

Remand and Dialogue in Administrative Law

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ABSTRACT

A bedrock principle of administrative law is that when a court finds an agency has erred, the court generally remands the action for the agency to consider anew (as opposed to the court deciding the matter itself). The conventional understanding is that this ordinary remand rule is part of the suite of judicial deference doctrines in administrative law. In our contribution to The George Washington Law Review's Annual Review of Administrative Law, we argue that this understanding is incomplete—at least when it comes to high-volume agency adjudication. In that context, the vast majority of agency adjudication decisions never make it to federal court. Judicial remands in cases that reach the courts allow the courts to engage in a dialogue with the agency, in turn improving agency decisionmaking in similar cases that never make it to federal court. Indeed, courts have developed and utilized a variety of tools to engage in a richer dialogue with the agency on remand. Remand, thus, can be a tool for judicial engagement and dialogue, not just one for judicial deference.

This argument, however, assumes that a dialogue between courts and agencies actually takes place—that remand is not just a judicial monologue. This Article explores the empirical realities of that assumption by presenting the findings of two separate studies: a cross-agency study for the Administrative Conference of the United States on agency appellate systems and a FOIA-based study of agency immigration decisions on remand. Although much more empirical work needs to be done, the findings from these studies provide an empirical window into how agencies engage with and respond to courts on remand. In light of these preliminary yet promising findings, we argue that courts (and agencies) should consider how to better engage in a dialogue on remand in order to produce a more systemic effect on high-volume agency adjudication systems.

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INTRODUCTION

In recent years, we have seen a rising “anti-administrativist” mood in administrative law.¹ Judges, scholars, and policymakers—largely conservative or libertarian—have argued that federal courts should reconsider the deferential aspects of judicial review of agency actions. In particular, they have advocated narrowing or eliminating *Chevron* and *Auer* deference to administrative interpretations of law

¹ See Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2–3 (2017) (so arguing); cf. Aaron Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1 (2017).

and reinvigorating the nondelegation doctrine.² These are ambitious, sweeping calls for reform that have the potential to dramatically reshape the modern administrative state. Although many of these efforts may appear sweeping, in reality they often focus myopically on courts as the solution. And it turns out that in the vast majority of federal agency actions, courts never get involved.³

Consider, for example, the regulation of immigration. Immigration adjudication is a prominent fixture in the modern regulatory state and a significant portion of the federal judiciary's administrative law docket. The Justice Department employs more than 500 immigration judges today; immigration courts received nearly 550,000 new cases and completed about 275,000 cases in 2019 alone.⁴ Yet, despite the reality that federal courts of appeals generally have exclusive jurisdiction to review petitions from these final decisions, they review only about 5,000 such petitions—less than two percent of completed agency adjudications.⁵ By congressional design, moreover, judicial review is highly deferential to the agency, so courts are limited by statute in the amount of control they can exert over the agency.⁶ That is unlikely to change any time soon—despite recent calls to narrow or eliminate *Chevron* deference for agency statutory interpretations.⁷

² For a survey of such criticisms, see Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018), and Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1938–58 (2020).

³ See generally Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620 (2018) (surveying the various regulatory actions that evade judicial review).

⁴ U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: IMMIGRATION JUDGE (IJ) HIRING (2020), <https://www.justice.gov/eoir/page/file/1242156/download> [<https://perma.cc/Z42R-3T29>] (reporting 529 total immigration judges and nearly 100 new judges hired in 2020); U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: NEW CASES AND TOTAL COMPLETIONS (2021), <https://www.justice.gov/eoir/page/file/1060841/download> [<https://perma.cc/F85L-VNNN>] (reporting 545,898 new cases and 276,945 completed cases in 2019).

⁵ See, e.g., ADMIN. OFF. OF THE U.S. CTS., U.S. COURTS OF APPEALS—JUDICIAL BUSINESS 2017 (2018) [hereinafter U.S. COURTS] (“Administrative agency appeals dropped 5 percent in 2017 to 6,153 and represented 12 percent of total filings in the courts of appeals. Appeals of Board of Immigration Appeals (BIA) decisions, which remained relatively stable, accounted for 85 percent of administrative agency appeals.”); see also 8 U.S.C. § 1252(a)(5) (2018) (providing the federal courts of appeals with exclusive jurisdiction—with several narrow exceptions—for judicial review of final removal orders).

⁶ See, e.g., 5 U.S.C. § 706 (2018) (detailing the deferential standards of judicial review under the Administrative Procedure Act).

⁷ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (raising constitutional concerns about *Chevron* deference in the immigration adjudication context); Michael Kagan, *Chevron's Asylum: Re-Assessing Deference in Refugee Cases*, 58 HOUS. L. REV. 1119 (2021); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021).

And even if courts were to become less deferential, they would review only the two-percent tip of the immigration-adjudication iceberg.

Accordingly, if the goal of anti-administrativists or other reformers is to better oversee the administrative state—especially in the context of high-volume agency adjudication—perhaps courts should look to another doctrine: the ordinary remand rule. First articulated in *SEC v. Chenery Corp. (Chenery I)*,⁸ this doctrine instructs a reviewing court, when it concludes that an agency’s decision is erroneous, to generally remand to the agency to consider the issue anew (as opposed to the court deciding the issue itself).⁹ The Supreme Court has applied this bedrock administrative law principle in a variety of contexts over the years, including invalidating recent high-profile attempts by the Trump Administration to rescind the Deferred Action for Childhood Arrivals (“DACA”) immigration relief program¹⁰ and to add a citizenship question to the 2020 census.¹¹ Last Term, the Court again confronted the failure of the Ninth Circuit to follow the ordinary remand rule in the context of immigration adjudication¹² This time, however, the Court reversed the Ninth Circuit on the merits without having to grapple with the lower court’s failure to remand to the agency.¹³

The conventional understanding is that this ordinary remand rule is part of the suite of judicial deference doctrines in administrative law. “Fundamental principles of administrative law,” the Supreme

⁸ 318 U.S. 80 (1943).

⁹ See *id.* at 95 (remanding because “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”).

¹⁰ See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (“Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.”).

¹¹ See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019) (affirming the district court’s remand because “[r]easoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action” and “[w]hat was provided here was more of a distraction”).

¹² See *Dai v. Barr*, 916 F.3d 731, 749 (9th Cir. 2018) (Trott, J., dissenting) (“With all respect, the majority opinion follows in our tradition of seizing authority that does not belong to us, disregarding DHS’s statutorily mandated role. Even the REAL ID Act has failed to correct our errors.”), *reh’g en banc denied*, 940 F.3d 1143, 1150 (9th Cir. 2019) (Callahan, J., dissenting from denial of rehearing en banc) (“We are asking yet again to be summarily reversed for violating the ‘ordinary remand rule.’”), *cert. granted*, 141 S. Ct. 221 (2020) (mem.).

¹³ See *Garland v. Dai*, 141 S. Ct. 1669, 1681 (2021) (holding that “[t]he Ninth Circuit’s deemed-true-or-credible rule cannot be reconciled with the INA’s terms”).

Court recently explained, “teach that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question.”¹⁴ Indeed, the doctrine is often criticized, especially in the immigration adjudication context, for being *too deferential* to agency action.¹⁵

In this Article, however, we argue that this understanding is mistaken, at least when it comes to high-volume agency adjudication—and that, in fact, the opposite can be true. Because the vast majority of agency adjudication decisions never make it to federal court, judicial remand allows federal courts to engage in a dialogue with an agency and to have a more systemic effect on the agency adjudication system compared to deciding a case without a remand. As one of us has argued in prior work in the immigration and tax contexts, the ordinary remand rule, when coupled with various tools courts can use to engage in a dialogue with the agency on remand, can be a powerful device for federal courts to play a more systemic role in high-volume agency adjudication.¹⁶

Having a systemic effect is particularly important in immigration adjudication and in other high-volume agency adjudication contexts (such as Social Security and veterans’ benefits adjudications) where individuals navigate the agency process, often without legal representation. In those contexts, individuals with meritorious claims are far less likely to make it to federal court because they either lack the wherewithal to seek judicial review or, when they do seek such review, have already procedurally defaulted those claims before the agency.¹⁷ Only by remanding and forcing the agency to correct systemic errors can the court help these individuals who, for whatever reason, do not seek judicial review.

The argument that the ordinary remand rule can be a tool for judicial engagement and can help produce systemic change, however,

¹⁴ *Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019).

¹⁵ *See, e.g., Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003) (not remanding because “constant remands to the BIA to consider the impact of changed country conditions occurring during the period of litigation of an asylum case would create a ‘Zeno’s Paradox’ where final resolution would never be reached” (citing *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000))).

¹⁶ *See* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 228 (2014); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 86 (2016) [hereinafter Walker, *Referral, Remand, and Dialogue*]; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014) [hereinafter Walker, *Ordinary Remand Rule*].

¹⁷ Walker, *Referral, Remand, and Dialogue*, *supra* note 16, at 93.

assumes that a dialogue between courts and agencies actually takes place—that remand is not just a judicial monologue. As Professor Gillian Metzger has put it in responding to Professor Emily Hammond’s important, related article *Dialogue and Deference in Administrative Law*, “it remains open whether the instances of serial litigation [Professor Hammond] identifies actually demonstrate court-agency dialogue, in the sense of a meaningful ‘conversation in which the participants strive toward[] learning and understanding to promote more effective deliberation and outcomes.’”¹⁸

This Article seeks to explore that issue from an empirical perspective. To do so, we report the findings from two studies of agency adjudication. First, over the last few years, one of us engaged in a cross-agency study on agency appellate systems for the Administrative Conference of the United States.¹⁹ That study explored a variety of features at a dozen high-volume agency appellate systems. One of the recurring themes in the interviews with agency officials was the importance of judicial remand and the resources and actions the agency takes on remand to respond to the courts. Although qualitative and exploratory in nature, these findings reveal a rich and fascinating story about how agencies structure their adjudication systems to respond to judicial remands.

Second, in a follow-up study to one published in *The George Washington Law Review* approximately seven years ago,²⁰ we requested via the Freedom of Information Act (“FOIA”) all of the immigration adjudication decisions on remand from the circuit-court decisions coded in the prior study. We coded every immigration adjudication decision on remand to demonstrate the extent to which the agency engages with the court’s decision that remanded the case. Among other things, we find that the noncitizen is denied relief in about 20% of the remanded cases and prevails on a remanded issue 50% of the time. The remaining cases are harder to categorize as a “win” or “loss,” including the 16% of cases where the proceedings

¹⁸ Gillian Metzger, *Serial Litigation in Administrative Law: What Can Repeat Cases Tell Us About Judicial Review?*, JOTWELL (June 25, 2012) (quoting Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1773 (2011) [hereinafter Hammond, *Deference and Dialogue*]), <https://adlaw.jotwell.com/serial-litigation-in-administrative-law-what-can-repeat-cases-tell-us-about-judicial-review/> [<https://perma.cc/M3U4-NV8P>].

¹⁹ See CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, AGENCY APPELLATE SYSTEMS (2020) (final report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-agency-appellate-systems> [<https://perma.cc/FFP4-8RVW>]; see also Administrative Conference Recommendation 2020-3: Agency Appellate Systems, 86 Fed. Reg. 6618, 6618–20 (Jan. 22, 2021) (adopting recommendations from WALKER & WIENER, *supra*).

²⁰ Walker, *Ordinary Remand Rule*, *supra* note 16.

were terminated or administratively closed. The remand process takes on average 2.2 years (with a median duration of 1.6 years), but the time varies based on case outcome. Compared to prior studies, a staggering 92% of noncitizens had legal counsel on remand. When it comes to actual dialogue, we find that the Board of Immigration Appeals (“BIA”) discusses the remanding court’s reasoning in nearly 80% of their decisions, with extensive discussion in nearly 25% of the decisions on remand. We ultimately find that the agency on remand usually seems to be listening, and often consciously responds and reacts, to the judicial reasoning.

Based on these findings, we argue that federal courts should recalibrate their approach to judicial review in high-volume agency adjudication to have a more systemic effect on the agency adjudication system. Such recalibration would not require any congressional action. The longstanding ordinary remand rule just needs to be reconceptualized; it alone allows courts to engage in meaningful dialogue with the agency. But courts should stop treating review of high-volume agency adjudication like ordinary judicial review. In this context, Article III courts should consider the systemic effect judicial review could have on agency adjudication system.

The Article proceeds as follows: Part I details the doctrinal framework for the ordinary remand rule and then explores how the remand rule has developed in practice, including how courts have crafted a number of dialogue-enhancing tools to accompany a remand. Part II compares the conventional, deference account of the doctrine with an alternative, engagement framework and argues that remand is a systemic remedy, not even (or just) a deference doctrine. Part III presents the findings from both empirical studies on agency-court dialogue. We conclude by encouraging courts, agencies, and scholars to pay more attention to remand as a tool to engage in a richer dialogue with agencies and to, in turn, have a broader influence on the agency’s adjudication system.

I. THE ORDINARY REMAND RULE

Over a half-century ago, Judge Henry Friendly tried to make sense of the *Chenery* Court’s remand rule—the “simple but fundamental rule of administrative law” that, when a court concludes that an agency’s decision is erroneous, the court should generally remand the case to the agency to consider the issue afresh (as opposed to the

court deciding the issue itself).²¹ Despite Judge Friendly’s “hope of discovering a bright shaft of light that would furnish a sure guide to decision in every case,” he ultimately concluded that “the grail has eluded me; indeed I have come to doubt that it exists.”²² “[P]erhaps,” Judge Friendly thought, determining when to reverse and remand under *Chenery* is “more an art than a science.”²³

Over the past fifty-plus years, courts have had tens (if not hundreds) of thousands of chances to practice that art. And the Supreme Court has continued to shape the contours of this “ordinary remand rule” more into a science, especially in the immigration adjudication context.²⁴ It has now held that the rule applies not only to questions of fact²⁵ and mixed questions of law and fact,²⁶ but also to certain questions of law.²⁷

Despite its central importance in the modern administrative state and its expanded role, little scholarly attention has been paid to the ordinary remand rule.²⁸ Similarly, even though the Supreme Court has provided repeated guidance to the lower federal courts, much doctrinal confusion persists as to when courts must remand and when “rare circumstances” justify departure from the ordinary rule.²⁹ Indeed, as one of us has documented in the immigration adjudication context, federal courts of appeals refused to apply the remand rule in roughly one in five cases reviewed—with the Fifth Circuit (33%) and the

21 *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947); *accord SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 95 (1943) (remanding the matter to the agency because the “administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”); *see also* Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 *DUKE L.J.* 199.

22 Friendly, *supra* note 21, at 199.

23 *Id.* at 200.

24 *See, e.g., Negusie v. Holder*, 555 U.S. 511, 523–24 (2009).

25 *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (remanding to the agency the factual question of “changed circumstances”).

26 *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (remanding to the agency mixed questions of law and fact where “[t]he matter requires determining the facts and deciding whether the facts as found fall within a statutory term”).

27 *See Negusie*, 555 U.S. at 523 (remanding to the agency a question of statutory interpretation where the agency “has not yet exercised its *Chevron* discretion to interpret the statute in question”).

28 One major exception is Professor Emily Hammond’s seminal piece on remand and reversal in the rulemaking context. *See* Hammond, *Deference and Dialogue*, *supra* note 18.

29 *Ventura*, 537 U.S. at 16 (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985))).

Ninth Circuit (32%) among the “worst” offenders when measured against the rule’s baseline.³⁰

Section I.A sets forth the doctrinal framework for the ordinary remand rule, and then Section I.B details how circuit courts have applied the rule in practice, at least in the immigration adjudication context.

A. *The Doctrinal Framework*

Since the beginning of judicial review of agency action, courts have recognized the agency’s unique position in the scheme of adjudication.³¹ Thus, since the 1940s, it has been the “simple but fundamental rule of administrative law” for reviewing courts to remand to agencies that erred.³² But for many years, the lower courts applied that “simple” rule without much Supreme Court articulation of its contours.³³ Without a reminder of its “fundamental” nature, many lower courts strayed from the ordinary remand rule, especially in the immigration context.³⁴

But since the turn of the century, the Supreme Court has cleaned up the ordinary remand rule, making clear that it is meant to be more of a bright-line rule.³⁵ In its current state, the remand rule (now some-

³⁰ Walker, *The Ordinary Remand Rule*, *supra* note 16, at 1582 tbl.1. These figures are drawn from a review of all of the published federal court of appeals decisions (over 400) that cite the immigration-remand trilogy (*Ventura*, *Thomas*, and *Negusie*) since the Court’s 2002 rearticulation of the remand rule in *Ventura* through the end of 2012.

³¹ See, e.g., *Chenery II*, 332 U.S. 194, 196 (1947) (explaining that the court must not “propel” itself into “the domain which Congress has set aside exclusively for the administrative agency); *Chenery I*, 318 U.S. 80, 88 (1943) (“For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”).

³² *Chenery II*, 332 U.S. at 196; see also Walker, *The Ordinary Remand Rule*, *supra* note 16, at 1561–78 (tracking the remand rule’s evolution from the 1940s until *Negusie* in 2009).

³³ But see, e.g., *Fla. Power & Light Co.*, 470 U.S. at 744 (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”); *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (reversing the D.C. Circuit’s opinion ordering an agency to issue a license the agency had previously denied because “the function of the reviewing court ends when an error of law is laid bare”—at which point “the matter once more goes to the [agency] for reconsideration”).

³⁴ See, e.g., *Ventura v. INS*, 264 F.3d 1150, 1157–58 (9th Cir. 2001) (failing to remand because it found sufficient changed conditions to grant the withholding of asylum, notwithstanding the fact that the BIA had never considered the issue).

³⁵ See *Negusie v. Holder*, 555 U.S. 511 (2009); *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam); *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

times called “the *Ventura* ordinary remand rule”³⁶) provides that, after the court concludes that the agency has erred, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”³⁷ As Section I.A explores, the rule has grown from its 1940s roots: It not only applies (1) to agency factual oversight or errors, but also (2) to mixed questions of law and fact, and even (3) to certain questions of law.

1. *Remand Factual Issues*

Recognizing its relative lack of expertise as a factfinder (and general inability to look outside the administrative record), an appellate court’s conclusion that an agency erred on a factual issue requires a remand.³⁸ Since the 1940s, appellate courts reviewing immigration adjudications should have known this: the law places the agency exclusively in charge of making factual determinations,³⁹ and “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”⁴⁰ Nevertheless, courts sometimes chose not to remand even when faced with factual issues that the agency had not decided.⁴¹

That changed with *INS v. Ventura*⁴² in 2002. When the government sought to deport Fredy Orlando Ventura to his home country of Guatemala for entering the United States unlawfully, Ventura countered with an application for asylum and withholding of deportation based on his fear and the threat of persecution “on account of” his “political opinion.”⁴³ Specifically, Ventura testified that he left Guatemala after guerillas threatened him and killed some of his family members—all due to the guerillas’ belief that Ventura disagreed with their political beliefs.⁴⁴

³⁶ *Negusie*, 555 U.S. at 524 (calling it “the *Ventura* ordinary remand rule”); *accord Ventura*, 537 U.S. at 17 (describing it as “the law’s ordinary remand requirement”); *Thomas*, 547 U.S. at 185 (noting that the rule is “what this Court described in *Ventura* as the ‘ordinary remand rule’”).

³⁷ *Negusie*, 555 U.S. at 523 (quoting *Thomas*, 547 U.S. at 186).

³⁸ *See Ventura*, 537 U.S. at 17.

³⁹ *See, e.g.*, 8 U.S.C. § 1158(a) (2018) (setting forth the legal requirements for the agency to make the basic asylum eligibility decisions at issue in many immigration decisions).

⁴⁰ *Chenery I*, 318 U.S. 80, 88 (1943).

⁴¹ *See, e.g.*, *Ventura v. INS*, 264 F.3d 1150, 1157 (9th Cir. 2001).

⁴² 537 U.S. 12 (2002) (per curiam).

⁴³ *Id.* at 13 (quoting 8 U.S.C. §§ 1101(a)(42)(A) (2018)).

⁴⁴ *See id.* at 14; *see also Ventura*, 264 F.3d at 1152 (explaining the facts in greater detail than the Supreme Court’s recitation).

The immigration judge, the first executive official to pass on Ventura's application, denied his requested relief.⁴⁵ While she found Ventura's testimony credible, she agreed with the government on two independent issues.⁴⁶ First, she found that Ventura had failed to objectively "demonstrate that the guerillas' interest" in him in his home country was "on account of his political opinion."⁴⁷ Second, she concluded that even if Ventura had objectively demonstrated his threat of persecution "on account of his political opinion," the "conditions" in Guatemala had changed significantly, so that the evidence failed to show that the guerrillas would "continue to have motivation and inclination to persecute him in the future."⁴⁸

The BIA agreed with the immigration judge on the first issue—that Ventura "did not meet his burden of establishing that he faces persecution 'on account of' [his political opinion]."⁴⁹ Because that conclusion meant Ventura was not eligible for asylum, the BIA noted that it "need not address" the government's alternative reason for deportation—the question of "changed country conditions."⁵⁰ Ventura, still seeking asylum, sought review in the relevant federal court of appeals.⁵¹

The Ninth Circuit reversed, holding that the record compelled it to conclude that Ventura had an objective basis to fear persecution in Guatemala "on account of" his political views, thus ending the government's first argument.⁵² But the government's second argument, on changed-country conditions, remained open. The government asked the Ninth Circuit to remand for the BIA to consider the argument in the first instance, and Ventura agreed that the Ninth Circuit should remand.⁵³

But the Ninth Circuit decided the issue itself in the first instance. After reciting the "general[]" rule that a court should "remand to the BIA for it to consider the issue," the Ninth Circuit held that it did not

⁴⁵ *Ventura*, 537 U.S. at 13–14.

⁴⁶ *Id.* at 14–15.

⁴⁷ *Id.* at 15 (quoting Appendix to Petition for Certiorari at 22a, *Ventura*, 537 U.S. 12 (No. 02-29)).

⁴⁸ *Id.* (quoting Appendix to Petition for Certiorari at 22a, *Ventura*, 537 U.S. 12 (No. 02-29)).

⁴⁹ *Id.* (quoting Appendix to Petition for Certiorari at 15a, *Ventura*, 537 U.S. 12 (No. 02-29)).

⁵⁰ *Id.* (quoting Appendix to Petition for Certiorari at 15a, *Ventura*, 537 U.S. 12 (No. 02-29)).

⁵¹ *Id.*

⁵² *Ventura v. INS*, 264 F.3d 1150, 1155 (9th Cir. 2001).

⁵³ *See Ventura*, 537 U.S. at 13.

need to remand “when it is clear that [it] would be compelled to reverse the BIA’s decision if the BIA decided the matter against the applicant.”⁵⁴ Put differently, it concluded, contrary to the very basis of *Chenery* and the remand rule, that it was able to “substitut[e] what it considers to be a more adequate or proper basis” to the agency’s would-be (or might-be) determination.⁵⁵

The Supreme Court stepped in to brighten the ordinary remand line. Dealing with the case on its “shadow docket,” the Court applied the “bitter medicine of summary reversal”—a medicine reserved for the most egregious lower court errors.⁵⁶ The failure to remand an unaddressed factual issue, the Court held, strayed so far from the “well-established principles of administrative law” that the bitter medicine was appropriate.⁵⁷ Because a court of appeals cannot “conduct a *de novo* inquiry into the [factual] matter being reviewed . . . to reach its own conclusions based on such an inquiry,”⁵⁸ the Ninth Circuit needed to “remand to the agency for additional investigation or explanation.”⁵⁹ On remand, “[t]he agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.”⁶⁰ And so the lower courts were reminded of *Chenery*’s “fundamental” requirements under a modern name: the “*Ventura* ordinary remand rule.”⁶¹

⁵⁴ *Ventura*, 264 F.3d at 1157 (first citing *Navas v. INS*, 217 F.3d 646, 662 (9th Cir. 2000); and then citing *Gafoor v. INS*, 231 F.3d 645, 656 n.6 (9th Cir. 2000)).

⁵⁵ *Chenery II*, 332 U.S. 194, 196 (1947).

⁵⁶ *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). See generally EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, *SUPREME COURT PRACTICE* § 5.12(C) (9th ed. 2007) (“If the Supreme Court considers the decision below to be clearly wrong but not worthy of oral argument, it may summarily dispose of the case as suggested.”); William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 *NYU J.L. & LIBERTY* 1 (2015) (explaining summary reversals and why the Supreme Court may use this particular procedure).

⁵⁷ *Ventura*, 537 U.S. at 16.

⁵⁸ *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

⁵⁹ *Id.*

⁶⁰ *Ventura*, 537 U.S. at 17. In light of its decision in *Ventura*, the Court also granted, vacated, and remanded two other Ninth Circuit decisions that similarly failed to follow the ordinary remand rule. See *INS v. Silva-Jacinto*, 537 U.S. 1100 (2003) (mem.); *INS v. Chen*, 537 U.S. 1016 (2002) (mem.).

⁶¹ See cases cited *supra* note 36.

2. Remand Applications of Law to Fact

Ventura did not shift the law. It followed *Chenery*, consistent with Congress's conclusion that the agency is the expert factfinder that must decide factual issues in the first instance.⁶² But how does the remand rule apply in application of law to fact—an area in which courts are normally more involved? The Court had the chance to clarify this modification in another case coming out of the Ninth Circuit: *Gonzales v. Thomas*.⁶³ And again, the Supreme Court found the bitter medicine of summary reversal appropriate.⁶⁴

The government sought to remove Michelle Thomas and her immediate family, citizens and natives of South Africa, because their visitor status had expired.⁶⁵ In response, Thomas requested asylum for her and her family, claiming they faced, among other things, “persecution or a well-founded fear of persecution on account of . . . membership in a particular social group.”⁶⁶ Specifically, Thomas argued that she faced persecution from South Africans of a different race because her father-in-law—a purported member of her “social group”—allegedly discriminated against South Africans of a different race in the plant where he was the foreman.⁶⁷

Neither the immigration judge nor the BIA granted Thomas relief, apparently because they thought that a familial relationship to an allegedly racist father-in-law could never constitute a “social group.”⁶⁸ But the Ninth Circuit, sitting en banc, disagreed with this legal conclusion, holding that “a family *may* constitute a social group for the purposes of the refugee statutes.”⁶⁹ This holding created a threshold question that the agencies in the case had previously viewed as irrelevant: Did the Thomas family in particular qualify as a “particular social group”?⁷⁰ Some institution—either the Article III court or the

⁶² See 8 U.S.C. §§ 1158(a) (2018); see also 5 U.S.C. § 706 (2018).

⁶³ 547 U.S. 183 (2006) (per curiam).

⁶⁴ See *id.* at 184.

⁶⁵ See Brief for Respondent at 3, *Thomas v. Ashcroft*, 359 F.3d 1169 (9th Cir. 2004) (No. 02-71656), 2002 WL 32297961, at *3.

⁶⁶ *Thomas*, 547 U.S. at 184 (emphasis omitted) (quoting 8 U.S.C. § 1101(a)(42)(A) (2000)).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006) (emphasis added).

⁷⁰ The dissent in the Ninth Circuit argued that this question, i.e., “whether the Thomases are a ‘particular social group,’” should *first* be considered by the agency. *Id.* at 1193 (Rymer, J., dissenting) (emphasis omitted).

Article II agency—needed to apply the new Ninth Circuit law to the facts of the case.

Rather than remand this application-of-law-to-fact question to the agency, the en banc Ninth Circuit answered the question itself, holding that the Thomases “belong to [a] particular social group.”⁷¹ The agency had nothing left to decide on this all-important threshold issue; instead, the court, citing *Ventura*, remanded the almost fully decided case to the agency to decide “the ultimate issue of whether the Thomases are eligible for asylum.”⁷²

But again, the Supreme Court summarily reversed: “The Ninth Circuit’s failure to remand” on the particular-social-group question “is legally erroneous, and that error is ‘obvious in light of *Ventura*,’ itself a summary reversal.”⁷³ The Court recognized that “[t]he agency has not yet considered whether [the father-in-law’s] family presents the kind of ‘kinship ties’ that constitute a ‘particular social group.’”⁷⁴ Because such an inquiry “requires determining the facts and deciding whether the facts as found fall within a statutory term,” and because the agency is the delegated expert of this inquiry, the Ninth Circuit should have remanded the question of whether the Thomases are a particular social group.⁷⁵ In so holding, the Court established that, as with pure questions of fact, questions of application of law to fact must be considered in their first instance by agencies rather than courts.⁷⁶

3. *Remand Certain Questions of Law*

To this point in its evolution, the law had not changed much since the 1940s: the *Chenery* remand rule originally required courts to remand after finding an error in an agency’s decision—whether that er-

⁷¹ *Id.* at 1189.

⁷² *Id.* (citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)).

⁷³ *Thomas*, 547 U.S. at 185.

⁷⁴ *Id.* at 186.

⁷⁵ *Id.* at 186–87 (citing *Ventura*, 537 U.S. at 17, for the reasons to remand).

⁷⁶ In light of its decision in *Thomas*, the Court also granted, vacated, and remanded two other court of appeals decisions that similarly failed to follow the ordinary remand rule. See *Keisler v. Gao*, 552 U.S. 801 (2007) (mem.); *Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006) (mem.); see also Patrick J. Glen, “*To Remand, or Not to Remand*”: *Ventura’s Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOB. L. & BUS. 1, 17–18 (2010) (discussing the cases in more detail). But cf. Brenna Finn, Comment, *Save Me from Harm: The Consequences of the Ordinary Remand Rule’s Misapplication to Gao v. Gonzales*, 16 AM. U. J. GENDER SOC. POL’Y & L. 527, 528–29 (2008) (arguing that “the Second Circuit properly exercised its power to review the BIA decision without remanding to the BIA for reconsideration of the contested issues,” and asserting that “the Supreme Court erroneously applied the ordinary remand rule to Ms. Gao’s case”).

ror was a question of fact, policy, or application of law to fact.⁷⁷ Importantly, that includes when the agency’s reasoning has been found deficient—a common reason for remanding in the rulemaking context.⁷⁸ *Ventura* and *Thomas* merely revived *Chenery*’s recognition that the remand rule is a “simple but fundamental rule of administrative law.”⁷⁹

But missing from *Chenery*’s discussion—and from the discussion generally, at least until *Chevron U.S.A. Inc. v. Natural Resources Defense Council*⁸⁰—was an exact description of when a court must remand to allow an agency to address a question of *law* in the first instance. Are questions of law—the greatest expertise of reviewing courts—the same as questions of fact or application of law to fact? Yes, answered the Court in *Negusie v. Holder*.⁸¹ With the “*Chevron* revolution”⁸² and the *Chenery* revival to thank, the ordinary remand rule now encompasses questions of law where (1) the statutory provision at issue is ambiguous and (2) Congress charges an agency with administering the statute.⁸³

In *Negusie*, the Eritrean Government incarcerated, punished, and beat Daniel Girmai Negusie as a political prisoner for two years before forcing him to work as a prison guard—a job that required him to punish others just as he had been punished.⁸⁴ After four years in this role, Negusie escaped Eritrea by hiding in a container on board a ship coming to the United States and sought asylum here.⁸⁵ The government argued that Negusie did not qualify for asylum because of the Immigration and Nationality Act’s so-called persecutor bar, which

⁷⁷ See Walker, *Ordinary Remand Rule*, *supra* note 16, at 1561–68.

⁷⁸ See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (remanding the DACA rescission decision to the agency for, among other things, insufficient reasoning). Over the last few decades, lower courts have also adopted an exception to the vacatur part of the ordinary remand rule, where the court remands the matter to the agency, but the agency action otherwise remains in effect. See Ronald M. Levin, “*Vacation*” at *Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 *DUKE L.J.* 291, 298–305 (2003). This remand without vacatur rule is not without controversy. See Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 *GEO. MASON L. REV.* 733, 758–59 (2021) (collecting criticisms).

⁷⁹ *Chenery II*, 332 U.S. 194, 196 (1947).

⁸⁰ 467 U.S. 837 (1984).

⁸¹ 555 U.S. 511 (2009).

⁸² Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *GEO. L.J.* 833, 834–35 (2001) (coining the phrase).

⁸³ See *Negusie*, 555 U.S. at 523; see also Walker, *Ordinary Remand Rule*, *supra* note 16, at 1577–78.

⁸⁴ *Negusie*, 555 U.S. at 515.

⁸⁵ See *id.*

statutorily prohibits the agency from granting asylum for those who persecuted other people.⁸⁶ Negusie contended that the persecutor bar contained an exception for persecution like his—that was coerced or otherwise the product of duress.⁸⁷ That disagreement teed up a purely legal question of statutory interpretation: Did the statute barring asylum for noncitizen persecutors make an exception for involuntary persecutors?

Following Supreme Court precedent it thought controlled the issue, the BIA concluded that there was no involuntary exception, and thus agreed with the government and denied Negusie's asylum.⁸⁸ What mattered, the BIA concluded, is “the objective effect”—*not* the subjective intent—of the noncitizen persecutor.⁸⁹ The Fifth Circuit agreed with the BIA and its interpretation of the prior Supreme Court precedent.⁹⁰

But the Supreme Court disagreed. It held that *Chevron* applied to the BIA's interpretation of the persecutor bar, what the Court saw as an ambiguous provision of the Immigration and Nationality Act.⁹¹ Justice Kennedy, writing for the Court, explained that the BIA had improperly relied on the Supreme Court's prior precedent and thus had not in fact exercised any independent discretion to which *Chevron* deference might apply.⁹² The underlying legal issue—of whether the persecutor bar applied to involuntary persecutions—thus remained unanswered.

Rather than performing the statutory interpretation itself—on the slate now officially wiped clean of any prior, on-point precedent—the Court remanded the legal question to the agency,⁹³ citing *Chevron*

⁸⁶ See Brief for Respondent at 2, *Negusie*, 555 U.S. 511 (No. 07-499), 2008 WL 3851621, at *2; see also 8 U.S.C. § 1101(a)(42) (2006) (“The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

⁸⁷ See *Negusie*, 555 U.S. at 517–18.

⁸⁸ See *id.* at 521 (“The BIA deemed its interpretation to be mandated by [prior Supreme Court precedent], and that error prevented it from a full consideration of the statutory question here presented.”); *id.* at 522 (“[T]he BIA has not exercised its interpretive authority but, instead, has determined that [the prior Supreme Court precedent] controls.”).

⁸⁹ *Id.* at 516 (quoting *In re Fedorenko*, 19 I. & N. Dec. 57, 69 (B.I.A. 1984)).

⁹⁰ See *Negusie v. Gonzales*, 231 F. App'x 325, 326 (5th Cir. 2007) (citing *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981)).

⁹¹ See *Negusie*, 555 U.S. at 516.

⁹² See *id.* But see *id.* at 538–39 (Thomas, J., dissenting) (disagreeing both that prior precedent did not answer the question and that the persecutor bar was ambiguous). One of us (Walker) clerked for Justice Kennedy the year *Negusie* was decided.

⁹³ *Id.* at 524 (“[W]e find it appropriate to remand to the agency for its initial determination of the statutory interpretation question and its application to this case.”). This conclusion leaves

and its progeny as well as the *Ventura* ordinary remand rule in the process.⁹⁴ In so doing, the Court established the larger rule in the area of remanding for purely legal questions: a court should remand a question of statutory interpretation of an *ambiguous* provision of a statute that an agency administers.⁹⁵ In this way, *Negusie* represents the intersection of the *Chevron* revolution and the *Chenery* revival. By requiring a remand when an agency has not yet freshly considered a legal issue of a statute it is charged with implementing, *Negusie* fused *Chevron*'s principles—as furthered advanced by *Brand X*—into the *Ventura* ordinary remand rule.⁹⁶

This fusion coheres from a doctrinal perspective. If a statute survives *Chevron* step zero (an agency has interpretive authority over the statute⁹⁷) and step one (“the statute is silent or ambiguous” on the issue⁹⁸), *Chevron* counsels the court to remand, even if the agency’s initial statutory interpretation was unreasonable under *Chevron* step two (the agency’s interpretation is based on a “permissible construction” of the statute⁹⁹). The Court implied as much in *Chevron* itself when it stated that “the court does not simply impose its own construction on the statute,”¹⁰⁰ and came close to expressing as much in *Brand X* when it expounded on *Chevron*: “[A] court’s opinion as to the best reading of an ambiguous statute an agency is charged with

no doubt that pure questions of law, e.g., what the meaning of “persecution” is in the statute here, are to be made in the first instance by the agency.

⁹⁴ See *id.* at 523–25 (“Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, ‘the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.’” (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam))); see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“Filling these gaps [in statutes] . . . involves difficult policy choices that agencies are better equipped to make than courts.” (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984))). But see *Negusie*, 555 U.S. at 529 (Stevens, J., concurring in part and dissenting in part) (believing the statutory “threshold question the Court addresses today is a ‘pure question of statutory construction for the courts to decide’” (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987))).

⁹⁵ *Negusie*, 555 U.S. at 523.

⁹⁶ See Walker, *Ordinary Remand Rule*, *supra* note 16, at 1568–74 (discussing *Chevron*’s and *Brand X*’s expansion of the remand rule, even prior to *Negusie*).

⁹⁷ See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

⁹⁸ *Chevron*, 467 U.S. at 843.

⁹⁹ See *id.*; see also Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 81–83 (2013) (offering strategies for agencies to interact with the courts and noting that “even if an agency plays the deference lottery [of when to get *Chevron* deference] and loses (either at the first or second stage), *Brand X* often allows the agency to play the lottery again”).

¹⁰⁰ *Chevron*, 467 U.S. at 843.

administering is not authoritative . . . [because] the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”¹⁰¹

4. The “Rare Circumstances” Wrinkle

The Supreme Court’s immigration-remand trilogy¹⁰² establishes, as a doctrinal matter, a fairly bright-line ordinary remand rule. We say “fairly” because the line is not perfectly bright. The Court has left open a “rare circumstances” exception, where a court need not remand despite the ordinary remand requirements being met.¹⁰³ What constitutes “rare circumstances,” however, remains largely unclear, especially in the immigration context.

Despite the Supreme Court failing to articulate when courts should not remand, what these rare circumstances *should* be can be gleaned from the rule’s underlying separation of powers values, discussed in Section II.A. And they should be rare indeed. We can identify only four narrow circumstances when a remand may not be required. The first two align with the two exceptions Judge Friendly identified in his 1969 *Duke Law Journal* piece by looking at Supreme Court cases in other agency contexts.¹⁰⁴ The latter two come from the

¹⁰¹ Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005). Although the *Negusie* Court only dealt with whether to remand *Chevron*-eligible agency statutory interpretations, Collin Schueler has further argued that “if a reviewing court faces an unsettled interpretive issue and it determines that the relevant statutory provision is ambiguous, the court should remand the matter to the BIA whether or not Congress delegated lawmaking power to the agency.” Collin Schueler, *A Framework for Judicial Review and Remand in Immigration Law*, 92 DENVER U. L. REV. 179, 181–82 (2014). Put differently, “a remand is proper if the BIA’s interpretation will be entitled to either *Chevron* or *Skidmore* deference on review.” *Id.* at 182.

¹⁰² *Negusie v. Holder*, 555 U.S. 511 (2009); *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam); *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

¹⁰³ See *Negusie*, 555 U.S. at 523; accord *Thomas*, 547 U.S. at 186; *Ventura*, 537 U.S. at 16.

¹⁰⁴ See Friendly, *supra* note 22, at 222–25. The Supreme Court cases Judge Friendly cites include *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 247–48 (1964) (affirming agency action and refusing to extend *Chenery* to require remand “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of [the] decision reached”); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion) (affirming agency action and refusing to reverse where the agency’s “command is not seriously contestable,” and where “[t]here is not the slightest uncertainty as to the outcome of a proceeding” before the agency, and thus “[i]t would be meaningless to remand”); and *Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. 486, 526 & n.14 (1968) (affirming agency action and refusing to apply *Chenery* remand rule where the agency’s decision was correct and “the District Court appears to have agreed in substance with all the major findings of the Commission” yet “added several points that it believed would also support the Commission’s conclusions” (emphasis omitted)).

Administrative Procedure Act (“APA”) and the Supreme Court’s recent precedent, respectively.

First, a court need not remand when “the only [agency] error is in a finding relied on in greater or less degree, along with other solid ones, as a predicate for the ultimate conclusion.”¹⁰⁵ Think harmless error. As the Supreme Court recently put it, these are the “rarer cases . . . where remand would serve no meaningful purpose.”¹⁰⁶ In these circumstances, the court can tell by reading the agency’s decision that the agency would do the same thing on remand, even if one of the factors relied on by the court is different than the agency.¹⁰⁷ Because the agency is still the body making the decision, and because its conclusion is still apparent from its decision, the court does not harm the separation of powers.¹⁰⁸ Indeed, the APA specifically approves this kind of decisionmaking by codifying a harmless-error standard for certain agency determinations.¹⁰⁹

Second, a court need not remand when the agency would not have jurisdiction or relative authority to act on remand. Remanding to an agency that lacks jurisdiction to act is, of course, unnecessary.¹¹⁰ And because, by definition, this cannot be an instance of “a question that has been delegated to [the] agency,” separation of powers has nothing to say.¹¹¹ Likewise, remanding to an agency that lacks the *relative authority* to act is similarly unnecessary. This occurs when, for example, a court finds that an agency does not have the power to authoritatively interpret a statute at *Chevron* step zero, or that a stat-

¹⁰⁵ Friendly, *supra* note 22, at 223.

¹⁰⁶ *Smith v. Berryhill*, 139 S. Ct. 1765, 1780 n.21 (2019).

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 1779 (“[A] federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question.”).

¹⁰⁹ *See* 5 U.S.C. § 706 (2018) (“In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”). Some scholars have urged that this exception should be much broader than it currently is. Compare Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 312 (2017) (arguing that “reviewing courts should be more deliberate about the choice of whether to require agencies to rectify errors” because “[t]here is often nothing to be gained, and something to be lost, in assigning make-work”), with Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 110 (2017) (“The current rule-based approach of the ordinary remand rule better accounts for this distrust [in bureaucracy]. And this rule-based approach is consistent with the text and structure of the APA’s appellate review model, especially as the model has evolved over the decades to address various separation-of-powers concerns.”).

¹¹⁰ This explains the Court’s failure to remand when setting aside an agency action in *City of Yonkers v. United States*, 320 U.S. 685, 691–92 (1944).

¹¹¹ *Smith*, 139 S. Ct. at 1779.

ute is unambiguous at *Chevron* step one.¹¹² Just as failing to remand when the court (and not the agency) has the jurisdiction to act does no violence to the separation of powers, neither does failing to remand when the court (and not the agency) has the ultimate authority to act.¹¹³ Congress has either given the interpretive authority to the court (if an ambiguous statute fails *Chevron* step zero), or has kept that authority (if a statute is unambiguous).¹¹⁴ In either instance, the agency does not have the authority, and so there is no separation-of-powers need to remand.

The final two exceptions are likely even rarer. Congress arguably codified the third exception in the APA itself. Section 706 of the APA provides an “unwarranted by the facts” standard of review when “the facts are subject [by statute] to trial de novo by the reviewing court.”¹¹⁵ As one of us has explained elsewhere, “[l]ogically, then, if the reviewing court is empowered to conduct a trial de novo, the court is not required to remand (though it retains discretion to do so) because de novo review allows the court to take the unusual step of substituting its judgment for that of the agency.”¹¹⁶ The Supreme Court, after all, has explained that the ordinary remand rule exists because “[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.”¹¹⁷ Although this is a narrow exception (because Congress seldom provides for trial de novo of agency action), one prominent example is the Tax Court’s trial de novo review of IRS tax deficiency determinations.¹¹⁸

112 Judges, of course, disagree on how much uncertainty is required to find an ambiguity at *Chevron*’s first step. As Justice Kavanaugh has observed, “One judge’s clarity is another judge’s ambiguity.” Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) (book review). The same is no doubt true of non-judges—as illustrated by the two of us. One (Saywell) would view this exception to remand more broadly than the other, as he would find fewer statutory provisions ambiguous. Accord Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) (“In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous. In my view, statutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare, given the number of parts involved.”).

113 See *Smith*, 139 S. Ct. at 1779.

114 Sunstein, *supra* note 97, at 190–91.

115 5 U.S.C. § 706(2)(F) (2018).

116 Hoffer & Walker, *supra* note 16, at 267.

117 Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

118 See Hoffer & Walker, *supra* note 16, at 254–56, 267–68 (detailing the intersection of the APA and Tax Court review of IRS tax deficiency determinations).

Finally, in *Smith v. Berryhill*¹¹⁹ in 2019, the Supreme Court noted in a footnote another potential, narrow exception to the ordinary remand rule: “where the Government joins the claimant in asking the court to reach the merits.”¹²⁰ This exception, like the APA trial de novo exception, seems consistent with separation-of-powers values. The APA exception, of course, is an express legislative command. This executive branch consent exception could theoretically be in tension with legislative command. But if the federal agency charged with implementing the statute in question (as opposed to just the Justice Department’s lawyers) determines the court should answer the question without remand, perhaps that alleviates those concerns. In all events, this consent exception merits deeper engagement and reflection—something that lies outside the ambitions of this Article.

B. *Remand in Practice: Judicial Toolbox for Dialogue*

Each year from immigration adjudications alone, there are thousands of petitions for courts to potentially put these principles into practice.¹²¹ In the last decade alone, the federal courts have cited the Supreme Court’s *Ventura* ordinary remand rule decision in more than 1,500 decisions.¹²²

In a prior article published in *The George Washington Law Review*, one of us examined all (over 400) of the published federal court of appeals decisions that cite the immigration remand trilogy since the Court’s 2002 rearticulation of the remand rule in *INS v. Ventura* through the end of 2012.¹²³ Those cases reveal that most circuits, most of the time, follow the ordinary remand rule.¹²⁴ Indeed, the overall compliance rate in the cases reviewed was over 80%, though there was much variance among circuits; some circuits—especially the Fifth (at 67%) and Ninth (at 68%)—were seemingly less faithful to this command.¹²⁵

¹¹⁹ 139 S. Ct. 1765 (2019).

¹²⁰ *Id.* at 1780 n.21.

¹²¹ See *supra* note 5 and accompanying text. Section I.B draws substantially from Walker, *Referral, Remand, and Dialogue*, *supra* note 16, at 86–95.

¹²² This conservative calculation is based on citations to just the Supreme Court’s 2002 remand opinion in *INS v. Ventura*, 537 U.S. 12 (2002), and not any of the Court’s other decisions articulating the remand rule. As of June 5, 2021, Westlaw KeyCite reports that *Ventura* has been cited in 3,286 published and unpublished judicial decisions, including in 1,603 such decisions over the last ten years.

¹²³ See Walker, *Ordinary Remand Rule*, *supra* note 16, at 1580.

¹²⁴ See *id.*

¹²⁵ *Id.* at 1582 tbl.1. With 154 published decisions in the sample of 342 cases, the Ninth

When circuit courts refused to follow the ordinary remand rule, they often expressed concerns that reflect the judiciary's traditional role as authoritative interpreter of the law and protector of individual rights and due process.¹²⁶ Courts appeared to refuse to remand certain issues when the remand would have allowed the agency to continue to delay or to deny relief when it should not, which in turn would have resulted in courts abdicating their authority to say what the law is, their duty to guarantee that procedures are fair, and their responsibility to ensure that rights are protected in the administrative process.¹²⁷ In one particularly colorful decision, Judge Sidney Thomas, writing for the Ninth Circuit en banc, compared the BIA's process to "Tegwar"—"The Exciting Game Without Any Rules."¹²⁸ Another Ninth Circuit decision compared the application of the remand rule in that case—where, in the court's opinion, "any remand in such circumstances would be extremely unfair to litigants, potentially triggering multiple determinations and repeated appeals"—to "a sort of Zeno's Paradox in which the arrow could never reach the target."¹²⁹

Not all courts that expressed these concerns, however, refused to remand. Instead, in the cases reviewed, some courts followed the ordinary remand rule, but also introduced certain tools to engage in a dialogue with the agency on remand.¹³⁰ For instance, in cases in which courts were skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some circuits required the agency to provide notice of its final determination, retained panel jurisdiction over the matter, or set deadlines for an agency response to the remand.¹³¹ Others suggested (or ordered) that immigration judges be replaced on remand, certified issues for decision on remand, or set forth hypothetical answers in

Circuit's 68% compliance rate skews the overall compliance rate significantly, with eight of the twelve circuits having a compliance rate greater than 90%. *Id.*

¹²⁶ *See id.* at 1558.

¹²⁷ *See id.* For further review of these cases, see generally *id.* at 1585–90.

¹²⁸ *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (citing *MARK HARRIS, BANG THE DRUM SLOWLY* 8 (1st ed. 1956)). *But see id.* at 397 (Trott, J., dissenting) ("When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated.").

¹²⁹ *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000); *accord Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003) (not remanding because "constant remands to the BIA to consider the impact of changed country conditions occurring during the period of litigation of an asylum case would create a 'Zeno's Paradox' where final resolution would never be reached" (citing *Avetova-Elisseva*, 213 F.3d at 1198 n.9)).

¹³⁰ *See Walker, Ordinary Remand Rule, supra* note 16, at 1590.

¹³¹ *See id.* at 1591–94.

dicta or concurring opinions.¹³² Some circuits, moreover, obtained concessions from the government at argument to narrow the potential grounds for denial of relief on remand.¹³³ In total, seven dialogue-enhancing tools emerged from the cases reviewed in that prior study.¹³⁴

The development of this toolbox for court-agency dialogue advances a number of important objectives for judicial review of agency adjudication (as well as agency action more generally).¹³⁵ Unlike refusing to remand—and thus substantively deciding the issue for the agency—these tools allow the court to remain part of the dialogue on remand while respecting congressional delegation and the executive branch’s law-execution responsibility.¹³⁶

These tools can also assist the court in addressing its concerns that a petitioner may get lost in the process on remand or that the relief may be unduly delayed or denied.¹³⁷ As Professor Hammond has observed, the tools can encourage swifter resolution of cases on remand to the agency—addressing one of the greatest concerns of the ordinary remand rule and agency decisionmaking more generally.¹³⁸ Consider, in particular, three of the tools uncovered in the prior immigration adjudication study designed to signal to the agency that the reviewing court is interested in a continued dialogue and a timely (and proper) resolution of the case on remand: (1) requesting notice of the agency decision on remand so as to signal the court’s interest in the outcome; (2) retaining jurisdiction over the matter on remand so that the case returns to the same judges who are already familiar with the

¹³² See *id.* at 1594–1600.

¹³³ These dialogue-enhancing tools are explored in greater detail elsewhere, see *id.* at 1590–1600, as are the statutory and constitutional limits on dialogue-enhancing tools, see *id.* at 1601–07.

¹³⁴ *Id.* at 1614 tbl.2.

¹³⁵ One of us, along with a tax scholar, has explored these implications in much greater detail elsewhere, in the context of the Tax Court’s review of IRS actions. See Hoffer & Walker, *supra* note 16, at 268–95 (explaining how judicial adherence to the ordinary remand rule while utilizing dialogue-enhancing tools preserves proper separation of powers while promoting expertise, consistency, efficiency, and equity on the systemic level).

¹³⁶ See *id.* at 293. Professor Emily Hammond similarly explored this court-agency dialogue in the rulemaking context. Hammond, *Deference and Dialogue*, *supra* note 18, at 1743–71 (examining the dialogue on remand in a variety of agency rulemaking contexts). Professor Hammond also noted that this judicial toolbox for agency dialogue “extends beyond the immediate context . . . to other types of adjudications as well as rulemakings.” Emily Hammond, *Court-Agency Dialogue: Article III’s Dual Nature and the Boundaries of Reviewability*, 82 GEO. WASH. L. REV. ARGUENDO 171, 177 (2014).

¹³⁷ See Hoffer & Walker, *supra* note 16, at 293.

¹³⁸ See Hammond, *Deference and Dialogue*, *supra* note 18, at 1775.

case; and (3) placing a time limit on remand so as to expedite the process.¹³⁹

Most relevant for this Article, an enriched dialogue using these tools has the potential to produce systemic effects on agency decision-making. Consider another set of three tools uncovered in the prior study: (1) providing hypothetical solutions in the court's decision to remand; (2) certifying an issue or issues for remand; and (3) obtaining government concessions at oral argument (or in the briefing) to limit the open issues on remand.¹⁴⁰ These tools not only help focus the dialogue on remand, but they also communicate to the agency specific—and oftentimes even systemic—problems identified by the reviewing court.

Importantly, the tools allow the court to suggest potential solutions for the agency to implement well beyond the particular case under review. The issuance of written, public judicial opinions allows this dialogue to extend beyond the hearing-level or appellate agency adjudicators dealing with the particular case—communicating, for instance, to similarly situated immigrants and other immigration judges handling similar claims. Indeed, such a public dialogue can even reach the agency's principals in Congress and in the executive branch.¹⁴¹

The seven tools identified in the cases reviewed in the prior study are by no means exhaustive. Indeed, in a series of articles, one of us has identified a number of other dialogue-enhancing tools.¹⁴² Table 1, below, lists thirteen such tools. These tools include a pair of remedial options—preliminary injunctive relief and remand without vacatur—that can shape the timing and scope of the remand dialogue.¹⁴³ They also include the court requesting the agency to issue a precedential decision that binds the whole agency and, in turn, brings more uniformity and consistency to trial-level and appellate adjudication within the agency.¹⁴⁴ This tool was actually used by at least one federal circuit court in the prior study, but it went unnoticed until we reviewed the

¹³⁹ Walker, *Ordinary Remand Rule*, *supra* note 16, at 1614 tbl.2.

¹⁴⁰ *See id.*

¹⁴¹ *See* Walker, *Ordinary Remand Rule*, *supra* note 16, at 1610–14 (providing examples).

¹⁴² *See* sources cited *supra* note 16.

¹⁴³ *See* sources cited *supra* note 16.

¹⁴⁴ *See* WALKER & WIENER, *supra* note 19, at 36–40 (exploring the roles of judicial remands and of precedential agency decisions in agency appellate systems); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 188–96 (2019) (detailing how agency-head review and precedential decisionmaking can help bring more consistency to agency adjudication outcomes).

BIA's decision on remand.¹⁴⁵ In the related context of Article I Tax Court adjudication, Professor Susannah Camic Tahk has coined these precedential decisions "spillover precedents," as they can have "ripple effects that subsequently benefit pro se litigants."¹⁴⁶

The final three tools address how to direct the dialogue to government officials other than the hearing-level or appellate agency adjudicator, so as to escalate the matter to the agency head, to the White House, or to Congress.¹⁴⁷ These thirteen tools together likely only scratch the surface. Much more work can be done to identify, examine, and further develop this toolkit for enhancing court-agency dialogue on remand.

In sum, by remanding while using these dialogue-enhancing tools, courts can contribute to a more properly functioning regulatory state where all three branches of government interact and influence agency action—not just in agency adjudication under judicial review, but in the agency's adjudication system as a whole. As Professor Hammond has remarked, "asking agencies to be equal partners in a dialogue enhances participation, deliberation, and legitimacy because . . . interested parties, Congress, and the courts can more easily understand and respond to their reasoning."¹⁴⁸

¹⁴⁵ Compare *Velazquez-Herrera v. Gonzales*, 466 F.3d 781, 783 (9th Cir. 2006) ("Accordingly, we grant the petition for review and remand this case to the BIA to allow it an opportunity to issue a precedential opinion regarding the definition of 'child abuse' under 8 U.S.C. § 1227(a)(2)(E)(i)."), with *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 504 (B.I.A. 2008) (noting the Ninth Circuit's invitation to issue a precedential opinion and accepting that invitation).

¹⁴⁶ Susannah Camic Tahk, *Spillover Tax Precedent 4* (Feb. 19, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3788538> [<https://perma.cc/GK9M-G46P>].

¹⁴⁷ See sources cited *supra* note 16.

¹⁴⁸ Hammond, *Deference and Dialogue*, *supra* note 18, at 1780; see also Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 492 (2010) ("[R]equiring that agencies explain and justify their actions also arguably reinforces political controls by helping to ensure that Congress and the President are aware of what agencies are doing.").

TABLE 1. JUDICIAL TOOLBOX FOR AGENCY DIALOGUE

The Tool	The Dialogue-Enhancing Effect
1. Notice of Agency Decision on Remand	Signals that court is interested in outcome and continued dialogue
2. Panel Retention of Jurisdiction	Sends message that the panel itself is interested in continuing dialogue in the event the agency denies relief
3. Time Limit on Remand	Communicates strong interest in continuing dialogue by speeding up that conversation
4. Hypothetical Solutions	Not only facilitates dialogue on remand, but expressly starts the dialogue before remand
5. Certification of an Issue for Remand	Suggests an agenda for remand, which helps frame dialogue in the event of subsequent judicial review
6. Government Concessions at Oral Argument	Limits issues on remand and focuses court-agency dialogue
7. Suggestion to Transfer to Different Administrative Judge	Attempts to change the primary agency speaker in the dialogue
8. Request Precedential Agency Decision	Seeks “spillover precedent” that could bring more consistency to the agency adjudication system
9. Preliminary Injunctive Relief	Expresses court’s strong opinion on issue and encourages expedited remand/dialogue
10. Remand Without Vacatur	Allows agency action to remand in effect but encourages the agency to provide additional explanation or consideration
11. Escalation of Issue to Agency Head	Requests, in the adjudication context, that the head of the agency exercise final decisionmaking authority on remand
12. Escalation of Issue Within the Executive Branch	Attempts to extend dialogue beyond agency to the executive branch or White House more broadly to apply pressure on the agency
13. Escalation of Issue to Congress	Attempts to extend dialogue beyond agency to Congress to change agency rules or behavior

II. REMAND AS A SYSTEMIC REMEDY, NOT JUST DEFERENCE

Through these many years and many cases, the conventional account for the ordinary remand rule has been one of deference. We explore that conventional account in Section II.A and challenge it in Section II.B. The ordinary remand rule, we conclude, should also be justified in terms of dialogue and judicial engagement, especially in the high-volume agency adjudication context where a reviewing court

can utilize remand to have a more systemic effect on the adjudication system.

A. *The Conventional Account: Judicial Deference*

The theory that motivates the ordinary remand rule has never been fully developed—neither by the Supreme Court that invented it nor by the administrative law scholars who study it and related doctrines.¹⁴⁹ In many ways, though, the theory for the remand rule unsurprisingly mirrors the theory for *Chevron* deference and related judicial deference doctrines in administrative law. First and foremost, the doctrine is based on congressional delegation and thus separation of powers. To borrow from the *Chevron* context, it is “a presumption that Congress, when it left ambiguity” or, perhaps, implementation “in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”¹⁵⁰ This delegation theory, in turn, has been grounded in at least four policy rationales identified by the Court and scholars: expertise, deliberative process, political accountability, and national uniformity of law.¹⁵¹ In theory, these are the core reasons why Congress delegates—or at least should delegate—authority to federal agencies, rather than courts.

Especially in the immigration adjudication context, the remand rule respects separation of powers in at least two distinct ways. First, there is the classic congressional delegation rationale: the remand rule respects Congress’s delegation of adjudicatory or policymaking authority to a federal agency rather than a court (an Article I–Article III separation of powers). As the Supreme Court has explained, when Congress has delegated the authority to the Executive, “a judicial judgment cannot be made to do service for an administrative judgment” because “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”¹⁵² In the prior study, we saw this rationale cited in several of

149 See, e.g., Friendly, *supra* note 22, at 206–22 (noting that the justifications for the *Chenery* rule were “insufficient”).

150 *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996).

151 See generally Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1475–82 (2018) (providing an overview of the theory of *Chevron* deference and some of its criticisms); Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1283–91 (2008) (surveying rationales for *Chevron* deference).

152 *Chenery I*, 318 U.S. 80, 88 (1943); accord Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of the Law: A Brand X Doctrine of Con-*

the reviewed cases. Courts were “cautious,” for example, “not to assume the role of the [agency],”¹⁵³ for doing so would not “pay due respect to Congress’s decision to entrust this initial determination to the [agency].”¹⁵⁴

The second way the remand rule respects separation of powers is by honoring the Executive’s duty to execute the law (an Article II–Article III separation of powers). The Constitution specifies that the Executive must “take Care that the Laws be faithfully executed,”¹⁵⁵ and the Court has acknowledged that “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”¹⁵⁶ Under this precedent, when Congress delegates power to the Executive, Article II therefore counsels courts to allow the Executive to do its job. This duty involves determining the facts relevant for enforcement, applying the law to facts, and making policy judgments about enforcement.¹⁵⁷

As scholars have argued, this Article II–Article III separation-of-powers principle may be particularly strong in the immigration context,¹⁵⁸ where the Executive “has broad, undoubted power over the subject of immigration and the status of” noncitizens.¹⁵⁹ “Judicial deference [to agencies] in the immigration context is of special importance,” the *Negusie* Court explained, because “executive officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”¹⁶⁰ The Court’s decisions in this area sug-

stitutional Avoidance, 64 ADMIN. L. REV. 139, 176–77 (2012) (exploring in more detail *Chevron*’s separation-of-powers goals).

¹⁵³ *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005).

¹⁵⁴ *Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); *accord Mickeviciute v. INS*, 327 F.3d 1159, 1165 (10th Cir. 2003).

¹⁵⁵ U.S. CONST. art. II, § 3.

¹⁵⁶ *Bowsher v. Synar*, 478 U.S. 714, 733 (1986); *see also* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 883 (2001) (“[T]he practical effect [of courts interpreting laws] is for the Court to dictate how the laws shall be executed, or, more precisely, how they shall not be. That arrogation by the Court creates the serious potential of violating Article II by displacing the President as executor of the laws.”).

¹⁵⁷ *See Bowsher*, 478 U.S. at 733.

¹⁵⁸ *See, e.g., Walker, Ordinary Remand Rule, supra* note 16, at 1565 (“Such intrusion into Article II responsibility to execute the law [by failing to remand] may well do more violence to separation of powers when the Executive is exercising express powers under Article II—as opposed to just law-elaboration authority delegated by Congress—as well as when exercising powers over immigration or national security under the plenary power doctrine.”).

¹⁵⁹ *Arizona v. United States*, 567 U.S. 387, 394 (2012) (first citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982); and then citing STEPHEN LEGOMSKY & CRISTINA RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 115–32 (5th ed. 2009)).

¹⁶⁰ *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

gest that courts should not second-guess Article II decisions regarding immigration.¹⁶¹ This aligns, moreover, with the Executive's broad authority over foreign affairs.¹⁶²

Beyond respecting separation of powers, courts have additional reasons to follow the ordinary remand rule, and Congress has more reason to delegate authority to agencies instead of courts—among them comparative expertise, political accountability, deliberative process, and nationality uniformity in the law.¹⁶³ Here, we focus on perhaps the primary policy rationale—and the rationale offered by the Supreme Court in its immigration-remand trilogy—for the ordinary remand rule: agency expertise.¹⁶⁴ Among other things, agency expertise allows the court to better “evaluate the evidence” so that “it can make an initial determination and; in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.”¹⁶⁵ This commonsense approach dates as far back as “New Deal-era administrative law,” which “firmly defined the role of expertise in the administrative state and created the model of judicial deference that would be both emulated and reacted against as administrative law developed during the rest of the twentieth century.”¹⁶⁶ As Professor Richard Pierce has observed, “[a]n agency with expertise in a particular area of regulation has an enormous advantage over a reviewing court in making this complicated judgment.”¹⁶⁷

161 See, e.g., *Arizona v. United States*, 567 U.S. at 394; *Toll*, 458 U.S. at 10; *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Graham v. Richardson*, 403 U.S. 365, 377–80 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418–20 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 62–68 (1941); *Truax v. Raich*, 239 U.S. 33, 42 (1915); see also Walker, *supra* note 152, at 183 (“[Q]uestions of constitutional avoidance abound in the immigration and national security context. . . . This may be due, in part, to the fact that there are myriad undecided constitutional questions—or ‘phantom constitutional norms’—that have arisen in light of the constitutionally unsettled nature of the federal government’s plenary power over immigration and national security.”).

162 See, e.g., *Mathews*, 426 U.S. at 81 & n.17; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

163 See generally Barnett et al., *supra* note 151, at 1475–82.

164 See *Negusie*, 555 U.S. at 524 (commanding remand so that “[t]he agency can bring its expertise to bear upon the matter” (alteration in original) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam))).

165 *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam).

166 Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 441 (2007).

167 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.9, at 377 (4th ed. 2002). For more on the comparative expertise policy justification, see ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE (2020); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); Lisa Schultz Bressman, *Beyond Ac-*

Take the immigration context as an example. Many of the cases reviewed in the prior study, in many different circuits, were remanded primarily because the courts were less expert than the agency.¹⁶⁸ Some courts noted that the case involved “element[s] of fact,” which they were not experts at resolving.¹⁶⁹ And other courts noted that the area of law was one in which the agency could resolve such disputes better than they could, at least in the first instance.¹⁷⁰ Either way, agency expertise is a core reason for courts to follow the ordinary remand rule.¹⁷¹ And it is likely a core reason why Congress has delegated such implementation authority to the agency instead of the court.

B. An Alternative Account: Judicial Engagement and Systemic Effect

It does not, however, do the ordinary remand rule justice to focus only, or even primarily, on judicial deference. Especially in the high-volume agency adjudication context, an alternative account for the ordinary remand rule emerges: one of judicial engagement in the modern administrative state. In this context, by remanding, courts can play a more systemic role in administrative governance’s objectives of fairness, efficiency, and consistency in agency adjudications (and other regulatory contexts).¹⁷²

As one of us has explained elsewhere, mass agency adjudication fits within the broader phenomenon of “bureaucracy beyond judicial review”—the vast, underexplored terrain of regulatory actions that

countability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461, 480 n.88 (2003); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246–47 (1987).

¹⁶⁸ See, e.g., *Sosa-Valenzuela v. Holder*, 692 F.3d 1103, 1114 (10th Cir. 2012); *De La Rosa v. Holder*, 598 F.3d 103, 110–11 (2d Cir. 2010); *Gallimore v. Att’y Gen.*, 619 F.3d 216, 229 (3d Cir. 2010); *Barakat v. Holder*, 621 F.3d 398, 406 (6th Cir. 2010); *Cruz v. Att’y Gen.*, 452 F.3d 240, 248 (3d Cir. 2006); *Habttemicael v. Ashcroft*, 370 F.3d 774, 783 (8th Cir. 2004); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).

¹⁶⁹ See, e.g., *Barakat*, 621 F.3d at 406.

¹⁷⁰ See, e.g., *Gallimore*, 619 F.3d at 229; accord *Liu v. U.S. Dep’t of Just.*, 455 F.3d 106, 117 (2d Cir. 2006).

¹⁷¹ Elsewhere, Professor Shoba Wadhia and one of us have expressed skepticism about the agency’s expertise in immigration adjudication—but only when it comes to statutory interpretation and only in comparison to agency rulemaking. Wadhia & Walker, *supra* note 7, at 1215–23.

¹⁷² Professor Stephanie Hoffer and one of us have explored elsewhere the ordinary remand rule’s role in advancing the values of consistency, efficiency, and fairness in the tax adjudication context. See Hoffer & Walker, *supra* note 16, at 276–89.

evade judicial review.¹⁷³ It may seem strange to classify formal adjudication as part of bureaucracy beyond judicial review. Formal adjudication, after all, involves trial-like agency proceedings before an administrative law judge or some other agency adjudicator, where the parties generally have the statutory right to seek judicial review of the agency's final decision.¹⁷⁴ But most formal agency adjudication is insulated from judicial review, especially mass agency adjudication (such as immigration, Social Security, and veterans' benefits adjudications) where only a fraction of cases will ever reach federal courts.¹⁷⁵

Focusing on immigration adjudication in particular, the federal courts of appeals review thousands of immigration adjudication petitions each year and issue some 5,000 decisions in those cases.¹⁷⁶ Yet, there are nearly 300,000 final decisions from the immigration courts and BIA each year, the vast majority of which never make it to federal court.¹⁷⁷ This is not the result of an efficient agency adjudication system that promotes interdecisional consistency. To the contrary, the disparities in adjudication outcomes at the agency level are well chronicled, with one seminal study calling the immigration adjudication system a "refugee roulette."¹⁷⁸

These interdecisional (in)consistency problems are exacerbated by the fact that many noncitizens navigate the process without legal representation. According to one 2015 study, only about two in five immigrants in removal proceedings in immigration court had legal representation, and less than half of those represented had representation for all of their agency hearings.¹⁷⁹ Unsurprisingly, immigrants represented by counsel are more likely to prevail.¹⁸⁰ That same study found that represented immigrants won tenfold (21%) more than unrepresented immigrants (2%).¹⁸¹ That is in part because unrepresented immigrants were fifteen times less likely to even seek relief

¹⁷³ Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 DÆDALUS: J. AM. ACAD. ARTS & SCIS. 155, 160–61 (2021).

¹⁷⁴ See Walker & Wasserman, *supra* note 144, at 148–53 (providing overview of APA-governed formal agency adjudication).

¹⁷⁵ See Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1241 (2020).

¹⁷⁶ U.S. COURTS, *supra* note 5.

¹⁷⁷ Walker, *supra* note 3, at 1632.

¹⁷⁸ JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2011).

¹⁷⁹ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 7–8 (2015).

¹⁸⁰ *Id.* at 9.

¹⁸¹ *Id.*

from removal.¹⁸² Other studies point to the same result and offer reasons why this happens—that, for example, unrepresented immigrants are far less likely to ultimately seek further review of an unfavorable decision.¹⁸³ The lack of legal representation no doubt plays a significant role in creating the stark disparities in the immigration adjudication system, and in preventing many potentially successful claims from reaching an Article III court.

To all of this bureaucracy beyond judicial review, however, the ordinary remand rule has the potential to be a powerful tool. In remanding in *Liu v. U.S. Department of Justice*,¹⁸⁴ Judge Calabresi aptly explained why this is so. Among the six reasons he noted, he emphasized the need for national uniformity and consistency in the application of federal immigration law and for the agency to pay sufficient attention to complicated issues the agency frequently confronts.¹⁸⁵ He also underscored the efficiency gains in remanding (as opposed to the court deciding the issue itself):

Given the high volume of cases that may include this issue, and because the BIA, in performing its appellate function, will review these decisions long before they are brought before us, we believe there is great value in having the BIA develop standards as it addresses these cases, which, in turn, will inform how we appraise findings of frivolousness when they reach us in the future.¹⁸⁶

Perhaps most importantly, Judge Calabresi emphasized that a remand empowers the agency to fulfill its responsibility to ensure “that claims be adjudicated in a fair and reasoned way.”¹⁸⁷ Refusing to remand can be counterproductive. That is because, he explained, “[s]tandardless and *ad hoc* decisionmaking by federal courts or by individual immigration judges is especially to be avoided with respect to the issue before us today. And the place to start in determining standards is in the agency empowered by Congress to administer the law, the BIA.”¹⁸⁸

¹⁸² *Id.*

¹⁸³ See David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1193 (2016) (“More than half of all immigrants with lawyers appeal if they lose before the immigration judge, while only 3% of immigrants without lawyers appeal.”).

¹⁸⁴ 455 F.3d 106 (2d Cir. 2006).

¹⁸⁵ See *id.* at 116–17.

¹⁸⁶ *Id.* at 117.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

In other words, if federal courts want to have a more systemic effect on mass agency adjudication, they should vigorously apply the ordinary remand rule along with accompanying dialogue-enhancing tools. The remand rule furthers this systemic-effect objective in at least three ways.

First, it allows agencies to create national rules. In “a legal system in which the supreme court can review only an insignificant proportion of the decided cases,”¹⁸⁹ chances are there will be inconsistent decisions among the courts of appeals. Not so, though, if every circuit court remanded cases to the single agency charged with deciding those cases, as some courts have recognized.¹⁹⁰ For instance, the BIA, by regulation, must “provide clear and uniform guidance to the [executive branch], the immigration judges, and the general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations.”¹⁹¹

Second, an agency’s consistent and national rules allow individuals subject to agency adjudication to know the rules in advance. In a system in which fewer than two in five immigrants in removal proceedings have legal representation, and in which less than half of those represented have legal representation at all during their agency hearings,¹⁹² knowing the standards in advance is especially important. Indeed, as Professor Tahk empirically explores in the tax adjudication context, such “spillover precedents” do not just benefit the parties in that case but have the potential to help all similarly situated parties, including those navigating the agency adjudication process without legal representation.¹⁹³

Third, the ordinary remand rule forces the agency to recognize and correct its mistakes, leading to system-wide improvement. Professor Stephanie Hoffer and one of us have made a similar observation in the tax adjudication context:

[T]he Tax Court’s acceptance of the ordinary remand rule should enhance consistency . . . because it will force the agency to recognize and correct its mistakes. Although remand will increase the IRS’s workload in the short term, in a world of limited resources it should create a strong incentive

¹⁸⁹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

¹⁹⁰ See, e.g., *Osakwe v. Mukasey*, 534 F.3d 977, 979 (8th Cir. 2008); *Rajah v. Mukasey*, 544 F.3d 449, 455 (2d Cir. 2008).

¹⁹¹ 8 C.F.R. § 1003.1(d)(1) (2020).

¹⁹² Eagly & Shafer, *supra* note 179, at 7–9.

¹⁹³ See Tahk, *supra* note 146.

for the agency to internalize the Tax Court's rulings by creating a process that will increase the frequency of correct determinations in the first instance. For example, the IRS may seek to avoid remand via aggressive employee training or creation or clarification of internal written guidance for employee use, among other things. These changes hopefully should lead to improved consistency and quality of determinations not just in cases that eventually reach the Tax Court but, more importantly, in the vast majority of cases that are never appealed.¹⁹⁴

We will also see a fairer and more consistent system. Ironically, these concerns motivate why many courts fail to remand: they understand that petitioners on remand may not get a fair shake, may get lost, or may, at the least, be in limbo for longer than they should.¹⁹⁵ Similarly situated petitioners are not necessarily treated similarly, and there are great disparities in outcomes that further agency and judicial review do not presently correct. But by remanding and engaging the agency, rather than making a one-off decision, courts can help produce fairer results on a more systemic level.

What's more, in a system in which courts make one-off decisions rather than remanding, agencies have misaligned incentives, leading to an increased likelihood of poor decisionmaking and ultimately to system-wide inefficiency in the long run.¹⁹⁶ If the agency knows its decision will be reviewed anew by the court, and knows further that it will never have to correct its mistakes on remand, it faces less incentive to avoid hastily deciding cases without proper regard for reaching the correct result.¹⁹⁷ But if it knows that it will have to redo its decision if it is improperly done, then it should have more incentive in the first instance of working hard to get it right.¹⁹⁸ In a system where the ordinary remand rule is routinely followed, we should see better

¹⁹⁴ Hoffer & Walker, *supra* note 16, at 281.

¹⁹⁵ See *supra* Section I.B.

¹⁹⁶ See Hoffer & Walker, *supra* note 16, at 283.

¹⁹⁷ See *id.* at 284.

¹⁹⁸ See, e.g., Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1146 (2012) ("[A]gencies . . . can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest (that is to say, the most likely to be litigated) issues with little experience with the overall scheme and its patterns."); see also, e.g., *Alliu v. Holder*, 569 F. App'x 1 (1st Cir. 2014) (per curiam) ("[C]onsiderations of fairness, efficiency, and the appropriate husbanding of scarce judicial resources all militate in favor of remanding this case so that the BIA can do now what it should have done in the first place.").

agency decisions, leading to less work for the courts, less work for the petitioners, and, yes, eventually less work for the agency. With a healthy and productive court-agency dialogue, we should see a more efficient regulatory system in the longer run.

When the ordinary remand rule is viewed in these terms, it is no longer just another judicial deference tool in administrative law. It becomes a tool for judicial engagement and greater judicial oversight of the administrative state.

III. COURT-AGENCY DIALOGUE: AN EMPIRICAL ASSESSMENT

This alternative account of the ordinary remand rule as a tool for systemic oversight assumes that an actual dialogue between the court and agency (and, at times, the agency's dual principals in Congress and the President) can exist on remand. In this Part, we present the findings from two separate studies on agency adjudication. Section III.A explores the remand-related findings from a study of agency appellate systems that one of us conducted for the Administrative Conference of the United States. Section III.B presents the findings from a study both of us conducted on agency immigration adjudication decisions on remand. And Section III.C concludes with a post-script on the *Negusie* case from the Court's immigration-remand trilogy—a case that is now back in the Fifth Circuit after more than eleven years on remand at the agency.

A. *Administrative Conference Study on Agency Appellate Systems*

Appellate systems in agency adjudication are widespread, and yet little comparative work has been done to examine their structures, functions, common challenges, and best practices. Last year, one of us coauthored a comprehensive study with Matthew Wiener, Acting Chair of the Administrative Conference of the United States, on appellate systems in the federal regulatory state.¹⁹⁹ As noted in the recommendations adopted by the Administrative Conference, our study focused on identifying recommendations on a number of subjects:

First, an agency's identification of the purpose or objective served by its appellate review; second, its selection of cases for appellate review, when review is not required by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth, its management, administration, and

¹⁹⁹ See WALKER & WIENER, *supra* note 19.

bureaucratic oversight of its appellate system; and sixth, its public disclosure of information about its appellate system.²⁰⁰

To conduct our study, we identified appellate systems at a dozen agencies for in-depth examination: (1) the Administrative Appeals Office at the U.S. Citizen and Immigration Services; (2) the Administrative Review Board at the Department of Labor; (3) the Appeals Council at the Social Security Administration; (4) the Board of Immigration Appeals at the Executive Office for Immigration Review; (5) the Board of Veterans Appeals at the Department of Veterans Affairs; (6) the Departmental Appeals Board and Medicare Appeals Council at the Department of Health and Human Services; (7) the Environmental Appeals Board at the Environmental Protection Agency; (8) the Equal Employment Opportunity Commission; (9) the Merits Systems Protection Board; (10) the National Labor Relations Board; (11) the Patent Trial and Appeals Board at the Patent and Trademark Office; and (12) the Securities and Exchange Commission.²⁰¹

For each agency appellate system in the study, we created a detailed case study based on publicly available information.²⁰² We then conducted semistructured interviews with at least one high-ranking official at each agency—in most cases the head of the agency appellate program.²⁰³ During the interviews, we largely followed a carefully designed script, but we also asked follow-up questions both as to answers given during the interview and as to questions we had based on the extensive agency overview we had created in advance of the interview.²⁰⁴ This study design has significant methodological limitations, which we flag in our report.²⁰⁵ Needless to say, this was an exploratory study.

Although not the central focus of our study and interviews, our interviews with agency officials shed fascinating light on the interaction between agency appellate bodies and federal courts.²⁰⁶ It turns

²⁰⁰ Administrative Conference Recommendation 2020-3: Agency Appellate Systems, 86 Fed. Reg. 6618, 6618–20 (Jan. 22, 2021).

²⁰¹ WALKER & WIENER, *supra* note 19, at 20–21; *see also id.* at 20–22 (detailing methodology for selecting the dozen case studies).

²⁰² *See Agency Appellate Systems*, ADMIN. CONF. U.S., <https://www.acus.gov/research-projects/agency-appellate-systems> [<https://perma.cc/UH3R-5QOK>] (the case studies are available in an online appendix located under the Project Documents heading).

²⁰³ *See* Walker & Wiener, *supra* note 19, at 21–22.

²⁰⁴ *See id.* at 22.

²⁰⁵ *See id.* (detailing study methodology and limitations).

²⁰⁶ The following findings are substantially reproduced from *id.* at 39–40, 52.

out that in most agency appellate programs, adjudicators pay close attention to judicial decisions that remand cases to the agency.²⁰⁷ And they take a number of measures to interact with the judicial decision on remand.²⁰⁸

Most obviously, the agency on remand must issue a new decision that responds to the federal court's decision (some agencies also have the ability to settle cases on remand).²⁰⁹ To do this, many appellate bodies confer with their full membership to discuss how to respond.²¹⁰ Among potential responses, the appellate adjudicators must often decide when to adopt the federal court's precedent nationwide or merely acquiesce to the precedent in the relevant federal circuit court's jurisdiction (or not).²¹¹ In the statutory interpretation context, they may even decide to adopt a different interpretation of an arguably ambiguous statute and seek *Chevron* deference under the *Brand X* doctrine.²¹² Sometimes the appellate adjudicators will decide to remand the case to the hearing-level adjudicator to make new factual findings or otherwise reconsider the remanded issue in the first instance.²¹³

It is important to note that the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction for three of the appellate programs in our study: the Board of Veterans Appeals, the Merit Services Protection Services, and the Patent Trial and Appeal Board.²¹⁴ For those agencies, there is no decision whether to acquiesce.²¹⁵ But officials from those agencies underscored how deep and interactive their relationship with the Federal Circuit has become. The agency appellate body and the Federal Circuit are in a continuing dialogue about the development of policy and precedent and the functioning of the adjudication program.²¹⁶ Officials at agency appellate bodies that are regularly reviewed by the U.S. Court of Appeals for the D.C. Cir-

207 *See id.*

208 *See id.*

209 *See id.*

210 *See id.*

211 *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679 (1989).

212 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

213 *See* WALKER & WIENER, *supra* note 19, at 39.

214 *See* 28 U.S.C. § 1295 (2018). A small class of cases from the Merit Services Protection Services may be appealed to a circuit other than the Federal Circuit. *See* 5 U.S.C. § 7703 (2018).

215 *See* 28 U.S.C. § 1295.

216 *See* WALKER & WIENER, *supra* note 19, at 39.

cuit made similar observations about the special relationship they have with the D.C. Circuit.²¹⁷

Aside from that circuit-court acquiescence question, the agency has the choice of how broadly or narrowly to construe the judicial command. Oftentimes, for instance, courts command the agency to flesh out the answer to the remanded issue. There are also complicated questions about whether the agency head or appellate body should issue a precedential decision (or other informal guidance) in response to the judicial remand in order to help the hearing-level adjudicators incorporate the circuit-court command, or whether to just remand the case back to the hearing-level adjudicator to deal with all of those issues in the first instance.²¹⁸ The agency appellate programs in our study take different approaches to these judicial remand issues, and recognize that remands present both opportunities and challenges for their agency adjudication program more generally.²¹⁹

Federal agencies not only respond to judicial remand through subsequent agency decisions, but they also respond by issuing guidance and training within the agency for the hearing-level and appellate adjudicators and for other agency officials.²²⁰ At some agencies, the appellate body takes the lead in this training.²²¹ At others, the agency general counsel's office plays that role.²²² A number of officials interviewed noted how the agency appellate bodies discuss these judicial decisions at regular meetings and agency-wide conferences and trainings.²²³ In other words, the judicial remand decisions have the potential to have a much more systemic effect on agency operations and adjudication outcomes.

When discussing judicial remands, a recurring theme emerged. Interviewed agency officials underscored that this court-agency interaction is not a one-way street.²²⁴ It is not just the circuit court that influences the agency; the agency's decisions also influence the court's approach.²²⁵ They view this interaction as more of a partnership than a supervisory relationship.²²⁶ To be sure, this study was necessarily ex-

²¹⁷ *See id.* at 40.

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *See id.*

²²² *See id.*

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.*

ploratory and qualitative. Much more empirical work needs to be done to attempt to assess the quality and depth of dialogue and engagement that occurs on remand. The next study, presented in Section III.B, is one such attempt to measure dialogue in another way, in one adjudication system.

B. FOIA-Based Study of Immigration Decisions on Remand

Another way to empirically explore the court-agency dialogue on remand is to review the remand decisions themselves. In the prior immigration adjudication study discussed in Section II.B, the circuit courts remanded 239 cases. As of 2014, Westlaw KeyCite showed that twenty (8%) of those cases returned to the court of appeals after remand.²²⁷ Using Westlaw alone, we can extrapolate some important insights. Fourteen of these twenty cases (70%) were denied when they returned to the court, meaning the court subsequently agreed that the agency had acted within its delegated authority on following the remand.²²⁸ In the other six cases (30%), the courts reversed, but they remanded again in four of the six cases.²²⁹

Although surface-level due to Westlaw's limitations and due to the lack of public availability of the agency decisions, even this small sample shows some back and forth between the courts and agencies. Take *Ucelo-Gomez v. Gonzales*²³⁰ as an example. The Second Circuit remanded for the immigration judge to decide an issue in the first instance.²³¹ On remand, the BIA reached the same determination as the immigration judge, and the panel subsequently agreed with the agency.²³² The court concluded that the agency had sufficiently engaged the issue, writing that "[t]he BIA has fulfilled the terms of our remand by rendering a timely opinion as to [the precise issue on remand]. We retained jurisdiction to decide the issues set forth by the petition, and upon further consideration in light of the BIA's opinion, we now deny the petition."²³³ Other cases showed even more give and

²²⁷ Walker, *Ordinary Remand Rule*, *supra* note 16, at 1615.

²²⁸ *Id.*

²²⁹ See *Montes-Lopez v. Holder*, 694 F.3d 1085, 1094 (9th Cir. 2012) (finding due process violation in immigration hearing on remand); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 612 (3d Cir. 2011) (remanding on different question of statutory interpretation); *Castañeda-Castillo v. Holder*, 638 F.3d 354, 363 (1st Cir. 2011) (remanding on different legal question); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 906 (8th Cir. 2009) (remanding to the BIA to resolve additional factual issues).

²³⁰ 464 F.3d 163 (2d Cir. 2006) (per curiam).

²³¹ See *id.* at 165.

²³² See *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007) (per curiam).

²³³ See *id.*

take. In *Valdiviezo-Galdamez v. Attorney General*,²³⁴ for example, Judge Hardiman concurred in the Third Circuit's second remand order, but used the hypothetical-answer dialogue-enhancing tool to express concern about the BIA's factfinding.²³⁵

So that we could better understand the court-agency dialogue on remand, far better than what Westlaw has to offer, we sought the agency decisions on remand over a number of years and a number of requests under FOIA.²³⁶ In June 2013, we filed a FOIA request seeking all of the agency remand decisions in all of the cases in the previous study. The agency released decisions on a rolling basis beginning in August 2014 and ending in September 2015. But these decisions were highly redacted, and they came in at snail's pace. When we finally received all of the decisions the agency was willing to provide, we began to analyze them. Because the agency decisions were so highly redacted, this was no easy task. In order to match the decisions so that we could examine the court-agency dialogue in greater detail, we worked with a team of research assistants to compare key facts, dates, and other information between the judicial and agency decisions. Indeed, just matching the remanded agency decision with the court remanding opinion was not always possible.

After attempting to match the redacted agency decisions to their court decisions, we coded the agency decisions for six key features: (1) whether final decision was issued by the BIA or immigration judge; (2) the length of time between the court and agency decisions; (3) the case outcome; (4) whether the noncitizen had legal representation on remand; (5) whether the agency discussed the court's decision and reasoning; and (6) how the agency reacted to the dialogue-enhancing tools the court used.²³⁷ We also included the agency decision's key language and made notations of any other significant aspects of the case.

²³⁴ 663 F.3d 582 (3d Cir. 2011).

²³⁵ See *id.* at 612, 618 (Hardiman, J., concurring) ("Should the BIA choose to adopt new requirements for 'particular social group,' I believe that it must also remand to the IJ for further factual development. . . . We did not authorize the BIA to usurp the IJ's role as factfinder.").

²³⁶ See generally Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L.J. 53 (1989).

²³⁷ Two different research assistants independently coded each decision on remand, and then one of us (Walker) reviewed each coded decision. The other (Saywell) also reviewed numerous agency decisions to help build out the analysis in this Section. It should go without saying that this is an exploratory study, from which generalizations should not be drawn due to the limited sample size and various other methodological limitations.

We were able to match 258 judicial decisions with their corresponding agency decision. Our sample did not include any decisions where the petition was denied because the agency in those instances had no more work to do. But the sample did include forty-five cases that did not follow the ordinary remand rule. In those cases, the agency would still get the case back and would still have to take some action. That number (17%) is consistent with the overall percentage of decisions from the previous study that failed to follow the ordinary remand rule, meaning our matched sample appears representative as to what happens in the agencies both when courts usurp the role of the agency and when they follow the ordinary remand rule. The remaining cases, 213 in all, followed the ordinary remand rule. In other words, we are missing only twenty-six cases from the prior study's remanded decisions.

We focus here on those 213 cases where the courts followed the ordinary remand rule, and we were able to match the redacted agency decisions on remand with the judicial decisions in the same case.²³⁸ There is a lot to be learned from this data. We begin with the outcome—whether the noncitizen (labeled the “respondent” before the agency) won or lost, or whether something else happened to the case. We then detail the time taken on remand, the rate of legal representation before the agency, the extent to which the agency engages with the court's reasoning, and the role that the dialogue-enhancing tools play on remand.

1. *Outcomes on Remand*

Recall that in the cases we reviewed, many courts worried that if they did not grant relief, the noncitizen would not prevail before the agency. But the remand decisions do not seem to support that fear.

Respondents lost outright in only forty-four of the 213 remanded cases (20.7%). Of those forty-four cases where the respondent was ordered removed, the respondent failed to appear in nine of them and

²³⁸ We have published these agency decisions on remand, along with our coding dataset, here: Christopher Walker, *Replication Data for Remand and Dialogue in Administrative Law*, HARV. DATAVERSE (2021), <https://doi.org/10.7910/DVN/HKBFON> [<https://perma.cc/73KT-4AFJ>]. The agency produced the decisions on remand in five batches, with some duplicate decisions: (A) August 13, 2014 (seventy cases); (B) November 13, 2015 (one hundred cases); (C) November 24, 2014 (forty-eight cases); (D) April 13, 2015 (forty-seven cases); and (E) September 21, 2015 (twenty-three cases). Throughout this Part, we cite to these remanded decisions by batch and case number, such as A01, B03, E07, and so forth. The decisions are similarly organized in our online database. Our coding dataset is available on request.

thus forfeited applications for relief from removal.²³⁹ Because of that failure to appear, we cannot ascertain the effect of the judicial remand would have had on the merits of the case. We also cannot tell from the agency decisions alone whether the prolonged delay of the agency decisionmaking on remand may have caused the respondent to get lost in the process—another concern sometimes noted by courts when refusing to remand. But if we exclude the failure-to-appear cases and only look at cases where the respondent lost on the merits, that would only be thirty-five cases, or 16.4% of our dataset.

By contrast, the noncitizen prevailed in obtaining at least some of the relief originally sought in 108 cases (50.7%). This relief included the agency adjudicator determining either that the respondent was not subject to removal or that the respondent was eligible for some type of relief from removal, such as asylum, withholding of removal, cancellation of removal, adjustment of status, or some sort of waiver.²⁴⁰

The remaining sixty-one cases (28.6%) could not easily be classified as a “win” or a “loss” based on the remanded issue. The great majority of these cases, however, have resulted or will result in the noncitizen not being ordered removed. In particular, in thirty-four cases (16.0%), the removal proceedings were terminated or administratively closed. There are a number of reasons why proceedings could be terminated or administratively closed, and in most cases in the dataset the immigration court’s short order provides no insight into those reasons.²⁴¹ Some reasons would seem like a “win” for the respondent, including obtaining or being able to apply for adjustment of status,²⁴² obtaining deferred action status,²⁴³ or the Department of Homeland Security (“DHS”) otherwise exercising prosecutorial discretion not to proceed.²⁴⁴ Others, however, provide less comfort, including when proceedings are administratively closed or terminated without prejudice because the respondent has left the United States.²⁴⁵

²³⁹ See A39; A70; B23; B46; B51; B98; C21; C34; D45.

²⁴⁰ See, e.g., C13 (including the standard immigration judge order form with a checklist of the various types of relief from removal).

²⁴¹ In one representative decision, the immigration judge entered a one-sentence order: “And now, this 20th day of November, 2009, it is hereby ordered that Respondent’s Motion to Recalendar and Terminate Proceedings is Granted as unopposed.” A25.

²⁴² See A08; A29; A63; B04; B13; C01; E06.

²⁴³ See B24.

²⁴⁴ There are many cases in the dataset in which DHS consents to the administrative closure or termination of removal proceedings, though the immigration court’s decision provides no additional details. See, e.g., A15; A37; A42; A63; C38; D35; D39.

²⁴⁵ See A43; A50.

In at least four cases in our dataset, the proceedings were terminated due to the respondent's death.²⁴⁶

The remaining twenty-seven cases (12.7%) are even less insightful. In two cases the immigration court granted the respondent's request for voluntary departure in lieu of removal,²⁴⁷ in two cases the BIA reversed an immigration court's finding of a frivolous asylum filing,²⁴⁸ and in two other cases the BIA addressed motions to reopen—granting one filed by both parties²⁴⁹ and denying one sought by DHS.²⁵⁰ In another case, the BIA granted respondent's motion to reissue its decision, so that a timely appeal could be filed.²⁵¹ And in the final twenty (9.4%) cases, the BIA had remanded the case to the immigration court, and a final decision had not been rendered at the time when the government responded to our FOIA request.²⁵²

In sum, if court-agency dialogue is measured by whether the agency responds by granting the relief the reviewing court suggests is likely warranted, the agency decisions reviewed underscore that the agency is at least listening. Below we'll take a closer look at when and how the agency speaks back. Moreover, to the extent concerns about judicial remand center on the agency just finding another reason to withhold relief on remand, those concerns seem overstated. Respondents lost in just 20.7% of the remanded cases, and that percentage decreases to 16.4% if the failure-to-appear cases are excluded.

2. *Timing*

In the cases reviewed, courts that refused to remand also expressed concerns about undue delay on remand. As noted in Section I.B, the Ninth Circuit has compared judicial remand to Tegwar²⁵³ as well as “a sort of Zeno's Paradox in which the arrow could never reach the target.”²⁵⁴ “[F]inal resolution would never be reached” with constant remands,²⁵⁵ some courts worry, and “[n]o immigrant should

²⁴⁶ See A04; D15; D28; E04.

²⁴⁷ See B30; C10.

²⁴⁸ See D05; D36.

²⁴⁹ See C01.

²⁵⁰ See C04.

²⁵¹ See B39.

²⁵² See D01; D02; D07; D08; D11; D14; D16; D18; D22; D23; D25; D26; D32; D33; D40; D41; D42; D43; D44; D46.

²⁵³ See *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (citing MARK HARRIS, *BANG THE DRUM SLOWLY* 8, 63 (1st ed. 1956)).

²⁵⁴ *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000).

²⁵⁵ *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003).

have to live [for] years with the uncertainty as to whether she can stay in this country or not.”²⁵⁶

These are serious concerns. But are they grounded in empirical reality? In our dataset of 213 agency decisions on remand, the final agency decision in the record produced by the agency via FOIA was entered in as little as 99 days after the judicial remand and in as much as 3,368 days (9.2 years). The mean duration on remand was 806.5 days (2.2 years), and the median duration was 579 days (1.6 years). Of those 213 decisions, 64 were issued within one year of judicial remand (30.0%), 123 within two years (57.7%), and 164 within three years (77.0%). Conversely, 30 decisions were issued more than four years after judicial remand (14.1%), 19 more than five years (8.9%), 11 more than six years (5.2%), and 6 more than seven years (2.8%). Two of those six exceeded seven years at 8.6 years and 9.2 years, respectively.²⁵⁷

It is helpful to disaggregate this data based on case outcome. As noted above, in thirty-four cases (16.0%), the removal proceedings were terminated or administratively closed. And in many of these cases, that happened because the noncitizen had subsequently qualified for adjustment of status or some other relief from removal. It is quite possible that the respondent, as a matter of strategy and/or DHS as a matter of prosecutorial discretion, delayed the proceedings on remand to allow time for the noncitizen to qualify for other relief from removal.

In the forty-four cases where the respondent was denied relief, the mean duration between judicial remand and final agency decision was 904.3 days (2.5 years), and the median duration was 602.5 days (1.7 years). In the 108 cases where the respondent obtained some relief on which the court remanded, the mean duration was 747.5 days (2.1 years), and the median duration was 578.5 days (1.6 years). By contrast, in the thirty-four cases that were terminated or administratively closed, the mean duration rose to 1,037.5 days (2.8 years), and the median duration rose to 965.5 days (2.7 years). Finally, it is worth reiterating that twenty cases in our dataset were still pending before the agency on remand when the agency responded to our FOIA request. In the records we have, the mean duration from judicial remand to the last agency decision in the FOIA response in those twenty cases

²⁵⁶ *Mayo v. Ashcroft*, 317 F.3d 867, 874–75 (8th Cir. 2003); *see also Baballah v. Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004).

²⁵⁷ C09; D17.

was 526.3 days (1.4 years), and the median duration was 338.5 days (0.9 years).

We are not in a position to draw any definitive conclusions about whether these post-remand adjudication times are reasonable. For some noncitizens, each day living under legal uncertainty on remand could be personally devastating, and even more so if they face the threat of detention. On the other hand, some delays allow noncitizens to qualify for other relief from removal, or to otherwise spend more time in the United States with their loved ones. After all, the median duration on remand for those who are denied relief is 1.7 years, compared to 1.6 years for those who obtain some relief on which the judicial remand was based. And for those whose proceedings are terminated or administratively closed—many of whom qualify for other relief from removal—the median duration extends a full year to 2.7 years.

3. *Legal Representation*

One element that seems to make the agencies listen, and grant respondents' relief, is whether the respondent is represented by counsel. As detailed in Section II.B—and as documented by Professor Ingrid Eagly and then-law clerk Steven Shafer, for example—fewer than two in five noncitizens in removal proceedings have legal representation,²⁵⁸ and less than half of those represented had legal representation during all of their agency hearings.²⁵⁹ Pro se respondents in that study succeeded only two percent of the time, compared to twenty-one percent for those represented by counsel.²⁶⁰

Our study included only those individuals who won in federal court—those, that is, that successfully overturned the agency's decision and obtained a remand. It makes sense, then, that in 197 of the 213 cases the respondent had counsel (92.5%).²⁶¹ In the 108 cases where the respondents obtained some relief on which the judicial re-

²⁵⁸ Eagly & Shafer, *supra* note 179, at 7.

²⁵⁹ *Id.* at 8.

²⁶⁰ *Id.* at 9.

²⁶¹ One of those immigrants obtained counsel on his second trip to the BIA. *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 602 (3d Cir. 2011) (“[N]o one entered an appearance with the BIA on Valdiviezo-Galdamez’s behalf on remand. Thus, he had no attorney of record. Valdiviezo-Galdamez appeared pro se and did not file a brief.” (emphasis omitted)); *see also* *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 291 (3d Cir. 2007). This seemed to have helped change his fate, providing at least anecdotal evidence that having counsel helps. When the petitioner was unrepresented before the BIA on October 22, 2008, the BIA dismissed his appeal. *See* D08. Yet after he obtained counsel, the BIA remanded to the immigration judge on February 7, 2014. *See id.* The agency has not yet completed its review. *See id.*

mand was based, ninety-nine were represented (91.7%). In the forty-four cases where the respondents were denied relief, forty were represented (88.9%). And in the thirty-four cases terminated or administratively closed, all but one respondent had legal counsel (97.1%).

No doubt in part because these cases all deal with judicial remands to the agency, the rate of legal representation is much higher than in prior, more extensive empirical studies. Not only are we dealing with small numbers here, but these are cases where a court has found merit for a remand that likely raises the likelihood of legal representation. Yet, the fact that nine in ten immigrants have counsel on remand is noteworthy for another reason: with legal representation, these noncitizens are in a much better position than the average, unrepresented respondent to encourage the BIA to craft effective “spillover precedents” on remand—precedents that benefit other similarly situated (though likely *pro se*) respondents—and thus have a more profound systemic effect of the immigration adjudication system.²⁶²

4. *BIA Discussion of Judicial Decisions*

As detailed in Section III.B.1, that only one in five decisions on remand resulted in a denial of all relief from removal suggests that the agency listens on remand—that is, that it takes seriously the judicial command to consider the case anew. Indeed, the outcomes on remand provide at least some support for the proposition that there is a court-agency dialogue on remand. But case outcomes alone do not tell us much about the depth or breadth of that dialogue.

A deeper dive into the BIA decisions on remand, however, reveals an often-rich dialogue between the agency and the court.²⁶³ Start with the basics of dialogue: fully understanding what the other side says and why they say it. The BIA, our study finds, does just that—it often discusses and demonstrates comprehension of why the court remanded the case, often at great length. In 168 of the 213 BIA decisions on remand (78.9%), the BIA not only mentions that the reviewing court remanded the case but also discusses the reasons for

²⁶² For further discussion of spillover precedents, see *supra* notes 144–46 and accompanying text.

²⁶³ In our coding and discussion regarding the extent of court-agency dialogue, we limit our analysis to BIA decisions, putting to one side the immigration court decisions. That is because the systemic effect of judicial remand and dialogue is most effective at the agency appellate level—where the agency has the ability to set policy for the trial-level adjudicators. See WALKER & WIENER, *supra* note 19, at 11–16, 36–39 (exploring the agency appellate bodies’ role in setting policy for trial-level adjudicators and the agency more generally).

remand.²⁶⁴ Many times that discussion was extensive. Indeed, one of us (Walker) rereviewed all of these BIA decisions and determined that forty-nine (23.0%) included what he would categorize as an extensive response to the court's reasoning.²⁶⁵

In *Gui Cun Liu v. Ashcroft*,²⁶⁶ for example, then–Judge Alito for the Third Circuit found legal error in the BIA's admissibility of evidence rulings.²⁶⁷ The court properly remanded, citing *Ventura*, while noting that its “decision should in no way be read as *requiring* the BIA to [rule one way or the other]. Rather, the BIA may proceed on remand as it does with respect to any [other] question.”²⁶⁸ On remand, the BIA acknowledged the court's decision, and it explained the court's holding in some depth.²⁶⁹ In a separate order, the BIA then granted withholding of removal and conditionally granted asylum.²⁷⁰

On remand, it was not unusual for the BIA to agree with the reviewing court,²⁷¹ and even, at times, confess error.²⁷² For instance, on remand in *Gallimore v. Attorney General*,²⁷³ the BIA issued a detailed, four-page decision, in which it admitted that the Third Circuit's “decision to remand the record was prompted largely by [the BIA's] mistake [concerning the date of a prior conviction], which we now correct.”²⁷⁴

The BIA also discusses and engages issues even when it disagrees with the reviewing court. A terrific example is *Lemus-Losa v. Holder*²⁷⁵ out of the Seventh Circuit. Judge Wood, writing for the

²⁶⁴ In the other 45 cases, the BIA just briefly notes that the circuit court has remanded the case—sometimes providing the court's holding and sometimes not—and then either decides the case in a cursory fashion or more often remands the case to the immigration judge to consider the issues anew. Compare A16 (noting that there was a judicial remand, accepting the parties' stipulation that respondents are eligible for withholding of removal, and remanding to immigration judge just to conduct the required background checks), with A17 (“This case is before the Board pursuant to [redacted] order of the United States Court of Appeals for the [redacted], which vacated in part the Board's decision. The record will be remanded to the Immigration Judge for further proceedings not inconsistent with the [redacted] order.”).

²⁶⁵ A07; A24; A27; A32; A41/B99; A67; A70; B01; B02; B03; B05; B06; B14; B24; B29; B32; B33; B62; B64; B95; B96/C14; C07; C12; C19; C23; C35; C36; D01; D04; D05; D08; D14; D15; D20; D25; D26; D27; D34; D36; D38; D39; D43; D45; D46; E03; E04; E10; E19; E20.

²⁶⁶ 372 F.3d 529 (3d Cir. 2004).

²⁶⁷ See *id.* at 533–34.

²⁶⁸ *Id.* at 534 n.9.

²⁶⁹ See E3.

²⁷⁰ See *id.*

²⁷¹ See, e.g., A27; B09.

²⁷² See, e.g., A13.

²⁷³ 619 F.3d 216 (3d Cir. 2010).

²⁷⁴ A13.

²⁷⁵ 576 F.3d 752 (7th Cir. 2009).

court, found fault in the BIA's decision, which had ordered Lemus-Losa removed.²⁷⁶ The court remanded the case to the BIA.²⁷⁷ On remand, the BIA "carefully considered the issues raised by the Seventh Circuit," yet ultimately disagreed with the court.²⁷⁸ "Upon consideration of the Seventh Circuit's decision," the BIA wrote, "we respectfully reaffirm our prior determination."²⁷⁹

In a more pointed example, on remand in *Murillo-Salmeron v. INS*,²⁸⁰ the BIA took issue with the Ninth Circuit's criticism of the agency's prior decisions in that case:

We note initially that although the court stated that we did not discuss the merits of the respondent's adjustment application, in fact, the second two paragraphs of our three-paragraph decision related to that issue, and we specifically found that the Immigration Judge had not abused his discretion in denying adjustment. We note in this regard that the Immigration Judge issued a lengthy and thoughtful decision regarding the discretionary aspects of this case, which fully recognized the respondent's equities.²⁸¹

This dialogue nicely captures a somewhat more aggressive exchange between the court and the agency. This type of response is definitely an outlier among the 168 decisions in which the BIA discusses the reviewing court's decision and reasoning.

But what of the more advanced parts of dialogue: a true back-and-forth with the courts? Our study reveals that such dialogue also takes place. The best way to see it is in the cases that went to the court of appeals, then went back to the agency, then back to the courts, and sometimes then back to the agency. The First Circuit's decisions in *Castañeda-Castillo* may be an extreme example of such multiple remands. First, in 2006 and 2007, a First Circuit panel and then the court en banc considered and ultimately rejected the agency's application of the "persecutor bar" to the noncitizen's asylum claim.²⁸² The case

²⁷⁶ See *id.* at 761.

²⁷⁷ See *id.*

²⁷⁸ *In re Lemus-Losa*, 25 I. & N. Dec. 734, 746 (B.I.A. 2012). This precedential opinion is part of D45. See D45.

²⁷⁹ *Lemus-Losa*, 25 I. & N. Dec. at 734. The BIA nevertheless remanded to the immigration judge "for supplemental fact-finding and the entry of a new decision that accounts for all relevant intervening developments." *Id.* at 747. The respondent failed to appear at his subsequent immigration court hearing, and the immigration judge found that at a prior hearing he had conceded removability and was thus ordered removed. See D45.

²⁸⁰ 327 F.3d 898 (9th Cir. 2003).

²⁸¹ B64.

²⁸² *Castañeda-Castillo v. Gonzales*, 464 F.3d 112 (1st Cir. 2006); *Castañeda-Castillo v. Gon-*

made its way back to the First Circuit in 2011, and this time the court remanded to the BIA to analyze whether “‘Peruvian military officers whose names became associated with the Accomarca massacre’ constitute[d] a cognizable particular social group.”²⁸³ The BIA thoroughly discussed the First Circuit’s decision before holding that it was a particular social group.²⁸⁴ It remanded to the immigration judge for fact-finding and legal analysis on whether the government could rebut the presumption that the petitioner had a well-founded fear of persecution if he returned to Peru.²⁸⁵ The immigration judge performed factfinding, and the BIA granted relief to the petitioners.²⁸⁶ The First Circuit then entered final judgment (because it had kept jurisdiction of the case), approving what the agency had done.²⁸⁷

As another example, perhaps an instance where the court did not listen as well as it should have, take *Zheng v. Ashcroft*.²⁸⁸ The Ninth Circuit originally disagreed with the BIA’s legal standard on an issue and remanded the case back to the agency after disagreeing.²⁸⁹ The BIA analyzed the case through the lens of the Ninth Circuit’s decision, clarified the issues, and sent the case back to the immigration judge.²⁹⁰ The immigration judge found Zheng not credible, but when the case reached the Ninth Circuit again, the Ninth Circuit lost patience with the agency.²⁹¹ It discussed and quoted what the agency had done, but it disagreed with it, refused to remand the merits again, and held that “Zheng is automatically eligible for asylum.”²⁹²

In *Yusupov v. Attorney General*,²⁹³ the Third Circuit similarly gave up on the ordinary remand rule when the case returned to the court:

No amount of reconsideration by the BIA will change that.
Where the BIA has twice considered the whole record and

zales, 488 F.3d 17 (1st Cir. 2007) (en banc). The BIA, on remand, issued a one-paragraph cursory remand to the immigration judge to proceed to consider the merits of the respondent’s asylum claim. See E01.

²⁸³ *Castañeda-Castillo v. Holder*, 638 F.3d 354, 363 (1st Cir. 2011).

²⁸⁴ See D34.

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *Castañeda-Castillo v. Holder*, 676 F.3d 1 (1st Cir. 2012). In this short opinion, the court also rejected the government’s claim that the court lacked the ability to issue final judgment even though the court had retained jurisdiction over the case. See *id.* at 3.

²⁸⁸ 332 F.3d 1186 (9th Cir. 2003).

²⁸⁹ See *id.* at 1197.

²⁹⁰ See C30.

²⁹¹ See *Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005).

²⁹² *Id.* at 1142.

²⁹³ 650 F.3d 968 (3d Cir. 2011).

failed to support its conclusion that Petitioners are a danger to national security with substantial evidence, and where the Government represented at oral argument that there are no additional facts or evidence to link either individual to activities or groups adverse to United States interests, there is no reason to remand.²⁹⁴

Relatedly, and as noted in Section III.B.1, it is also not unusual for DHS to exercise prosecutorial discretion on remand.²⁹⁵

These few examples merely scratch the surface of the 168 BIA decisions on remand that engage with the court's reasoning and the forty-nine decisions among those that engage in an extensive dialogue with the reviewing court on remand. These decisions reinforce the findings from the cross-agency Administrative Conference study on agency appellate systems, discussed in Section III.A, that agency appellate bodies ordinarily listen carefully to judicial decisions that remand and often engage substantially in response.

5. *Effect of Dialogue-Enhancing Tools*

In the prior remand study discussed in Section I.B, one of us documented a number of tools courts have developed that have the potential to enhance the court-agency dialogue on remand, to help ensure the noncitizen receives the appropriate relief in a timely manner, and to allow the court to produce a more systemic effect on the agency's adjudication system. While that study identified those tools and explained how they could enhance dialogue, it did not attempt to assess whether those tools have had an effect on agencies on remand.²⁹⁶

In this final portion of Section III.B, we attempt to conduct that assessment—or at least to ascertain whether our dataset can shed any empirical light. To do so, we focus primarily on whether the BIA mentions the tool or otherwise interacts with it on remand.

Notice of Agency Decision on Remand. In *Sinha v. Holder*,²⁹⁷ the Ninth Circuit reversed a denial of asylum relief and “directed” the parties “to notify [it] immediately after the BIA’s decision on re-

²⁹⁴ *Id.* at 993. The agency decision on remand is E02. *See* E02.

²⁹⁵ *See, e.g.*, C11 (demonstrating that the BIA administratively closed the proceedings “based upon the Department of Homeland Security’s exercise of prosecutorial discretion”).

²⁹⁶ *See* Walker, *Ordinary Remand Rule*, *supra* note 16, at 1614–20 (exploring the potential effect of judicial remand and these tools on the agency-court dialogue and agency outcomes on remand).

²⁹⁷ 564 F.3d 1015 (9th Cir. 2009).

mand.”²⁹⁸ Because this remand tool requires the parties—not the adjudicating agency—to provide the court with notice, it is probably no surprise that there was no mention in the agency’s decision on remand of this notice requirement. And, to be clear, *Sinha* was only one case in our dataset where a court requested such notice.

The proceedings on remand in this case are nevertheless worth noting. The BIA briskly discussed the court’s decision and reasoning, and then remanded the matter to the immigration judge, emphasizing that, “at the remanded hearing, both parties shall be afforded an opportunity to present additional evidence, both documentary and testimonial.”²⁹⁹ The immigration judge held a hearing and ruled orally that the respondents were entitled to asylum.³⁰⁰ The total process on remand took 1.3 years from the date of the court’s decision—compared to the mean resolution of 2.2 years in the dataset and 2.1 years for cases where the respondent obtained relief.

Panel Retention of Jurisdiction. Two cases already discussed in Section III.B involved the circuit-court panel retaining jurisdiction of the case on remand: *Castañeda-Castillo v. Holder*³⁰¹ and *Ucelo-Gomez v. Gonzales*.³⁰² It is no surprise that cases in which the circuit-court panel retains jurisdiction often involve extensive dialogue on remand and then again at the court. But it is difficult to know whether the complicated aspects of the case encouraged the court to retain jurisdiction, or whether the panel’s decision to retain jurisdiction encouraged the extended dialogue. Our guess is that in most situations it is the former.

There are five cases in our dataset that we know the circuit-court panel retained jurisdiction of the case when remanding it to the agency.³⁰³ The respondent obtained relief in three of those cases.³⁰⁴ The mean duration of the remand proceeding was 913.2 days (2.4 years), but the mean is skewed by the atypically long dialogue (5.1 years) the court and agency had in *Castañeda-Castillo*, discussed above in Section III.B.4. Excluding *Castañeda-Castillo*, the mean duration of the other four cases was 675.0 days (1.9 years).

²⁹⁸ *Id.* at 1026.

²⁹⁹ B27.

³⁰⁰ *See id.*

³⁰¹ 638 F.3d 354 (1st Cir. 2011); D34.

³⁰² 464 F.3d 163 (2d Cir. 2006); B02.

³⁰³ *See* A20; B02; B22; B58; D34; D38.

³⁰⁴ *See* A20; B22; D34.

The two respondent losses merit a brief note.³⁰⁵ In one, the respondent conceded removability on remand and instead sought cancellation of removal, which the BIA denied.³⁰⁶ So we do not know what the BIA would have done on the merits of the remanded issue. The other is *Ucelo-Gomez*. As discussed earlier in Section III.B, the BIA on remand in *Ucelo-Gomez* issued a detailed, eight-page decision finding that the respondent was not part of a “particular social group” for asylum purposes.³⁰⁷ The noncitizen sought further review. The Second Circuit panel, which had retained jurisdiction, denied that petition, observing that “[t]he BIA has fulfilled the terms of our remand by rendering a timely opinion as to whether affluent Guatemalans constitute a particular social group for asylum purposes.”³⁰⁸

Again, it is difficult to ascertain the effectiveness of this tool—especially because it is difficult to determine causality—and we only have five cases in the dataset.

Time Limit on Remand. Only three cases in our dataset involved a judicial decision that set a deadline or otherwise encouraged prompt resolution on remand.³⁰⁹ Two of them were just discussed: *Castañeda-Castillo v. Holder*³¹⁰ and *Ucelo-Gomez v. Gonzales*.³¹¹

In *Castañeda-Castillo*, the First Circuit “stress[ed] that this case has been ping-ponging around for over eighteen years” that “[r]egardless of the ultimate outcome of his extradition proceedings, it is our expectation that our opinion today will aid the IJ and BIA in the expeditious and final resolution of Castañeda’s asylum claims.”³¹² On remand, the BIA “share[d] the sentiment” regarding the timing and “requested that the remand [to the immigration judge] be adjudicated as expeditiously as possible.”³¹³ It seemed to work. The immigration judge issued a thirteen-page written decision just four months after the BIA’s remand decision, in which the judge granted asylum

³⁰⁵ See B02; B58.

³⁰⁶ See B58.

³⁰⁷ See B02.

³⁰⁸ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007) (per curiam).

³⁰⁹ See B02; D34; D38.

³¹⁰ 638 F.3d 354 (1st Cir. 2011); D34.

³¹¹ 464 F.3d 163 (2d Cir. 2006); B02.

³¹² *Castañeda-Castillo*, 638 F.3d at 367.

³¹³ D34; see also *id.* (“We understand the need for an expeditious outcome in this case. Nonetheless, both parties have asserted that there is new and relevant evidence available. We therefore conclude that the record is stale and will remand the record to the Immigration Court to provide the parties the opportunity to further develop the record.”).

relief to the respondents.³¹⁴ In total, the respondents obtained asylum relief 319 days after the court's remand decision.

In *Ucelo-Gomez v. Gonzales*, the Second Circuit was even more directive by ordering the BIA "to issue its responsive opinion *within 49 days*."³¹⁵ On remand, the BIA did not mention the deadline, nor did it meet the deadline.³¹⁶ But the BIA did issue an eight-page decision that extensively responded to the Second Circuit's reasoning and ultimately denied relief to the respondent.³¹⁷ It issued this decision four months (125 days) after the judicial remand decision. And, as noted above, the Second Circuit on appeal denied the petition and observed that the BIA issued "a timely opinion."³¹⁸

Finally, in *Jian Hui Shao v. Board of Immigration Appeals*,³¹⁹ the Second Circuit remanded for "the BIA to determine in the first instance in what circumstances, if any, a Chinese national who has two children in China in apparent violation of that country's family planning policies may, on that basis alone, establish the 'well-founded fear of persecution' needed to support an asylum claim."³²⁰ In so remanding, the court urged a prompt response: "Because of the volume of similar claims being raised in this Court, we respectfully request that the BIA resolve this matter as soon as possible."³²¹ The BIA answered the call, issuing a precedential opinion less than eight months (238 days) after the judicial remand.³²² Although the BIA denied relief to the respondent, it held:

A person who fathers or gives birth to two or more children in China may qualify as a refugee if he or she establishes that the births are a violation of family planning policies that would be punished by local officials in a way that would give rise to a well-founded fear of persecution.³²³

Although we only have three datapoints in our study, all three suggest that this dialogue-enhancing tool may have promise. Each case was decided on remand in less than a year, which is much quicker

³¹⁴ *See id.*

³¹⁵ *Ucelo-Gomez*, 464 F.3d at 172.

³¹⁶ *See* B02.

³¹⁷ *See id.*

³¹⁸ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007) (per curiam).

³¹⁹ 465 F.3d 497 (2d Cir. 2006).

³²⁰ *Id.* at 503.

³²¹ *Id.*

³²² D38.

³²³ *In re J-H-S-*, 24 I. & N. Dec. 196, 196 (B.I.A. 2007).

than the mean of 2.2 years for all of the remand decisions in our dataset.

Certification of Issues on Remand and Hypothetical Solutions.

As discussed in Section III.B.4, the BIA often engages with the circuit court's reasoning, and this includes discussing the issues on which the court remanded and the suggestions or hypothetical solutions the court proposes in its remand decision. Indeed, we coded 102 BIA decisions on remand that expressly recognized and discussed the specific issues remanded to the agency, and another half dozen where the BIA noted and engaged with the court's hypothetical solutions.³²⁴ We do not endeavor to canvass all of the various BIA decisions that respond to either of these tools. But two cases merit special mention.

First, in *Rajah v. Mukasey*,³²⁵ the Second Circuit remanded to the BIA to “seek a quantum by which better to measure the reasonableness of a petitioner's request for a continuance, and a clearer demarcation of the range of permissibility to be exercised by the IJ.”³²⁶ The court charged the BIA to consider the following:

- (a) the intent of Congress in creating a mechanism for adjusting status based on labor certification and visa eligibility, as expressed in 8 U.S.C. § 1255(i), (b) the lengthy delays and uncertainties caused by the implementation of this mechanism, and (c) the effect, if any, in a given case, of a labor certification being approved after the agency has acted, but while the case is still *sub judice*.³²⁷

On remand, the BIA issued a thirteen-page precedential opinion, in which it acknowledged the Second Circuit's charge to consider those factors.³²⁸ Indeed, the BIA also noted that the Second Circuit had required in a subsequent, unpublished decision that the BIA consider two additional factors: “(d) the effect, if any, of waiting for an application for an employment-based visa, as opposed to a labor certification, to be processed, and (e) the effect, if any, of an employment-based visa being denied after the agency has acted, but while the case is still pending.”³²⁹ After articulating a more detailed standard that addresses these five factors, the BIA denied a continuance in this particular

³²⁴ See A27; A47; B42; B46; B62; C36.

³²⁵ 544 F.3d 449 (2d Cir. 2008).

³²⁶ *Id.* at 450.

³²⁷ *Id.*

³²⁸ See *In re Rajah*, 25 I. & N. Dec. 127, 129 (B.I.A. 2009); D04.

³²⁹ *In re Rajah*, 25 I. & N. Dec. at 129 n.3 (quoting *Ghoniem v. Mukasey*, 305 F. App'x 738, 740 (2d Cir. 2009)).

case.³³⁰ On appeal, the Second Circuit dismissed the petition and held that the BIA did not abuse its discretion in denying the continuance.³³¹

Second, in *Biao Yang v. Gonzales*,³³² the Second Circuit remanded the case to the BIA to further flesh out and apply its agency precedents for determining whether an asylum filing is frivolous.³³³ Like in *Rajah*, the Second Circuit charged the BIA to consider a number of nonexclusive issues:

(1) to what extent the IJ is required to set out his or her factual findings to support a frivolousness determination separately from the adverse credibility determination and to what extent he or she is permitted to incorporate by reference the findings made to support an adverse credibility determination; (2) to what extent the IJ is required to consider the applicant's explanations for any discrepancies separately from the adverse credibility determination; (3) to what extent the IJ is required to explicitly find that the fabrications at issue were "deliberate" or "material"; and (4) to what extent the IJ is required, if at all, to inform the applicant during the course of the proceedings that he or she is considering a frivolousness determination before he or she renders such a determination.³³⁴

In a footnote, the court also charged the BIA to "decide whether a general warning given at the beginning of a hearing (i.e., prior to petitioner's testimony or identification of any inconsistencies) regarding the consequences of filing a frivolousness application in order to satisfy the notice requirement also satisfies any such 'warning' requirement."³³⁵

On remand, the BIA issued a ten-page precedential opinion.³³⁶ For reasons that are not clear from the record, it took nearly three years from the judicial remand decision for the BIA to issue this decision. In its decision, the BIA acknowledges and addresses the issues raised by the Second Circuit in four separate sections, and it also answers the question in the footnote.³³⁷ The BIA then remanded the

³³⁰ See *id.* at 138.

³³¹ See *Rajah v. Holder*, 405 F. App'x 547, 548 (2d Cir. 2011).

³³² 496 F.3d 268 (2d Cir. 2007).

³³³ See *id.* at 272.

³³⁴ *Id.* at 279.

³³⁵ *Id.* at 279 n.9 (emphasis omitted).

³³⁶ See *In re B-Y-*, 25 I. & N. Dec. 236 (B.I.A. 2010); D05.

³³⁷ See *In re B-Y-*, 25 I. & N. Dec. at 239-43.

case to the immigration judge to reconsider her frivolousness-filing finding in light of the BIA's precedential opinion.³³⁸ And on remand, the immigration judge reversed her finding.³³⁹

Request for Precedential Opinion. In our dataset, circuit courts expressly asked the BIA to issue a precedential decision in at least two cases. In one, the BIA accepted the Ninth Circuit's request to issue a precedential decision—and ultimately held that the respondent was not subject to removal.³⁴⁰ In the other, the BIA denied the Seventh Circuit's request, noting in a footnote that the BIA did “not find this to be the proper vehicle for a precedential decision on this issue” of “whether a lawsuit filed against a government is a legitimate means of expressing a political opinion.”³⁴¹

Because this dialogue-enhancing tool was not expressly analyzed in the prior study (and thus not coded in that study), it is quite possible that there are additional judicial decisions in our dataset in which the court expressly requested a precedential opinion. As illustrated by the *Biao Yang* and *Rajah* cases discussed above, moreover, circuit courts often certify issues for remand, which implicitly invites the BIA to issue a precedential decision that would set binding policy for the trial-level adjudicators and the agency more generally. Indeed, there are at least seven precedential decisions in our dataset on remand.³⁴² This tool deserves much more scholarly and judicial attention.

Government Concessions on Appeal. Our dataset did not disclose many judicial opinions in which the court noted government concessions on appeal that could potentially limit the scope of remand. But *Sandoval v. Holder*³⁴³ is worth noting. There, the Eight Circuit noted that “even the government does not buy everything it is trying to sell.”³⁴⁴ “At oral argument, in contrast to the brief, the government conceded the statute would not apply to an eight-year-old child whose parents armed her with a fraudulent birth certificate and instructed her to say she was a United States citizen if asked by the officer.”³⁴⁵

³³⁸ See *id.* at 243–45.

³³⁹ See D05.

³⁴⁰ See *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 504 (B.I.A. 2008); D27.

³⁴¹ D46.

³⁴² *In re M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re Lemus-Losa*, 25 I. & N. Dec. 734 (B.I.A. 2012); *In re B-Y-*, 25 I. & N. Dec. 236 (B.I.A. 2010); *In re Rajah*, 25 I. & N. Dec. 127 (B.I.A. 2009); *In re Velazquez-Herrera*, 24 I. & N. Dec. 503 (B.I.A. 2008); *In re J-H-S-*, 24 I. & N. Dec. 196 (B.I.A. 2007); *In re Y-L-*, 24 I. & N. Dec. 151 (B.I.A. 2007).

³⁴³ 641 F.3d 982 (8th Cir. 2011).

³⁴⁴ *Id.* at 987.

³⁴⁵ *Id.*

Perhaps it is no surprise that, on remand before the BIA, DHS joined the respondent's motion, "agree[ing] that the respondent is eligible for adjustment of status and a waiver of inadmissibility under [the Act], and merits relief in the exercise of discretion."³⁴⁶ And it is similarly unsurprising that the BIA granted the joint motion.³⁴⁷

Suggestion to Agency to Assign Different Immigration Judge.

There are at least five judicial decisions in our dataset in which the reviewing court suggests, urges, or orders that the BIA assign the case to a different immigration judge on remand.³⁴⁸ In four of those cases, the BIA on remand expressly notes that the court had requested that the case be assigned to a different immigration judge.³⁴⁹ In two of those cases, the BIA expressly orders the case to be assigned to a different immigration judge on remand.³⁵⁰ In the other two, it is less clear whether the BIA is ordering a change or just noting the court's request.³⁵¹ In the one case where the BIA does not mention the court's suggestion, that is likely because the parties stipulated that the respondents were eligible for withholding of removal, and the BIA accepted that stipulation and did not remand the issue to the immigration court.³⁵² Ultimately, the respondent obtained relief in four of those five cases—with the sole denial being in a case where the BIA reassigned the case to a different immigration judge on remand.³⁵³

In the abstract, one could reasonably question whether the ordinary remand rule actually fosters a real dialogue between the court and agency, or whether it is just a judicial monologue. But these agency decisions on remand often reveal a rich dialogue, i.e., a "conversation in which the participants strive toward learning and understanding to promote more effective deliberation and outcomes,"³⁵⁴ as opposed to "straightforward compromise" where "both agencies and courts deviat[e] from their real views of the best answer, perhaps significantly, in order to put an end to litigation that clearly has gone on way too long."³⁵⁵

³⁴⁶ A48.

³⁴⁷ *See id.*

³⁴⁸ *See* A16; A38; C16; D03; E01.

³⁴⁹ *See* A38; C16; D03; E01.

³⁵⁰ *See* A38; D03.

³⁵¹ *See* C16 ("The court remanded the case to the Board, noting its view that the case should be assigned to a different Immigration Judge on remand"); E01 ("We note the court's suggestion that this case be assigned to a different Immigration Judge on remand.").

³⁵² *See* A16.

³⁵³ *See* D03.

³⁵⁴ Hammond, *Deference and Dialogue*, *supra* note 18, at 1773.

³⁵⁵ Metzger, *supra* note 18.

That said, this is just one dataset of a couple hundred cases at one agency. Much more empirical work needs to be done to draw more generalizable conclusions about the role of judicial remand in fostering a court-agency dialogue. And even more work needs to be done to explore whether this dialogue results in federal courts having a more systemic effect on the administrative adjudication system as a whole. But the findings from this study, coupled with the cross-agency study of agency appellate systems discussed in Section III.A, suggest the court-agency dialogue likely matters, and definitely merits such further empirical exploration.

C. *A Negusie Postscript: Sixteen Years and Counting*

Part III has focused so far on findings that provide support for courts to consider the ordinary remand rule as a tool for judicial engagement and dialogue. We do not mean to overstate this, however. The conventional account of remand as a tool for deference cannot be overlooked. Nor can the costs that accompany forcing the agency to reconsider a case on remand (as opposed to the court answering the question itself). The post-remand history of the third case in the immigration-remand trilogy—*Negusie v. Holder*³⁵⁶—is illustrative.

As discussed in Section I.A.3, Daniel Girmai Negusie spent two years in his early twenties as a political prisoner in Eritrea for his refusal to fight in the Eritrean navy against Ethiopians, whom he considered his brothers.³⁵⁷ On release, he was forced to work as a prison guard.³⁵⁸ After approximately four years of coerced work, he escaped and fled to seek refuge in the United States.³⁵⁹

One month after his escape, Negusie arrived in the United States in December 2004, where he immediately sought asylum relief.³⁶⁰ The immigration judge largely credited Negusie's testimony, but ultimately denied asylum and similar relief from removal in May 2005.³⁶¹ The BIA dismissed the appeal in February 2006.³⁶² Both the immigration judge and the BIA concluded that the Immigration and Nationality

³⁵⁶ 555 U.S. 511 (2009).

³⁵⁷ See Brief for Petitioner at 14, *Negusie*, 555 U.S. 511 (No. 07-499), 2008 WL 2445504, at *14.

³⁵⁸ See *id.* at 14–15.

³⁵⁹ See *id.*

³⁶⁰ See Joint Appendix at 63, *Negusie*, 555 U.S. 511 (No. 07-499), 2008 WL 2442321, at *63.

³⁶¹ See Brief for Petitioner at 1, *Negusie v. Gonzales*, 231 F. App'x 325 (5th Cir. 2007) (No. 06-60193), 2006 WL 5631660, at *1.

³⁶² See *id.*

Act's persecutor bar precluded asylum relief.³⁶³ Negusie did receive, however, the more temporary deferral of removal relief under the Convention Against Torture,³⁶⁴ so that he remained in the United States and was not detained.³⁶⁵

In an unpublished decision issued in May 2007, the Fifth Circuit denied Negusie's petition for review.³⁶⁶ The Supreme Court granted certiorari in March 2008,³⁶⁷ and the Court issued its decision remanding the case to the agency in March 2009.³⁶⁸ At the time of the remand, Negusie was thirty-three years old; more than four years had passed since he first applied for asylum.³⁶⁹

Remand at the agency was not a model of expediency. Then-President Barack Obama had been elected a couple of months before the Court remanded the case to the BIA. The case remained at the agency for President Obama's entire presidency.³⁷⁰ Based on the Unified Agenda in 2010, it appears that the Obama Administration was considering rulemaking to address the statutory persecutor bar that was the subject of Negusie's case.³⁷¹ DHS reasserted this intention in the Unified Agenda in at least 2012, 2013, 2014, and 2015.³⁷² The fact that the BIA did not hold oral arguments on remand until September 2017 supports the proposition that the administration was seriously considering rulemaking first.³⁷³ With that said, it was not until June 2018 that the BIA issued a decision on remand.³⁷⁴ In its decision, the BIA recognized—contrary to its decision before remand—a narrow exception for duress to the statutory persecutor bar to asylum

³⁶³ See *Negusie*, 555 U.S. at 511.

³⁶⁴ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113.

³⁶⁵ See *In re Negusie*, 28 I. & N. Dec. 120, 123 (U.S. Att'y Gen. 2020) (noting that Negusie was granted deferral of removal); see also *id.* at 155 (remanding the case to the BIA to hold for an updated identity and security investigation before granting the deferral of removal).

³⁶⁶ *Negusie*, 231 F. App'x at 326.

³⁶⁷ *Negusie v. Mukasey*, 552 U.S. 1255 (2008).

³⁶⁸ *Negusie*, 555 U.S. at 511.

³⁶⁹ Joint Appendix at 64, *Negusie*, 555 U.S. 511 (No. 07-499), 2008 WL 2442321, at *64 (listing birthdate as January 15, 1976).

³⁷⁰ See Barack Obama, WHITE HOUSE HIST. ASS'N., <https://www.whitehousehistory.org/bios/barack-obama> [<https://perma.cc/UU7J-G2W2>].

³⁷¹ See 75 Fed. Reg. 79,536, 79,546 (Dec. 10, 2010) (noting that, in response to *Negusie*, the proposed rule "would provide a limited exception for actions taken by the applicant under duress and clarify the required levels of the applicant's knowledge of the persecution").

³⁷² See 77 Fed. Reg. 7664 (Feb. 13, 2012); 78 Fed. Reg. 1318 (Jan. 8, 2013); 79 Fed. Reg. 896 (Jan. 7, 2014); 79 Fed. Reg. 76,456 (Dec. 22, 2014); 80 Fed. Reg. 77,710 (Dec. 15, 2015).

³⁷³ See *In re Negusie*, 27 I. & N. Dec. 347, 348 n.2 (B.I.A. 2018).

³⁷⁴ See *id.* at 348.

relief, but concluded that Negusie himself did not meet the newly articulated standard.³⁷⁵

Even though Negusie did not ultimately obtain asylum relief from removal, the BIA's 2018 decision set forth the threshold standard for considering the duress exception to the persecutor bar:

While we need not define the precise boundaries of a duress standard in the context of this case, at a minimum the applicant must establish by a preponderance of the evidence that he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others. Only if the applicant establishes each element by a preponderance of the evidence would it be appropriate to consider whether the duress defense applies.³⁷⁶

The BIA's exception to the persecutor bar seems like a narrower approach than Justice Stevens might have envisioned in his separate opinion in *Negusie*, in which he argued that "voluntary assistance in persecution is required and that duress and coercion vitiate voluntariness."³⁷⁷ Yet, at the same time, the BIA's approach is much different than Justice Thomas's bright-line persecutor bar to asylum relief that recognizes no duress exception³⁷⁸—a position DHS had adopted on remand.³⁷⁹

But the BIA's decision was not the end of the matter. Several months later, in October 2018, the Attorney General referred the case to himself for decision, inviting the parties and any interested amicus curiae to file supplemental briefs.³⁸⁰ Then, in November 2020, the Attorney General issued a precedential decision on the matter, ultimately agreeing with Justice Thomas that the persecutor bar contains

³⁷⁵ See *id.*

³⁷⁶ See *id.* at 363.

³⁷⁷ *Negusie v. Holder*, 555 U.S. 511, 535 (2009) (Stevens, J., concurring in part and dissenting in part).

³⁷⁸ See *id.* at 539 (Thomas, J., dissenting).

³⁷⁹ See *Negusie*, 27 I. & N. Dec. at 351.

³⁸⁰ See *In re Negusie*, 27 I. & N. Dec. 481, 481 (U.S. Att'y Gen. 2018).

no duress exception and further holding that the immigrant petitioner bears the burden of proving by a preponderance of the evidence that the persecutor bar does not apply.³⁸¹

In other words, after more than eleven years on remand, the agency ultimately ended up where it was before the Supreme Court decided to remand. That does not mean no meaningful dialogue took place on remand or that a national solution was not reached. The positions of the Attorney General, BIA, and DHS grappled with and embraced the various arguments made by the Justices in their separate *Negusie* opinions. It is not at all clear how the Supreme Court would have ruled if it had not remanded the statutory interpretation question. Perhaps there would not have been a majority to recognize a duress exception. And even under Justice Stevens's approach, the Court would have remanded the case to the agency to flesh out the scope of the duress standard.³⁸² The BIA ultimately did that and, yet, still denied relief under its new duress standard.³⁸³

It cannot be ignored, however, that Negusie waited nearly sixteen years from when he sought refuge in the United States until the Attorney General issued his decision on remand in November 2020, including more than eleven years after the Supreme Court remanded his case to the agency. Although Negusie had received deferral of removal from the original immigration judge and does not appear to have been detained during the legal proceedings or on remand, his legal status in the United States has remained in limbo.³⁸⁴ After all, deferral of removal is a temporary form of relief that can be terminated if the government decides to remove Negusie to another country where he is not likely to be tortured or if conditions in Eritrea change such that he would no longer be likely to be tortured there.³⁸⁵

Negusie's case, moreover, is still not over. He has sought judicial review of the Attorney General's decision.³⁸⁶ And we now have a new

³⁸¹ See *In re Negusie*, 28 I. & N. Dec. 120, 120 (U.S. Att'y Gen. 2020).

³⁸² See *Negusie*, 555 U.S. at 537–38 (Stevens, J., concurring in part and dissenting in part) (“I would leave for the Attorney General—and, through his own delegation, the BIA—the question how the voluntariness standard should be applied. The agency would retain the ability, for instance, to define duress and coercion; to determine whether or not a balancing test should be employed; and, of course, to decide whether any individual asylum-seeker's acts were covered by the persecutor bar. Those are the sorts of questions suited to the agency's unique competencies in administering the INA.”).

³⁸³ See *supra* note 375 and accompanying text; see also *Negusie*, 28 I. & N. Dec. at 120–21.

³⁸⁴ See generally *Negusie*, 28 I. & N. Dec. at 120–21.

³⁸⁵ See 8 C.F.R. § 208.17 (2012).

³⁸⁶ Petition for Review, *Negusie v. Barr*, No. 20-61141 (5th Cir. Dec. 3, 2020). The petition for review notes that Negusie continues to not be detained. That petition was dismissed for lack

presidential administration, with a new Attorney General who could reconsider the prior Attorney General's precedential decision.

The human costs—including delay, uncertainty, and the potential for agency error—should not be ignored when considering the normative case for the ordinary remand rule. But as noted in Section I.B, courts have a toolbox of dialogue-enhancing tools that can ameliorate some of these concerns. To discourage undue delay, for instance, the circuit-court panel can retain jurisdiction of the matter and set a deadline for the remand, with requests for regular progress updates on remand. To be sure, these tools will not eliminate all costs. But in light of the phenomenon of bureaucracy beyond judicial review, refusing to remand also has costs, as described in Section II.B. In particular, a myopic, judicial focus on just the agency adjudication under review obscures the reality that there are likely countless similar cases pending or decided by the agency that will never make it to court. Remand and dialogue have the potential to help courts—and agencies—address those systemic issues, hopefully bringing more fairness, efficiency, and consistency to the high-volume agency adjudication system.

CONCLUSION

In recent years, judges, scholars, and policymakers—largely those right of center—have argued for dramatic changes to the way federal courts review administrative actions. Those reforms have ranged from eliminating or at least narrowing administrative law's judicial deference doctrines to reinvigorating the nondelegation doctrine. Whatever the merit of these reforms, given that the vast majority of agency actions never reach federal courts, we argue that courts should more fully embrace one substantial shift in mindset: courts should view their role in the administrative state not only as reviewing the agency actions that reach them, but also as engaging in a dialogue with the agency and the political branches. This vision reorientation is particularly important in the context of high-volume agency adjudication, where many individuals have meritorious claims but lack the wherewithal to seek judicial review.

Although the remand rule is often viewed as judicial deference, it does not need to be. It can also be a means of judicial engagement, especially when coupled with the toolbox of dialogue-enhancing tools

of jurisdiction. Order, No. 20-61141 (5th Cir. Feb. 12, 2021). Negusie filed a new petition for review, which is currently pending. Petition for Review, *Negusie v. Garland*, No. 21-60314 (5th Cir. Apr. 15, 2021).

courts can employ when remanding flawed agency actions back to the agency. When courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some courts require the agency to provide notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand. Others suggest that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions. Some courts, moreover, obtain concessions from the government to narrow the potential grounds for denial of relief on remand, or request that the agency on remand issue a precedential decision that can have spillover effects on similarly situated individuals subject to administrative adjudication. And courts through their published opinions can set off fire alarms for Congress, the President, and the public to draw attention to potential systemic issues in a regulatory process.

These tools help courts play a more active role in improving fairness, efficiency, and consistency in the agency adjudication system generally rather than just in the limited number of cases that make it to a federal court. Yet the tools still respect the proper separation of powers by using mere words, instead of orders that may exceed their statutory (or, in some cases, perhaps constitutional) authority. Using this toolbox is one example of how judicial review in administrative law should be enhanced to address the present-day realities of mass agency adjudication and other bureaucratic actions that otherwise evade judicial review.