

Remand and Dialogue in Administrative Law

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CSAS Working Paper 19-32

The Administration of Immigration, October 25, 2019



Antonin Scalia Law School
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FOR THE STUDY OF THE
ADMINISTRATIVE STATE
George Mason University®

REMAND AND DIALOGUE IN ADMINISTRATIVE LAW

89 GEORGE WASHINGTON LAW REVIEW (forthcoming 2021)

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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 administrative law issue, 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 the cases that do allow the courts to engage in a dialogue with the agency, producing a more systemic effect on the agency adjudication system. Indeed, courts have developed and utilize 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 and reinvigorating the nondelegation doctrine.² These are ambitious, sweeping calls for reform that have the potential to dramatically

¹ See Gillian E. Metzger, *The Supreme Court 2016 Term: 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. FORUM 1 (2017).

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); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1938–58 (2020).

reshape the modern administrative state. But while many 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, and they review only about 5,000 such petitions—less than two percent of 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 to agency statutory interpretations.⁷ And even if courts were to become less deferential, they would still only

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 EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ADJUDICATION STATISTICS: IMMIGRATION JUDGE (IJ) HIRING (Oct. 2020) (reporting 529 total immigration judges and nearly 100 new judges hired in 2020), <https://www.justice.gov/eoir/workload-and-adjudication-statistics>; EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ADJUDICATION STATISTICS: NEW CASES AND TOTAL COMPLETIONS (Jan. 2021) (reporting 545,898 new cases and 276,945 completed cases in 2019), <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

⁵ See, e.g., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS—JUDICIAL BUSINESS 2017 (2018) (“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 8 U.S.C. § 1252(a)(5) (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 (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. (forthcoming 2021); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021).

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 *Chenery v. SEC*, 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).⁸ 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 Removals immigration relief program (DACA) and to add a citizenship question to the 2020 census.⁹ And this Term the Court again confronted the failure of the Ninth Circuit to follow ordinary remand rule in the context of immigration adjudication¹⁰. This time the Court reversed the Ninth Circuit on the merits without having to grapple with the lower court’s failure to remand to the agency.¹¹

⁸*SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 95 (1943) (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.”).

⁹*Dep’t of Homeland Sec. v. Regents of 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.”); *Dep’t of Commerce 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.”).

¹⁰*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.”), *rehearing 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).

¹¹*Garland v. Dai*, No. 19-1155, 2021 WL 2194837, at *9 (U.S. June 1, 2021) (holding that “[t]he Ninth Circuit’s deemed-true-or-credible rule cannot be reconciled with the INA’s terms”).

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 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."¹² Indeed, the doctrine is often criticized, especially in the immigration adjudication context, for being *too deferential* to agency action.¹³ 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 than 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.¹⁴

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 circumstances, it is much more likely that individuals will not seek judicial review of erroneous decisions—either because they lack the sophistication to navigate the judicial process or have otherwise procedurally defaulted meritorious claims in the administrative process.¹⁵ Only by remanding and forcing the agency

¹²Smith v. Berryhill, 139 S. Ct. 1765, 1779. (2019).

¹³See, 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)))

¹⁴See 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*].

¹⁵Walker, *Referral, Remand, and Dialogue*, *supra* note 14, at 93.

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, assumes that a dialogue between courts and agencies actually takes place—that remand is not just a judicial monologue. Or as Gillian Metzger has put it in responding to Emily Hammond’s important, related article *Dialogue and Deference*, “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 towards learning and understanding to promote more effective deliberation and outcomes.’”¹⁶

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.¹⁷ 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 *Law Review* some seven years ago,¹⁸ 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

¹⁶ 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/>.

¹⁷ CHRISTOPHER J. WALKER & MATTHEW WIENER, AGENCY APPELLATE SYSTEMS (Report to Admin. Conf. of the U.S., Dec. 14, 2020), <https://ssrn.com/abstract=3728393>; see also Admin. Conf. of the U.S., Recommendation 2020-3, Agency Appellate Systems, 86 Fed. Reg. 6618 (Jan. 22, 2021) (adopting recommendations from WALKER & WIENER, *supra*).

¹⁸ Walker, *Ordinary Remand Rule*, *supra* note 14.

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, with the noncitizen prevailing on a remanded issue half the time and the remaining cases harder to categorize as a "win" or "loss," including 16% of the cases where the proceedings 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 time 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 need to must 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).¹⁹ 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.”²⁰ “[P]erhaps,” Judge Friendly thought, determining when to reverse and remand under *Chenery* is “more an art than a science.”²¹

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.²² It has now held that the rule applies not only to questions of fact²³ and mixed questions of law and fact,²⁴ but also to certain questions of law.²⁵

Despite its central importance in the modern administrative state and its expanded role, little scholarly attention has been paid to the ordinary remand rule.²⁶ Similarly, even though the Supreme Court

¹⁹SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947); *see also* 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.”).

²⁰Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 199.

²¹*Id.* at 200.

²²*Negusie v. Holder*, 555 U.S. 511, 523–24 (2009) (calling it the “ordinary remand rule”).

²³*INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (remanding to the agency factual question of “changed circumstances”).

²⁴*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”).

²⁵*Negusie*, 555 U.S. at 523 (remanding to the agency question of statutory interpretation where the agency “has not yet exercised its Chevron discretion to interpret the statute in question.”).

²⁶One major exception is Emily Hammond’s seminal piece on remand and reversal in the rulemaking context. Hammond, *Deference and Dialogue*, *supra* note 16.

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.²⁷ 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 Ninth Circuit (32%) among the “worst” offenders when measured against the rule’s baseline.²⁸

Part I.A sets forth the doctrinal framework for the ordinary remand rule, and then Part 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.²⁹ Thus, since the 1940s, it has been the “simple but fundamental rule of administrative law” for reviewing courts to remand to agencies that erred.³⁰ But for many years, the lower courts applied that “simple” rule without much Supreme Court articulation of its contours.³¹ Without a reminder of its “fundamental” nature,

²⁷ *Ventura*, 537 U.S. at 16 (“Rather, ‘the 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))).

²⁸ Walker, *The Ordinary Remand Rule*, *supra* note 14, 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.

²⁹ See *Chenery II*, 332 U.S. 194; *Chenery I*, 318 U.S. 80.

³⁰ *Chenery II*, 332 U.S. at 196; see also Walker, *The Ordinary Remand Rule*, *supra* note 14, at 1561–78 (tracking the remand rule’s evolution from the 1940s until *Negusie* in 2009).

³¹ But see, e.g., *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“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 the 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 that point the matter once more goes to the [agency] for reconsideration.”).

many lower courts strayed from the ordinary remand rule, especially in the immigration context.³²

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.³³ In its current state, the remand rule (now sometimes called “the *Ventura* ordinary remand rule”³⁴) 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.”³⁵ As Part 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 generally inability to look outside the administrative record), an appellate court’s conclusion that an agency erred on a factual issue requires a remand.³⁶ Since the 1940s, appellate courts reviewing immigration adjudications should have known this: The law places the agency exclusively in charge of making factual determinations,³⁷ and “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”³⁸ Nevertheless, courts sometimes chose not to remand even when faced with factual issues that the agency had not decided.³⁹

³² 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).

³³ *Negusie*, 555 U.S. 511; *Gonzales*, 547 U.S. 183; *Ventura*, 537 U.S. 12.

³⁴ *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”); *Gonzales*, 547 U.S. at 185 (noting that the rule is “what this Court described in *Ventura* as the ‘ordinary ‘remand’ rule’”).

³⁵ *Negusie*, 555 U.S. at 523 (quoting *Thomas*, 547 U.S. at 186, which in turn quotes *Ventura*, 537 U.S. at 16, which in turn quotes *Fla. Power & Light Co.*, 470 U.S. at 744).

³⁶ *Ventura*, 537 U.S. at 17.

³⁷ E.g., 8 U.S.C. §§ 1158(a), 1253(h)(1) (setting forth the legal requirements for the agency to make the basic asylum eligibility decisions at issue in many immigration decisions).

³⁸ *Chenery I*, 318 U.S. at 88.

³⁹ See, e.g., *Ventura*, 264 F.3d at 1157.

That changed with *INS v. Ventura* in 2002.⁴⁰ 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.”⁴¹ Specifically, Ventura testified that he left Guatemala after guerillas threatened him and killed some of his family members—all due to the guerilla’s belief that Ventura disagreed with their political beliefs.⁴²

The immigration judge, the first executive official to pass on Ventura’s application, denied his requested relief.⁴³ While she found Ventura’s testimony credible, she agreed with the government on two independent issues. 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.”⁴⁴ Second, she concluded that even if Ventura had an 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.”⁴⁵

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].”⁴⁶ 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.”⁴⁷ Ventura, still seeking asylum, sought review in the relevant federal court of appeals.

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

⁴⁰ *Ventura*, 537 U.S. 12.

⁴¹ *Id.* at 13 (quoting 8 U.S.C. §§ 1101(a)(42)(A), 1253(h)).

⁴² *Id.* at 14; *see also Ventura*, 264 F.3d 1152 (explaining the facts in greater detail than the Supreme Court’s recitation).

⁴³ *Ventura*, 537 U.S. at 13.

⁴⁴ *Ventura*, 537 U.S. at 15 (quoting App. to Pet. for Cert. 22a).

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting App. to Pet. for Cert. 15a).

⁴⁷ *Id.*

government's first argument.⁴⁸ 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.⁴⁹

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 need to remand because “when it is clear that [it] would be compelled to reverse the BIA’s decision if the BIA decided the matter against the applicant.”⁵⁰ 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.⁵¹

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.⁵² 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.⁵³ Because a court of appeals cannot “conduct a de novo inquiry into the [factual] matter being reviewed and to reach its own conclusions based on such an inquiry,”⁵⁴ the Ninth Circuit needed to “remand to the agency for additional investigation or explanation.”⁵⁵ For 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

⁴⁸ *Ventura*, 264 F.3d at 1155.

⁴⁹ *Ventura*, 537 U.S. at 13.

⁵⁰ *Id.* at 1157 (citing *Navas v. INS*, 217 F.3d 646, 662 (9th Cir. 2000); *Gafoor v. INS*, 231 F.3d 645, 656 n.6 (9th Cir. 2000)).

⁵¹ *Chenery II*, 332 U.S. at 196.

⁵² *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). See generally EUGENE GRESSMAN et al, SUPREME COURT PRACTICE § 5.12(c)(7)(d) (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).

⁵³ *Ventura*, 537 U.S. at 16.

⁵⁴ *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744).

⁵⁵ *Id.*

determine whether its decision exceeds the leeway that the law provides.”⁵⁶ And so the lower courts were reminded of *Chenery*’s “fundamental” requirements under a modern name: the “*Ventura* ordinary remand rule.”⁵⁷

2. *Remand Applications of Law to Fact*

Ventura did not shift the law. It followed *Chenery*, consistent with Congress’s conclusion that says the agency is the expert factfinder that must decide factual issues in the first instance.⁵⁸ But what how does the remand rule apply in an area in which courts are normally more involved: application of law to fact? The Court had the chance to clarify this modification in another case coming out of the Ninth Circuit: in *Gonzales v. Thomas*.⁵⁹ And again, the Supreme Court found the bitter medicine of summary reversal appropriate.⁶⁰

The government sought to remove Michelle Thomas and her immediate family, citizens and natives of South Africa, because their visitor status had expired.⁶¹ 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.”⁶² Specifically, Thomas argued that she faced persecution from black South Africans because her white father-in-law—a purported member of her “social group”—allegedly mistreated black workers in the plant where he was the foreman.⁶³

Neither the immigration 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.”⁶⁴

⁵⁶ *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.).

⁵⁷ *Negusie v. Holder*, 555 U.S. 511, 524 (2009) (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”).

⁵⁸ 8 U.S.C. §§ 1158(a), 1253(h)(1); see also 5 U.S.C. § 706.

⁵⁹ *Thomas*, 547 U.S. at 185.

⁶⁰ *Id.* at 184.

⁶¹ Brief for Respondent, 2002 WL 32297961 *3 (2002).

⁶² *Thomas*, 547 U.S. at 184 (quoting 8 U.S.C. § 1101(a)(42)(A)).

⁶³ *Id.*

⁶⁴ *Id.*

But the en banc Ninth Circuit disagreed with this legal conclusion, holding that “a family *may* constitute a social group for the purposes of the refugee statutes.”⁶⁵ 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”?⁶⁶ Some institution—either the Article III court or the 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 the [a] particular social group.”⁶⁷ 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.”⁶⁸

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.”⁶⁹ 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.’”⁷⁰ 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 at this inquiry, the Ninth Circuit should have remanded the question of whether the Thomases are a particular social group.⁷¹ 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.⁷²

⁶⁵ *Id.* at 1187 (emphasis added).

⁶⁶ The dissent argued that this question, i.e. “whether the Thomases are a ‘particular social group,’” should *first* be considered by the agency. *Id.* at 1193 (emphasis in original).

⁶⁷ *Id.* at 1189.

⁶⁸ *Id.* (citing *Ventura*, 537 U.S. 12).

⁶⁹ *Gonzales*, 547 U.S. at 185.

⁷⁰ *Id.* at 186.

⁷¹ *Id.* at 186-87 (citing *Ventura*, 537 U.S. at 17, for the reasons to remand).

⁷² 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 *Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006) (mem.); *Keisler v. Gao*, 552 U.S. 801 (2007) (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. GLOBAL L. & BUS. 1, 17-18 (2010) (discussing

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 error was a question of fact, policy, or application of law to fact.⁷³ Importantly, that includes when the agency's reasoning has been found deficient—a common reason for remanding in the rulemaking context.⁷⁴ *Ventura* and *Thomas* merely revived *Chenery*'s recognition that the remand rule is a “simple but fundamental rule of administrative law.”⁷⁵

But missing from *Chenery*'s discussion—and from the discussion at least until *Chevron v. NRDC*⁷⁶—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*. With the “*Chevron* revolution”⁷⁷ and the *Chenery* revival to thank, the ordinary remand rule now encompasses questions of law where (1) the statutory

the cases in more detail). *But see* 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 assert[ing] that the Supreme Court erroneously applied the ordinary remand rule to Ms. Gao's case”).

⁷³ See Walker, *Ordinary Remand Rule*, *supra* note 14, at 1561–68.

⁷⁴ See, e.g., *Dep't of Homeland Sec. v. Regents of 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*, 69 GEO. MASON L. REV. 733, 758–59 (2021) (collecting criticisms).

⁷⁵ *Chenery II*, 332 U.S. at 196.

⁷⁶ 467 U.S. 837 (1984).

⁷⁷ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 834–35 (2001) (coining the phrase).

provision at issue is ambiguous and (2) Congress charges an agency with administering the statute.⁷⁸

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 in the same just as he had been punished.⁷⁹ 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.⁸⁰ The government argued that Negusie did not qualify for asylum because of the Immigration and Nationality Act’s so-called persecutor bar, which statutorily prohibits the agency from granting asylum for those who persecuted other people.⁸¹ Negusie contended that the persecutor bar that contained an exception for persecution like his—that was coerced or otherwise the product of duress.⁸² That disagreement teed up a purely legal question of statutory interpretation: Did the statute barring asylum for alien 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.⁸³ What mattered, the BIA concluded, is “the objective effect of an alien’s actions,”⁸⁴ not the subjective intent of the persecutor. The Fifth Circuit agreed with the BIA and its interpretation of the prior Supreme Court precedent.⁸⁵

⁷⁸ See *Negusie*, 555 U.S. at 523; 523 see also Walker, *Ordinary Remand Rule*, *supra* note 14, at 1577–78.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Brief for Respondent, 2008 WL 3851621 *1 (2008); 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.”).

⁸² *Negusie*, 555 U.S. at 517–18.

⁸³ *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.”).

⁸⁴ *Id.* (quoting *Matter of Fedorenko*, 19 I. & N. Dec. 57, 69 (BIA 1984)).

⁸⁵ *Negusie v. Holder*, 231 F. App’x 325, 326 (5th Cir. 2007) (citing *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981)).

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.⁸⁶ 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.⁸⁷ 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,⁸⁸ citing both *Chevron* (and its progeny) and the *Ventura* ordinary remand rule in the process.⁸⁹ 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 the statute that an agency administers.⁹⁰ 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

⁸⁶ *Negusie*, 555 U.S. at 516.

⁸⁷ *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.

⁸⁸ *Negusie*, 555 U.S. 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 no doubt that pure questions of law—what the meaning of “persecution” is in the statute—are to be made in the first instance by the agency.

⁸⁹ *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*, 547 U.S. at 186, in turn quoting *Ventura*, 537 U.S. at 16, in turn quoting *Fla. Power & Light Co.*, 470 U.S. at 744)); see also *id.* (“Filling these gaps [in statutes] . . . involves difficult policy choices that agencies are better equipped to make than courts.” (quoting *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005))). But see *id.* at 534–38 (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)).

⁹⁰ *Negusie*, 555 U.S. at 523.

Chevron’s principles (as furthered advanced also by *Brand X*) into the *Ventura* ordinary remand rule.⁹¹

This fusion coheres from a doctrinal perspective. If a statute survives *Chevron* step zero (an agency has interpretive authority over the statute⁹²) and step one (“the statute is silent or ambiguous” on the issue⁹³), *Chevron* counsels the court to remand, even if the agency’s initial statutory interpretation was unreasonable under *Chevron* step two.⁹⁴ The Court implied as much in *Chevron* itself when it stated that “the court does not simply impose its own construction on the statute,”⁹⁵ 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 administering is not authoritative . . . [because] the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”⁹⁶

4. The “Rare Circumstances” Wrinkle

These three cases establish, as a doctrinal matter, a fairly bright-line ordinary remand rule. But 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.⁹⁷ What constitutes “rare circumstances,”

⁹¹ See Walker, *Ordinary Remand Rule*, *supra* note 14, at 1568–74 (discussing *Chevron*’s and *Brand X*’s expansion of the remand rule, even prior to *Negusie*).

⁹² See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

⁹³ *Chevron*, 467 U.S. at 843.

⁹⁴ See also Christopher J. Walker, *How To Win the Deference Lottery*, 93 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”).

⁹⁵ *Chevron*, 467 U.S. at 843.

⁹⁶ *Brand X*, 545 U.S. at 983 (majority opinion). 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); see *id.* at 182 (“In other words, a remand is proper if the BIA’s interpretation will be entitled to either *Chevron* or *Skidmore* deference on review.”).

⁹⁷ *Negusie*, 555 U.S. at 523 (internal quotation marks omitted); see also *Gonzales*, 547 U.S. at 186 (same); *Ventura*, 537 U.S. at 16 (2002) (same).

however, remains largely unclear, especially in the immigration context.

Despite the lack of Supreme Court articulation on when courts should not remand, can glean what these rare circumstances *should* be based on the rule's underlying separation of powers values, discussed in Part 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.⁹⁸ And the latter two come from the Administrative Procedure Act (APA) itself and the 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."⁹⁹ Think harmless error. Or as the Supreme Court recently put it, these are the "rarer cases . . . where remand would serve no meaningful purpose."¹⁰⁰ 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.¹⁰¹ Because the agency is still the body making the decision, because its conclusion is still apparent from its decision, the court does not harm the separation of powers.¹⁰² Indeed, the APA specifically approves this

⁹⁸ Friendly, *supra* note 20, at 222–25. The Supreme Court cases he cites include *Mass. Tr. 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) (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").

⁹⁹ Friendly, *supra* note 20, at 223.

¹⁰⁰ *Smith v. Berryhill*, 139 S. Ct. 1765, 1780 n.21 (2019).

¹⁰¹ *See id.*

¹⁰² *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.").

kind of decisionmaking by codifying a harmless-error standard for certain agency determinations.¹⁰³

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.¹⁰⁴ And because, by definition, this cannot be an instance “a question . . . that has been delegated to [the] agency,” separation of powers has nothing to say.¹⁰⁵ 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 statute is unambiguous at *Chevron* step one.¹⁰⁶ 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

¹⁰³ See 5 U.S.C. § 706 (“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 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.”).

¹⁰⁴ 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).

¹⁰⁵ *Smith*, 139 S. Ct. at 1779.

¹⁰⁶ 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, Book Review, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016). The same is no doubt true of non-judges—as illustrated by the two of us. One (Saywell) would view this exception to remand as 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 305, 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.”).

authority to act.¹⁰⁷ 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).¹⁰⁸ 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.”¹⁰⁹ 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.”¹¹⁰ 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.”¹¹¹ 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.¹¹²

Finally, in *Smith v. Berryhill* 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.”¹¹³ 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

¹⁰⁷ See *Smith*, 139 S. Ct. at 1779.

¹⁰⁸ Sunstein, *supra* note 92, at 190–91.

¹⁰⁹ 5 U.S.C. § 706(2)(F).

¹¹⁰ Hoffer & Walker, *supra* note 14, at 267.

¹¹¹ *Fla. Power & Light Co.*, 470 U.S. at 744

¹¹² See Hoffer & Walker, *supra* note 14, at 254–56, 267–68 (detailing the intersection of the APA and Tax Court review of IRS tax deficiency determinations).

¹¹³ *Smith*, 139 S. Ct. at 1780 n.21.

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.¹¹⁴ In the last decade alone, the federal courts have cited the Supreme Court's *Ventura* ordinary remand rule decision in more than 1500 decisions.¹¹⁵

In a prior article published in the *Law Review*, one of us examined all of the published federal court of appeals decisions (over 400) that cite the immigration remand trilogy since the Court's 2002 rearticulation of the remand rule in *INS v. Ventura* through the end of 2012.¹¹⁶ Those cases reveal that most circuits, most of the time, follow the ordinary remand rule.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ Courts appeared to refuse to remand certain issues when the remand would allow the agency to continue to delay or deny relief when it should not, and thus result in courts abdicating their authority to say what the law is and their duty to ensure that procedures are fair and rights are protected in the administrative process.¹²⁰ In one particularly colorful decision, Judge Sidney Thomas,

¹¹⁴ See note 5 *supra* and accompanying text. Part I.B draws substantially from Walker, *Referral, Remand, and Dialogue*, *supra* note 14, at 86–95.

¹¹⁵ This conservative calculation is based on citations to just the Court's 2002 remand opinion in *Ventura*, 537 U.S. 12, 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 3286 published and unpublished judicial decisions, including in 1603 such decisions over the last ten years.

¹¹⁶ See Walker, *Ordinary Remand Rule*, *supra* note 14, at 1580.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1582 tbl.1. With 154 published decisions in the sample of 342 cases, the Ninth 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.*

¹¹⁹ *Id.* at 1558.

¹²⁰ *Id.* For further review of these cases, see generally *id.* at 1585–90.

writing for the Ninth Circuit en banc, compared the BIA's process to Tegwar—The Exciting Game Without Any Rules.¹²¹ 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.”¹²²

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.¹²³ 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.¹²⁴ Others suggested (or ordered) that immigration judges be replaced on remand, certified issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions.¹²⁵ Some circuits, moreover, obtained concessions from the government at argument to narrow the potential grounds for denial of relief on remand.¹²⁶ In total, seven dialogue-enhancing tools emerged from the cases reviewed in that prior study.¹²⁷

The development of this toolbox for court-agency dialogue advances a number of important objectives for judicial review of

¹²¹ *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (citing MARK HARRIS, *BANG THE DRUM SLOWLY* 8, 48, 60–64 (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.”).

¹²² *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)).

¹²³ Walker, *Ordinary Remand Rule*, *supra* note 14 at 1590.

¹²⁴ *Id.* at 1591–94.

¹²⁵ *Id.* at 1594–1600.

¹²⁶ These dialogue-enhancing tools are explored in greater detail in *id.* at 1590–1600, as are the statutory and constitutional limits on dialogue-enhancing tools. *See id.* at 1601–07.

¹²⁷ *Id.* at 1614 tbl.2.

agency adjudication (as well as agency action more generally).¹²⁸ For one thing, 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.¹²⁹

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.¹³⁰ 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.¹³¹ 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 case; and (3) placing a time limit on remand so as to expedite the process.¹³²

And finally and most relevant for this Article, an enriched dialogue in a particular case has the potential to produce systemic effects on agency decisionmaking. 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

¹²⁸ One of us, along with a tax scholar, have 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 14, 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).

¹²⁹ See *id.* at 293. Emily Hammond similarly explored this court-agency dialogue in the rulemaking context. Hammond, *Deference and Dialogue*, *supra* note 16, 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).

¹³⁰ See Hoffer & Walker, *supra* note 14, at 293.

¹³¹ See Hammond, *Deference and Dialogue*, *supra* note 16, at 1775.

¹³² Walker, *Ordinary Remand Rule*, *supra* note 14, at 1614 tbl.2.

briefing) to limit the open issues on remand.¹³³ 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.¹³⁴

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. The table below lists thirteen such tools.¹³⁵ 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.¹³⁶ 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.¹³⁷ This tool was actually used by at least one circuit-court in the prior study, but it went unnoticed until we reviewed the BIA’s decision on remand.¹³⁸ In the related context of Article I Tax Court adjudication, Susannah Camic Tahk has coined

¹³³ See *id.*

¹³⁴ See Walker, *Ordinary Remand Rule*, *supra* note 14, at 1610–14 (providing examples).

¹³⁵ See sources cited in note 14 *supra*.

¹³⁶ See *id.*

¹³⁷ See WALKER & WIENER, *supra* note 17, 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).

¹³⁸ 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 *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 504 (BIA 2008) (noting the Ninth Circuit’s invitation to issue a precedential opinion and accepting that invitation).

these “spillover precedents,” as these precedential decisions can have downward (or sometime sideways) ripple effects that subsequently benefit pro se litigants.”¹³⁹

The remaining three all address how to direct the dialogue to government officials other than the hearing-level or appellate agency adjudicator: to escalate the matter to the agency head in the adjudication context and to escalate the matter outside of the agency to the White House or Congress.¹⁴⁰ These thirteen tools 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.”¹⁴¹

¹³⁹ Susannah Camic Tahk, *Spillover Tax Precedent* (unpub. manuscript, dated Feb. 19, 2021), <https://ssrn.com/abstract=3788538>.

¹⁴⁰ See sources cited in note 14 *supra*.

¹⁴¹ Hammond, *Deference and Dialogue*, *supra* note 16, 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.”).

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 remain 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 Part II.A and challenge it in Part II.B. The ordinary remand rule, we conclude, can 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—by the Supreme Court that invented it or by administrative law scholars who study it and related doctrines.¹⁴² In

¹⁴² See, e.g., Friendly, *supra* note 20, at 206–22 (noting that the justifications for the *Chenery* rule were “insufficient”).

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 here 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.’”¹⁴³ And 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.¹⁴⁴ 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.”¹⁴⁵ In the prior study, we saw this rationale cited in several of the reviewed cases. Courts were “cautious,” for example, “not to assume the role of the [agency],”¹⁴⁶ for doing so would not “pay due

¹⁴³ *Brand X Internet Servs.*, 545 U.S. at 982 (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996)).

¹⁴⁴ 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).

¹⁴⁵ *Chenery I*, 318 U.S. at 88; accord Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of the Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 176–77 (2012) (exploring in more detail *Chevron*’s separation-of-powers goals).

¹⁴⁶ *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005).

respect to Congress's decision to entrust this initial determination to the [agency]."¹⁴⁷

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,”¹⁴⁸ 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.”¹⁴⁹ 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.¹⁵⁰

As scholars have argued, this Article II–Article III separation-of-powers principle may be particularly strong in the immigration context,¹⁵¹ where the Executive “has broad, undoubted power over the subject of immigration and the status of aliens.”¹⁵² “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.’”¹⁵³ The Court's decisions in this area suggest that courts should not second-guess Article II decisions regarding

¹⁴⁷ *Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); *accord* *Mickevičiute v. INS*, 327 F.3d 1159, 1165 (10th Cir. 2003).

¹⁴⁸ U.S. CONST. art. II, § 3.

¹⁴⁹ *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 for violating Article II by displacing the President as executor of the laws.”).

¹⁵⁰ *See Bowsher*, 478 U.S. at 733.

¹⁵¹ *See, e.g., Walker, Ordinary Remand Rule, supra* note 14, 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.”).

¹⁵² *Arizona v. United States*, 567 U.S. 387, 394 (2012) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982); STEPHEN LEGOMSKY & CRISTINA RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 115–32 (5th ed. 2009)).

¹⁵³ *Negusie*, 555 U.S. at 517 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

immigration.¹⁵⁴ This aligns, moreover, with the Executive’s broad authority over foreign affairs.¹⁵⁵

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.¹⁵⁶ 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.¹⁵⁷ 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.”¹⁵⁸ 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.”¹⁵⁹ As 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.”¹⁶⁰

¹⁵⁴ See, e.g., *Arizona*, 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 145, at 183 (“[Q]uestions of constitutional avoidance abound in the immigration and national security context . . . in part, [due] 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.”).

¹⁵⁵ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Mathews v. Diaz*, 426 U.S. 67, 81, n.17 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

¹⁵⁶ *Barnett, Boyd & Walker*, *supra* note 144.

¹⁵⁷ *Negusie*, 555 U.S. at 524 (commanding remand so that “[t]he agency can bring its expertise to bear upon the matter” (quoting *Gonzales*, 547 U.S. at 186-87, in turn quoting *Ventura*, 537 U.S. at 17)).

¹⁵⁸ *Ventura*, 537 U.S. at 17.

¹⁵⁹ Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 441 (2007).

¹⁶⁰ RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.9, at 377 (4th ed. 2002). For more on the comparative expertise policy justification, see

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.¹⁶¹ Some courts noted that the case involved “element[s] of fact,” which they were not experts at resolving.¹⁶² 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.¹⁶³ Either way, agency expertise is a core reason for courts to follow the ordinary remand rule.¹⁶⁴ 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

But it does not 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

ELIZABETH FISHER & SIDNEY SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* (2020); STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); Lisa Schultz Bressman, *Beyond Accountability: 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).

¹⁶¹ 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. Attorney Gen. of U.S.*, 619 F.3d 216, 229 (3d Cir. 2010); *Barakat v. Holder*, 621 F.3d 398, 406 (6th Cir. 2010); *Cruz v. Attorney Gen. of U.S.*, 452 F.3d 240, 248 (3d Cir. 2006); *Habtemicael v. Ashcroft*, 370 F.3d 774, 783 (8th Cir. 2004); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).

¹⁶² See, e.g., *Barakat*, 621 F.3d at 406.

¹⁶³ See, e.g., *Gallimore*, 619 F.3d at 229; accord *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 117 (2d Cir. 2006).

¹⁶⁴ Elsewhere, 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* in comparison to agency rulemaking. Wadhia & Walker, *supra* note 7, at 1215–23.

fairness, efficiency, and consistency in agency adjudications (and other regulatory contexts).¹⁶⁵

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 evade judicial review.¹⁶⁶ 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.¹⁶⁷ But most formal agency adjudication is insulated from judicial review, especially mass agency adjudication (such as immigration, Social Security, and veterans’ adjudications) where only a fraction of cases ever reach federal courts.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ Nor is this 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.”¹⁷¹

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

¹⁶⁵ Elsewhere, Stephanie Hoffer and one of us have explored 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 14, at 276–89.

¹⁶⁶ Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 DÆDALUS: J. AM. ACAD. ARTS & SCIS. 155 (2021).

¹⁶⁷ See Walker & Wasserman, *supra* note 137, at 148–53 (providing overview of APA-governed formal agency adjudication).

¹⁶⁸ Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1241 (2020).

¹⁶⁹ U.S. Courts, *supra* note 5.

¹⁷⁰ Walker, *supra* note 3 at 1632.

¹⁷¹ JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (2011).

representation, and less than half of those represented had representation for all of their agency hearings.¹⁷² Unsurprisingly, immigrants represented by counsel are more likely to prevail. That same study found that represented immigrants won tenfold (21%) more than unrepresented immigrants (2%).¹⁷³ That is in part because unrepresented immigrants were fifteen times less likely to even seek relief from removal.¹⁷⁴ Other studies point to the same result and offer reasons why it happens—that, for example, unrepresented immigrants are far less likely to ultimately seek further review of an unfavorable decision.¹⁷⁵ 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*,¹⁷⁶ Judge Calabresi aptly explained why this that 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.¹⁷⁷ 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.¹⁷⁸

Perhaps most importantly, Judge Calabresi emphasized that a remand empowers the agency to fulfill its responsibility to ensure

¹⁷²Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 7–8 (2015).

¹⁷³*Id.* at 9.

¹⁷⁴*Id.*

¹⁷⁵David 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.”).

¹⁷⁶455 F.3d 106 (2d Cir. 2006).

¹⁷⁷*Id.* 116–17.

¹⁷⁸*Id.* at 117.

“that claims be adjudicated in a fair and reasoned way.”¹⁷⁹ Refusing to remand can be counterproductive. That is because, Judge Calabresi, 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.”¹⁸⁰

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,”¹⁸¹ 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.¹⁸² 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.”¹⁸³

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,¹⁸⁴ knowing the standards in advance is especially important. Indeed, as 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

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

¹⁸² *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).

¹⁸³ 8 C.F.R. § 1003.1(d)(1).

¹⁸⁴ Eagly & Shafer, *supra* note 172, at 7–9.

parties, including those navigating the agency adjudication process without legal representation.¹⁸⁵

Third, the ordinary remand rule forces the agency to recognize and correct its mistakes, leading to system-wide improvement. 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 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.¹⁸⁶

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 be.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ 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

¹⁸⁵ See Tahk, *supra* note 139.

¹⁸⁶ Hoffer & Walker, *supra* note 14, at 281.

¹⁸⁷ See Part I.B *supra*.

¹⁸⁸ See *id.*

¹⁸⁹ Hoffer & Walker, *supra* note 14, at 283.

reaching the correct result.¹⁹⁰ 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.¹⁹¹ In a system where the ordinary remand rule is routinely followed, we should see better 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. 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 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. Part 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. Part III.B presents the findings from a study both of us conducted on agency immigration adjudication decisions on remand. And Part III.C concludes with a post-script on the *Negusie* case from the Court's immigration remand trilogy—a case that is now back at the Fifth Circuit after more than eleven years on remand at the agency.

¹⁹⁰ See *id.* at 284.

¹⁹¹ 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) (“[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.”).

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, Matthew Wiener and one of us published a comprehensive study for the Administrative Conference of the United States on appellate systems in the federal regulatory state.¹⁹² 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 bureaucratic oversight of its appellate system; and sixth, its public disclosure of information about its appellate system.¹⁹³

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 of 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 Opportunity Employment 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.¹⁹⁴

For each agency appellate system in the study, we created a detailed case study based on publicly available information.¹⁹⁵ We

¹⁹² See WEINER & WALKER, *supra* note 17.

¹⁹³ Admin. Conf. of the U.S., Recommendation 2020-3, Agency Appellate Systems, 86 Fed. Reg. 6618, 6619 (Jan. 22, 2021).

¹⁹⁴ WALKER & WIENER, *supra* note 17, at 20–21; see also *id.* 20–22 (detailing methodology for selecting the dozen case studies).

¹⁹⁵ See Admin. Conf. of the U.S., Agency Appellate Systems, <https://www.acus.gov/research-projects/agency-appellate-systems> (last visited

then conducted semi-structured interviews with at least one high-ranking official at each agency—in most cases the head of the agency appellate program.¹⁹⁶ 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.¹⁹⁷ This study design has significant methodological limitations, which we flag in our report.¹⁹⁸ Needless to say, this is 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.¹⁹⁹ It turns out that in most agency appellate programs, adjudicators pay close attention to judicial decisions that remand cases to the agency.²⁰⁰ And they take a number of measures to interact with the judicial decision on remand.²⁰¹

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).²⁰² To do this, many appellate bodies confer with their full membership to discuss how to respond.²⁰³ 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).²⁰⁴ 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.²⁰⁵ Sometimes the appellate adjudicators will decide to

Feb. 19, 2021) (the case studies are available on an online appendix located under the Project Documents heading).

¹⁹⁶ WALKER & WIENER, *supra* note 17 at 21–22.

¹⁹⁷ *Id.* at 22.

¹⁹⁸ *Id.* (detailing study methodology and limitations).

¹⁹⁹ The following findings are substantially reproduced from *id.* at 39–40, 52.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

²⁰⁵ See *Brand X*, 545 U.S. at 982 (“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

remand the case to the hearing-level adjudicator to make new factual findings or otherwise reconsider the remanded issue in the first instance.²⁰⁶

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.²⁰⁷ For those agencies, there is no decision whether to acquiesce.²⁰⁸ 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.²⁰⁹ Officials at agency appellate bodies that are regularly reviewed by the U.S. Court of Appeals for the D.C. Circuit made similar observations about the special relationship they have with the D.C. Circuit.²¹⁰

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 often 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 on remand.²¹¹ 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.²¹²

unambiguous terms of the statute and thus leaves no room for agency discretion.”).

²⁰⁶ WALKER & WIENER, *supra* note 17, at 39.

²⁰⁷ See 28 U.S.C. § 1295. 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.

²⁰⁸ See 28 U.S.C. § 1295.

²⁰⁹ WALKER & WIENER, *supra* note 17, at 39.

²¹⁰ *Id.* at 40.

²¹¹ *Id.*

²¹² *Id.*

Federal agencies do not only respond to judicial remand through subsequent agency decisions. They also respond by issuing guidance and training within the agency—for the hearing-level and appellate adjudicators and for other agency officials.²¹³ At some agencies, the appellate body takes the lead in this training.²¹⁴ At others, the agency general counsel’s office plays that role.²¹⁵ A number of officials interviewed noted how the agency appellate bodies discuss these judicial decisions at regular meetings and agency-wide conferences and trainings.²¹⁶ 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. Agency officials interviewed underscored that this court-agency interaction is not a one-way street.²¹⁷ It is not just the circuit court that influences the agency; the agency’s decisions also influence the court’s approach.²¹⁸ They view this interaction as more of a partnership than a supervisory relationship.²¹⁹ To be sure, this study is necessarily exploratory 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 Part 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 explore empirically the court-agency dialogue on remand is to review the remand decisions themselves. In the prior immigration adjudication study discussed in Part 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.²²⁰ Using Westlaw alone, we can extrapolate some important insights. Fourteen of the cases (70%) were denied when they returned to the court, meaning the court subsequently agreed that the agency

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Walker, *Ordinary Remand Rule*, *supra* note 14, at 1615.

had acted within its lawfully delegated authority on following the remand.²²¹ In the other six cases (30%), the courts reversed, but they remanded again in four of the six cases.²²²

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. Mukasey* as an example.²²³ The Second Circuit remanded for the immigration judge to decide an issue in the first instance.²²⁴ On remand, the BIA reached the same determination as the immigration judge, and the panel subsequently agreed with the agency.²²⁵ 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."²²⁶ Other cases showed even more give and take. In *Valdiviezo-Galdamez v. Attorney General*,²²⁷ 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.²²⁸

To understand the court-agency dialogue on remand in the cases reviewed far more than what Westlaw has to offer, we sought the agency decisions on remand over a number of years and a number of

²²¹ *Id.*

²²² 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).

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

²²⁴ *Id.* at 165.

²²⁵ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007) (per curiam).

²²⁶ See *id.* ("The 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. 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.").

²²⁷ 663 F.3d 582 (3d Cir. 2011).

²²⁸ *Id.* at 612, 618 (Hardiman, J., concurring) ("We did not authorize the BIA to usurp the IJ's role as factfinder. . . . 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.").

requests under the Freedom of Information Act (FOIA).²²⁹ 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 began to release decisions on a rolling basis 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 a number of things, including agency outcomes, timing, and whether they talk back to the courts. We coded for six key features of each decision: (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.²³⁰ We also included the agency decision's key language and made notations of any other significant aspects of the case.

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 it did include 45 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 percentage (17%) is consistent with the overall percentage of decisions

²²⁹ See generally Margaret Gilhooly, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L.J. 53, 53 (1989).

²³⁰ 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 Part. It should go without saying that this an exploratory study, from which generalizations should not be drawn due to the limited sample size and various other methodological limitations.

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 26 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.²³¹ 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, whether he 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 44 of the 213 remanded cases (20.7%). Of those 44 cases where the respondent was ordered removed, the respondent failed to appear in nine of them and thus forfeited applications for relief from removal.²³² 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

²³¹ We have made all of these agency decisions on remand publicly available here: <working on this; to insert details in next draft>. The agency produced the decisions on remand in five batches, with some duplicate decisions: (A) August 13, 2014 (70 cases); (B) November 13, 2015 (100 cases); (C) November 24, 2014 (48 cases); (D) April 13, 2015 (47 cases); and (E) September 21, 2015 (23 cases). Throughout this Part, we cite to these remanded decisions by batch and case number, such as A1, B3, E7, and so forth. The decisions are similarly organized in our online database. Our coding dataset is available on request.

²³² See A39, A70, B23, B46, B51, B98, C21, C34, D45.

only look at cases where the respondent lost on the merits, that would only be 36 cases, or 16.9% 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 that the agency adjudicator determined 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.²³³

The remaining 61 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 34 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.²³⁴ Some reasons would seem like a “win” for the respondent, including obtaining or being able to apply for adjustment of status,²³⁵ obtaining deferred action status,²³⁶ or the Department of Homeland Security (DHS) otherwise exercising prosecutorial discretion not to proceed.²³⁷ Others, however, provide less comfort, including when proceedings are administratively closed or terminated without prejudice because the respondent has left the United States.²³⁸ In at least four cases in our dataset, the proceedings were terminated due to the respondent’s death.²³⁹

The remaining 26 cases are even less insightful. In two cases the immigration court granted the respondent’s request for voluntary

²³³ See, e.g., C13 (including the standard immigration judge order form with a checklist of the various types of relief from removal).

²³⁴ 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.

²³⁵ A08; A29; A63; B04; B13; C01; E06.

²³⁶ B24.

²³⁷ 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.

²³⁸ A43; A50.

²³⁹ A04; D15; D28; E04.

departure in lieu of removal,²⁴⁰ in two cases the BIA reversed an immigration court's finding of a frivolous asylum filing,²⁴¹ and in two other cases the BIA addressed motions to reopen—granting one filed by both parties²⁴² and denying one sought by DHS.²⁴³ And in the final 20 (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.²⁴⁴

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 16.9% 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 Part I.B, the Ninth Circuit has compared judicial remand to Tegwar²⁴⁵ as well as “a sort of Zeno's Paradox in which the arrow could never reach the target.”²⁴⁶ “[F]inal resolution would never be reached” with constant remands,²⁴⁷ some courts worry, and “[n]o immigrant should have to live [for] years with the uncertainty as to whether she can stay in this country or not.”²⁴⁸

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

²⁴⁰ B30; C10.

²⁴¹ D05; D36.

²⁴² C01.

²⁴³ C04.

²⁴⁴ D01; D02; D07; D08; D11; D14; D16; D18; D22; D23; D25; D26; D32; D33; D40; D41; D42; D43; D44; D46.

²⁴⁵ *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (citing MARK HARRIS, *BANG THE DRUM SLOWLY* 8, 48, 60–64 (1st ed. 1956)).

²⁴⁶ *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000).

²⁴⁷ *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003).

²⁴⁸ *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).

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.²⁴⁹

It is helpful to disaggregate this data based on case outcome. As noted above, in 34 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 44 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 34 cases that were terminated or administratively closed, the mean duration rose to 1037.5 days (2.8 years), and the median duration rose to 965.5 days (2.7 years). Finally, it is worth reiterating that 20 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 20 cases 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

²⁴⁹ C09; D17.

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 thing that seems to make the agencies listen—and grant respondents relief—is whether the respondent is represented by counsel. As detailed in Part II.B and as documented by Ingrid Eagly and Steven Shafer, for example, fewer than two in five noncitizens in removal proceedings have legal representation,²⁵⁰ and less than half of those represented had legal representation during all of their agency hearings.²⁵¹ *Pro se* respondents in that study succeeded only two percent of the time, compared to twenty-one percent for those represented by counsel.²⁵²

Our study, remember, included only those individuals who won at 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%).²⁵³ In the 108 cases where the respondents obtained some relief on which the judicial remand was based, 99 were represented (91.7%). In the 44 cases where the respondents were denied relief, 40 were represented (88.9%). And in the cases 34 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

²⁵⁰ Eagly & Shafer, *supra* note 172, at 7.

²⁵¹ *Id.* at 8.

²⁵² *Id.* at 9.

²⁵³ 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.”); see *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 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. D08. Yet after he obtained counsel, the BIA remanded to the immigration judge on February 7, 2014. *Id.* The agency has not yet completed its review. *Id.*

small numbers here, but these are cases where a court has found merit for a remand that likely raises the likelihood of legal representation. But 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.²⁵⁴

4. *BIA Discussion of Judicial Decisions*

As detailed in Part III.B.1, the fact 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 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.²⁵⁵ 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 remand.²⁵⁶ Many times that discussion was extensive. Indeed, one of

²⁵⁴ For further discussion of spillover precedents, see notes 184–185 *supra* and accompanying text.

²⁵⁵ 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 17, at 11–16, 36–39 (exploring the agency appellate bodies’ role in setting policy for trial-level adjudicators and the agency more generally)

²⁵⁶ 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

us (Walker) re-reviewed all of these BIA decisions and determined that 50 (23.5%) included what he would categorize as an extensive response to the court's reasoning.²⁵⁷

In *Gui Cun Liu v. Ashcroft*, for example, then-Judge Alito for the Third Circuit found legal error in the BIA's admissibility of evidence rulings.²⁵⁸ 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."²⁵⁹ On remand, the BIA acknowledged the court's decision, and it explained the court's holding in some depth.²⁶⁰ In a separate order, the BIA then granted withholding of removal and conditionally granted asylum.²⁶¹

On remand, it was not unusual for the BIA to agree with the reviewing court and even, at times, confess error.²⁶² For instance, on remand in *Gallimore v. Attorney General*,²⁶³ 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."²⁶⁴

The BIA also discusses and engages the issues even when it disagrees with the reviewing court. A terrific example of this is the *Lemus-Losa v. Holder* out of the Seventh Circuit.²⁶⁵ Judge Wood, writing for the court, found fault in the BIA's decision, which had ordered Lemus-Losa removed.²⁶⁶ It remanded the case to the BIA.²⁶⁷

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.").

²⁵⁷ A07; A12; 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.

²⁵⁸ 372 F.3d 529, 533–34 (3d Cir. 2004).

²⁵⁹ *Id.* at 534 n.9.

²⁶⁰ E3.

²⁶¹ *Id.*

²⁶² *See, e.g.*, A13; A27; B09.

²⁶³ 619 F.3d 216 (3d Cir. 2010).

²⁶⁴ A13.

²⁶⁵ 576 F.3d 752 (7th Cir. 2009).

²⁶⁶ *Id.* at 761.

²⁶⁷ *Id.*

On remand, the BIA “carefully considered the issues raised by the Seventh Circuit,” yet ultimately disagreed with the court.²⁶⁸ “Upon consideration of the Seventh Circuit’s decision,” the BIA wrote, “we respectfully reaffirm our prior determination.”²⁶⁹

In a more pointed example, on remand in *Murillo-Salmeron v. INS*,²⁷⁰ 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.²⁷¹

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 Third Circuit’s decisions in *Castañeda-Castillo* may be an extreme example of such multiple remands. First, in 2006 and 2007, a Third 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.²⁷²

²⁶⁸ Matter of Lemus-Losa, 25 I. & N. Dec. 734, 746 (BIA 2012). This precedential opinion is part of D45.

²⁶⁹ *Lemus-Losa*, 25 I. & N. Dec. at 734. The Board 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 746. 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. D45.

²⁷⁰ 327 F.3d 898, 902 (9th Cir. 2003).

²⁷¹ B64.

²⁷² *Castañeda-Castillo v. Gonzales*, 464 F.3d 112 (1st Cir.2006) (*Castañeda I*); *Castañeda-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir.2007) (en banc) (*Castañeda II*). The BIA, on remand, issue a one-paragraph cursory remand to the immigration judge to proceed to consider the merits of the respondent’s asylum claim. E01.

The case made its way back to the Third 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’ constitutes a cognizable particular social group.”²⁷³ The BIA thoroughly discussed the First Circuit’s decision before holding that it was a particular social group.²⁷⁴ 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.²⁷⁵ The immigration judge performed factfinding, and the BIA granted relief to the petitioners.²⁷⁶ The First Circuit then entered final judgment (because it had kept jurisdiction of the case), approving of what the agency had done.²⁷⁷

As another example, perhaps an example where the court did not listen as well as it should have, take *Zheng v. Ashcroft* out of the Ninth Circuit.²⁷⁸ The court originally disagreed with the BIA’s legal standard on an issue and remanded the case back to the agency after disagreeing. 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.²⁷⁹ The immigration judge found that Zheng was not credible, but when the case reached the Ninth Circuit again, the Ninth Circuit lost patience with the agency.²⁸⁰ 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.”²⁸¹

In *Yusupov v. Attorney General*,²⁸² the Third Circuit similarly gave up on the ordinary remand rule when the case returned to its court:

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

²⁷³ *Castaneda-Castillo v. Holder*, 638 F.3d 354, 363 (1st Cir. 2011) (*Castañeda III*).

²⁷⁴ D34.

²⁷⁵ D34.

²⁷⁶ D34.

²⁷⁷ *Castaneda-Castillo v. Holder*, 676 F.3d 1 (1st Cir. 2012) (*Castañeda IV*). 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. *Id.* at 3.

²⁷⁸ 332 F.3d 1186, 1196-97 (9th Cir. 2003).

²⁷⁹ C30.

²⁸⁰ *See Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005).

²⁸¹ *Id.* at 1142.

²⁸² 650 F.3d 968, 993 (3d Cir. 2011).

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.²⁸³

Related and as noted in Part III.B.1, it is also not unusual for DHS to exercise prosecutorial discretion on remand.²⁸⁴

These few examples merely scratch the surface of the 168 BIA decisions on remand that engage with the court’s reasoning and the 50 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 Part III.A, that agency appellate bodies 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 Part 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.²⁸⁵

In this final section of Part 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*,²⁸⁶ the Ninth Circuit reversed a denial of asylum relief and “directed” the parties “to notify [it] immediately after the BIA’s decision on

²⁸³ *Id.* at 993. The agency decision on remand is E02.

²⁸⁴ *See, e.g.*, C11 (The BIA administratively closed the proceedings “based upon the Department of Homeland Security’s exercise of prosecutorial discretion.”).

²⁸⁵ *See Walker, Ordinary Remand Rule, supra* note 14, at 1614–20 (exploring the potential effect of judicial remand and these tools on the agency-court dialogue and agency outcomes on remand).

²⁸⁶ 564 F.3d 1015 (9th Cir. 2009).

remand.”²⁸⁷ Because this remand tool requires the parties—not the adjudicating agency—to provide the court with notice, it is probably no surprise that there’s no mention in the agency’s decision on remand of this notice requirement. Not in this case, the sole case in our dataset in which the court requested such notice.

The proceedings on remand 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.”²⁸⁸ The immigration judge held a hearing and ruled orally that the respondents were entitled to asylum.²⁸⁹ 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 obtain relief.

Panel Retention of Jurisdiction. Two cases already discussed in Part III.B involved the circuit-court panel retaining jurisdiction of the case on remand: *Castañeda-Castillo v. Holder*²⁹⁰ and *Ucelo-Gomez v. Gonzales*.²⁹¹ It is no surprise that cases where the circuit-court panel retains jurisdiction often involve extensive dialogue on remand and then back at the court. But it is difficult to know which is the cause—the complicated aspects of the case encourage the court to retain jurisdiction, or the panel’s decision to retain jurisdiction encourage the extended dialogue. Our guess is that in most situations it’s the former.

There are five cases in our dataset in which we know that the circuit-court panel retained jurisdiction of the case when remanding it to the agency.²⁹² The respondent only obtained relief in three of those cases. 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 in Part III.B.4. Excluding *Castañeda-Castillo*, the mean duration for the other four cases was 675.0 days (1.9 years).

²⁸⁷ *Id.* at 1026.

²⁸⁸ B27.

²⁸⁹ B27.

²⁹⁰ 638 F.3d 354 (1st Cir. 2011); D34

²⁹¹ 464 F.3d 163 (2d Cir. 2006); B2.

²⁹² A20; B2; B22; B58; D34; D38.

The two respondent losses merit a brief note. In one, the respondent conceded removability on remand and instead sought cancellation of removal, which the BIA denied.²⁹³ So we do not know what the BIA would have done on the merits of the remanded issue. As discussed earlier in Part III.B, in *Ucelo-Gomez*, the BIA on remand issued a detailed, eight-page decision finding that the respondent was not part of a “particular social group” for asylum purposes. The noncitizen sought further review. The Second Circuit panel (that 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.”²⁹⁴

Again, it is difficult to ascertain the effectiveness of this tool, especially as 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. Two of them were just discussed: *Castañeda-Castillo v. Holder*²⁹⁵ and *Ucelo-Gomez v. Gonzales*.²⁹⁶

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.”²⁹⁷ 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.”²⁹⁸ It seemed to work. The immigration judge issued a 17-page written decision just four months after the BIA’s remand decision, in which the judge granted asylum relief to the respondents.²⁹⁹ In total, the respondents obtained asylum relief 319 days after the court’s remand decision.

²⁹³ B58.

²⁹⁴ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007).

²⁹⁵ 638 F.3d 354 (1st Cir. 2011); D34

²⁹⁶ 464 F.3d 163 (2d Cir. 2006); B2.

²⁹⁷ 638 F.3d 354, 367 (1st Cir. 2011)

²⁹⁸ 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.”).

²⁹⁹ D34.

In *Ucelo-Gomez v. Gonzales*, the Second Circuit was even more directive by ordering the BIA “to issue its responsive opinion *within 49 days*.”³⁰⁰ On remand, the BIA did not mention the deadline, nor did it meet the deadline.³⁰¹ 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.³⁰² 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 decision.”³⁰³

Finally, in *Jian Hui Shao v. Board of Immigration Appeals*, 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.”³⁰⁴ 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.”³⁰⁵ The BIA answered the call, issuing a precedential opinion less than eight months (238 days) after the judicial remand.³⁰⁶ Although the BIA denied relief to the respondent, it held that “[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.”³⁰⁷

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

³⁰⁰ 464 F.3d 163, 172 (2d Cir. 2006).

³⁰¹ B02.

³⁰² B02.

³⁰³ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007).

³⁰⁴ 465 F.3d 497, 503 (2d Cir. 2006).

³⁰⁵ *Id.*

³⁰⁶ D38.

³⁰⁷ In Re J-H-S-, 24 I. & N. Dec. 196, 196 (BIA 2007).

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.³⁰⁸ 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*, 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.”³⁰⁹ The court charged the BIA to consider:

(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*.³¹⁰

On remand, the BIA issued a thirteen-page precedential opinion, in which it acknowledged the Second Circuit’s charge to consider those factors.³¹¹ Indeed, the BIA also noted that the Second Circuit had required in 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.”³¹² After articulating a more detailed standard that addresses these five factors, the BIA denied a continuance in this particular case. On appeal, the Second Circuit dismissed the petition and held that the BIA did not abuse its discretion in denying the continuance.³¹³

Second, in *Biao Yang v. Gonzales*, the Second Circuit remanded the case to the BIA to further flesh out and apply its agency precedents for

³⁰⁸ A27; A47; B42; B46; B62; C36.

³⁰⁹ *Rajah v. Mukasey*, 544 F.3d 449, 450 (2d Cir. 2008).

³¹⁰ *Id.*

³¹¹ *Matter of Rajah*, 25 I.&N. Dec. 127, 129 (BIA 2009); D04.

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

³¹³ *Rajah v. Holder*, 405 F. App’x 547, 548 (2d Cir. 2011).

determining whether an asylum filing is frivolous.³¹⁴ 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.³¹⁵

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."³¹⁶

On remand, the BIA issued ten-page precedential opinion.³¹⁷ 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.³¹⁸ The BIA then remanded the case to the immigration judge to reconsider her frivolousness finding, in light of the BIA's precedential opinion.³¹⁹ On remand, the immigration judge reversed her prior frivolous bar finding.³²⁰

Request for Precedential Opinion. In our dataset, circuit courts expressly asked the BIA to issue a remand in at least two cases. In one, the BIA accepted the Ninth Circuit's request to issue one (and ultimately held that the respondent was not subject to removal).³²¹ In

³¹⁴ 496 F.3d 268, 272 (2d Cir. 2007).

³¹⁵ *Id.* at 279.

³¹⁶ *Id.* at 279 n.3.

³¹⁷ Matter of B-Y-, 25 I.&N. Dec. 236, 236 (BIA 2010); D05.

³¹⁸ See B-Y-, 25 I.&N. Dec. at 239–43.

³¹⁹ *Id.* at 243–45.

³²⁰ D05.

³²¹ Matter of Velazquez-Herrera, 24 I.&N. Dec. 503, 504 (BIA 2008); D27.

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.”³²²

Because this dialogue-enhancing tool was not expressly analyzed in the prior study (and thus not coded in that study), it is quite possible 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.³²³ This tool deserves much more scholarly and judicial attention.

Government Concessions on Appeal. Our dataset did not disclose in many judicial opinions that noted that the court extracted a concession from the government that could potentially limit the scope of remand. But *Sandoval v. Holder* is worth noting.³²⁴ There, the Eighth Circuit noted that “even the government does not buy everything it is trying to sell”: “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.”³²⁵ 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.”³²⁶ And it is similarly unsurprisingly that the BIA granted the joint motion.³²⁷

Suggestion to Agency to Assign Different Immigration Judge. There are a half-dozen judicial decisions in our dataset in

³²² D46.

³²³ *Matter of M-E-V-G-*, 26 I.&N. Dec. 227 (BIA 2014); *Matter of Lemus-Losa*, 25 I.&N. Dec. 734 (BIA 2012); *Matter of B-Y-*, 25 I.&N. Dec. 236 (BIA 2010); *Matter of Rajah*, 25 I.&N. Dec. 127 (BIA 2009); *Matter of Velazquez-Herrera*, 24 I.&N. Dec. 503 (BIA 2008); *In Re J-H-S-*, 24 I.&N. Dec. 196 (BIA 2007); *Matter of Y-L-*, 24 I.&N. Dec. 151 (BIA 2007).

³²⁴ 641 F.3d 982 (8th Cir. 2011).

³²⁵ *Id.* at 987.

³²⁶ A48.

³²⁷ A48.

which the reviewing court suggests, urges, or orders that the BIA assign the case to a different immigration judge on remand.³²⁸ In five of those cases, the BIA on remand expressly notes that the court had requested that the case be assigned to a different immigration judge. In three of those cases, the BIA expressly orders the case to be assigned to a different immigration judge on remand.³²⁹ In the two others, it is less clear whether the BIA is ordering a change or just noting the court's request.³³⁰ 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.³³¹ Ultimately, the respondent obtained relief in five of those six cases—with the sole denial being in a case where the BIA reassigned the case to a different immigration judge on remand.³³²

* * *

In the abstract, one could reasonably question whether the ordinary remand rule actually fosters a real dialogue between the court and agency, or is just a judicial monologue. But these agency decisions on remand often show a rich dialogue—*i.e.*, a “conversation in which the participants strive toward learning and understanding to promote more effective deliberation and outcomes”³³³—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.”³³⁴

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

³²⁸ A16; A38; A62; C16; D03; E01.

³²⁹ A38; A62; D03.

³³⁰ 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.”).

³³¹ A16.

³³² D03.

³³³ Hammond, *Deference and Dialogue*, *supra* note 16, at 1773.

³³⁴ Metzger, *supra* note 16.

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 Part 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 so far has focused on findings that provide some support for courts to consider the ordinary remand rule as a tool for judicial engagement and dialogue. We do not mean to overstate this, though; the conventional account of remand as a tool for deference cannot be overlooked. Nor can the costs that accompany forcing the agency 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*³³⁵—is illustrative.

As discussed in Part I.A.3, Daniel Girmai Negusie spent two years in his early twenties as a political prisoner in Eritrean for his refusal to fight in the Eritrean navy against Ethiopians, whom he considered his brothers.³³⁶ On release, he was forced to work as a prison guard, where he witnessed prisoners tortured.³³⁷ After some four years of coerced work, he escaped and fled to seek refuge in the United States.³³⁸

One month after his escape, Negusie arrived in the United States in December 2004, when he immediately sought asylum relief.³³⁹ The immigration judge largely credited Negusie's testimony but ultimately denied asylum and similar relief from removal in May 2005, and the BIA dismissed the appeal in February 2006.³⁴⁰ Both the immigration judge and the BIA concluded that the Immigration and Nationality Act's persecutor bar precluded asylum relief.³⁴¹ Negusie did receive, however, the more temporary deferral of removal relief under the

³³⁵ 555 U.S. 511.

³³⁶ Brief of Petitioner, in *Negusie v. Mukasey*, 2008 WL 2445504 at *14 (2008) (S. Ct.).

³³⁷ *Id.* at *14–*15.

³³⁸ *Id.*

³³⁹ Joint Appendix, in *Negusie v. Mukasey*, 2008 WL 2442321 at *63 (2008) (S. Ct.).

³⁴⁰ Brief for Petitioner, in *Negusie v. Gonzales*, 2006 WL 5631660 at *1 (2006) (5th Cir.).

³⁴¹ *Negusie*, 555 U.S. at 511.

Convention Against Torture, so that he remained in the United States and was not detained.³⁴²

In an unpublished decision issued in May 2007, the Fifth Circuit denied Negusie's petition for review.³⁴³ The Supreme Court granted certiorari in March 2008,³⁴⁴ and the Court issued its decision remanding the case to the agency in March 2009.³⁴⁵ At the time of the remand, Negusie was 33 years old; more than four years had passed since he first applied for asylum.³⁴⁶

For reasons that are not entirely clear from the public record, remand at the agency was not a model of expediency. President Obama had been elected a couple months before the Court remanded the case to the BIA. The case remained at the agency for President Obama's entire presidency.³⁴⁷ 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.³⁴⁸ DHS reasserted this intention in the United Agenda in at least 2012, 2013, 2014, and 2015.³⁴⁹ The fact that the BIA did not hold oral argument on remand until September 2017 supports the proposition that the administration was seriously considering rulemaking first.³⁵⁰ At any rate, it was not until June 2018 that the BIA issued a decision on remand. And in its decision, the BIA recognized a narrow exception for duress to the statutory persecutor bar to asylum relief, but concluded that Negusie himself did not meet the newly articulated standard.³⁵¹

³⁴² See *In re Negusie*, 28 I&N Dec. 120, 123 (A.G. 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).

³⁴³ *Negusie v. Gonzales*, 231 F. App'x 325, 326 (5th Cir. 2007).

³⁴⁴ *Negusie v. Mukasey*, 552 U.S. 1255 (2008).

³⁴⁵ *Negusie*, 555 U.S. 511.

³⁴⁶ Joint Appendix, in *Negusie v. Mukasey*, 2008 WL 2442321 at *64 (2008) (S. Ct.) (listing birthdate as January 15, 1976).

³⁴⁷ See Barack Obama, THE WHITE HOUSE HISTORICAL ASSOC. (last visited May 4, 2021), <https://www.whitehousehistory.org/bios/barack-obama>.

³⁴⁸ See 75 Fed. Reg. 79536, 79546 (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").

³⁴⁹ 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. 76456 (Dec. 22, 2014); 80 Fed. Reg. 77710 (Dec. 15, 2015).

³⁵⁰ *In re Negusie*, 27 I&N Dec. 347, 348 n.2 (BIA 2018).

³⁵¹ *Id.* at 348.

Even though Negusie did not ultimately obtain asylum relief from removal, the BIA did recognize a narrow duress exception to the persecutor bar, contrary to its decision before remand. In its decision, the BIA set forth the threshold standard for considering the duress exception:

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.³⁵²

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."³⁵³ 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 exception³⁵⁴—a position DHS adopted on remand.³⁵⁵

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.³⁵⁶ And then in November 2020, the Attorney General issued a precedential decision in the matter, ultimately agreeing with Justice Thomas that the persecutor bar contains no duress exception and further holding that the immigrant

³⁵² *Id.* at 363.

³⁵³ *Negusie*, 555 U.S. at 535 (Stevens, J., concurring in part and dissenting in part).

³⁵⁴ *Id.* at 539 (Thomas, J., dissenting).

³⁵⁵ *Negusie*, 27 I&N Dec. at 351.

³⁵⁶ *Id.* at 481.

petitioner bears the burden of proving by a preponderance of the evidence that the persecutor bar does not apply.³⁵⁷

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.³⁵⁸ The BIA ultimately did that and yet still denied relief under its new duress standard.³⁵⁹

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 last November, including more than eleven years since 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 be detained during the legal proceedings or on remand, his legal status in the United States has remained in limbo.³⁶⁰ 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.³⁶¹

³⁵⁷ In re Negusie, 28 I&N Dec. 120, 120 (A.G. 2020).

³⁵⁸ 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.”).

³⁵⁹ *Negusie*, 28 I&N Dec. at 120–21.

³⁶⁰ See generally *id.*

³⁶¹ See 8 C.F.R. § 208.17.

Negusie's case, moreover, is still not over. He has sought judicial review of the Attorney General's decision.³⁶² And we now have a new 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 Part 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 Part 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. But 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.

³⁶² Petition for Review, *Negusie v. Barr*, No. 20-61141 (5th Cir., filed Dec. 3, 2020). The petition for review notes that Negusie continues to not be detained.

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 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.