted on account of his faith).

¹⁵⁸ *See L-E-A- I*, 27 I. & N. Dec. at 44 (analogizing to the historic scenario of the Bolshevik assassination of the family of Czar Nicholas II because of animus towards the family).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

requirement.¹⁶¹ The BIA gives the example of the Bolshevik assassination of Czar Nicholas II's family in 1917, where, although political reasons contributed to the endangerment and ultimate death of the family, "it would be difficult to say that . . . their family membership was not at least 'one central reason' for their persecution."¹⁶² For cases where there is no *per se* animus, however, such as where family status is connected to another protected ground intertwined in the dispute, evidence demonstrating nexus and "one central reason" may be more complicated.¹⁶³ Although the association to a protected group need not be the only reason for the persecution, it must play more than a minor role.¹⁶⁴

To establish nexus to protected social group, an applicant must prove that the protected characteristic served as a but-for cause of the persecution and did not play a minor role such that the adjudicator can "state with conviction what motivated the purported persecutor."¹⁶⁵ Further, that motivation must be on account of the victim's associations or traits, not the persecutor's.¹⁶⁶ The persecutor's understanding of the victim's association with the protected group need not be accurate,¹⁶⁷ but it must constitute one central reason for the persecution.¹⁶⁸ Although the Court's findings and the BIA's holdings govern across circuits,¹⁶⁹ the nexus standard still contains some ambiguities and the federal courts have not interpreted it consistently across circuits.¹⁷⁰

¹⁶¹ *Id.* at 43–44.

¹⁶² *Id.*

¹⁶³ *See id.* at 45 (finding that where an individual or group is targeted for retaliation or as a means to an end, it is more difficult to prove that the group status is "one central reason").

¹⁶⁴ *See* *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 44 (B.I.A. 2017).

¹⁶⁵ *See id.* at 43–44; *Nicolas-Sebastian v. Barr*, 769 Fed. App'x 248, 252 (6th Cir. 2019).

¹⁶⁶ *See* *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (finding that a gang's political motivations for recruiting did not establish a nexus to the victim's political opinions).

¹⁶⁷ *See id.* (implying that an erroneous belief that the respondent's refusal to join the gang was politically based could have been sufficient to persecution based on political opinion).

¹⁶⁸ *L-E-A- I*, 27 I. & N. Dec. at 43–44.

¹⁶⁹ *See* U.S. CONST. art. III; *Board of Immigration Appeals*, UNITED STATES DEPT. OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last visited July 3, 2023).

¹⁷⁰ *Compare* *Perez Vasquez v. Garland*, 4 F.4th 213, 221 (4th Cir. 2021) (holding the protected ground need not be the dominant reason for the persecution), *with* *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1286 (11th Cir. 2021) (holding the protected ground must be an essential part of the motivation for the persecution).

C. *The Federal Circuit's Interpretation of Nexus*

Although both the BIA and the Supreme Court have developed the nexus standard beyond its statutory definition,¹⁷¹ it still proves a significant hurdle for the uniform adjudication of asylum claims.¹⁷² In cases where motives for persecution may be mixed, courts often struggle to define which reasons for persecution were central.¹⁷³ This issue becomes especially prevalent in cases of persecution instigated by gangs and other guerilla-type groups.¹⁷⁴ Cases involving gang violence against members of a protected group require the asylum seeker to demonstrate that his or her ties to the protected group, not a general criminal motive, was a central reason for the harm.¹⁷⁵

In determining motive sufficient to establish nexus, the federal courts have ranged in the stringency of their evidentiary requirements under the *L-E-A- I* standard.¹⁷⁶ The Fourth Circuit developed a more lenient, victim-centric review for nexus, emphasizing that the protected class need only be “one central reason” for persecution.¹⁷⁷ The Ninth Circuit adopted a slightly narrowed approach, explicitly stating that if the protected ground is “incidental, tangential, superficial or subordinate to another reason for harm” then it cannot function as a central reason under the nexus requirement.¹⁷⁸ The Eleventh Circuit later held similarly, though narrowing the standard further to prevent the protected ground from playing any subordinate role in an applicant’s persecution.¹⁷⁹

¹⁷¹ See *Elias-Zacarias*, 502 U.S. at 482 (clarifying that nexus as persecution on account of the victims trait, not the persecutors); *L-E-A- I*, 27 I. & N. Dec. at 43–44 (allowing families to constitute particular social groups).

¹⁷² See *Perez Vasquez*, 4 F.4th at 221; *Sanchez-Castro*, 998 F.3d at 1286.

¹⁷³ See *Perez Vasquez*, 4 F.4th at 221; *Sanchez-Castro*, 998 F.3d at 1286; *L-E-A- I*, 27 I. & N. Dec. at 43–44.

¹⁷⁴ See *Perez Vasquez*, 4 F.4th at 218–22; *Sanchez-Castro*, 998 F.3d at 1287.

¹⁷⁵ See *Perez Vasquez*, 4 F.4th at 221; *Sanchez-Castro*, 998 F.3d at 1287; see also *Elias-Zacarias*, 502 U.S. at 482.

¹⁷⁶ See *Sanchez-Castro*, 998 F.3d at 1287 (noting that the Fourth Circuit takes a more lenient approach to the nexus requirement than the Eleventh Circuit).

¹⁷⁷ *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (4th Cir. 2015) (emphasis added).

¹⁷⁸ *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009).

¹⁷⁹ *Sanchez-Castro*, 998 F.3d at 1286–87 (citing *Parussimova*, 555 F.3d at 740–41).

1. The Fourth Circuit's Evaluation

The Fourth Circuit, applying the broadest standard for nexus, only requires the protected class to be *a* central reason for persecution, even if it is not *the* central reason.¹⁸⁰ Demonstrated in *Hernandez-Avalos v. Lynch*, the Fourth Circuit takes a victim-centered approach to determining persecutorial motive.¹⁸¹ In *Hernandez-Avalos*, the court evaluated the nexus requirement for an applicant claiming asylum based on familial persecution by a local gang.¹⁸² The petitioner claimed that she was subjected to violence and threats because of her familial connection to a cousin who was murdered for refusing to join the Mara 18 gang.¹⁸³ The petitioner claimed that, after the burial of her husband's cousin, armed gang members came to her home, threatening her if she identified gang members as the killers.¹⁸⁴ Following the initial threat, the gang approached the petitioner two more times, threatening to kill her if she refused to let her son join their gang.¹⁸⁵ These threats involved gang members putting a gun directly to the petitioner's head, and telling her to turn her son over or she would be killed.¹⁸⁶

The Fourth Circuit ultimately held that the petitioner suffered persecution on account of her familial status.¹⁸⁷ Reversing the previous denial of asylum by the agency, the court determined that, because the petitioner was threatened as a result of her son's gang recruitment, her protected status was a central reason for her persecution.¹⁸⁸ The court reasoned that the gang threatened the petitioner as an attempt to leverage her maternal authority over her son.¹⁸⁹ The court further rejected the government's contention that the petitioner's attempts to prevent her son's recruitment were incidental to the persecution she faced—which the government claimed was the result of general criminal violence.¹⁹⁰ Instead, the court held that the mere existence of

¹⁸⁰ *Hernandez-Avalos*, 784 F.3d at 949–50.

¹⁸¹ *See id.* at 948–50.

¹⁸² *Id.* at 947, 949.

¹⁸³ *Id.* at 947.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947 (4th Cir. 2015).

¹⁸⁷ *Id.* at 950.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 949–50.

an alternative motive for the petitioner's persecution did not inherently negate the evidence that the gang targeted the petitioner—and not another person—because of her family ties.¹⁹¹

Taking a broad approach to the standard of establishing nexus,¹⁹² the Fourth Circuit, when addressing familial social groups, has held that the applicant need not demonstrate the ultimate reason for his or her persecution, just that familial association served as a proximate cause for the individual's targeting.¹⁹³ The court in *Cordova v. Holder* further developed this analysis, determining that the mere fact that targeting individuals and families was not a unique activity for gangs does not undermine a petitioner's fear of persecution, and does not inherently negate a familial nexus.¹⁹⁴ The Fourth Circuit in *Hernandez-Avalos*, by looking at whether the group association is a central reason for the persecution, rather than *the ultimate* reason for persecution,¹⁹⁵ closely follows the victim-center approach dictated endorsed by the Supreme Court¹⁹⁶ and advocated for through the Convention.¹⁹⁷

2. The Ninth Circuit's Evaluation

The Ninth Circuit has adopted a similar but slightly more particular standard than the Fourth Circuit, closely scrutinizing whether the harm is tangentially related to the protected group or a retaliatory act, both of which are insufficient to establish nexus.¹⁹⁸ Prior to the passage of the Real-ID Act in 2005,¹⁹⁹ the Ninth Circuit adopted a more lenient

¹⁹¹ *Id.* at 950.

¹⁹² Compare *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015), with *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (requiring the nexus to be primary or principal to the persecution), and *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1287 (11th Cir. 2021) (declining to follow the Fourth Circuit standard for being too lenient).

¹⁹³ See *Hernandez-Avalos*, 784 F.3d at 950; *Cordova v. Holder*, 759 F.3d 322, 339 (4th Cir. 2014).

¹⁹⁴ *Cordova*, 759 F.3d at 339–40 (citing *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011)) (“we cannot agree with the government’s characterization of this evidence as describing nothing more than the ‘general conditions of upheaval and unrest associated with gang violence.’”).

¹⁹⁵ *Hernandez-Avalos*, 784 F.3d at 950.

¹⁹⁶ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that to satisfy nexus, the persecution must be on account of the victim’s protected trait, not the persecutor’s).

¹⁹⁷ See Convention Relating to the Status of Refugees, *supra* note 14, art. 1(A)(2) (defining “refugees” based on the refugee’s traits, not the persecutor’s).

¹⁹⁸ Compare *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021), with *Hernandez-Avalos*, 784 F.3d at 950.

¹⁹⁹ Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in various sections of 8 and 49 U.S.C.).

standard for mixed motive analysis—requiring only that the harm be motivated “at least in part” by the implied protected ground.²⁰⁰ After *Parussimova v. Mukasey* in 2009, the Ninth Circuit has held that the protected group motivation must be “‘primary,’ ‘essential,’ or ‘principal’” to the persecution.²⁰¹ And after the BIA’s holding in *L-E-A-I*, the Ninth Circuit has held that the protected group must play more than a minor role in the mistreatment to satisfy nexus—it must be essential to the persecutor’s decision to act.²⁰²

In *Garcia v. Wilkinson*, the Ninth Circuit identified the fine line between establishing and failing to establish nexus.²⁰³ The petitioner in *Garcia* contended that a drug cartel kidnapped her husband to extort him.²⁰⁴ She alleged that even after her husband agreed to turn over the deed to his property, the cartel killed him.²⁰⁵ After identifying the cartel as responsible for her husband’s murder, members of the cartel threatened the petitioner and her family.²⁰⁶ Years later, the cartel again targeted the petitioner by attempting to recruit her son.²⁰⁷ When cartel members finally issued a warning for the petitioner to leave her home, she fled to the United States.²⁰⁸

The Ninth Circuit ultimately remanded the case, finding that the BIA erred in disregarding evidence that could cross the line from personal retribution to establishing nexus through animus.²⁰⁹ Relying on prior Ninth Circuit cases, the court held that evidence of sweeping retaliation towards a family can demonstrate animus distinct from purely personal retribution.²¹⁰ Both the threats the petitioner received following her husband’s death and regarding her son’s recruitment could

²⁰⁰ The “at least in part” standard essentially removed the “central” component from the Real-ID Act’s “once central reason” language. *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009) (explaining the development of the 9th Circuit’s mixed motive standard).

²⁰¹ *Id.*

²⁰² See *Parussimova*, 555 F.3d at 741 (citing *In re J-B-N & S-M*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007)); see also *Garcia*, 988 F.3d at 1145.

²⁰³ *Garcia*, 988 F.3d at 1145 (finding that showing animus towards a particular social group could establish nexus, but “purely personal retribution” cannot).

²⁰⁴ *Id.* at 1139.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1139–40.

²⁰⁷ *Id.* at 1140.

²⁰⁸ *Id.*

²⁰⁹ *Garcia v. Wilkinson*, 988 F.3d 1136, 1144–45 (9th Cir. 2021).

²¹⁰ *Id.* at 1145 (citing *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018)).

demonstrate animus even though both incidents involved generalized criminal gang activities of retaliation and recruitment.²¹¹

The dual goals of criminal groups do not prevent the fulfillment of nexus or the establishment of animus, but in this case, more information was necessary to determine if the familial association was tangential to the cartel's targeting and not a result of animus towards her family specifically.²¹² The petitioner's evidence of persecution may have been insufficient to establish that the instigating circumstance surrounding her harm was her connection to a particular social group.²¹³ Thus, the court specifically instructed the BIA to determine whether the persecutors "specifically sought out the 'particular social group.'"²¹⁴ Although the court maintained the dual goals of a persecutor did not inherently negate the petitioner's nexus claim, it acknowledged the thin line between proper nexus and incidental or tangential motives—which cannot satisfy the nexus requirement.²¹⁵

The Ninth Circuit's standard for establishing "a central reason" for persecution acknowledges that the proffered nexus does not have to be a dominant reason for the persecution while also recognizing that the line between nexus and no nexus "is a fine one."²¹⁶ This slightly narrowed approach—compared to the Fourth Circuit—²¹⁷ increases the scrutiny applied to close cases to prevent incidental familial associations from allowing asylum protection.²¹⁸ Although the court in *Garcia* drew a line between personal retribution and familial animus, evidence of sweeping violence towards a family unit could suffice the nexus motive requirement.²¹⁹ The petitioner, however, still must demonstrate via uncontradicted testimony that the persecutors specifically sought out the family group and continued to target that group over time.²²⁰

²¹¹ See *id.* at 1145–46.

²¹² See *id.*

²¹³ *Id.*

²¹⁴ *Id.* (citing *Parada*, 902 F.3d at 910).

²¹⁵ *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021).

²¹⁶ *Id.*

²¹⁷ Compare *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015), with *Garcia*, 988 F.3d at 1145 (requiring the nexus to be primary or principal to the persecution).

²¹⁸ See *Garcia*, 988 F.3d at 1145.

²¹⁹ *Id.* (citing *Parada*, 902 F.3d at 910).

²²⁰ See *id.* (citing *Parada*, 902 F.3d at 910).

3. The Eleventh Circuit's Evaluation

Operating in direct opposition to the Fourth Circuit, the Eleventh Circuit developed the most stringent standard of the three circuits.²²¹ The Eleventh Circuit's decision in *Sanchez-Castro v. U.S. Attorney General*, specifically demonstrates the court's *persecutor*-centric evaluation of the nexus requirement.²²² The case itself also involved an asylum proceeding predicated on the petitioners claim of gang related persecution on account of familial status.²²³ The petitioner in *Sanchez-Castro* testified that a local gang targeted her immediate family upon knowledge of her father's employment in the United States.²²⁴ She recounted several incidents where she and her family members were sexually, physically, and financially harassed by gang members, eventually causing the family to flee to the United States.²²⁵ The Eleventh Circuit upheld the agency's denial of asylum on the grounds that Sanchez-Castro failed to establish that her family status presented a central motive for her persecution.²²⁶ The court reasoned that the anecdotes provided by Sanchez-Castro demonstrated she and her family were merely victims of ordinary criminal activity, not targeted for their family status.²²⁷ Furthermore, the court concluded that where the persecution of a family operates only as a means to a different end, not as a result of the family's identity, the familial association is only incidentally relevant.²²⁸

The Eleventh Circuit acknowledged that it evaluates issues of nexus differently than the Fourth Circuit.²²⁹ Directly referencing the Fourth Circuit's decision in *Hernandez-Avalos v. Lynch*, the Eleventh Circuit criticized that court for overly extending the nexus inquiry.²³⁰ The court

²²¹ Compare *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1284–87 (11th Cir. 2021) (explaining the Eleventh Circuit's rational and declining to follow the Fourth Circuit standard for being too lenient), with *Garcia*, 988 F.3d at 1145 (requiring the nexus to be primary or principal to the persecution), and *Hernandez-Avalos*, 784 F.3d at 950.

²²² See *Sanchez-Castro*, 998 F.3d at 1285–88.

²²³ *Id.* at 1283–85.

²²⁴ *Id.* at 1284.

²²⁵ *Id.*

²²⁶ *Id.* at 1287–88.

²²⁷ *Id.* at 1286–87.

²²⁸ *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1287 (11th Cir. 2021) (citing *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 44–45 (B.I.A. 2017)).

²²⁹ *Id.* (declining to follow the “more lenient” approach to the nexus requirement used in the Fourth Circuit).

²³⁰ *Id.* (citing *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015)).

further alleged that adoption of the Fourth Circuit's approach would permit adjudicators to allow nexus to be established even when familial status is "subordinate to another reason for harm."²³¹ This rationale effectively requires the group association to be the central reason for the persecution and the ultimate motivation of the persecutor.²³²

The differing objectives of federal circuit court rulings on the nexus motive requirement, especially for familial groups, are demonstrative of an ambiguous standard for granting asylum in cases where there may be mixed motives for persecutions.²³³ The lack of clear structure and legal standard for the nexus requirement among the circuit courts results in nonuniform results and mixed applications of law in asylum proceedings.²³⁴ The outcomes of asylum petitions should not be arbitrarily distributed based on where an applicant lands geographically. The courts, therefore, must adopt a new, unambiguous legal standard to analyze asylum claims for applicants facing mixed motives from persecutors so the outcomes of individual asylum cases are based on merit, not jurisdiction.

ANALYSIS

I. CURRENT ANALYTICAL STANDARD: WHY THE "A CENTRAL REASON" STANDARD IS OVERLY AMBIGUOUS

The nexus requirement's "central reason" threshold currently gives the courts excessive discretion when determining the validity of an applicant's asylum claim.²³⁵ The definitional standard requiring the demonstration of "at least one central reason" for persecution is interpreted differently among at least three federal circuits, resulting in discrepancies in outcomes of factually and evidentially similar

²³¹ *Id.* (internal quotations omitted).

²³² *See id.* at 1286–88.

²³³ *Compare* *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (acknowledging the fine line between establishing nexus and not), *with Sanchez-Castro*, 998 F.3d at 1284 (requiring membership in a protected group to be a primary reason for persecution), *and Hernandez-Avalos*, 784 F.3d at 949–50 (allowing nexus so long as the protected group is not tangential to persecution).

²³⁴ *See Sanchez-Castro*, 998 F.3d at 1284–88 (directly declining to follow the Fourth Circuit Standard); *Hernandez-Avalos*, 784 F.3d at 949–50, 954.

²³⁵ *See Sanchez-Castro*, 998 F.3d at 1287–88; *Hernandez-Avalos*, 784 F.3d at 949–50 (emphasizing the "one central reason" requirement for establishing nexus).

cases.²³⁶ The lack of uniformity and incongruent evidentiary standards demanded across circuit courts to prove motive do not follow the spirit of international refugee protections²³⁷ and functionally deprive migrants of the limited due process rights supposed to be guaranteed in immigration proceedings.²³⁸ This Section will analyze the limitations of each circuit's approach to the "one central reason" standard and address the international and due process considerations in defining a more robust legal standard.

The three approaches defined by the Fourth, Ninth, and Eleventh Circuits each focus on different points for determining the "central reason" for an applicant's persecution.²³⁹ Because of the courts' necessary reliance on one-sided and often anecdotal evidence, deciphering the true reason for persecution may be difficult.²⁴⁰ But the courts' ability to view persecutorial motive from any perspective and with an unrestricted level of speculation fails to conform to the spirit of international law and to establish uniform adjudication across immigration cases.²⁴¹

A. *The Fourth Circuit's Applicant-Centered Approach*

The Fourth Circuit's applicant-centered approach to determining persecutorial motive requires the court to find that an applicant's

²³⁶ Compare *Garcia*, 988 F.3d at 1145 (remanding for further review), with *Sanchez-Castro*, 998 F.3d at 1287–88 (denying asylum), and *Hernandez-Avalos*, 784 F.3d at 949–50, 954 (granting asylum).

²³⁷ See Convention Relating to the Status of Refugees, *supra* note 14 (seeking to provide the widest possible rights to refugees).

²³⁸ See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 426–27 (1999) (discussing Congress's primary purpose in passing the Refugee Act was to implement the principles of the 1967 United Nations Protocol Relating to the Status of Refugees); *Plyer v. Doe*, 457 U.S. 202, 210 (1982) (granting immigrants, no matter their immigration status, due process protections under the Fifth and Fourteenth Amendments).

²³⁹ Compare *Garcia*, 988 F.3d at 1145 (acknowledging the thin line between nexus and personal retribution), with *Sanchez-Castro*, 998 F.3d at 1285–88 (focusing on the persecutor's goal), and *Hernandez-Avalos*, 784 F.3d at 949–50 (looking at applicant's persecution as opposed to someone else).

²⁴⁰ See *Angov v. Lynch*, 788 F.3d 893, 908 (9th Cir. 2015) (noting that the federal rules of evidence do not apply to asylum cases as "a brief scan of [the] caselaw shows it's pretty much impossible to build an asylum case without relying on evidence that would be laughed out of a court if presented in a domestic trial").

²⁴¹ See Convention Relating to the Status of Refugees, *supra* note 14. Compare *Garcia*, 988 F.3d at 1145 (acknowledging the thin line between nexus and personal retribution), with *Sanchez-Castro*, 998 F.3d at 1284–87 (focusing on the persecutor's goal), and *Hernandez-Avalos*, 784 F.3d at 949–50 (looking at applicant's persecution as opposed to someone else's).

membership to a particular social group was the reason why that individual—and not another person—was targeted.²⁴² The court's rationale addresses some of the shortcomings of the narrower approaches to finding proper nexus motives and gives deference to the protection and right-preserving spirit of the UNHCR as adopted by the United States.²⁴³ First, the nexus analysis requires evidence used to establish motive using a victim-centric approach.²⁴⁴ Addressing an important evidentiary barrier affecting many asylum seekers, the court determined that the petitioner cannot be expected to directly prove his persecutor's exact motive.²⁴⁵ The allowance of circumstantial evidence, often through personal anecdotes, develops a more victim-centered standard and may prevent the factfinder from speculating or assuming hypothetical ulterior motives.²⁴⁶ Inquiring why the family—rather than the individual—was targeted further requires the court to answer a potentially impossible question.²⁴⁷ The typical process of immigration itself limits the available evidence to prove persecutorial motive in asylum cases, especially where corroborating witnesses still reside in the petitioner's home country or fear negative, possibly brutal, repercussions for testifying.²⁴⁸ Under the applicant perspective analysis, the petitioner still must provide credible, persuasive, and specific evidence, but the factfinder cannot speculate additional motives that lack evidentiary support.²⁴⁹

The Fourth Circuit's additional remark that the uniqueness of the persecutor's actions should not affect the validity of a nexus claim further supports the Convention and protocol's goal of broadly protecting rights.²⁵⁰ The refugee definition does not require the persecution suffered by an applicant to be unique to that applicant.²⁵¹ Additionally,

²⁴² *Hernandez-Avalos*, 784 F.3d at 949–50 (citing *Cordova v. Holder*, 759 F.3d 322, 339 (4th Cir. 2014)).

²⁴³ See Convention Relating to the Status of Refugees, *supra* note 14; *Cordova*, 759 F.3d at 339–40.

²⁴⁴ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992).

²⁴⁵ See *id.* at 483.

²⁴⁶ See *Elias-Zacarias*, 502 U.S. 478.

²⁴⁷ See *Cordova*, 759 F.3d at 339–40.

²⁴⁸ See *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1284 (11th Cir. 2021) (petitioner's family members did not testify for fear of deportation); *Robin v. I.N.S.*, 211 F.3d 1274 (9th Cir. 2000) (unpublished table decision) (noting the lack of availability of corroborating evidence and allowing applicant testimony only so long as it is credible, persuasive, and specific).

²⁴⁹ See *Robin*, 211 F.3d at 1274 (unpublished table decision).

²⁵⁰ CONVENTION INTRODUCTORY NOTE, *supra* note 17, at 2–4.

²⁵¹ Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102–03.

the Supreme Court's holding in *I.N.S. v. Elias-Zacarias*—requiring victim-centric analyses—still requires the applicant to provide some evidence to prove motive—but does not require that evidence to be direct.²⁵² This requirement again decreases the potential opportunities for speculation available to the factfinder based on evidence that may not be available or exist at all.²⁵³

Although the Fourth Circuit's broad review of persecutorial motive limits opportunities for speculation, it could allow for asylum grants in cases where an applicant's established protected group is not inherently central to his or her persecution.²⁵⁴ In adopting this standard, the court has successfully denied asylum in cases where the applicant was unable to sufficiently prove persecution or harm on account of family status, but the line between targeting an individual and her family and targeting an individual because of her family can be difficult to discern.²⁵⁵ For example, in cases where an applicant's family relationship changes or where the motive shifts it may be difficult to determine if the familial connection is central enough.²⁵⁶ Narrower views of the requirement, as adopted in the Ninth and Eleventh Circuits, could prevent this line drawing issue.

B. *The Ninth Circuit's Fine Line Analysis*

The Ninth Circuit's standard for establishing nexus only slightly expands the perspective of the Fourth Circuit and reviews the persecution from the perspective of the family unit or other invoked group as well as the individual.²⁵⁷ The court in *Garcia v. Wilkinson* remanded the case to the BIA to determine whether sufficient nexus was established through the petitioner's evidence of sweeping retaliation towards the family.²⁵⁸ The Ninth Circuit's requirement that

²⁵² See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

²⁵³ See *Robin*, 211 F.3d at 1274 (unpublished table opinion).

²⁵⁴ The Fourth Circuit's more lenient standard may, at the very least, cause confusion in the jurisdiction and give heavy deference to the applicant in close cases. See *Alvarez Largos v. Barr*, 927 F.3d 236, 249 (4th Cir. 2019) (finding, after a lengthy trial process, that the petitioner's status as an unmarried mother satisfied the nexus requirement).

²⁵⁵ See *Madrid-Montoya v. Garland*, 52 F.4th 175, 181 (4th Cir. 2022) (finding insufficient nexus established because persecutor's motive was to take the petitioner's family's land).

²⁵⁶ See *id.*

²⁵⁷ *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015).

²⁵⁸ *Garcia v. Wilkinson*, 988 F.3d 1136, 1145–48 (9th Cir. 2021) (finding that the BIA's previous analysis ignored pertinent and uncontroverted evidence).

the petitioner produce uncontradicted evidence that the persecutor specifically targeted his or her family unit could close gaps left in the Fourth Circuit's standard, especially in close cases with mixed motives.²⁵⁹

Requiring proof of family targeting, though expanding the analysis outside the applicant's individual persecution, focuses the court on the discriminatory nature of the persecution.²⁶⁰ This expansion could help reduce the likelihood of an incidental nexus, especially in cases with gang violence or other more generalized criminal behaviors. In close evidentiary cases or if the persecutor's motive changes, the petitioner may still demonstrate a clear nexus connection by showing familial animus or other evidence to bolden the nexus line.²⁶¹ The Ninth Circuit's approach also provides a more objective standard and more focused review of the fact-sensitive analysis to establish nexus.²⁶² In cases where there are multiple potential motives for persecution, the court does not need to make nuanced determinations of proximate cause.²⁶³ Instead, the court should focus its analysis on the fine line to determine why the group specifically was targeted, whether the harm demonstrates sweeping retaliations, and if there is sufficient evidence of animus.²⁶⁴

The major issue with the Ninth Circuit's fine line approach is its lack of adherence to the Supreme Court's victim-centered review requirement.²⁶⁵ Although requiring more specific proof of motive—such as animus—only slightly deviates from *Elias-Zacarias* and *L-E-A- I*,²⁶⁶ and likely still falls within the spirit of refugee law under the UNHCR,²⁶⁷ the standard still prevents the acceptance of nexus motives allowed in

²⁵⁹ Compare *Madrid-Montoya*, 52 F.4th at 181 (merely asking why the petitioner and not “some other person” was targeted), with *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (requiring substantial evidence to demonstrate nexus between petitioner's family and his persecution).

²⁶⁰ See *Garcia*, 988 F.3d at 1145 (petitioner claiming she was targeted because of her family ties).

²⁶¹ See *id.*

²⁶² See *id.* (acknowledging that the petitioner and her family had experienced “murder, specific death threats, forcible taking of property, conscriptions, and attempted failed conscriptions”).

²⁶³ See *Parada*, 902 F.3d at 910 (finding sufficient evidence of animus in a case of mixed motive persecution).

²⁶⁴ See *id.*

²⁶⁵ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992).

²⁶⁶ See *Elias-Zacarias*, 502 U.S. at 483–84; *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 43–44 (B.I.A. 2017).

²⁶⁷ Convention Relating to the Status of Refugees, *supra* note 14, pmbl.

other circuits.²⁶⁸ For example, the Ninth Circuit noted in *Garcia* that the court maintains a traditional presumption against establishing nexus based on opposition to gang recruitment.²⁶⁹ Additionally, in an unpublished opinion, the Ninth Circuit denied a petition for review of an applicant claiming persecution based on familial wealth, despite the continuous targeting of an entire family unit.²⁷⁰ Because the expanded analytical view requires the court to acknowledge the fine line of establishing nexus—a review that requires specific evidence rising beyond the level of personal retribution or generalized violence²⁷¹—the court determined the motivation was financial, not familial.²⁷²

The Fourth Circuit, despite also requiring specific evidence of harm and threats, has applied more lenient standards in its focus on the individual.²⁷³ Under this victim-centered analysis, factually similar case could have a different outcome. For example, the court might find that because the petitioner's familial relationship put the individual in the line of harm, nexus may be established.²⁷⁴ Such a determination would be consistent with the Fourth Circuit's finding that inquiring why the petitioner's family was targeted is "not the relevant question."²⁷⁵

C. *The Eleventh Circuit's Means to an End Distinction*

The Eleventh Circuit's stringent standard for establishing nexus, despite adopting the *L-E-A- I* reasoning, views motive from the perspective of the persecutors themselves and requires that the persecution cannot be the means to an end.²⁷⁶ The means-to-an-end requirement expands the court's periphery, instructing it to consider

²⁶⁸ See, e.g., *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015).

²⁶⁹ *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092–93 (9th Cir. 2013)).

²⁷⁰ *Sanchez v. Sessions*, 706 Fed. App'x 897, 898–99 (9th Cir. 2017).

²⁷¹ *Garcia*, 988 F.3d at 1145 (finding that sweeping retaliation over time can demonstrate animus distinct from personal retribution and that dual goals of a persecutor does not inherently prevent the establishment of nexus).

²⁷² *Sanchez*, 706 Fed. App'x at 898–99.

²⁷³ See *Hernandez-Avalos*, 784 F.3d at 950 (granting asylum for petitioner claiming nexus requirement based on opposing familial gang recruitment).

²⁷⁴ See *Perez Vasquez v. Garland*, 4 F.4th 213, 222–23 (4th Cir. 2021).

²⁷⁵ See *id.* (remanding on the grounds that targeting an individual for financial gain could establish nexus).

²⁷⁶ *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1287 (11th Cir. 2021) (citing *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 44–46 (B.I.A. 2017)).

perspectives of parties outside the petitioner and reject incidents that could be explained by generalized criminal activity.²⁷⁷ The means-to-an-end standard, however, requires the adjudicators to find the baseline motivation of the persecutor based on evidence-supported inferences, which falls outside the precedented purview of the court—assuming such evidence exists.²⁷⁸

In *Sanchez-Castro*, the Eleventh Circuit additionally noted that when the harm by the persecutor is not unique to the protected social group, the court may be additionally skeptical of the proposed nexus.²⁷⁹ Demonstrations of the same or similar harms to individuals outside the family unit by the persecutor detract from the petitioner's claim of targeting and demonstrate motive outside the proposed nexus.²⁸⁰ The court's narrower view of the "one central reason" requirement establishes that if there is any additional reason or potential motive for persecution or chief explanation, either plausible or established by evidence, the nexus requirement cannot be satisfied.²⁸¹ The Eleventh Circuit standard is designed to prevent incidental or generalized violence claims in high-risk countries from flooding the courts with asylum claims and expansive grants.²⁸²

The major success of this approach to reviewing nexus claims is its essential elimination of incidental reasons for persecution.²⁸³ By requiring the court to first consider motives from the perspective of the persecutor rather than rely on those perceived by the petitioner, the court attempts to identify the reason for the harm.²⁸⁴ A more objective approach to reviewing the nexus claim allows the court to better establish if the familial status is central to the harm caused.²⁸⁵ Narrowing the central reason standard to deny claims with incidental or even subordinate nexus connections further removes the court's subjective

²⁷⁷ *Id.* at 1287–88.

²⁷⁸ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Rivera v. U.S. Att'y Gen.*, 487 F.3d 815, 823 (11th Cir. 2007) (quoting *Perlera-Escobar v. Exec. Off. for Immigr.*, 894 F.2d 1292, 1299 (11th Cir.1990)).

²⁷⁹ See *Sanchez-Castro*, 998 F.3d at 1287–88.

²⁸⁰ See *id.*

²⁸¹ See *id.*

²⁸² See *id.* at 1288 (identifying El Salvador as a country "plague[d]" with gang violence).

²⁸³ See *id.* at 1287.

²⁸⁴ See *id.* at 1287–88 (asking the petitioner and the government to speculate on what the persecutor may have been thinking by finding no nexus had been established because no evidence directly suggested that the cartel was motivated by family animus).

²⁸⁵ See *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1287 (11th Cir. 2021).

weighing of potential causes for harm.²⁸⁶ The Eleventh Circuit's means-to-an-end approach effectively converts "*one* central reason" into "*the* central reason."²⁸⁷

The primary issue with the means-to-an-end approach employed by the Eleventh Circuit regards its distortion of the "one central reason" standard.²⁸⁸ The standard, established in the INA's definition of a refugee, requires that an individual's status comprise "at least one central reason for" the feared persecution.²⁸⁹ The court's application of the standard in *Sanchez-Castro*, however, ignores the allowance of alternate, equally probable motivations because the proffered motives were not *the* central reason.²⁹⁰ The Eleventh Circuit's assertion that only persecutorial acts that are "impossible to disentangle" from the petitioner's ties to a protected social group may satisfy nexus further establishes a standard that is almost impossible to reach.²⁹¹ Despite criticizing the Fourth Circuit's more expansive approach, the court's denial of any subordinate motivator, no matter the plausibility, overly restricts an asylum seeker's ability to establish nexus.²⁹²

The Eleventh Circuit's persecutor-centered review of the nexus requirement deviates from the Court's victim-focused view of asylum claims.²⁹³ Asking the adjudicator to view instances of persecution through the lens of the persecutor requires the fact finder to answer an impossible question: what was the persecutor thinking?²⁹⁴ The sensitive nature of asylum petitions and hearings inherently restricts the availability of evidence for both the government and the petitioner.²⁹⁵ Not only must

²⁸⁶ See *id.*

²⁸⁷ See *id.* at 1287 (citing *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015)).

²⁸⁸ See *id.* (not allowing nexus when the proffered reason for persecution is "subordinate to another reason for harm").

²⁸⁹ 8 U.S.C. § 1158(b)(1)(B)(i).

²⁹⁰ See *Sanchez-Castro*, 998 F.3d at 1284 (ignoring the possibility that the petitioner was targeted because of her familial relationship).

²⁹¹ *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1158 (11th Cir. 2019) (finding sufficient nexus established in an instance in which the motives for the persecutorial act were "impossible to disentangle").

²⁹² See *Sanchez-Castro*, 998 F.3d at 1287 (citing *Hernandez-Avalos*, 784 F.3d at 950).

²⁹³ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992).

²⁹⁴ See *Sanchez-Castro*, 998 F.3d at 1287 (speculating on the motives of a Central American gang in extorting the petitioner).

²⁹⁵ See *id.* at 1285; *Robin v. I.N.S.*, 211 F.3d 1274 (9th Cir. 2000) (unpublished table decision) (noting the lack of availability of corroborating evidence).

the adjudicator rely primarily on limited anecdotal evidence,²⁹⁶ but the Federal Rules of Evidence do not apply to immigration proceedings.²⁹⁷ In *Sanchez-Castro* specifically, the petitioner's own family members refused to testify on his behalf for fear of retaliation or deportation.²⁹⁸ This standard requires the court to rely on anecdotal evidence and limited political knowledge to speculate the motivation of an actor who is not present to corroborate.²⁹⁹ The pursuit of the "real reason" for persecution conditions requires the court to ask why a bad actor commits bad acts, rather than asking why the individual asylum seeker was harmed.³⁰⁰

The evaluative standards employed by each circuit represent different modes of interpretation for the nexus's "central reason" requirement. The Fourth Circuit employs the broadest approach, giving the most deference to the testimony of the petitioner in viewing the persecutorial acts.³⁰¹ The Ninth and Eleventh Circuits, narrowing the review standard, look at the context surrounding the harm to the individual through the lens of the family unit or protected ground/proposed group and the persecutors, respectively.³⁰² Although all are rooted, at least in part, on goals of creating an efficient and equitable immigration system and adjudicatory process, the Eleventh Circuit's ultra-narrow reliance on the persecutor's direct motive veers too far from the permissible lens for nexus review.³⁰³ The appropriate standard lies somewhere between the expansive Fourth Circuit and Ninth Circuit approaches,³⁰⁴ so long as that standard protects the Due Process

²⁹⁶ See, e.g., *Sanchez-Castro*, 998 F.3d at 1285 (relying on testimony from the petitioner because direct evidence was international and not accessible to the court).

²⁹⁷ See *Matter of D-R-*, 25 I. & N. Dec. 445, 458 (B.I.A. 2011) ("In immigration proceedings, the 'sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.'").

²⁹⁸ *Sanchez-Castro*, 998 F.3d at 1285.

²⁹⁹ See *id.* at 1287 (relying on limited knowledge of the petitioners to determine the motivation of a violent gang).

³⁰⁰ See *id.* at 1285; *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015).

³⁰¹ *Hernandez-Avalos*, 784 F.3d at 950.

³⁰² See *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021); *Sanchez-Castro*, 998 F.3d at 1288.

³⁰³ See *Sanchez-Castro*, 998 F.3d at 1287. By not allowing nexus to be established when the proffered reason for persecution is "subordinate to another reason for harm," the Eleventh Circuit essentially transforms "one central reason" into "the central reason." See *id.*

³⁰⁴ See *Garcia*, 988 F.3d at 1145; *Hernandez-Avalos*, 784 F.3d at 950.

requirements³⁰⁵ and international standards and goals regarding immigration.³⁰⁶

II. THE NEW LEGAL STANDARD

The varied analyses for the “central reason” requirement for nexus cases involving mixed motives affect the due process rights that protect every individual, regardless of citizenship.³⁰⁷ The validity of an asylum claim under the current system depends on the adjudicator and geographic location of the court rather than the merits.³⁰⁸ Legal scholars in the field of immigration have noted this issue in the system and proposed solutions of how to create a more robust and uniform test, though none have been successfully implemented by the BIA or Congress.³⁰⁹ New modes of analysis for the nexus requirement must not only facilitate consistency in case outcomes across jurisdictions, but also align with the spirit and substance of the standards on which the United States’ immigration law is based.³¹⁰ Additionally, given the new wave of increased border crossings, the method must further the national security goals of the Department of Homeland Security and avoid “opening the floodgates” of immigration, thereby overloading the system.³¹¹

³⁰⁵ See *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (granting immigrants, no matter their status, due process protection under the Fifth and Fourteenth Amendments).

³⁰⁶ See Convention Relating to the Status of Refugees, *supra* note 14, pmbl.

³⁰⁷ See *Plyler*, 457 U.S. at 210 (granting immigrants, no matter their status, due process protection under the Fifth and Fourteenth Amendments).

³⁰⁸ Compare *Sanchez-Castro*, 998 F.3d at 1288, and *Hernandez-Avalos*, 784 F.3d at 950.

³⁰⁹ See e.g., Gupta, *supra* note 88, at 502–03 (expanding on previous proposal of a tort law like motive framework).

³¹⁰ See also Convention Relating to the Status of Refugees, *supra* note 14, at art. 33 (setting international standards for refugee protection). Under the currently guidance, different federal circuit courts approach the “one central reason” analysis differently leading to mixed result for factually similar cases. See *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021) (closely scrutinizing tangential motives); *Sanchez-Castro*, 998 F.3d at 1284 (not allowing a protected trait to be a “means to an end”); *Hernandez-Avalos*, 784 F.3d at 949–50 (employing a victim-centered approach).

³¹¹ See *Mission and Core Values*, USCIS, <https://www.uscis.gov/about-us/mission-and-core-values> (Apr. 20, 2023); Helen P. Grant, *The Floodgates Are Not Going to Open, but Will the U.S. Border?*, 29 Hous. J. INT’L L. 1, 53 (2006). Following the expiration of Title 42 in May 2023, the Department of Homeland Security and Department of Justice, Executive Office for Immigration Review issued a rule to amend 8 C.F.R. pt. 208 to incentivize safe and orderly entrance to the United States for asylum seekers, provide protections to noncitizens facing persecution in their home country, and share responsibility for providing asylum to eligible migrants with the United States’ regional problems. This proposed rule aimed to address the reality of the unprecedented migratory flow and subsequent costs on the immigration system by establishing presumptive

This Section will outline a new mode of analysis based on the victim focused Fourth Circuit test in the context of mixed motive cases involving gang violence on families and will discuss the potential consequences of using this method from both a legal perspective and based on international and domestic security goals.

A. *Introduction and Explanation of the New Test*

In asylum cases, the burden of proving status as a refugee rests solely on the applicant or petitioner.³¹² The crux of this analysis rests on the application of the nexus requirement in mixed motive cases.³¹³ In such cases, nexus to a protected characteristic must be at least “one central reason” for the petitioner’s persecution.³¹⁴ The proposed analysis thus assumes the petitioner has proven by the preponderance of evidence that he or she either experienced harm rising to the level of persecution or has a well-founded fear of future harm the government is unable or unwilling to prevent.³¹⁵ Additionally, it assumes that the petitioner has sufficiently established himself as a member of a protected social group—here, a family unit—leaving only the question of whether the persecution came on account of the petitioner’s familial connection.³¹⁶ Finally, the analysis anticipates that the petitioner provided complete and credible evidence and testimony to the judge, though it does not matter whether that evidence is direct or circumstantial.³¹⁷

In reviewing the nexus requirement, the vague language of the “one central reason” requirement creates an obvious hurdle for the courts.³¹⁸ Other commenters on the subject have described the language of the standard “at best unhelpful and at worst violat[ive]

conditions of eligibility for asylum seekers. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (proposed May 16, 2023) (to be codified at 8 C.F.R. 208, 8 C.F.R. 1003, 8 C.F.R. 1208).

³¹² 8 C.F.R. § 1208.13 (a).

³¹³ See *Garcia*, 988 F.3d at 1145; *Sanchez-Castro*, 998 F.3d at 1286; *Hernandez-Avalos*, 784 F.3d at 949–50.

³¹⁴ *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 44 (B.I.A. 2017).

³¹⁵ The INA requires that an asylum applicant has a well-founded fear of persecution for harm that the government is unable or unwilling to prevent. See 8 U.S.C. § 1101 (a)(42)(i).

³¹⁶ The INA likewise requires the applicant to have a protected trait or be a part of a protected group. See *id.*

³¹⁷ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that an applicant only needs provide some evidence of motive which could be direct or circumstantial).

³¹⁸ 8 U.S.C. § 1158(b)(1)(B)(i).

[of] the spirit of the Refugee Convention.”³¹⁹ Following the guidance of antidiscrimination law and tort law, relevant proposed revisions to the standard have included requiring the petitioner to demonstrate but-for causation or shifting the burden to the government to prove that the proffered motive was not essential to the persecution.³²⁰ Although using that framework is helpful for creating an applicant-oriented analysis of the “central reason” for the persecution, it follows the flawed understanding employed by the Eleventh Circuit—requiring family ties be *the* reason for persecution rather than *a* reason for persecution.³²¹ Further, the framework overcomplicates the court’s review through multiple burden shifts and redundant review of issues already present in the court’s analysis.³²²

An appropriate method of establishing whether a petitioner’s familial ties served as “one central reason” for persecution, therefore, is already within the review methods employed by the courts.³²³ The proposed method of analysis for mixed motive nexus would first require the petitioner to establish that—similar to the “but-for” causation test—but for a familial association, he or she would not face persecution. Then, in cases where multiple plausible motives may be central to the harm, the court should look at indicators of animus towards or deliberate targeting of the family unit or other protected group.³²⁴ This allows the court to weigh the role of particular social group ties in the persecution and keep focus on the individual and group persecuted without shifting the statutorily imposed burden off the petitioner.³²⁵

³¹⁹ Gupta, *supra* note 88, at 502.

³²⁰ *Id.*

³²¹ See Sanchez-Castro v. U.S. Att’y Gen., 998 F.3d 1281, 1287 (11th Cir. 2021); Gupta, *supra* note 88, at 503.

³²² Gupta’s proposed framework shifts the burden of proof to the government to prove (or rather disprove) motive where but-for causation does not exist. If the government demonstrates that the persecution would have occurred even without the protected trait the burden would shift back to the applicant to show either “(1) that even absent the [government’s] proffered reason for the persecution, the persecution would have still occurred; (2) that the likelihood of the persecution increased because of the protected trait; or (3) that the severity of the persecution increased because of the protected trait.” See Gupta, *supra* note 88, at 503–07.

³²³ See Garcia v. Wilkinson, 988 F.3d 1136, 1145 (9th Cir. 2021).

³²⁴ See *id.*

³²⁵ See 8 C.F.R. § 1208.13 (a) (burden of proof); Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015) (focusing analysis on the petitioner rather than the persecutor).

1. Description of the Two-Pronged Nexus Test

An appropriate analytical framework for establishing “one central reason” for the nexus requirement first requires a victim-centered frame of reference.³²⁶ An immigration judge should ask why the petitioner as an individual was targeted or harmed, not why the persecutors targeted the petitioner’s protected group.³²⁷ Therefore, the first prong of the proposed nexus analysis follows the expansive Fourth Circuit test almost identically and asks the court to determine whether family ties played a central role in why the petitioner “and not some other person” was persecuted.³²⁸ The court’s first mode of review is implicitly similar to the “but-for” test suggested by Professor Gupta in her torts-based analysis of nexus requirement.³²⁹ Essentially, the petitioner would have to establish a link between association with a protected group and individual persecution demonstrating a reasonable and nontangential but-for cause.³³⁰ Through this prong, the protected group association, following the “one central reason” language, need not be *the* cause or even the dominant cause, so long as it is not incidental to the persecution.³³¹ This rationale resolves simple mixed motive cases, for example granting asylum for mothers targeted as part of gang recruitment tactics, but denying nexus for individuals who were merely victims of personal vendettas or retaliatory behaviors.³³²

For cases with more complex motives—often found in claims of persecution where the persecutors regularly engage in generalized criminal activity—the Fourth Circuit’s basic method might not be as effective.³³³ Gangs, for example, may have several motivations for violence or other criminal behaviors, including financial motives, rivalries, or indiscriminate harassment.³³⁴ In such cases where the line of

³²⁶ See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

³²⁷ See *Hernandez-Avalos*, 784 F.3d at 949–50.

³²⁸ See *Perez Vasquez v. Garland*, 4 F.4th 213, 222 (4th Cir. 2021).

³²⁹ See Gupta, *supra* note 88, at 503.

³³⁰ See *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017) (finding that the protected ground must be more than incidental to the harm caused).

³³¹ *Id.*

³³² See e.g., *Garcia v. Wilkinson*, 988 F.3d 1136, 1145 (9th Cir. 2021); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947–48, 954 (4th Cir. 2015).

³³³ See *Sanchez-Castro v. U.S. Att’y Gen.*, 998 F.3d 1281, 1287 (11th Cir. 2021) (noting the financial motives of gangs); Gupta, *supra* note 88, at 502–03 (expanding on her previous torts-based model for failing to apply to more complex cases).

³³⁴ See *Sanchez-Castro*, 998 F.3d at 1287–88.

persecution on account of family ties and generalized victimization may be blurred, the court should look to the second prong of the proposed test. Following the Ninth Circuit's fine line analysis, the second prong asks the petitioner to further demonstrate that the family unit—or another protected group—was specifically and deliberately targeted.³³⁵

Therefore, through this prong, the petitioner may proffer additional evidence—for example, demonstrating some level of animus of the persecutor towards the family—to bolster the legitimacy of the group status as a central reason.³³⁶ The court would then review the proffered evidence based on the following factors: (1) additional family members who were harmed, (2) the “triggering event” inducing the persecution, (3) the consistency of the substance of the harm or threats, and (4) other groups who experienced the same or similar harms.³³⁷ The weight of the supplemental factors depends primarily on the availability of evidence and, although no factor inherently holds greater weight than the others, weight may shift based on credibility of the additional testimony.

2. Practical Application of the Proposed Test

To test the second prong of the proposed analysis, the factor evaluation will be applied to the factual pattern of one of the previously discussed cases, the Eleventh Circuit's *Sanchez-Castro v. U.S. Attorney General*.³³⁸ Recall that in *Sanchez-Castro*, the petitioner faced persecution from a gang after her father moved to the United States for work.³³⁹ The gang, assuming the family had money, harassed and extorted its members on several occasions, which could amount to persecution.³⁴⁰ The intertwined financial motive of generalized criminal extortion makes the first prong of analysis unhelpful by failing

³³⁵ See *Garcia*, 988 F.3d at 1145.

³³⁶ See *id.*

³³⁷ See *Sanchez-Castro*, 998 F.3d at 1287 (recognizing that evidence of other family members experiencing similar violence, the role of gang violence in the community, consistent motivations for the persecutor, and that the reason for targeting is related to the protected status affects the central reason analysis).

³³⁸ *Sanchez-Castro*, 998 F.3d 1281.

³³⁹ *Id.* at 1284.

³⁴⁰ *Id.* The immigration judge originally found that the petitioner's harm did not amount to persecution, on appeal the BIA and the court looked at whether the alleged persecution had a satisfactory nexus. The court did not reach whether the harm amounted to persecution, but other circuits have held prolonged gang violence could amount to persecution. *Id.* at 1284–87 (comparing its decision to the Fourth Circuit which granted asylum to a petitioner under similar facts).

to meaningfully distinguish the motives.³⁴¹ A court could just as easily determine that the gang targeted the petitioner for financial gain as it could determine that the gang targeted the petitioner for her familial relationship with her husband.³⁴² The change in outcome by a simple framing adjustment requires the analysis to move to the second prong and examine the proffered evidence against the proposed “fine line” factors.

Under the evaluation of the “fine line” factors, the Eleventh Circuit’s case could have satisfied the nexus requirement. The first factor, identifying additional targeted group members, shows that the petitioner’s entire family was targeted by the gang.³⁴³ Specifically, the gang kidnapped her sister, assaulted her and her brother, and overtly threatened her mother.³⁴⁴ While some of these specific instances of abuse plausibly stemmed from secondary motives of general gang behaviors,³⁴⁵ the second factor asks the court to identify the triggering event. Although the triggering event is not generally a necessary question for the court, in cases where the motive for harassment may be unclear or may have shifted, it could be useful to demonstrate how the petitioner got on the persecutor’s radar to start.³⁴⁶ In *Sanchez-Castro*, the petitioner’s family’s persecution began when her father went to work in the United States.³⁴⁷ The family’s perceived tie to the father and his wealth effectively put the family on the radar of the gang even if some later harassment and persecution were not directly related to her father.³⁴⁸

The third and fourth factors, which question the consistency of the persecution and the discriminatory nature of the persecutions, are less clear under these facts. As to the consistency of the persecution, the family received multiple threats for multiple reasons; however, the family was consistently extorted and stolen from for their perceived wealth because of its ties to the father living abroad.³⁴⁹ Additionally, the

³⁴¹ See *id.* at 1287.

³⁴² See *id.*

³⁴³ *Sanchez-Castro v. U.S. Att’y Gen.*, 998 F.3d 1281, 1284 (11th Cir. 2021).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 1287 (noting that the petitioner’s brother was shoved for wearing a shirt associated with a rival gang, and that sexual harassment is common gang activity).

³⁴⁶ See also *Madrid-Montoya v. Garland*, 52 F.4th 175, 180–81 (4th Cir. 2022).

³⁴⁷ *Sanchez-Castro*, 998 F.3d at 1284.

³⁴⁸ See *id.*

³⁴⁹ *Id.*

general harm inflicted on the family—recruitment, theft, kidnapping, and sexual harassment—are common behaviors among gangs members and likely weigh against the petitioner in this fact pattern.³⁵⁰ The demonstrated animus towards multiple targeted family members, however, triggered by the newly perceived wealth of their father, suggests that the petitioner would likely satisfy the proposed nexus test despite the generalized criminal behavior that surrounded the persecutorial acts.³⁵¹

This factored test, though more stringent than the Fourth Circuit's original approach, could potentially include claims that do not properly establish nexus, especially in close cases like the one illustrated above.³⁵² The test, despite having three factors weigh predominantly in favor of satisfying the nexus requirement, could still grant too much discretion to the court in weighing the factors or permit traditionally non-satisfactory nexus claims. The analysis, however, does not broaden the scope of the court to allow any facially reasonable nexus claim. For example, in the case illustrated above, if the extorsive threats to the mother ended just a few years prior to the family's migration, even holding all else equal, satisfaction under the factored nexus analysis would fail under the third factor requiring substantive consistency of the harm. By shifting the harm from consistent threats based on perceived familial wealth to unrelated incidents of criminal abuse, the petitioner can no longer claim that she reasonably feared persecution on account of her familial status.³⁵³ Therefore, even with the demonstrable targeting of the family unit and triggering event factors falling in the petitioner's favor, the lower court's denial of asylum would likely still stand.³⁵⁴

The proposed two-pronged analysis of the "at least one central reason" requirement would thus produce more uniform results within the immigration adjudicatory system.³⁵⁵ By creating an avenue to distinguish cases where familial bonds are incidental or tangential to harm—especially where general criminality or shifting motives may

³⁵⁰ See *Sanchez-Castro v. U.S. Att'y Gen.*, 998 F.3d 1281, 1287 (11th Cir. 2021); *Garcia v. Wilkinson*, 988 F.3d 1136, 1144–45 (9th Cir. 2021).

³⁵¹ See *Sanchez-Castro*, 998 F.3d at 1287.

³⁵² See *id.*; *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015).

³⁵³ See *Sanchez-Castro*, 998 F.3d at 1287.

³⁵⁴ *Id.*

³⁵⁵ The implementation of a uniform standard for nexus would reduce the likelihood of circuit splits and therefore create more uniform adjudication. Compare *id.* (finding no nexus), with *Hernandez-Avalos*, 784 F.3d at 950 (finding a nexus).

play a significant role—the discretion of the adjudicators and reviewing courts diminishes, allowing for more consistent results across circuits.³⁵⁶ Although the test itself may allow more satisfactory claims of nexus to pass through the system under this more expansive method of analysis, the “one central reason” requirement consists of only one part of one element of an asylum claim, and only applies if mixed motives for persecution are present.³⁵⁷ Additionally, the test allows the court to comply with the set legal standard, requiring it to focus its analysis on the victim and to keep the burden of proving the elements of an asylum claim on the petitioner.³⁵⁸ The proposed method of analysis thus presents a legally permissible and effective alternative to the current fractured analytical standards, so long as it remains within the goals of the international and domestic immigration system.

B. *Important Policy Considerations*

The proposed analytical standard for the mixed motive nexus analysis further conforms to the international legal standards and spirit of the Refugee Convention without contradicting national goals or opening floodgates at the border.³⁵⁹ The dynamics of the immigration system—as technology advances and global crises continue to escalate—change constantly and affect both the goals and missions of international asylum law and the domestic concerns in the United States.³⁶⁰ The past few years have seen record numbers of border crossings, including individuals seeking asylum, which has increased concern for security at the border and highlighted inefficiencies of the U.S. immigration processing and adjudication.³⁶¹ Further, the United States’ accession to the Refugee Convention and Protocol binds the

³⁵⁶ The Eleventh Circuit explicitly declined to follow the Fourth Circuit’s approach to establishing mixed motive nexus, citing a different understanding of the “one central reason” requirement. *Compare Sanchez-Castro*, 989 F.3d at 1287 (denying asylum where the protected trait is a subordinate reason for harm), with *Hernandez-Avalos*, 784 F.3d at 950 (allowing nexus to be established even where the protected trait is not the major reason for harm).

³⁵⁷ See 8 U.S.C. § 1158(b)(1).

³⁵⁸ See *id.*

³⁵⁹ See Gupta, *supra* note 88, at 502–03; Grant, *supra* note 311, at 53.

³⁶⁰ See Susan F. Martin, *Heavy Traffic: International Migration in an Era of Globalization*, BROOKINGS INSTITUTION (Sept. 1, 2001), <https://www.brookings.edu/articles/heavy-traffic-international-migration-in-an-era-of-globalization/>.

³⁶¹ *Southwest Land Border Encounters (By Component)*, *supra* note 4. In April 2023, the Biden administration put a temporary hold on asylum application processing to help alleviate this

governance of immigration to the substantive standards of international law with its aim to non-discriminatorily protect the fundamental rights of global citizens.³⁶² The proposed test, although minutely expanding the allowed claims for the nexus requirements, does not change the required elements of asylum and remains consistent with these international and domestic goals.

The Department of Homeland Security's adjudicatory immigration agency, the USCIS, operates within the department's mission to secure the borders by processing and adjudicating immigration applications with "fairness, integrity, and respect."³⁶³ That mission has changed over time, but it remains supportive of a consistent adjudicatory proceedings in the asylum process, which is the main aim of the proposed standard.³⁶⁴ The implementation of this mission, however, is further complicated by concerns of an expanded nexus standard incentivizing migration and "flooding" the Department of Justice's Immigration Courts and the borders with asylum applications.³⁶⁵

Concerns of flooding the adjudication system with asylum applications are inconsistent with the goal of the proposed method of analysis. The primary purpose and goal of the proposed standard is to facilitate the efficient functioning of the adjudication of asylum petitions, not to increase the number of petitions received or even accepted. The more robust standard both creates more uniform and equitable proceedings across jurisdictions and limits the discretionary powers of the adjudicator—forcing him or her follow a clear test. In the aggregate, this standard would likely reduce some of the backlog in the court system by allowing cases to be adjudicated more efficiently and uniformly. Further, even if the more lenient standard encouraged some individuals to apply for asylum who otherwise may not have, the goal

backlog and prepare for the end of Title 42. See Hamed Aleaziz, *Signature Biden Asylum Reform is Now on Hold*, L.A. TIMES, Apr. 13, 2023, at A5.

³⁶² I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 426 (1999) (discussing Congress's primary purpose in passing the Refugee Act was to codify the principles of the 1967 United Nations Protocol Relating to the Status of Refugees to US law).

³⁶³ FYs 2023-2026 STRATEGIC PLAN, U.S. CITIZENSHIP AND IMMIGR. SERVS. 15 (2023) ("USCIS needs to improve the efficiency, effectiveness, accessibility, uniformity, and consistency of the citizenship and naturalization process.") <https://www.uscis.gov/sites/default/files/document/reports/StrategicPlanFY23.pdf>.

³⁶⁴ See *Aguirre-Aguirre* 526 U.S. at 426.

³⁶⁵ See Grant, *supra* note 311, at 53.

of creating efficiency and uniform decisions across jurisdictions justifies the burden of the hypothetical increase.

As to the secondary concern of flooding the border, the multi-element requirements for proving status as a refugee already significantly limit the probability of “flooding the border.”³⁶⁶ Moreover, of the nearly two million open removal cases in 2021, only 671,000 of those proceedings involved asylum claims.³⁶⁷ Therefore, the proposed nexus standard will neither violate the spirit of federal and international immigration law nor flood the courts and borders with asylum petitions.

The international spirit of asylum law under the Refugee Convention and protocol supports a more open and comprehensive asylum adjudication process to protect the fundamental rights of global citizens.³⁶⁸ The UNHCR has continued to demonstrate this goal through the evolution of international standards and guidelines for refugee law.³⁶⁹ This evolution, in the context of the shift from the 1951 Convention to the 1967 Protocol, demonstrates an international trend to expand asylum access in the face of growing humanitarian and border crises rather than denying it.³⁷⁰ The adopted asylum procedures of the United States, especially in cases of nuanced protected grounds, including particular social groups, has been historically more restrictive than those of other countries that acceded to the Convention.³⁷¹ Although the United States is only bound by the substantive components of the Convention and Protocol through its accession,³⁷² the explicit goal of Congress to conform American asylum law to the international standards assumes some level of acceptance of the spirit of those standards.³⁷³ The adjudication of nexus under the proposed test, following the international and domestic goals of producing an equitable immigration system to protect refugees, is supported as a legally efficient way to increase the consistency of the immigration adjudication system.

³⁶⁶ *Id.*

³⁶⁷ AM. IMMIGR. COUNCIL, *supra* note 54.

³⁶⁸ See Convention Relating to the Status of Refugees, *supra* note 14, pmbl.

³⁶⁹ See UNHCR Handbook, *supra* note 100, at 9.

³⁷⁰ Protocol Relating to the Status of Refugees, *supra* note 39, art. I(1) (expanding the international definition of a refugee in the face of growing humanitarian crises).

³⁷¹ See Grant, *supra* note 311, at 6.

³⁷² Protocol Relating to the Status of Refugees, *supra* note 39, at art. I(1); Farbenblum, *supra* note 39.

³⁷³ See 8 U.S.C. § 1101(a)(42); H.R. REP. NO. 96-781, at 10,17 (1980) (Conf. Rep.).

CONCLUSION

Immigration and migration are not issues isolated to the United States. Humanitarian crises exist globally, calling states to react and adapt to the changing world. Internationally, the standards for addressing the evolving refugee crisis have put the dignity and rights of asylum seekers at the forefront of policy and legal decision making. By acceding to the Refugee Convention and Protocol, the United States accepted that duty and promised protection to individuals who faced persecution on account of a protected trait. Immigration adjudicators, however, have found difficulty applying aspects of the asylum elements uniformly across jurisdictions, especially when establishing nexus with mixed motives. The legal standard for the motive element of the nexus requirement, therefore, should focus on the proximate cause of an individual's persecution and then address how it relates to other causes. By restoring focus to the victim's persecution, rather than the targeting of an entire protected group, the courts will adopt a more uniform approach to asylum grants and align more closely with the spirit of the international standards of asylum law.

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