AS A MATTER OF FACT, NO: APPELLATE JURISDICTION TO REVIEW DENIALS OF DEFERRAL OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

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I. INTRODUCTION

Elenilson J. Ortiz-Franco is one of eleven million immigrants living in the United States without permission from the U.S. government.[1] Ortiz-Franco, a citizen of El Salvador, is a former member of the Salvadoran gang MS-13; he immigrated to the United States in 1987, joined MS-13, and eventually became an informant for federal prosecutors in New York.[2] Ortiz-Franco fears torture at the hands of members of the MS-13 gang should he be forced to return to his country of citizenship.[3]

Following his entry into the United States, Ortiz-Franco was convicted of criminal possession of a weapon, attempted petit larceny, and possession of a controlled substance.[4] Ortiz-Franco was indicted on federal charges relating to gang activity and attended a proffer session with the government, in which he exchanged information about criminal activity for

1. *See* Jens Manuel Korgstand & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 19, 2014), http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/ (citing the large portion of the immigrant population that is undocumented to show the importance of the legal issues these immigrants face); *see also* Ortiz-Franco v. Holder, 782 F.3d 81, 83 (2d Cir. 2015) (noting petitioner's illegal entry into the U.S.).

2. *See Ortiz-Franco*, 782 F.3d at 83-84 (describing Ortiz-Franco's past, prior to arriving in the United States, and his involvement with MS-13 and the U.S. government).

3. *See id.* at 85 (referencing Ortiz-Franco's fear that if returned to El Salvador, the gang members will kill him, and the Salvadoran government will not be willing or able to stop the gang violence).

4. *See id.* at 83-84 (identifying three criminal convictions that Ortiz-Franco accrued from 1992 to 1996).

leniency on the part of the prosecution.[5] He believes his cooperation with federal prosecutors will be perceived by the gang as a betrayal causing leading members of MS-13 in El Salvador to retaliate and kill him upon his return to the country.[6] Accordingly, Ortiz-Franco applied for deferral of his removal under the protections granted by the Convention Against Torture (CAT).[7] The immigration judge denied Ortiz-Franco's application for deferral of removal under the CAT.[8] On appeal, the Court of Appeals for the Second Circuit held that it lacked jurisdiction to review Ortiz-Franco's denial.[9] The Court determined its lack of jurisdiction stemmed from a statutory bar that restricts jurisdiction to only "constitutional claims or questions of law" when the petitioner has committed an enumerated criminal offense.[10]

This Comment will address the recent circuit split over the correct interpretation and application of the jurisdictional bar preventing appellate review of factual questions in review of denials of CAT deferral.[11] First, Part II briefly introduces CAT deferral and the statutes controlling the jurisdiction of courts to review denials of CAT deferral.[12] Second, Part III will address the courts' interpretations of the jurisdictional bar to appellate review of factual questions in denials of CAT deferral.[13] Finally, Part III will also argue that the jurisdictional bar is not applicable to intrinsically mixed issues of law and fact.[14]

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5. *See id.* at 84 (noting Ortiz-Franco was indicted along with fellow members of MS-13 on charges relating to a fight with a rival gang, in which Ortiz-Franco and others made gestures associating them with MS-13).

6. *See id.* (stating Ortiz-Franco's co-defendants received copies of his proffer statements, ultimately making the gang aware of his cooperation with the government).

7. *See id.* (noting Ortiz-Franco's application for deferral of removal under the CAT rather than withholding of removal, which he would have been barred from receiving due to his criminal convictions).

8. *See id.* at 85 (identifying denial of Ortiz-Franco's application because the immigration judge did not find sufficient evidence to prove Ortiz-Franco would be more likely than not to be tortured if returned to El Salvador).

9. *See id.* at 91 (finding lack of jurisdiction to review factual issues raised by Ortiz-Franco on appeal).

10. *See id.* at 88 (holding Ortiz-Franco fell within the scope of the jurisdictional bar due to his prior criminal convictions).

11. *See* 8 U.S.C. § 1252(a)(2)(C) (2005) (limiting the jurisdiction of appellate courts to review denials of various forms of immigration relief); *see also infra* Part III.

12. *See infra* Part II.A-D (explaining the concepts of defensive immigration relief, such as CAT deferral, and appellate review of such decisions).

13. *See infra* Part III.A-B (addressing the two main interpretations of 8 U.S.C. § 1252(a)(2)(C) that create a circuit split).

14. *See infra* Part III.C-VI (concluding jurisdictional bar does not apply to CAT deferral review due to the mixed nature of the questions on appeal).

II. BACKGROUND

A. Relief Under the Convention Against Torture and Bars to Relief

After an immigrant is found to be removable, three primary defensive applications exist to help the immigrant avoid removal if he or she exhibits a credible fear of returning to his or her home country.[15] Deferral under the CAT became a part of U.S. immigration law in 1998 when Congress enacted the Foreign Affairs Reform and Restructuring Act (FARRA).[16] Removal of an individual to a country where he or she would be more likely than not to be tortured is a violation of the CAT, and deferral prevents the removal of an individual, who otherwise is barred from relief, to a country where he or she would likely be tortured.[17]

The Department of Justice (DOJ) developed regulations in 1999 to comply with certain requirements in FARRA, including the requirement that relief under the CAT must be excluded from individuals barred from asylum and withholding of removal under the Immigration and Nationality Act (INA).[18] To comply with the requirements, the DOJ created a method by which an immigrant can either receive CAT deferral of removal or CAT withholding of removal.[19]

The major difference between the previous forms of relief, such as withholding of removal, and CAT deferral of removal is that the latter is available to applicants regardless of their inadmissibility for prior criminal activity.[20] A criminal conviction is not an automatic bar to relief in the

15. *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1142-43 (2015) (describing three types of fear-based relief from removal, which are asylum, withholding of removal under the Immigration and Nationality Act (INA), and deferral of removal under the CAT).

16. *See id.* at 1144 (explaining the background of the adoption of CAT by Congress); *see also* Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. (1998) (incorporating portions of the CAT into U.S. law).

17. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478-01, 8479 (Feb. 19, 1999).

18. *See* Heeren, *supra* note 15, at 1144 (stating that DOJ needs to limit availability of CAT relief and explaining the nature of the regulations that Congress required when it incorporated the CAT as part of federal law).

19. *See id.* (differentiating the two kinds of relief the DOJ created to comply with congressionally mandated exclusionary requirements).

20. *See* 8 C.F.R. § 208.17(a) (2012) (allowing a grant of deferral of removal to individuals who are subject to "mandatory denial of withholding of removal under §§ 208.16(d)(2) or (d)(3)"); *see also id.* § 208.16(d)(2)-(3) (mandating denial of withholding of removal for individuals who were convicted of a "particularly serious crime" or "an aggravated felony (or felonies)" and the immigration judge does not determine, on an individual basis, that the crime (or crimes) was not a "particularly serious crime").

form of deferral of removal.[21] An individual who meets the required elements for deferral of removal will not be removed to a country where the court finds the individual is more likely than not to be tortured.[22] Deferrals of removal under the CAT lack finality, and the orders function more as injunctions that prevent the enforcement of the preexisting final order of removal, which is a requirement to receive relief in the form of deferral under the CAT.[23] The grant of deferral of removal does not remove the final order of removal; deferral merely stays the removal order.[24]

To determine whether an individual is entitled to protection under the CAT, the immigration judge (IJ) considers evidence of past torture and whether the applicant can relocate within the country to a place where he or she would not likely be tortured.[25] Initially, the IJ must determine whether the individual will more likely than not be tortured in the proposed country of removal.[26]

The INA bars review of final orders of removal against an individual who has committed a crime enumerated in various sections of the Act.[27] The Act includes a provision for judicial review of "constitutional claims or questions of law."[28] The bar to review due to criminal activity does not limit this jurisdictional grant.[29] The Code of Federal Regulations defines

21. *See id.* § 208.16(d)(2)-(3) (differing from withholding because individuals who were convicted of a "particularly serious crime" or "an aggravated felony (or felonies)" are not automatically excluded from eligibility for relief).

22. *See id.* § 208.17(a) (defining elements for eligibility for deferral, which lacks a discretionary element).

23. *See* Wanjiru v. Holder, 705 F.3d 258, 264 (7th Cir. 2013) (differentiating between final orders of removal and deferrals of removal under the CAT on the basis of the respective function and finality of each).

24. *See id.* (discussing the ability to revisit the circumstances of cases and remove the injunction preventing the execution of the final order of removal).

25. *See* 8 C.F.R. § 208.16(c)(3)(i)-(iv) (2012) (listing additional evidence the IJ considers, including: evidence of "gross, flagrant or mass violation of human rights within the country of removal" and other information about country conditions).

26. *See id.* § 208.16(c)(4) (noting the order in which the IJ should approach CAT relief applications).

27. *See* 8 U.S.C. § 1252(a)(2)(C) (2005) (stripping appellate courts of jurisdiction to review final orders of removal when the individual to be removed has committed any offense in 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)(A)(i)-(ii), or 1227(a)(2)(A)(iii), (B), (C), or (D)).

28. *See id.* § 1252(a)(2)(D) (limiting review to exclude questions of fact).

29. *See id.* (defining orders of removal as "final" when (1) the respondent waives her right to appeal, (2) the time allowed for an appeal expires without the respondent filing an appeal, (3) a subsequent decision ordering removal is issued if the original was certified to the BIA or Attorney General, (4) an IJ orders an individual removed *in*

an order of removal as "final" when the Board of Immigration Appeals (BIA) dismisses the appeal.[30]

Jurisdiction to review certain types of claims is granted or limited by provisions in the INA.[31] The changes made to the INA through the REAL ID Act of 2005 came about in part due to the decision in *INS v. St. Cyr*.[32] In that decision, the Supreme Court held that previous versions of the INA did not eliminate habeas corpus review by district courts because the provisions in the statute did not strip jurisdiction through a "clear, unambiguous, and express" declaration.[33]

B. Mixed Issues of Law and Fact

The jurisdiction of appellate courts to review many immigration decisions is generally limited to only issues of law or constitutional claims and not questions of fact.[34] Even where the decisions by lower courts and administrative judges are heavily criticized, appellate courts generally must defer to the lower court's factual findings.[35] Claims for relief under Article 3 of the CAT are particularly fact-based and usually turn on factual issues.[36]

The distinction between law and fact for the purposes of assigning responsibility for decision-making exists in the Constitution and has been

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absentia, or (5) an individual overstays an order of removal connected to a grant of voluntary departure).

30. *See* 8 C.F.R. § 1241.1(a)-(f) (2008) (listing additional instances when an order of removal becomes final, including when the respondent waives appeal, when the time period to appeal ends, upon entry of an order of removal made during the respondent's absence, etc.).

31. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310-11 (2005) (amending 8 U.S.C. § 1252 to include § 1252(a)(4)–(5), creating a separate provision for CAT claims and a provision of exclusive means of review).

32. *See* Petition for Writ of Certiorari, Franco-Ortiz v. Lynch, 2015 WL 5607691 (No. 15-362), at 18 (identifying the decision in INS v. St. Cyr, 533 U.S. 289, 314 (2001) as a major factor in the passage of the REAL ID Act of 2005).

33. *See id.* (referencing the holding in *St. Cyr*, which spurred on the passage of the REAL ID Act to clarify the jurisdiction-stripping provisions of the INA).

34. *See* Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 57 (2010) (discussing the law-fact distinction as a threshold determination to either allow or preclude judicial review in removal proceedings).

35. *See id.* at 57-58 (criticizing the requirement that appellate courts defer to IJs' decisions as to factual findings in nearly all cases); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 351-52 (Nov. 2007) (noting the increase in summary affirmances in CAT claims).

36. *See* Sharpless, *supra* note 34, at 58 (identifying the importance of the resolution of factual issues in claims for relief under the CAT).

extended into legal history through incorporation in various laws over time.[37] Historically, questions of law involve applicable standards and rules, while issues of fact concern the events or occurrences that gave rise to the legal action.[38] The distinction between issues of law and issues of fact is not as clear as it might seem, especially in assessing jurisdiction for appellate review.[39] The Ninth Circuit in *Estrada-Corona v. Holder* identified and discussed the distinction between pure issues of law or fact and mixed questions of law and fact, further noting whether an individual is more likely than not to be tortured if removed to a certain country is a mixed question of law and fact.[40]

Appellate review doctrine institutionalizes the systemic issues inherent that are in the law-fact distinction.[41] Typically, appellate courts review lower court factual findings under the clearly erroneous standard, which is very deferential to lower courts.[42] Appellate courts review lower courts' legal determinations de novo.[43] There is no clear standard, however, for instances of mixed questions of law and fact, questions that turn on the application of certain legal standards to facts.[44]

Courts are divided on the question of whether an individual is substantially likely to be tortured is a question of law or fact.[45] The

37. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U.L. REV. 1769, 1778 (2003) (citing U.S. CONST. art. III, § 2; U.S. CONST. amend. VII).

38. *See id.* at 1778 (distinguishing between issues of law and fact).

39. *See id.* at 1778-79, 1784 (noting that traditionally, legal questions involve standards and rules, while factual questions center on events and transactions, but the distinction has become muddled).

40. *See* Estrada-Corona v. Holder, 554 F. App'x. 579, 579 (9th Cir. 2014) (mem.) (holding that a finding regarding the likelihood an individual will be tortured with acquiescence of government officials, if removed, is a mixed question of law and fact); *accord* Ramadan v. Gonzales, 479 F.3d 646, 656-57 (9th Cir. 2007) (defining mixed questions of law and fact as the application of a legal standard to undisputed facts); Ghahremani v. Gonzales, 498 F.3d 993, 999 (9th Cir. 2007) (differentiating between mixed and pure questions of law or fact).

41. *See* Allen, *supra* note 37, at 1784-85 (identifying the importance of the law-fact distinction in appellate review doctrine).

42. *See id.* (outlining the standards of review applied by appellate courts to each type of question).

43. *See id.* at 1785 (noting appellate courts apply the least deferential standard to questions of law).

44. *See id.* at 1778-79 (identifying that using mixed questions of law and fact to determine what standard of review to apply is highly complicated and confusing).

45. *See* Sharpless, *supra* note 34, at 70 (arguing that courts disagree about whether legal standards applied to determine the "likelihood of something happening" fall under the law or fact distinction).

question of whether certain actions rise to the level of torture as defined by the CAT is typically treated as a question of law.[46] Courts are divided over the law-fact status of legal standards regarding the likelihood of something happening or not happening.[47]

The disagreement among courts about whether specific issues are legal or factual questions is particularly complicated regarding the questions of reviewability.[48] For example, the threshold question for review of denials of deferral of removal explicitly requires a determination of whether established facts are sufficient to satisfy a rule.[49] Courts typically view this as a question of law, despite the necessity of applying law to facts to answer the question.[50]

C. Appellate Courts and the Jurisdictional Bar

The Second Circuit held in *Ortiz-Franco v. Holder* that it did not have jurisdiction to review the IJ's denial of Ortiz-Franco's application for deferral of removal.[51] The court noted that it was rare that it directly addressed the jurisdictional issue that it had attempted to avoid answering in the past.[52] In his petition for writ of certiorari, Ortiz-Franco challenged the court's determination that its jurisdiction was limited when reviewing a final order of removal.[53]

The jurisdictional statute at issue in Ortiz-Franco's appeal and subsequent petition for certiorari, 8 U.S.C. § 1252(a)(2)(C), does not define

46. *See id.* at 70-71 (noting the Second and Third Circuits have treated likelihood of torture as a purely legal question, while other circuits have treated the same issue as purely factual).

47. *See id.* at 70 (stating that courts disagree about what kind of question determinations of likelihood are).

48. *See id.* (finding courts tend to view whether the likelihood of torture is reviewable as purely a question of law because it is a mixed question).

49. *See id.* (identifying the threshold question for review of denials of relief under Article 3 of CAT that is whether the established facts satisfy the rule that the applicant is substantially likely to be tortured).

50. *See id.* (noting the treatment of a mixed question as a purely legal question).

51. *See* Ortiz-Franco v. Holder, 782 F.3d 81, 86 (2d Cir. 2015) (finding a bar to the appellate jurisdiction in Ortiz-Franco's case due to prior criminal convictions).

52. *See id.* (finding a general policy of avoidance of the jurisdictional question wherever possible, in favor of assuming hypothetical jurisdiction).

53. *See id.* at 88 (citing 8 U.S.C. § 1252(a)(2)(C) as limiting jurisdiction to review a final order of removal in this and similar cases). *But see* Petition for Writ of Certiorari, *supra* note 32 (arguing that the Court of Appeals misinterpreted the jurisdictional statute because it is not clear that CAT claims are final orders under FARRA § 2242(d)).

final order of removal.[54] Looking to FARRA § 2242(d), it is not clear that denials of CAT deferral are actually final orders of removal, calling into question the applicability of the bar to CAT decisions.[55] The statute grants jurisdiction to review orders of removal, as long as it is not an order of removal without a hearing, but denials of deferral are not mentioned in the statute.[56] Further, the statute provides that review under this section of the INA is the "sole and exclusive means for judicial review" of any claim under the CAT.[57] The grant of jurisdiction to review CAT decisions is separate from the grant of jurisdiction earlier in the statute for review of final orders of removal.[58]

The Ninth Circuit also addressed the issue of the jurisdictional bar in *Lemus-Galvan v. Mukasey*, in which an IJ denied Lemus-Galvan deferral under the CAT based on a determination that it was not more likely than not that he would be tortured if returned to Mexico.[59] The court held on appeal that it had jurisdiction to review the claim for deferral under the CAT because such decisions are always decisions made on the merits of the claim.[60]

Additionally, the Seventh Circuit discussed the jurisdictional bar in *Wanjiru v. Holder*, which involved a denial of deferral under the CAT due to a conviction for misdemeanor sexual misconduct, which Wanjiru conceded was a crime of moral turpitude.[61] Unlike the Ninth Circuit, the appellate court in this case found it had jurisdiction to review the claim because the denial did not constitute a final order of removal for the

54. *See* 8 U.S.C. § 1252(a)(2)(C) (2005) (lacking a definition of final order of removal, creating confusion over whether a denial of deferral under the CAT is a final order of removal subject to jurisdictional limits in the statute).

55. *See* Petition for Writ of Certiorari, *supra* note 32, at 17 (noting the lack of definition of CAT deferral decisions as final orders of removal, raising the question of whether the jurisdictional bar should apply to CAT deferral decisions).

56. *See* 8 U.S.C. § 1252(a)(2)(C).

57. *See id.* § 1252(a)(4).

58. *See id.* (separating final orders of removal and CAT decisions, leading to a potential interpretation that they are different types of claims and not subject to the same limits on reviewability).

59. *See* Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1083 (9th Cir. 2008) (discussing the decision below, as well as Lemus-Galvan's underlying conviction for attempted second degree murder).

60. *See id.* at 1083-84 (distinguishing between denials of withholding and deferral under the CAT, and noting that denials of deferral based on determinations of the likelihood of torture are necessarily decisions on the merits that are reviewable).

61. *See* Wanjiru v. Holder, 705 F.3d 258, 262-63 (7th Cir. 2013) (questioning whether a conviction for a crime involving moral turpitude strips the court of jurisdiction to review the denial of deferral under the CAT).

purpose of the statute.[62]

III. ANALYSIS

A. Statutory Construction Does Not Support Application of the Jurisdictional Bar to CAT Claims

The separation of CAT decisions and final orders of removal for the purposes of the jurisdictional statute is significant. By separating the portion of the statute granting jurisdiction over review of final orders of removal from a distinct portion of the statute discussing review of CAT decisions, the statute distinguishes between the two.[63] The separation of final orders of removal and CAT decisions for the purposes of reviewability suggests that the two should be treated differently.[64]

Within the statute, CAT claims are separated from final orders of removal outside of the jurisdictional bar.[65] A portion of the statute eliminates habeas corpus review for final orders of removal.[66] The section immediately preceding that section of the statute eliminates habeas corpus review for CAT claims.[67] If decisions on CAT claims were final orders of removal, there would be no need to have two separate sections within the same statute eliminating the same type of collateral review for each.[68] Alternatively, if CAT claims are not distinct from final orders of removal, the statutory provision divesting appellate courts of habeas review in cases of CAT claims would be unnecessary, as it would already have been

62. *See id.* at 264-65 (focusing on the Supreme Court's warning that statutory interpretations preserving judicial review are favored, and noting the importance of keeping open the means of judicial review that make sure the U.S. complies with its obligations under the CAT).

63. *See id.* (granting jurisdiction over CAT decisions); *see also* 8 U.S.C. § 1252(a)(2)(A) (2005) (granting jurisdiction to review final orders of removal, aside from orders granted under 8 U.S.C. § 1225(b)(1)).

64. *See* Petition for Writ of Certiorari, *supra* note 32 (noting statutory distinctions between final orders of removal and CAT decisions suggest disparate treatment of the two).

65. *See* 8 U.S.C. § 1252(a)(4)-(5) (2005) (creating a distinction between orders of removal and CAT claims).

66. *See id.* (eliminating habeas corpus review explicitly for an order of removal only).

67. *See id.* § 1252(a)(4) (eliminating habeas corpus review for CAT claims only, thereby drawing a distinction between orders of removal and CAT claims).

68. *See id.* (distinguishing between CAT claims and final orders of removal for the purpose of eliminating habeas corpus review); *see* also Petition for Writ of Certiorari, *supra* note 32, at 19 (noting statutory distinctions between final orders of removal and CAT decisions for the purpose of habeas review as suggesting the two concepts are not the same).

covered under 8 U.S.C. § 1252(a)(5).[69]

1. The Legislative History of the REAL ID Act of 2005 Further Supports Inapplicability of the Bar to CAT Claims

The argument in favor of the inapplicability of the jurisdictional bar to CAT claims is supported not only by the distinctions within the statute between final orders and CAT claims but also by the legislative history of the REAL ID Act.[70] Because the *INS v. St. Cyr* decision was one of the major reasons the REAL ID Act was enacted, it is clear that the purpose of amending the INA was to clarify the meaning of jurisdiction-stripping provisions.[71] If the purpose of the amendments to the INA were to clarify when appellate courts are stripped of jurisdiction to review claims in response to the *St. Cyr* decision, it would sensibly follow that the amendments themselves were meant to be explicit and clear.[72] Thus, the amendments should be read as expressing the intended jurisdictional bars and limitations.[73] If Congress wanted to create a jurisdictional bar that applied to review of denials of CAT deferral, based on the purpose of the amendments, it is likely that Congress would have unambiguously stripped appellate courts of jurisdiction to review those claims.[74] Additionally, it is clear that CAT claims are treated differently than final orders across the entirety of the statute, which further bolsters the argument that the jurisdictional bar was not intended to apply to CAT claims.[75] When taken together with the legislative history, it appears that Congress did not intend for the jurisdictional bar to apply to CAT claims because if it did want the bar to apply, it would have spoken clearly.[76]

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69. *See* Petition for Writ of Certiorari, *supra* note 32, at 19 (differentiating between final orders and CAT decisions as two distinct concepts).

70. *See id.* at 18 (identifying the requirement in *INS v. St. Cyr* that Congress speak clearly and unambiguously when repealing habeas jurisdiction or stripping other jurisdiction as the major cause of the passage of the REAL ID Act of 2005).

71. *See id.* (describing the purpose of the amendments to expressly eliminate habeas review under the INA in response to the *St. Cyr* decision).

72. *See id.* at 18-19 (identifying the provisions of the INA that were amended to more clearly strip appellate courts of jurisdiction to review specific claims).

73. *See id.* at 19 (focusing on the purpose of clarifying jurisdiction-stripping provisions and the explicit separation of orders of removal and CAT claims within the amendments).

74. *See id.* at 18 (emphasizing the purpose of the amendments to clarify jurisdiction-stripping provisions).

75. *See id.* at 20 (noting the holistic approach to statutory interpretation and the disparate treatment of CAT claims and final orders across the statute).

76. *See id.* at 18, 20 (identifying the need for Congress to explicitly restrict jurisdiction where it meant to do so).

The Second Circuit's argument that the statutory provisions of the INA are explicit and serve to clarify one another is not convincing because the argument suggests the statute is either redundant or that CAT claims actually are distinct from final orders.[77] In considering the clarifying provision, 8 U.S.C. § 1252(a)(4), the court essentially noted that there was no substantial difference between that provision and 8 U.S.C. § 1252(a)(5).[78] The court faced a complicated position and had to argue in favor of a redundant interpretation to avoid acknowledging that the more rational reason the two provisions existed was because they address two *different* things.[79]

2. Wanjiru v. Holder *Advances the Appropriate Treatment of Denials of Deferral Under the CAT Due to a Lack of Finality in These Decisions, as Distinguished from Final Orders of Removal*

The lack of finality in deferrals of removal under the CAT comes from the function of the orders as an injunction that prevents the enforcement of a preexisting final order of removal, which is a requirement to receive relief in the form of deferral under the CAT.[80] This distinction between the finality of the two orders is supported by the statutory construction, as well as the function of each order.[81] The Seventh Circuit extended this reasoning behind inapplicability of the statutory bar in *Wanjiru v. Holder*, noting the temporary nature of deferral of removal under the CAT.[82] Ortiz-Franco's case is distinct from Wanjiru's because there is no question that Ortiz-Franco has committed the requisite crimes to trigger the jurisdictional

77. *See* Ortiz-Franco v. Holder, 782 F.3d 81, 88-89 (2d. Cir. 2015) (finding that § 1252(a)(4) serves to clarify rather than being a redundancy); *see also* Petition for Writ of Certiorari, *supra* note 32 (identifying the contradiction in the Second Circuit's interpretation of the tension between § 1252(a)(4) and § 1252(a)(5), that either they are redundant or address two *different* types of claims).

78. *See* Petition for Writ of Certiorari, *supra* note 32, at 21 (finding Second Circuit's argument to mean that the court viewed the provision as merely explanatory and adding nothing to the overall statute).

79. *See id*. (noting the Second Circuit's discussion of the tension between the two provisions was brief).

80. *See* Wanjiru v. Holder, 705 F.3d 258, 264 (7th Cir. 2013) (differentiating between final orders of removal and deferrals of removal under the CAT based on the function and finality of each).

81. *See id.* (stating that deferrals are subject to changes in policy and discretion, unlike final orders of removal); *see also* 8 U.S.C. § 1252(a)(4) (2005) (eliminating habeas corpus review for CAT claims only, thereby differentiating between an order of removal and CAT claims, which creates a tension between the two regarding whether the two categories are distinct).

82. *See Wanjiru*, 705 F.3d at 264 (noting the distinction in permanence between withholding and deferral of removal).

bar in § 1252(a)(2)(C).[83] Due to this distinction, the analysis of Ortiz-Franco's claim should most closely resemble the alternative holding in *Wanjiru v. Holder*.[84] The line the Seventh Circuit drew in *Wanjiru* most supports Ortiz-Franco's claim to judicial review of his entire claim: denials of CAT deferrals are final enough to warrant judicial review, but they are not final orders that trigger the § 1252(a)(2)(C) bar.[85] Applying the approach of the Seventh Circuit to the facts of Ortiz-Franco's claim, the IJ's determination regarding the likelihood Ortiz-Franco would be tortured should he return to El Salvador would be reviewable on appeal because the denial of CAT deferral is not a final order of removal.[86]

The appropriate approach to judicial review of denials of deferral under the CAT is to handle them in the same manner as injunctive relief, rather than as final orders.[87] A grant of deferral of removal under the CAT is a temporary form of relief from removal, as it is not an order that is safe from change due to a shift in policy or circumstances, making it unlike a final order of removal.[88] A denial of deferral under the CAT is not a final order either; rather, it is a decision regarding a form of relief from the execution of a final order of removal that was previously issued in an individual's case.[89] Likewise, a grant of deferral functions like a temporary injunction preventing the removal of an individual who is subject to a final order of removal.[90] The deferral does not remove the preexisting final order of removal completely, only temporarily enjoining the execution of the

83. *Compare id*. at 263 (finding Wanjiru was not convicted of triggering crimes), *with* Ortiz-Franco v. Holder, 782 F.3d 81, 83, 87 (2nd Cir. 2015) (noting crimes for which Ortiz-Franco was convicted, as well as the triggering of the jurisdictional bar by those convictions).

84. *See Wanjiru*, 705 F.3d at 264 (holding that the jurisdictional bar did not apply because denials of deferral under the CAT are not final orders).

85. *See id.* (stating that a deferral of removal is more similar to an injunction rather than a final order).

86. *See id.* (applying the jurisdictional bar only to final orders, not to decisions regarding deferrals); *see also* Petition for Writ of Certiorari, *supra* note 32, at 23-24 (noting the decisions regarding deferrals made distinct from the undisturbed final order of removal made prior to the deferral decision).

87. *See Wanjiru*, 705 F.3d at 264 (distinguishing between the finality of final orders of removal and that of deferral under the CAT, which functions more like injunctive relief).

88. *See id.* (addressing the ways deferral of removal mirrors an injunction, including the lack of certainty and finality, as well as the ability to revisit the claim).

89. *See id.* (distinguishing CAT deferral from final orders); *see also* Petition for Writ of Certiorari, *supra* note 32, at 13 (noting application of CAT deferral as an injunction preventing the execution of an intact final order).

90. *See Wanjiru*, 705 F.3d at 264 (highlighting the temporary nature of deferral of removal and the relative ease with which the protection from removal can be lifted).

order.[91] Thus, the order of removal that was issued against the applicant prior to the application for relief under the CAT is not affected by the decision regarding that relief.[92] The CAT decision is, therefore, not a final order of removal necessary to trigger the jurisdictional bar; rather, it is a barrier to execution of the order of removal in the case of the specific applicant.[93] It is clear that the final order is not altered because if circumstances change that would make torture less likely in the case of the applicant, the government can end the deferral of removal under the CAT or remove the applicant to a third country.[94] The distinction between the finality of the order of removal, which is always enforceable but for CAT relief, and a deferral under the CAT, which can change at any time due to a variety of circumstances, highlights the clear lack of finality in CAT relief decisions.[95] Due to the lack of finality of the denials of deferral under the CAT, the jurisdictional bar should not apply to these decisions.[96]

In his Petition for Writ of Certiorari, Ortiz-Franco made an alternative argument regarding statutory construction that is also compelling.[97] Section 1252(a)(4), granting jurisdiction to review any cause or claim for relief under CAT, is not subject to any other provision of the statute, which means the statute allows for review of denials of deferrals under the CAT notwithstanding a determination of finality.[98] Further, the wording of §

91. *See id.* (discussing the ability to revisit the circumstances of cases and remove the injunction preventing the execution of the final order of removal).

92. *See* Petition for Writ of Certiorari, *supra* note 32, at 23 (stating the nature of the CAT relief decision as analogous to an injunction that does not disturb an existing final order) (citing *Wanjiru*, 705 F.3d at 263-65).

93. *See id.* at 23 (arguing that a grant of deferral under the CAT merely prevents the government from executing the existing final order of removal rather than altering that order in any way).

94. *See id.* (noting that changes in conditions alter the existence of CAT relief such that it allows or does not allow enforcement of the order of removal, rather than altering the existence of the order itself).

95. *See id.* at 23-24 (stating appellate jurisdiction to review CAT claims is not barred by § 1252(a)(2)(C) because the decisions are not final in the same way an order of removal is, as evidenced by the way a deferral under CAT functions compared to the final order of removal).

96. *See Wanjiru*, 705 F.3d at 264 (identifying the lack of finality as precluding the application of the bar to review of CAT denials); *see also* 8 C.F.R. § 1241.1(a)-(f) (2008) (listing the instances when an order of removal is "final," not including a denial of relief under the CAT).

97. *See* Petition for Writ of Certiorari, *supra* note 32, at 22 (arguing that the bar would not apply even if the deferral claims are final because § 1252(a)(4) still allows for review of factual claims).

98. *See id.*(considering the jurisdictional bar inapplicable to review of CAT claims due to the intentional wording of the statute to override the criminal bar by including

1252(a)(4) supports the finding that any question regarding a CAT claim is reviewable, thus including both legal and factual questions.[99]

B. The Lemus-Galvan *Reasoning as an Alternate Reason as to Why the Jurisdictional Bar Does Not Apply*

Even if the argument that denials of deferral under the CAT are not sufficiently final to preclude jurisdiction because they function as a temporary injunction fails, there is a strong argument in favor of jurisdiction based on the nature of the decision underlying the denial.[100] The Ninth Circuit's reasoning that denials of CAT deferral must be made on the merits of an individual's claim provides alternate reasoning supporting the inapplicability of the jurisdictional bar to review of these denials.[101] The focus on the nature of the decision as being made on the merits is critical for Ortiz-Franco's claim that his denial of deferral should be reviewable regardless of the jurisdictional bar.[102]

If Ortiz-Franco's denial was based on his criminal conviction, a court following the Ninth Circuit's reasoning would likely be barred from reviewing the determination.[103] Such a denial would be more likely to occur in a claim for withholding of removal, where the statute clearly precludes relief in the form of withholding for individuals convicted of enumerated offenses.[104] Review of a *discretionary* finding in a CAT

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the portion stating notwithstanding any other provision of law so close to the jurisdictional bar within the statute).

99. *See id.* (citing Lovan v. Holder, 574 F.3d 990, 998 (8th Cir. 2009)) (noting the language any cause or claim as broad and non-restrictive, thereby likely not intending to limit the jurisdiction to review CAT claims to any one type of question, allowing review of both questions of law and questions of fact).

100. *See Wanjiru*, 705 F.3d at 264 (holding in favor of jurisdiction based on the function of deferrals of removal as injunctions preventing the enforcement of preexisting final orders of removal); *see also* Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1083 (9th Cir. 2008) (granting jurisdiction to review denials of deferral based on the decision necessarily being made on the merits).

101. *See Lemus-Galvan*, 518 F.3d at 1083 (asserting that the § 1252(a)(2)(C) bar does not apply to denials of CAT deferral because they are necessarily made on the merits due to the nature of the claims).

102. *See id.* at 1084 (noting the significance of the fact that the denial of the deferral claim was not based on the criminal conviction, rather due to an IJ's finding on the possibility of internal relocation).

103. *See id.* (distinguishing between determinations based on a criminal conviction and those made on the merits, noting those based on criminal convictions would be subject to the jurisdictional bar).

104. *See id.* at 1083 (referencing the clear bar to review under § 1252(a)(2)(C) in cases of denials of withholding of removal when the individual has been convicted of certain crimes).

withholding claim is precluded by case law, preventing review of denials based strictly on the criminal conviction.[105] By the same reasoning, denials based on a combination of facts and law are reviewable.[106] Under the Ninth Circuit's reasoning, Ortiz-Franco's denial should be reviewable if his claim was denied due to a determination made on the merits of his claim.[107]

The IJ in *Ortiz-Franco* denied the application for deferral under the CAT because he found that Ortiz-Franco did not provide sufficient evidence that it was more likely than not that he would be tortured if he was returned to El Salvador, meaning the determination was on the merits of Ortiz-Franco's claim.[108] Based on the nature of the IJ's decision, the issue of whether Ortiz-Franco provided sufficient evidence of the likelihood he would be tortured should be reviewable on appeal.[109] As the denial was not based on Ortiz-Franco's underlying criminal convictions, the decision was based on the merits of Ortiz-Franco's claim and thus, under the Ninth Circuit's approach, is not subject to the jurisdictional bar.[110]

C. Mixed Questions of Law and Fact Are Outside the Scope of the Jurisdictional Bar

The decisions of the appellate courts all but disregard a critical flaw in the statutory structure of the jurisdictional bar; it separates reviewable

105. *See* Unuakhaulu v. Gonzales, 416 F.3d 931, 936 (9th Cir. 2004) (describing the distinction between denials based on criminal convictions and those the government argues fall under the jurisdictional bar, which are mixed issues of law and fact, rather than strictly discretionary determinations).

106. *See id*. (noting that mixed questions of law and fact are not strictly discretionary determinations).

107. *See Lemus-Galvan*, 518 F.3d at 1084 (noting when a denial of deferral is based on some merit determination other than an individual's criminal convictions, the appellate court should have jurisdiction to review the denial, as it is not explicitly barred by the statute).

108. *See* Ortiz-Franco v. Holder, 782 F.3d 81, 83 (2nd Cir. 2015) (citing the holding below that Ortiz-Franco failed to prove this element that is required for CAT relief to be granted).

109. *See id.* at 85, 91 (noting the IJ's basis for his decision to deny Ortiz-Franco's application and that the issue was not reviewable); *see also Lemus-Galvan*, 518 F.3d at 1084 (citing Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007)) (stating that review of decisions on the merits is not precluded under the jurisdictional bar).

110. *See Ortiz-Franco*, 782 F.3d at 91 (identifying the basis for the denial below as Ortiz-Franco's failure to show it is more likely than not that he would be tortured if returned to El Salvador); *see also Lemus-Galvan*, 518 F.3d at 1084 (distinguishing between decisions subject to the bar, based on the underlying criminal convictions, and decisions on the merits, turning on the determination of likelihood of torture).

issues into two distinct categories: questions of law or questions of fact.[111] The distinction between questions of law and questions of fact creates a critical void into which many determinations in CAT claims fall.[112]

Applying the standard developed in the Ninth Circuit through the decisions in *Morales v. Gonzales*[113] and *Lemus-Galvan*, the jurisdictional bar should not be applied to review of denials of deferral under the CAT when a denial is not based on underlying criminal convictions because of the necessarily mixed question of law and fact at issue.[114] When a denial of deferral is not based on a criminal conviction but instead on a failure to meet the burden of proof on one or more elements necessary to warrant relief, the determination involves the application of law to facts.[115] While there is no explicit bar to review of mixed questions of law and fact, there is also no explicit grant of jurisdiction over review of these questions, leaving many issues in jurisdictional "limbo" on appeal.[116] For example, review of CAT claims regularly requires courts to apply a legal standard to established facts to determine if the facts meet the standard.[117] Such a

111. *See* Morales v. Gonzales, 478 F.3d 972, 980 (9th Cir. 2007) (determining which kinds of factual issues are reviewable outside the jurisdictional bar); *see also* Wanjiru v. Holder, 705 F.3d 258, 264 (7th Cir. 2013) (relying on the finality of a decision to determine reviewability); *Lemus-Galvan*, 518 F.3d at 1084 (referring to denials on the merits of the claim as reviewable, without discussing the need to establish reviewability of mixed questions of law and fact).

112. *See Lemus-Galvan*, 518 F.3d at 1084 (citing *Morales*, 478 F.3d 972) (constructing a potential exception to the jurisdictional bar for decisions on the merits, creating a quasi-mixed question of law and fact grant of jurisdiction); *see also* Sharpless, *supra* note 34, at 58-59 (arguing the law-fact distinction restricts the ability of judicial review to accurately function in denials of CAT claims).

113. 478 F.3d 972 (9th Cir. 2007).

114. *See id*. at 980-81 (holding determinations made on the merits present mixed questions of fact and law on review that are not precluded from review by the jurisdictional bar); *see also Lemus-Galvan*, 518 F.3d at 1084 (affirming the holding in *Morales* as allowing review of denials of deferral on the merits of the claim, rather than due to a criminal conviction).

115. *See Morales*, 478 F.3d at 980 (differentiating between factual issues and denials on the merits, which are not purely legal issues).

116. *See* Aaron G. Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1367 (Oct. 2006) (arguing that circuit courts should treat mixed questions of law and fact as questions of law under the REAL ID Act); *see also* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 331 (2005) (limiting review of CAT claims based on jurisdictional limits created by this Act, including restrictions on factual and legal issues).

117. *See Morales*, 478 F.3d at 980 (distinguishing between a determination on the merits and a purely legal determination, such as a determination based on the existence of a criminal conviction); Ramadan v. Gonzales, 479 F.3d 646, 656-57 (9th Cir. 2007)

determination is not purely legal, like a question of whether a certain offense is a crime involving moral turpitude.[118] Further, the question is not a purely factual one, either, like whether an individual filed an application during the permissible timeframe.[119] Based on these examples, it is evident that mixed questions tend to look considerably more like legal questions and less like purely factual questions.[120] By ambiguously restricting the jurisdiction of appellate courts to review questions that are not pure questions of law, the INA as amended by the REAL ID Act of 2005 creates serious due process concerns for applicants for CAT relief.[121]

1. Mixed Questions of Law and Fact Do Not Fall Under the Jurisdictional Bar Because They Can Be Classified With Questions of Law

Appellate review of denials of CAT deferral should be treated as mixed questions of law and fact, extending appellate jurisdiction to include determinations regarding such issues, especially since such jurisdiction is not precluded by statute.[122] The growing view that limiting appellate review to questions of law also includes mixed questions opens the door for expansion of appellate review to mixed questions in denials of CAT deferrals.[123] In review of fact-based determinations, the difficulty of

(concluding that questions of law in the REAL ID Act of 2005 "includes review of application of statutes and regulations to undisputed historical facts").

118. *See* Mancilla-Delafuente v. Lynch, 804 F.3d 1262, 1264 (9th Cir. 2015) (denying jurisdiction to review denials of discretionary relief but finding jurisdiction to review purely legal questions).

119. *See* Hernandez-Nolasco v. Lynch, 807 F.3d 95, 99 (4th Cir. 2015) (holding that likelihood of torture is a purely factual question);.Voskanyan v. Holder, No. 07-70233, 2011 WL 466818, at *1 (9th Cir. Feb. 10, 2011) (noting whether the respondent filed her application within one year of arriving in the United States was a purely factual question).

120. *See* Pieschacon-Villegas v. Att'y Gen., 671 F.3d 303, 309-10 (3d Cir. 2011) (stating that a determination of whether government acquiescence would be likely is precluded by 8 U.S.C. § 1252(a)(2)(C)-(D), but whether the correct legal standard was applied is a question of law, and misapplication of the legal standard in light of the evidence is reviewable); Huang v. Att'y Gen., 620 F.3d 372, 384-85 (3d Cir. 2010) (conceding that whether an individual has a "well-founded fear" is a mixed question of fact and law); Jean-Pierre v. Att'y Gen., 500 F.3d 1315, 1322 (11th Cir. 2007) (noting whether certain conduct would occur is the factual portion and whether that meets a legal standard is the legal portion of the mixed question).

121. *See* U.S. CONST., amend. V. (guaranteeing due process of the law); *see also* 8 U.S.C. § 1252(a)(5) (creating exclusive jurisdiction over review of CAT claims, subject to limits within the statute).

122. *See* 8 U.S.C. § 1252(a)(4) (2005) (making petitions for claim under the United Nations Convention Against Torture).

123. *See* Adame v. Holder, 777 F.3d 390, 391 (7th Cir. 2015) (noting that beyond the immigration context, the Supreme Court occasionally interprets mixed questions of

separating the questions of fact from the questions of law builds a compelling basis for the acceptance of the interpretation of statutes as allowing review of mixed questions under the grant of jurisdiction over questions of law.[124]

The most appropriate way to handle appellate review of denials of CAT deferrals is to treat the issue on appeal, if it is not the underlying conviction itself, like a mixed question of law and fact in appellate review of criminal convictions.[125] Immigration cases include only limited, conflicting discussion of the mixed question of law and fact issue, thus leaving little basis for comparison outside of the scope of criminal cases.[126] Allowing appellate review of denials of CAT deferral under the mixed question theory is more fair and consistent with the purpose of the CAT and due process interests than the current jurisdictional limits of appellate review.[127] Treating the issue on appeal as a mixed question permits appellate courts to simply identify whether the relevant standard is satisfied by the facts of the case.[128] Under this approach to appellate review, circuit courts would look to the facts and law in the case, as adjudged by the immigration judge below, taking them as established and beyond dispute.[129] The scope of the appellate inquiry would be whether the rule of law was properly applied to the accepted facts in the case.[130]

Using the treatment of mixed questions in criminal law as a starting point for analysis, recent immigration decisions further serve to bolster the argument in favor of treating mixed questions of law and fact as questions

law and fact as questions of law).

124. *See id.* (noting the willingness of some circuits to treat mixed questions of law and fact as questions of law for jurisdictional purposes to review immigration claims).

125. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) (stating that a mixed question of law and fact will permit an appellate court see if the facts of the case satisfy some legal standard).

126. *See Adame*, 777 F.3d at 391 (noting a growing disagreement among the circuits regarding how to treat mixed questions of law and fact when addressing the scope of appellate jurisdiction).

127. *See* Heeren, *supra* note 15, at 1143 (noting that the purpose of CAT is to prevent individuals from being removed to countries where they are more likely than not to be tortured).

128. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996) (quoting discussion of the treatment of mixed questions of law and fact in *Pullman-Standard*, identifying the facts and rule of law as undisputed on appeal).

129. *See id.* at 696-97 (limiting appellate review to the application of established law to accepted facts).

130. *See id.* (noting the scope of appellate review of mixed questions of law and fact, excluding review of facts or law individually).

of law under jurisdictional statutes.[131] The growing number of immigration decisions on review that find jurisdiction to review mixed questions of law and fact sets a critical foundation for the interpretation of CAT deferral claims as reviewable mixed questions.[132]

2. CAT Deferral Determinations Are Mixed Questions of Law and Fact

Applying the definition of a mixed question of law and fact from the Third Circuit, denials of CAT deferrals based on failure of an applicant to bear his or her burden of proof on a particular factor necessary for a grant of relief should be reviewable as mixed questions.[133] Similar forms of immigration relief have been accepted as reviewable under 8 U.S.C. § 1252(a)(2)(D) as mixed questions of law and fact, lending support to finding CAT deferrals reviewable due to similarity between the issues and determinations.[134]

The Ninth Circuit also provides support for the argument that denials of CAT deferral based on failure to meet the burden of proof for factors other than the underlying criminal conviction are reviewable as mixed questions of law and fact.[135]

The court's finding that the question of whether the applicant is more likely than not to be tortured and whether such torture will occur with or by the acquiescence of public officials is a mixed question of law and fact is directly applicable to Ortiz-Franco's claim to an appeal.[136] The mixed

131. *See Adame*, 777 F.3d at 391 (citing Supreme Court cases, such as *Pullman-Standard v. Swint*, *Bogardus v. Commissioner*, and *Ornelas v. United States*, that do not treat jurisdictional-stripping language as applying to mixed questions of law and fact).

132. *See* Ramadan v. Gonzales, 479 F.3d 646, 656-57 (9th Cir. 2007) (identifying the reviewability of mixed questions of law and fact, as defined in *Pullman-Standard v. Swint*, in the context of immigration relief); *see also* 8 C.F.R. § 1208.17(a) (2003) (defining the grounds upon which deferral under the CAT will be granted).

133. *See* Ehikhuemhen v. Att'y Gen., 535 Fed. App'x. 113, 119 (3d Cir. 2013) (defining a mixed question of law and fact as "one that requires application of a legal standard to a particular set of circumstances." (citing Huang v. Att'y Gen., 620 F.3d 372, 384 (3d Cir. 2010))).

134. *See id.* (citing Barrios v. Holder, 581 F.3d 849, 857 (9th Cir. 2009) (per curiam), in which the court held that it had jurisdiction to review whether the IJ correctly applied law to the accepted facts in a threshold determination in a Nicaraguan Adjustment and Central American Relief Act (NACARA) application)).

135. *See* Estrada-Corona v. Holder, 554 Fed. App'x. 579, 580 (9th Cir. 2014) (finding that whether or not an alien is more likely than not to be tortured with acquiescence of government officials is a mixed question of law and fact).

136. *See id.* (distinguishing between the question of whether facts rise to the requisite level of likelihood of torture for relief from a purely factual question of what was likely to happen to the applicant if removed to Mexico); *see also* Ortiz-Franco v.

question on review before the court in *Estrada-Corona* was identical to the question on appeal before the court in *Ortiz-Franco*.[137]

The question on appeal in *Ortiz-Franco* is distinguishable from other questions that are purely factual or purely legal.[138] Under the standard developed by the Ninth Circuit in *Ramadan*, however, the category of mixed questions of law and fact is increasingly broad and encompasses many frequently appealed determinations within immigration law.[139] Purely legal questions, thus, would involve only reviewing the lower court's interpretation, rather than application, of a particular legal standard.[140] Similarly, a purely factual question strictly involves the determination of what specific facts are instead of determining whether such facts are sufficient to rise to the level of satisfying a certain legal standard.[141] Thus, mixed questions fill the gap in immigration statutes by allowing review of determinations involving only the application of a given legal standard to *established* facts.[142] Such review more closely resembles a legal determination, as it is not functioning to ferret out facts, but instead looking to how law is applied to established facts.[143]

Holder, 782 F.3d 81, 85-86 (2d Cir. 2015) (raising the question on appeal of likelihood Ortiz-Franco would be tortured by gang members with government acquiescence if returned to El Salvador).

137. *See Ortiz-Franco*, 782 F.3d at 85-86 (precluding the question of likelihood of torture with government acquiescence from review on appeal due to statutory bar preventing review of factual questions); *Estrada-Corona*, 554 Fed. App'x. at 579 (finding likelihood of torture with government acquiescence is a mixed question of law and fact).

138. *See Ortiz-Franco*, 782 F.3d at 85-86 (identifying the question on review as the likelihood of torture with government acquiescence if Ortiz-Franco was returned to El Salvador); *see also* Mekonnen v. Holder, 402 Fed. App'x. 316, 317 (mem.) (9th Cir. 2010) (presenting a purely factual question of timely filing).

139. *See* Ramadan v. Gonzales, 479 F.3d 646, 656-57 (9th Cir. 2007) (defining mixed questions of law and fact as the application of a legal standard to undisputed facts); *see also* Ghahremani v. Gonzales, 498 F.3d 993, 998-99 (9th Cir. 2007) (applying the *Ramadan* definition of mixed question to a due diligence inquiry, holding that inquiry is a mixed question of law and fact because it involves the application of a legal standard to established facts).

140. *See Ghahremani*, 498 F.3d at 999 (noting that mixed questions "merely . . . apply [a] legal standard," rather than interpreting the legal standard.).

141. *See id.* (identifying facts in mixed questions as established and not in dispute).

142. *See id.* (defining mixed questions of law and fact); *see also* 8 U.S.C. § 1252(a)(2)(C) (2005) (differentiating between legal and factual questions for the purpose of review but failing to address treatment of mixed questions of law and fact).

143. *See Ghahremani*, 498 F.3d at 999 (differentiating between mixed questions and pure questions of law or fact); *see also Ramadan*, 479 F.3d at 654 (noting the omission of the word "pure" from distinctions between questions of law and questions of fact in the REAL ID Act of 2005, indicating an allowance of room within the

Looking beyond the Second Circuit, *Lemus-Galvan* and *Wanjiru* also provide support for the argument that mixed questions of law and fact should not be subject to the jurisdictional bar.[144] The Ninth Circuit in particular created a compelling argument in favor of the treatment of denials of deferral based on failure to rise to the requisite level of likelihood for one or more of the necessary elements to warrant CAT relief as mixed questions of law and fact.[145] Classifying the type of determination the decision was based on as one on the merits is consistent with the nature of mixed questions of law and fact, which requires the application of a legal standard to established facts.[146] Essentially, the Ninth Circuit was carving out a preservation of appellate jurisdiction for mixed questions of law and fact without explicitly calling the type of determination up for review a mixed question.[147]

The Seventh Circuit also addressed the issue of whether the jurisdictional bar applies to preclude review of denials of deferral under the CAT, but that court held that the bar does not apply for a different reason than the Ninth Circuit.[148] The inapplicability of the bar in *Wanjiru* turned on the lack of finality of a denial of deferral, a determination that is completely separate from the analysis of the decision as on the merits in *Lemus-Galvan*.[149] It is important that these two circuits reached the same

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statutory grant of jurisdiction for mixed questions of law and fact).

144. *See* Wanjiru v. Holder, 705 F.3d 258, 264 (7th Cir. 2013) (identifying the lack of finality as precluding the application of the bar to review of CAT denials); Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1083 (9th Cir. 2008) (asserting that the § 1252(a)(2)(C) bar does not apply to CAT deferral denials because they are necessarily made on the merits).

145. *See Lemus-Galvan*, 518 F.3d at 1084 (noting that the IJ's denial was based on a finding that Lemus-Galvan did not establish that internal relocation within Mexico was not possible).

146. *See id.* (identifying a "jurisdictional wrinkle" between Lemus-Galvan's order of removal based on his conviction and the subsequent denial of deferral based separately on his failure to prove internal relocation would be impossible in Mexico).

147. *See id.* (distinguishing between decisions based on convictions and those based on the merits of a claim).

148. *Compare Wanjiru*, 705 F.3d at 264 (denying applicability of the bar based on a lack of sufficient finality in the denial of deferral), *with Lemus-Galvan*, 518 F.3d at 1084 (holding the nature of the decision as on the merits as the basis for the inapplicability of the bar to review of the claim).

149. *See Wanjiru*, 705 F.3d at 264 (identifying deferrals of removal as not final because a deferral order is essentially an injunction preventing the enforcement of a separate final order of removal); *see also Lemus-Galvan*, 518 F.3d at 1084 (reaching the same conclusion as *Wanjiru*, through different means, that the denial was based on a determination on the merits of the claim rather than due to an underlying, established criminal conviction).

conclusion in different ways because neither holding precludes the application of the other; in fact, the two holdings dovetail with one another.[150] The issue of finality does not preclude a determination that deferrals are reviewable because they are mixed questions, necessarily decided on the merits.[151] Likewise, the mixed question argument does not prevent the success of the argument that denials are reviewable because they are not final orders of removal, but are essentially injunctions.[152]

Based on the interests of ensuring that individuals' due process rights are protected and that claims are adjudicated consistently, allowing mixed questions of law and fact to be reviewed under the same grant of jurisdiction as questions of law is the most accurate application of the statute.[153] Circuits are divided over how best to handle mixed questions, creating a compelling interest in resolving the question and establishing a standard of adjudication that can be applied uniformly.[154] The nature of CAT claims makes treating them as mixed questions that are reviewable under the grant of jurisdiction for legal questions the most accurate and reasonable.[155]

IV. CONCLUSION

The INA would deny appropriate and fair review to claims under the CAT if the existing appellate review provisions do not incorporate mixed questions of law and fact under the grant of jurisdiction for legal questions.[156] Not only would such a failure raise due process concerns, but

150. *See Wanjiru*, 705 F.3d at 264 (holding based on a finality); *see also Lemus-Galvan*, 518 F.3d at 1084 (focusing on the merits of the claim).

151. *See Lemus-Galvan*, 518 F.3d at 1084 (finding no language that would preclude an alternate finding that the lack of finality of the decision also allows for appellate jurisdiction to review the claim).

152. *See Wanjiru*, 705 F.3d at 264 (acknowledging the decision in *Lemus-Galvan* and not finding it incompatible with the instant decision).

153. *See* U.S. CONST., amend. V. (guaranteeing due process of the law); 8 U.S.C. § 1252(a)(4) (2005) (making petitions for review under the INA the sole means for judicial review of any action under the United Nations Convention Against Torture, limiting the number of claims that are reviewable if mixed questions are not reviewable).

154. *See* Adame v. Holder, 777 F.3d 390, 391 (7th Cir. 2015) (noting a growing disagreement among the circuits regarding how to treat mixed questions of law and fact when addressing the scope of appellate jurisdiction).

155. *See id.* at 390 (noting that outside the immigration context, the Supreme Court occasionally interprets questions of law as including mixed questions of law and fact) (citing Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982)).

156. *See* 8 U.S.C. § 1252(a)(4) (2005) (making petitions for review under the INA the only means for judicial review of any claim under the United Nations Convention Against Torture, which would be limited to narrow jurisdiction if the criminal bar

it would also raise concerns about whether the CAT is being implemented in accordance with its purpose or whether certain claims are slipping through the statutory cracks.[157] Further, the overall statutory purpose and construction indicates intent by legislators to allow review of CAT denials.[158] Even if an argument in favor of allowing review of mixed questions as subsumed under the grant of jurisdiction over questions of law is not compelling, courts have sufficient basis to note jurisdiction based on statutory construction and purpose.[159] This Comment is only limited to the narrow discussion of the jurisdiction to review mixed questions of fact and law within the scope of denials of deferral of removal under the CAT, and it does not foreclose any future arguments regarding other provisions of the INA and jurisdiction to review mixed questions.[160]

applied).

157. *See* U.S. CONST., amend. V. (guaranteeing due process of the law); *see Adame*, 777 F.3d at 391 (citing a growing disagreement regarding how to treat mixed questions of law and fact).

158. *See* 8 U.S.C. § 1252(a)(4)-(5) (creating a distinction between order of removal and CAT claims); Ortiz-Franco v. Holder, 782 F.3d 81, 89 (2nd Cir. 2015) (finding that § 1252(a)(4) clarifies rather than being a redundancy); *see also* Petition for Writ of Certiorari, *supra* note 32, at 21 (identifying the contradiction in the Second Circuit's interpretation of the tension between § 1252(a)(4) and (5)).

159. *See* Ghahremani v. Gonzales, 498 F.3d 993, 999 (9th Cir. 2007) (distinguishing between pure questions of law or fact and mixed questions of law and fact); Ramadan v. Gonzales, 479 F.3d 646, 654 (9th Cir. 2007) (noting the omission of the word pure in the REAL ID Act of 2005 in regards to distinctions between types of questions for jurisdictional purposes).

160. *See supra* Part II-III (discussing the nature of mixed questions and how they fit within the appellate jurisdiction of reviewable questions).