

Recalibrating Judicial Review in Immigration Adjudication

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Recent calls to reform how federal courts review administrative immigration adjudications can be grouped into two main approaches. First, reformers have encouraged the Supreme Court to eliminate, or at least narrow, Chevron deference to the Board of Immigration Appeals' statutory interpretations. Second, reformers have urged Congress to improve substantive law and procedure of immigration courts, including calls to insulate immigration judges from political pressure and to provide for legal representation in the process, as well as to expand the scope of judicial review of immigration adjudications.

This Article calls for a narrower yet critical recalibration of judicial review in immigration adjudication. When remanding flawed adjudications back to the agency, courts should utilize a variety of dialogue-enhancing tools to engage in a richer dialogue with the agency on remand. This recalibration of judicial review is particularly important in a mass-adjudication context like immigration, where courts only review a small subset of agency adjudications and many errors never make it to court because the noncitizens in the process lack the wherewithal to successfully navigate the administrative process.

This Article sheds important empirical light on the court-agency dialogue on remand by reporting, via a years-long FOIA study, how the agency responds to judicial instructions on remand. Although much more empirical work needs to be done, the findings from this study suggest that courts should consider how to better engage in a dialogue with the agency on remand in order to have a more systemic effect on high-volume agency adjudications like immigration.

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INTRODUCTION

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 nearly 450 immigration judges who, to date in 2019, have received more than 400,000 new cases and completed about 275,000 cases.¹ The federal courts of appeals generally have exclusive jurisdiction to review final decisions from immigration adjudications, and they review around 5,000 such petitions each year.² In other words, Article III courts review less than two percent of the cases adjudicated by immigration courts each year. By congressional design, moreover, judicial review is highly deferential to the agency. That is unlikely to change any time soon—despite recent calls to at least narrow or eliminate *Chevron* deference to agency statutory interpretations.³

In immigration adjudication, Article III courts, moreover, must apply *Chenery*’s ordinary remand rule: When a court concludes that an

¹ EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ADJUDICATION STATISTICS: IMMIGRATION JUDGE (IJ) HIRING (2019) (reporting 442 total immigration judges and 91 new judges hired to date in 2019), <https://www.justice.gov/eoir/workload-and-adjudication-statistics>; EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ADJUDICATION STATISTICS: NEW CASES AND TOTAL COMPLETIONS (2019) (reporting as of October 7, 2019, 443,729 new cases and 275,522 completed cases), <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

² *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).

³ *See, e.g.*, Michael Kagan, *Chevron’s Asylum: Re-Assessing Deference in Refugee Cases* (working draft); Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491 (2019); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (Gorsuch, J., concurring) (raising constitutional concerns about *Chevron* deference in the immigration adjudication context).

agency's decision is erroneous, the ordinary rule is to remand to the agency to consider the issue anew (as opposed to the court deciding the issue itself).⁴ This basic administrative law principle is often criticized, especially in the immigration adjudication context, for being too deferential to agency action. In prior work in the immigration and tax contexts, however, one of us has argued that 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.⁵

Having a systemic effect is particularly important in immigration adjudication and in other high-volume agency adjudicative contexts where less-sophisticated individuals navigate the agency process, oftentimes 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. Only by remanding and forcing the agency to correct systemic errors can the court help these individuals who fail to seek judicial review.

Building on that prior work, this Article sheds some additional empirical light on the potential effect of the remand rule on enhancing court-agency dialogue on remand. To do so, it reports the findings from a years-long FOIA study where we coded every immigration adjudication decision on remand to demonstrate the extent to which the agency engages with the court's decision that remanded the case. We find that the agency on remand is listening and often responds to the judicial instructions. Based on these findings, we argue that federal courts should recalibrate their approach to judicial review in immigration adjudication to focus on having a more-systemic effect on the agency adjudicative system. Such recalibration would not require any congressional action. The ordinary remand rule itself allows courts to engage in meaningful dialogue with the agency. But courts must stop treating immigration adjudication like ordinary administrative law. When it comes to judicial review of high-volume

⁴SEC 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”).

⁵See Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84 (2016); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014).

administrative adjudications like immigration, Article III courts should consider the systemic effect judicial review could have on agency adjudicative system.

The Article proceeds as follows: Part I contrasts the classic account of formal adjudication and accompanying judicial review under the APA (Part I.A) with the more agency-deferential approach to immigration adjudication and judicial review per the INA (Part I.B). Part I.B also describes many of the challenges facing immigration adjudication at the Justice Department and for noncitizens attempting to navigate that process. Part II turns the ordinary remand rule's role in agency adjudication. Part II.A details the doctrine, as the Supreme Court has articulated it in a trilogy of immigration adjudication cases in the 2000s. Part II.B explores how the circuit courts have developed a number of tools they utilize when remanding to engage in a deeper dialogue with the agency on remand. Part II.C makes the policy case for why the remand rule and these accompanying dialogue-enhancing tools should be used to help courts address more systemic issues in immigration adjudication. Part III turns to the results from our FOIA study to demonstrate how the BIA responds to these remand and why that should give us some—albeit cautious—hope that remand and dialogue have the potential to help address systemic disparities and failures in high-volume agency adjudications like immigration adjudication.

I. JUDICIAL REVIEW OF AGENCY ADJUDICATION

In 1946, the Administrative Procedure Act (APA) set forth the criteria for “formal” adjudication, requiring an administrative law judge to make the initial determination and the agency head to have the final word. That is the lost world. Today, the vast majority of agency adjudications Congress has created are not paradigmatic “formal” adjudications as set forth in the APA. It turns out that there is great diversity in the procedures by which federal agencies adjudicate. This new world of agency adjudication involves a variety of less-independent administrative judges, hearing officers, and other agency personnel adjudicating disputes.

Immigration adjudication is part of this new world. Part I.A provides an overview of the lost world of APA-government formal adjudication, whereas Part I.B contrasts that lost world to immigration adjudication—a type of formal adjudication that is not governed by the formal adjudication provisions of the APA.

A. Formal Adjudication under the APA⁶

Enacted in 1946, the Administrative Procedure Act establishes the default rules for federal agency action and judicial review,⁷ subject to congressional override in the agency's governing statute.⁸ The APA divides the types of agency actions into two broad categories: (1) rulemaking, which is the agency process for promulgating rules that articulate "an agency statement of general or particular applicability and future effect";⁹ and (2) adjudication, which is agency action that does not qualify as rulemaking.¹⁰

The APA further distinguishes "formal" adjudication from all other types of "informal" adjudication. The APA's formal adjudication procedures generally apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹¹ In such circumstances, the APA requires a number of trial-like procedures similar to a bench trial in federal court, subject to modification in the agency's governing statute. Richard Pierce's

⁶The current version of Part I.A draws substantially from Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019).

⁷See 5 U.S.C. §§ 551–559, 701–706 (2012). For more on APA's enactment, see, for example, Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). For an overview of the evolution of the APA since 1946, see, for example, Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633–68 (2017).

⁸See, e.g., *Dickinson v. Zurko*, 527 U.S. 150, 154–55 (1999) (holding that to depart from the APA default rules, the agency's governing statute must suggest "more than a possibility of a [different] standard, and indeed more than even a bare preponderance of evidence"; and stating that the exception "must be clear"). See generally Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 243–45 (2014) (discussing the standards for departing from the APA's default rules).

⁹5 U.S.C. § 551(4)–(5) (2012).

¹⁰*Id.* § 551(6) (defining adjudication as the "agency process for the formulation of an order"); *id.* (defining an "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making"). *But see* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077 (2004) (noting that the APA's distinction between rulemaking and adjudication is confusing and arguing that the APA's definition of "rule" "may be the most blatantly defective provision in the Act").

¹¹5 U.S.C. § 554(a) (2012). The APA includes a half-dozen exceptions, including where the agency adjudication is subject to a trial de novo review, "proceedings in which decisions rest solely on inspections, tests, or elections," and "cases in which an agency is acting as an agent for a court." *Id.* § 554(a)(1)–(6).

Administrative Law Treatise identifies ten key statutory requirements of APA-governed formal adjudication, which are summarized in Table 1.¹² Wasserman and Walker added an eleventh important feature: final decision-making authority in an agency head.

Table 1. Classic APA-Governed Formal Adjudication

	Statutory Requirement	APA Provision
1.	Notice of Legal Authority and Matters of Fact and Law Asserted	§ 554(b)
2.	Oral Evidentiary Hearing Before the Agency or ALJ Who Must Be Impartial	§ 556(b)
3.	Limitations on Adjudicator's Ex Parte Communications with Parties and Within Agency	§§ 554(d), 557(d)(1)
4.	Availability of Legal or Other Authorized Representation	§ 555(b)
5.	Burden of Proof on Order's Proponent	§ 556(d)
6.	Party Entitled to Present Oral or Documentary Evidence	§ 556(d)
7.	Party Entitled to Cross-Examine Witnesses if Required for Full Disclosure of Facts	§ 556(d)
8.	Decision Limited to Bases Included in Hearing Record	§ 556(d)
9.	Party Entitled to Transcript of Evidence from Exclusive Record for Decision	§ 556(e)
10.	Decision Includes Reasons for All Material Findings and Conclusions	§ 557(c)(3)(A)
11.	Agency Head Final Decision-Making Authority and De Novo Review of ALJ Decisions	§ 557(b)

The first three requirements reflect due process concerns ensuring proper notice and a meaningful opportunity to be heard before an unbiased adjudicator. The APA requires that the parties subject to adjudication be provided with timely notice of the hearing, including “the legal authority and jurisdiction under which the hearing is to be held” and “the matters of fact and law asserted.”¹³ An impartial adjudicator must preside over the evidentiary hearing. An impartial adjudicator means the agency, “one or more members of the body which comprises the agency,” or “one or more administrative law

¹² 1 PIERCE, *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 703 (discussing formal adjudication procedures set forth in 5 U.S.C. §§ 554–557).

¹³ 5 U.S.C. § 554(b) (2012). This notice requirement applies to the agency and private parties when they are the moving parties, though the APA expressly requires private parties to “give prompt notice of issues controverted in fact or law.” *Id.*

judges appointed under” the APA.¹⁴ The adjudicator cannot engage in ex parte communications about the case “unless on notice and opportunity for all parties to participate.”¹⁵ Nor can the adjudicator “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”¹⁶

The APA provides four main requirements for the agency hearing. Parties may be represented by an attorney or, “if permitted by the agency, by other qualified representative.”¹⁷ In the proceeding, the proponent has the burden of proof, and the parties are entitled to present oral or documentary evidence, though “the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”¹⁸ A party is also allowed to submit rebuttal evidence and “to conduct such cross-examination as may be required for a full and true disclosure of the facts.”¹⁹

The final three APA requirements featured in Pierce’s treatise address the agency’s order and decision. The agency’s decision must be based exclusively on the record created at the hearing and supported by “reliable, probative, and substantial evidence.”²⁰ If a party believes the agency’s decision is based on a material fact outside of the record, the party must have an opportunity to make a timely request for reconsideration.²¹ Accordingly, the APA requires the agency to provide the parties with an “exclusive record” of “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”²² Not only must the agency’s decision be based solely on the exclusive record created at the hearing, but it must also include a

¹⁴ *Id.* § 556(b) (2012); *see also id.* § 3105 (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.”). The APA provides that parties may move to exclude administrative law judges for “personal bias or other disqualification of a presiding or participating employee.” *Id.* § 556(b).

¹⁵ *Id.* § 554(d)(1).

¹⁶ *Id.* § 554(d)(2). Indeed, the APA has detailed prohibitions on ex parte communications “relevant to the merits of the proceeding,” requirements to make any such communications part of the public record of the proceeding, and authority for the agency to require the offending party “to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.” *Id.* § 557(d).

¹⁷ *Id.* § 555(b).

¹⁸ *Id.* § 556(d).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* § 556(e).

²² *Id.*

statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.”²³

In the *Administrative Law Treatise*, Pierce does not list agency-head final decision-making authority as one of the ten core features of APA-governed formal adjudication. Indeed, this feature has been underexplored in administrative law literature.²⁴ But this agency-head final decision-making authority certainly deserves mention. The APA provides that, in cases where “the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case,” and that initial “decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule.”²⁵ When the agency decides to review an initial decision—either on appeal or via sua sponte review—the agency head has final decision-making authority.²⁶

When it comes to judicial review of formal agency adjudications, the APA generally requires that there first be final agency action²⁷ and then provides for a fairly limited scope of review. Review is generally limited to the administrative record.²⁸ The agency’s action can only be invalidated if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”²⁹ For APA-governed formal adjudication, agency factual determinations can only be overturned if “unsupported by substantial evidence.”³⁰ And, as

²³ *Id.* § 557(c)(3)(A).

²⁴ An important exception is Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996). See also Shapiro, *supra* note **Error! Bookmark not defined.**, at 921 (noting how agency heads have “the power to formulate policy by either adjudication or the promulgation of regulations”).

²⁵ 5 U.S.C. § 557(b) (2012).

²⁶ See Weaver, *supra* note 24, at 252 (noting that while the APA “imposed strict divisions between those who prosecute and those who adjudicate,” it “imposed far fewer restraints on the appellate process; under the APA, ALJ decisions were fully reviewable within the agency”).

²⁷ 5 U.S.C. § 702 (Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.).

²⁸ See *id.* § 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.”).

²⁹ *Id.* § 706(2)(A).

³⁰ *Id.* § 706(2)(E).

further discussed in Part II, the Supreme Court has held that if the agency has erred, the ordinary course is to remand the matter to the agency to redo (as opposed to the reviewing court deciding the issue itself).

B. Immigration Adjudication under the INA

<CJW Note: Part I.B will describe the immigration adjudication process and how it departs from the classes APA formal adjudication one. It will also describe the volume of adjudications at the agency and in the courts as well as survey the literature on the stark disparities in outcomes both before the agency and in court.>

II. THE ORDINARY REMAND RULE IN AGENCY ADJUDICATION

Over a half-century ago Judge Henry Friendly tried to make sense of the *Chenery* Court's reversal-and-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 anew (as opposed to the court deciding the issue itself).³¹ Judge Friendly “had the hope of discovering a bright shaft of light that would furnish a sure guide to decision in every case,” yet he concluded that “the grail has eluded me; indeed I have come to doubt that it exists.”³² Instead, he observed, it appears that determining when to reverse and remand under *Chenery* is “perhaps more an art than a science.”³³

Since the *Chenery* decisions in the 1940s (and Judge Friendly's *Duke Law Journal* article in 1969), courts have applied administrative law's remand rule in tens (if not hundreds) of thousands of cases. Specifically in the immigration adjudication context, the Supreme Court has continued to shape the contours of this “ordinary remand

³¹SEC 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”).

³²Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 199. *See generally* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011).

³³*Id.* at 200.

rule”³⁴—indicating that it applies not only to questions of fact³⁵ and mixed questions of law and fact,³⁶ but also to certain questions of law.³⁷ Despite its central importance in the modern administrative state, little scholarly attention has been paid to the ordinary remand rule.³⁸ Similarly, even though the Supreme Court has provided repeated guidance to the lower federal courts, much doctrinal confusion persists as to when courts must remand and when there are “rare circumstances” that justify departing from the ordinary rule.³⁹ 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.⁴⁰

Part II examines this feature of agency adjudication more closely and argues that the remand rule, while often criticized as a doctrine

³⁴*Negusie v. Holder*, 555 U.S. 511, 523–24 (2009) (calling it the “ordinary remand rule”).

³⁵*INS v. Ventura*, 537 U.S. 12, 15–16 (2002) (per curiam) (remanding to the agency factual question of “changed circumstances”).

³⁶*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”).

³⁷*Negusie*, 555 U.S. at 523 (2009) (remanding to the agency question of statutory interpretation where the agency “has not yet exercised its *Chevron* discretion to interpret the statute in question”). 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 [Board of Immigration Appeals (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”).

³⁸One major exception is Emily Hammond’s seminal piece on remand and reversal in the rulemaking context. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011).

³⁹*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 *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

⁴⁰Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1582 tbl.1 (2014). These figures are drawn from a review of all of the published federal court of appeals decisions (over 400) that cite the immigration trilogy (*Ventura*, *Thomas*, and *Negusie*) since the Court’s 2002 rearticulation of the remand rule in *Ventura* through the end of 2012

of deference to agency decisionmaking, can actually help the reviewing court to play a more impactful role in systemic reform of agency adjudication. Part II.A describes the ordinary remand rule, as the Supreme Court has further developed it in the 2000s through a trilogy of cases in the immigration adjudication context. Part II.B. makes the policy case for this rule.

A. The Framework for the Ordinary Remand Rule

Since the beginning of judicial review of agency decisions, courts have recognized the agency's unique position in the scheme of adjudication.⁴¹ Thus, since the 1940s, it has been the "simple but fundamental rule of administrative law" for reviewing courts to remand to agencies that erred.⁴² But for many years, the lower courts applied that "simple" rule without much Supreme Court articulation of its contours.⁴³ Without a reminder of its "fundamental" nature, many lower courts strayed from the ordinary remand rule, especially in the immigration context.⁴⁴

But since the turn of the century, the Supreme Court has cleaned up the ordinary remand rule, making clear that it truly is a bright-line rule.⁴⁵ In its current state, the remand rule (now sometimes called "the *Ventura* ordinary remand rule"⁴⁶) provides that, after the court

⁴¹SEC v. *Chenery*, 332 U.S. 194 (1947) (*Chenery II*); SEC v. *Chenery*, 318 U.S. 80 (1943) (*Chenery I*).

⁴²*Chenery*, 332 U.S. at 196; *see also* Walker Toolbox, *supra* note XX, at 7-18 (tracking the remand rule's evolution from the 1940s until *Ventura* in 2002).

⁴³*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.").

⁴⁴*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).

⁴⁵*Negusie v. Holder*, 555 U.S. 511 (2009); *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam); *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

⁴⁶*Negusie v. Holder*, 555 U.S. 511, 524 (2009) (calling it "the *Ventura* ordinary remand rule"); *accord* *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam) (describing it as "the law's ordinary remand requirement"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (noting that the rule is "what this Court described in *Ventura* as the "ordinary 'remand' rule").

concludes that the agency has erred, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”⁴⁷ As Part II.A explores, the rule has grown from its 1940s roots: It not only applies to agency factual oversight or errors,⁴⁸ but also to mixed questions of law and fact⁴⁹ and even certain questions of law.⁵⁰

1. *Remand Factual Issues*

Recognizing its relative lack of expertise as a fact-finder, an appellate court’s conclusion that an agency erred on a fact-issue requires a remand. Since the 1940s, appellate courts reviewing immigration executive officials (Immigration Judges and, most directly, the Board of Immigration Appeals (BIA)⁵¹) should have known this: the law places the agency exclusively in charge of making factual determinations,⁵² and “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”⁵³ Nevertheless, courts sometimes chose not to remand even when faced with factual issues that the BIA had not decided.

Then came *INS v. Ventura* in 2000.⁵⁴ There, the Government sought to deport Fredy Orlando Ventura to his home country of Guatemala because he had entered the United States illegally. In his defense, 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.”⁵⁵ Specifically, Ventura testified that he left Guatemala after guerillas threatened

⁴⁷ *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 *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

⁴⁸ *Ventura*, 537 U.S. at 15-16 (remanding to the agency factual question of “changed circumstances”).

⁴⁹ *Thomas*, 547 U.S. at 186 (remanding to the agency mixed issues of fact and law where “[t]he matter requires determining the facts and deciding whether the facts as found fall within a statutory term”).

⁵⁰ *Negusie*, 555 U.S. at 523 (2009) (remanding to the agency question of statutory interpretation where the agency “has not yet exercised its *Chevron* discretion to interpret the statute in question”).

⁵¹ [Cite the statute that gives appellate courts the power to review BIA decisions].

⁵² *E.g.*, 8 U.S.C. § 1158(a); 8 U.S.C. § 1253(h)(1) (setting forth the legal requirements for the *agency* to make the basic asylum eligibility decisions at issue in many immigration decisions, including *Ventura*).

⁵³ *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

⁵⁴ *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

⁵⁵ *Id.* (quoting 8 U.S.C. §§ 1101(a)(42)(A), 1253(h)).

him and killed some of his family members—all due to the guerilla’s belief that Ventura disagreed with their political beliefs.⁵⁶

The Immigration Judge, the first executive official to pass on Ventura’s application, denied his requested relief. 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 was “on account of his political opinion.”⁵⁷ 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.”⁵⁸

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].”⁵⁹ 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.”⁶⁰ Ventura, still seeking asylum, sought review in the Ninth Circuit.

The Ninth Circuit reversed, holding that the record compelled it to conclude that Ventura had an objective basis to fear persecution in Guatemala “on the account” of his political views. This conclusion ended the Government’s first argument, but its alternative argument remained: that the changed conditions in Guatemala meant that Ventura’s fears were not founded. The Government had the Immigration Judge on its side—the only agency official to consider the issue—but it asked the Ninth Circuit to remand so that the BIA could consider the argument in the first instance. Ventura agreed that the Ninth Circuit should remand. Yet, after giving lip service to the “general[]” rule that a court should “remand to the BIA for it to consider the issue in the first instance,”⁶¹ the Ninth Circuit followed a circuit exception to the remand rule. It held that it did not need to remand “when it is clear that [it] would be compelled to reverse the

⁵⁶ *Id.* at 14; *see also* Ventura v. I.N.S., 264 F.3d 1150, 1152-53 (9th Cir. 2001) (explaining the facts in greater detail than the Supreme Court’s recitation). [Should we also cite the BIA opinion here?]

⁵⁷ INS v. Ventura, 537 U.S. 12, 15 (2002) (per curiam) (quoting App. to Pet. for Cert. 22a). [Cite IJ decision or BIA decision?]

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting App. to Pet. for Cert. 15a).

⁶⁰ *Id.*

⁶¹ Ventura v. INS, 264 F.3d 1150, 1157 (9th Cir. 2001).

BIA’s decision if the BIA decided the matter against the applicant.”⁶² 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.⁶³

The Supreme Court stepped in to brighten the ordinary remand line. It applied the “bitter medicine of summary reversal”—a medicine reserved for the most egregious lower court errors.⁶⁴ 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.⁶⁵ 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,”⁶⁶ the Ninth Circuit needed to “remand to the agency for additional investigation or explanation.”⁶⁷ 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 determine whether its decision exceeds the leeway that the law provides.”⁶⁸ And so the courts of appeals were reminded of *Chenery*’s “fundamental” requirements under a modern name: the “*Ventura* ordinary remand rule.”⁶⁹

⁶² *Id.* (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)).

⁶³ *SEC v. Chenery*, 332 U.S. 194, 196 (1947) (*Chenery II*).

⁶⁴ *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). See generally EUGENE STERN, 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.”); David C. Frederick, Christopher J. Walker & David M. Burke, *The Insider’s Guide to the Supreme Court of the United States*, in ABA-CAL APPELLATE PRACTICE COMPENDIUM 8 (Dana Livingston & American Bar Association eds., 2012) (discussing the Court’s summary reversal practice under Supreme Court Rule 16.1).

⁶⁵ *Ventura*, 537 U.S. at 16.

⁶⁶ *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

⁶⁷ *Id.*

⁶⁸ *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) (memorandum); *INS v. Yi Quan Chen*, 537 U.S. 1016 (2002) (memorandum).

⁶⁹ *Negusie v. Holder*, 555 U.S. 511, 524 (2009) (calling it “the *Ventura* ordinary remand rule”); accord *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam) (describing it as “the law’s ordinary remand requirement”); *Gonzales v.*

2. *Remand Applications of Law to Fact*

Ventura did not resemble a shift in the law—Congress says the agency is the delegated and expert fact-finder and must decide factual issues in the first instance; the reviewing court cannot supplant its judgment for the agency’s. It must remand factual issues. But what about an area where courts are more sophisticated: application of law to fact? The Court had the chance to clarify this modification of *Ventura* in another case coming out of the Ninth Circuit in *Gonzales v. Thomas*.⁷⁰ And again, the Supreme Court found the bitter medicine of summary reversal appropriate.

The Government sought to remove Michelle Thomas and her immediate family, citizens and natives of South Africa, because their visitor status had expired. Thomas requested asylum for her and her family, claiming that they faced, among other things, “persecution or a well-founded fear of persecution on account of . . . membership in a particular social group.”⁷¹ 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.

Neither agency bought her primarily race-related argument. The Immigration Judge denied asylum, and the BIA summarily affirmed. But neither agency fully considered Thomas’s contention that she faced persecution on the account of her membership in a “social group”—apparently because the agencies disagreed that her familial relationship to her allegedly racist father-in-law could constitute a “social group.”⁷²

The en banc Ninth Circuit changed the preexisting law⁷³ by holding that “a family *may* constitute a social group for the purposes of the refugee statutes.”⁷⁴ The Ninth Circuit accordingly created a threshold question that the agencies in the case had previously viewed

Thomas, 547 U.S. 183, 185 (2006) (per curiam) (noting that the rule is “what this Court described in *Ventura* as the “ordinary ‘remand’ rule”).

⁷⁰ *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam).

⁷¹ *Id.* at 184 (quoting 8 U.S.C. § 1101(a)(42)(A)).

⁷² *Id.* at 184. <Would be great to cite the BIA opinion directly here as well.>

⁷³ *Thomas v. Gonzales*, 409 F.3d 1177, 1180 (9th Cir. 2005) (en banc) (“We also overrule *Estrada-Posadas v. IJINS*, 924 F.2d 916 (9th Cir. 1991), and its progeny, to the extent that they hold that a family may not constitute a ‘particular social group.’”).

⁷⁴ *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005) (en banc) (emphasis added).

as irrelevant: Was the Thomas family a “particular social group”?⁷⁵ Some institution—either the Article III court or the Article II agency—needed to apply the law to the facts of the case.

Rather than remanding that application-of-law-to-fact question to the agency, the en banc Ninth Circuit answered the question itself. It held that the Thomases “belong to the particular social group of ‘persons related to [the allegedly racist father-in-law],” and that they were attacked and threatened as part of that social group.⁷⁶ The agency had nothing left to decide on the 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.”⁷⁷

Again, the Supreme Court summarily stopped the Ninth Circuit in its tracks: “The Ninth Circuit’s failure to remand is legally erroneous, and that error is obvious in light of *Ventura*, itself a summary reversal.”⁷⁸ It 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.’” 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 Thomas are a particular social group.⁷⁹ In so doing, 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, not by courts.⁸⁰

⁷⁵The 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 (opinion of Rymer, J.) (emphasis in original).

⁷⁶*Id.* at 1189.

⁷⁷*Id.* (citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)). Later in the article, [CITE] we coin this a “fake remand”—when a court purports to follow *Ventura*’s ordinary remand rule, but in fact answers the actual issue and merely remands for the final determination of asylum. It is fake in every sense of the word: the court leaves the agency with nothing real left to decide.

⁷⁸*Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam).

⁷⁹*Id.* at 186-87 (citing *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam), for the reasons to remand).

⁸⁰In 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) (memorandum); *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007) (memorandum); 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 the cases in more detail). But see Brenna Finn, Comment, *Save Me from Harm: The Consequences of the Ordinary Remand Rule’s*

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.⁸¹ *Ventura* and *Thomas* merely revived *Chenery's* recognition that the remand rule is a “simple but fundamental rule of administrative law.”⁸² But absent from *Chenery's* discussion—and absent the discussion at least until *Chevron U.S.A. Inc. v. NRDC*⁸³—was an exact description of when a court must remand to allow an agency to address a pure question of *law* in the first instance. Are pure questions of law—the greatest expertise of appellate 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”⁸⁴ and the *Chenery* revival to thank, the ordinary remand rule now encompasses questions of law where (1) the statutory provision at issue is ambiguous and (2) Congress charges an agency with administering the statute.⁸⁵

In *Negusie*, the Eritrean Government incarcerated, punished, and beat Daniel Girmai Negusie, a national of Eritrea, for refusing to fight against his other homeland, Ethiopia. After two years of keeping Negusie as a political prisoner, Eritrea forced him to work as a prison guard—a job that required him to persecute others in the same way as he had earlier been persecuted. After four years as a prison guard, Negusie escaped Eritrea by hiding in a container on board a ship coming to the United States. He then sought asylum in America.⁸⁶

The Government argued that Negusie did not qualify for asylum because of the persecutor bar, which statutorily prohibits the agency from granting asylum for those who persecuted other people.⁸⁷

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”).

⁸¹ Walker Toolbox, *supra* note XX, at 13.

⁸² SEC v. *Chenery*, 332 U.S. 194, 196 (1947) (*Chenery II*).

⁸³ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁸⁴ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 834-35 (2001) (coining the phrase).

⁸⁵ 555 U.S. 511 (2009); *see also* Walker Toolbox, *supra* note XX, at 13.

⁸⁶ *Negusie*, 555 U.S. at 514-15 (setting out the facts).

⁸⁷ 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.”).

Negusie offered a view of the persecutor bar that contained a caveat, arguing that it did not apply when the alien’s assistance in persecution was coerced or otherwise the product of duress.⁸⁸ That disagreement teed up a purely legal issue of statutory interpretation: Did the statute barring asylum for alien persecutors make an exception for involuntary persecutors?

The BIA thought there was no involuntary exception, and thus agreed with the Government and denied Negusie’s asylum.⁸⁹ What mattered, the BIA concluded, is “the objective effect of an alien’s actions”⁹⁰ not the subjective intent of the persecutor. The BIA’s interpretation was not on a clean slate, however. Instead, it believed prior Supreme Court precedent mandated its legal conclusion.⁹¹ The Fifth Circuit agreed with the BIA and its interpretation of the prior Supreme Court precedent.⁹²

The Supreme Court disagreed. It recognized that *Chevron* applied to the BIA’s interpretation of the persecutor bar, an ambiguous provision of the Immigration and Nationality Act.⁹³ But it concluded that the BIA had misconstrued the Supreme Court’s prior precedent, *i.e.*, that the Supreme Court did not have any cases that held an “alien’s motivation and intent are irrelevant to the issue whether an alien assisted in persecution.”⁹⁴ Thus, the agency had not exercised any discretion to which *Chevron* deference would apply⁹⁵ and the underlying legal issue of whether the persecutor bar applied to involuntary persecutions remained unanswered.

⁸⁸ [Cite the BIA decision?]

⁸⁹ *Negusie*, 555 U.S. at 516 (citing App. to Pet. for Cert. 6a). [Again, should quote the BIA decision]

⁹⁰ *Id.* (quoting Matter of Fedorenko, 19 I. & N. Dec. 57, 69 (BIA 1984)).

⁹¹ [Cite BIA] (citing Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981)); see *Negusie*, 555 U.S. 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.”).

⁹² *Negusie v. Gonzales*, 231 F. App’x 325, 326 (5th Cir. 2007) (citing Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981)).

⁹³ *Negusie v. Holder*, 555 U.S. 511, 516 (2009).

⁹⁴ *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).

⁹⁵ *Id.* at 522 (majority opinion) (“[T]he BIA has not exercised its interpretive authority but, instead, has determined that [the prior Supreme Court precedent] controls.”); see also Walker Toolbox, *supra* note XX, at 21–22 (explaining that “*Chevron* deference did not apply because the agency had misread prior Supreme Court precedent and erroneously concluded it was bound by that precedent at *Chevron* step one”).

Rather than performing the statutory interpretation itself—on the slate now officially wiped clean of any prior precedent—the Court remanded the fresh legal question to the agency,⁹⁶ and cited both *Chevron* (and its progeny) and the *Ventura* ordinary remand rule in the process.⁹⁷ 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.⁹⁸ 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 interpreting, *Negusie* fused

⁹⁶ *Id.* at 524 (“[W]e find it appropriate to remand to the agency for its initial determination of the statutory interpretation question and its application to this case.”). This conclusion leaves 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.

⁹⁷ *Negusie*, 555 U.S. at 523–25 (majority opinion) (“Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.””) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam), in turn quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam), in turn quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)); *id.* (“Filling these gaps [in statutes] . . . involves difficult policy choices that agencies are better equipped to make than courts.”) (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 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)).

⁹⁸ *See Walker Toolbox*, *supra* note XX, at 22. Walker points out that *Negusie* is especially significant because Justice Scalia joined the Court’s opinion. *Id.* at 22 n.114. Even though Justice Scalia had strongly dissented in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005)—accusing the majority of creating a “breathtaking novelty: judicial decisions subject to reversal by executive officers,” *id.* at 1016—he may have taken a step back by joining *Negusie*. He even wrote a concurrence, noting that “[i]t is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute.” *Negusie*, 555 U.S. at 528 (Scalia, J., concurring); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) (“[*Chevron* deference is] an across-the-board presumption that, in the case of an ambiguity, agency discretion is meant.”). Walker concludes that “it seems that, for Justice Scalia, the agency only loses its authority to interpret a statute it administers when a court has weighed in on a statute before *Negusie* applied the *Ventura* ordinary remand rule to *Chevron* questions, when the interpretation is made in a lawsuit between private parties, or when a court decides extraordinary circumstances justify departing from that ordinary remand rule.” *Walker Toolbox*, *supra* note XX, at 22 n.114.

Chevron's principles (as furthered by *Brand X*) into the *Ventura* ordinary remand rule.⁹⁹

And this fusion makes sense, for the *Chevron* framework requires it. If a statute survives *Chevron* step zero (an agency has interpretative authority over the statute)¹⁰⁰ and step one ("the statute is silent or ambiguous" on the issue),¹⁰¹ then *Chevron* principles counsel the court to remand, even if the agency's initial statutory determination was unreasonable under *Chevron* step two.¹⁰² The Court implied as much in *Chevron* itself when it stated that "the court does not simply impose its own construction on the statute,"¹⁰³ 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."¹⁰⁴

4. The "Rare Circumstances" Wrinkle

These three cases establish, as a doctrinal matter, a bright-line ordinary remand rule. The line, however, is not perfectly bright. The "proper course . . . is to remand to the agency for additional investigation or explanation"—"except in rare circumstances."¹⁰⁵ What are these "rare circumstances"? The Court has not attempted to explain in the immigration context, but based on the rule's underlying separation of powers concerns, we can glean what these rare circumstances *should* be.¹⁰⁶ And they should be rare indeed.

⁹⁹ Walker Toolbox, *supra* note XX, at 15-18 (discussing *Chevron*'s and *Brand X*'s expansion of the remand rule, even prior to *Negusie*).

¹⁰⁰ See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

¹⁰¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

¹⁰² Walker Toolbox, *supra* note XX, at 16; 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").

¹⁰³ *Chevron*, 467 U.S. at 843.

¹⁰⁴ *Brand X*, 545 U.S. at 983 (majority opinion).

¹⁰⁵ *Negusie*, 555 U.S. at 523 (internal quotation marks omitted); see also *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (same); *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (same)

¹⁰⁶ While the Supreme Court has not given meaning to its "rare circumstances" exception, the federal courts of appeals have. See Part II, *infra*. We explain in Part II that these courts have reversed agency decisions yet refused

The rare circumstances should come into play only when separation-of-powers values are *not* in play. And separation of powers, especially in the immigration context, is nearly always in play. Whenever the court disagrees with an agency’s factual, legal, or policy conclusion, or its application of the law to facts, separation of powers principles exist in the case. Most often Congress in these instances has expressed a desire to have the agency, rather than the courts, decide the question.

We can think of two circumstances, however, where a court’s failure to remand would not do violence to separation of powers—and thus two instances where the ordinary remand rule would not come into play. These two exceptions align with the two exceptions that Judge Friendly identified in his 1969 *Duke Law Journal* piece by looking at Supreme Court cases in other agency contexts.¹⁰⁷

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.”¹⁰⁸ Put differently, a court need not remand when it affirms the agency’s conclusion, albeit by giving weight to slightly different factors than the agency. Think

to remand in certain situations in the immigration adjudication context, such as when the court believes the alien seeking asylum will not receive a fair proceeding on remand, [CITE], or when the agency has already had several “bites of the apple.” [CITE]. As explained below, *see* text XX and accompanying notes YY, we argue that the separation of powers concerns that underlie the ordinary remand rule do not support these court-made “rare circumstances” exceptions. Instead, we argue that the rare circumstances should apply *only* when (1) the court *affirms* the agency, albeit on slightly different grounds, *see* Friendly, *supra* note XX, at 199; or (2) when the agency does not have jurisdiction for the remand, *see id.* (citing *City of Yonkers v. United States*, 320 U.S. 685 (1944)). <insert third APA de novo review exception>

¹⁰⁷ Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 222-25 (1969). 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,” “[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”).

¹⁰⁸ Friendly, *supra* note XX, at 223.

harmless error. 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. The agency is still the body making the decision, and so the court does not harm separation of powers. Indeed, the APA specifically approves this kind of decisionmaking by codifying a harmless-error standard for certain agency determinations.¹⁰⁹

Second, a court need not remand when the agency would not have jurisdiction or relative authority to act on remand.¹¹⁰ This exception manifests itself in two ways. First, remanding to an agency that lacks *jurisdiction* to act is, of course, unnecessary. This explains the Court's failure to remand when setting aside an agency action in *City of Yonkers v. United States*.¹¹¹ Where an agency has no jurisdiction to act, the separation of powers concerns the ordinary remand rule seeks to address are not implicated. Second, 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.¹¹² Just as failing to remand when the court (and not the agency) has the jurisdiction to act does no violence to the separation of powers, neither does failing to remand when the court (and not the agency) has the ultimate authority to act. Congress has either given the interpretative authority to the Court (if a statute fails *Chevron* step zero), or has kept that authority (if a statute is unambiguous). In each circumstance, the agency does not have the authority, and so there is no separation-of-powers need to remand. The court, not the agency, has decisionmaking authority.

<insert third exception for when Congress had mandated de novo review of the agency adjudication, as contemplated by APA Section 706>¹¹³

¹⁰⁹ 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.")

¹¹⁰ Friendly, *supra* note XX, at 199 (citing *City of Yonkers v. United States*, 320 U.S. 685 (1944)).

¹¹¹ 320 U.S. 685, 691–92 (1944).

¹¹² <CITE cases?>

¹¹³ Another exception contemplated under the Administrative Procedure Act is when the governing statute provides that "the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F). See generally Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 267–68 (2014) (exploring this exception in the tax context).

In both of these “rare circumstances,” the separation-of-powers values that motivate the ordinary remand rule are far less compelling. The court is not substituting its judgment for the agency’s ultimate judgment. In these rare circumstances—but only these rare circumstances—should courts fail to follow *Ventura*’s ordinary remand rule.

B. Remand and Judicial Toolbox for Dialogue¹¹⁴

The federal courts of appeals handle thousands of petitions for review of immigration adjudications each year,¹¹⁵ and in the last decade alone they have cited the Court’s *Ventura* remand rule decision in nearly 1500 immigration decisions.¹¹⁶ In prior work, I examined all of the published federal court of appeals decisions (over 400) that cite the immigration trilogy since the Court’s 2002 rearticulation of the remand rule in *INS v. Ventura* through the end of 2012. Those cases reveal that most circuits, most of the time, follow the ordinary remand rule. Indeed, the overall compliance rate in the cases reviewed was over 80%, though there was much variance among circuits.¹¹⁷ Some circuits were less faithful to this command, with the Fifth Circuit (67%) and the Ninth Circuit (68%) among the worst offenders.¹¹⁸

When courts refuse to follow the ordinary remand rule, they often express concerns that reflect the judiciary’s traditional role as authoritative interpreter of the law and protector of individual rights and due process. Courts appear 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 constitutional authority to say what the law is and their duty to ensure that procedures are fair and rights are protected in the administrative

¹¹⁴The current version of Part II.B draws substantially from Part II of Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84 (2016).

¹¹⁵In 2014, for instance, the federal courts of appeals decided 2172 immigration petitions. John Guendelsberger, *Circuit Court Decisions for December 2014 and Calendar Year 2014 Totals*, IMMIGR. L. ADVISOR, Jan. 2015, at 1, 5.

¹¹⁶This calculation is a conservative estimate based on citations to the Supreme Court’s 2002 remand opinion in *Immigration & Naturalization Serv. v. Ventura*, 537 U.S. 12 (2002). As of March 16, 2016, Westlaw KeyCite reports that *Ventura* has been cited in 1410 published and unpublished decisions by courts of appeals over the last ten years.

¹¹⁷Walker, *supra* note XX, at 1582 tbl.1.

¹¹⁸*Id.* 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.*

process.¹¹⁹ In one particularly colorful decision, Judge Sidney Thomas, writing for the Ninth Circuit en banc, compared the BIA's process to Tegwar—"The Exciting Game Without Any Rules."¹²⁰ 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."¹²¹

Not all courts that express these concerns, however, refuse to remand. Instead, in the cases reviewed, some courts follow the ordinary remand rule, but also introduce certain administrative common law tools to engage in a dialogue with the agency on remand. For instance, in cases where 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 circuits 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 (or order) that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions. Some circuits, moreover, obtain concessions from the government at argument to narrow the potential grounds for denial of relief on remand.¹²² In total, seven dialogue-enhancing tools emerged from the cases reviewed, and those tools are summarized in the following table.¹²³

¹¹⁹ For further review of these cases, see generally *id.* at 1585–90.

¹²⁰ *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 Ramirez-Alejandre*, 319 F.3d at 397 (Trott, J., dissenting) ("When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated.").

¹²¹ *Avetova-Elisseva v. Immigration & Naturalization Serv.*, 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)). *See also* Christopher J. Walker, *How To Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 83–85 (2013) (explaining how federal agencies can strategically utilize the ordinary remand rule).

¹²² These dialogue-enhancing tools are explored in greater detail in Walker, *supra* note XX, at 1590–1600, as are the statutory and constitutional limits on dialogue-enhancing tools. *See id.* at 1601–07.

¹²³ This table reproduces part of Table 2 from Walker, *supra* note XX, at 1614 tbl.2. It excludes three tools that were not discovered in the cases reviewed but suggested by the author: (1) preliminary injunctive relief; (2) escalation of issue within the executive branch; and (3) escalation of issue to Congress. *See id.*

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

The development of this toolbox for court-agency dialogue advances a number of important objectives for judicial review of agency adjudication (as well as agency action more generally).¹²⁴ First and foremost, unlike refusing to remand an issue—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.¹²⁵

Second, these tools can assist the court in addressing its concerns that an immigrant may get lost in the process on remand or that the relief may be unduly delayed or denied. As Professor Hammond observed, the tools can encourage swifter resolution of cases on remand to the agency—addressing one of the greatest concerns of the

¹²⁴A colleague and I explore these implications in much greater detail elsewhere, in the context of the Tax Court’s review of actions by the Internal Revenue Service (“IRS”). See Hoffer & Walker, *supra* note XX, 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).

¹²⁵Emily Hammond similarly explored this court-agency dialogue in the rulemaking context. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1743–71 (2011) (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).

ordinary remand rule and agency decisionmaking more generally.¹²⁶ In particular, consider three of the tools uncovered in the immigration adjudication study: (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. These all 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.

Third, and perhaps more importantly, an enriched dialogue in a particular case can have systemic effects on agency decisionmaking. Consider another set of three tools uncovered in the study: (1) providing hypothetical solutions in the court’s decision to remand; (2) certifying an issue or issues for remand; and (3) obtaining government concessions at oral argument (or in the briefing) to limit the open issues on remand. 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 beyond the particular case under review. The issuance of written, public judicial opinions allows this dialogue to extend beyond the immigration judge and BIA member(s) 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.¹²⁷

In sum, by remanding yet utilizing 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.”¹²⁸ Part II.C examines this policy case for the ordinary remand rule in greater detail.

¹²⁶ Hammond, *Deference and Dialogue*, *supra* note 125, at 1775.

¹²⁷ See Walker, *supra* note XX, at 1610–14 (providing examples).

¹²⁸ Hammond, *Deference and Dialogue*, *supra* note 125, at 1780; see 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.”).

C. The Policy Case for the Ordinary Remand Rule

Courts should need nothing more than the Supreme Court's guidance in *Chenery* and its progeny, strengthened by the immigration trilogy in the 2000s, to understand the importance of the ordinary remand rule (and the accompanying judicial toolbox for court-agency dialogue). But if the legal case is not enough, the policy case drives the point home. Abiding by the ordinary remand rule furthers several policy goals—indeed, goals that help alleviate the same concerns courts raise when they fail to follow the remand rule. These policy considerations include respecting the proper separation of powers, leveraging agency expertise, encouraging consistency, promoting efficiency, and preserving equity. Each, addressed in turn, improves the system as a whole and allows for federal courts to play a more systemic role in agency adjudication.

1. Separation of Powers

Courts should ordinarily remand as a policy matter for one thing because doing so respects the separation of powers. In point of fact, it respects separation of powers on two different levels.

First, it respects Congress's delegation of adjudicatory or policymaking authority to an executive-branch agency (Article I–Article III separation of powers). As the Supreme Court has explained, where 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.”¹²⁹ We saw this rationale cited in some of the reviewed cases. Courts were “cautious,” for example, “not to assume the role of the [agency],”¹³⁰ for doing so would not “pay due respect to Congress's decision to entrust this initial determination to the [agency].”¹³¹

Second and less obviously, it respects the Executive's constitutional duty to execute the law (Article II–Article III separation

¹²⁹SEC v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). See also *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (“Congress, when it left ambiguity 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.”); accord Walker, Brand X *Constitutional Avoidance*, *supra* note XX, at 176-77 (exploring in more detail *Chevron's* separation-of-powers goals).

¹³⁰*Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005).

¹³¹*Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); accord *Mickeviute v. I.N.S.*, 327 F.3d 1159, 1165 (10th Cir. 2003).

of powers). While no courts (and very few scholars) discussed this facet of separation of powers in the reviewed cases, it is critical nonetheless. The Constitution specifies that the Executive must “take Care that the Laws be faithfully executed,”¹³² 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.”¹³³ 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.

The Article II–Article III separation-of-powers principles are particularly strong in the immigration context, where the Executive “has broad, undoubted power over the subject of immigration and the status of aliens.”¹³⁴ This power resembles a plenary power over immigration, which “declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions.”¹³⁵ While the Court has not assigned a police power over immigration to the Executive branch, its decisions suggest that courts should not second-guess Article II decisions regarding immigration.¹³⁶

¹³² U.S. CONST. art. II, § 3.

¹³³ *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.”).

¹³⁴ *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982); S. Legomsky & C. Rodríguez, *Immigration and Refugee Law and Policy* 115-32 (5th ed. 2009)).

¹³⁵ Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

¹³⁶ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Mathews v. Diaz*, 426 U.S. 67 (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 Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 183 (2012) (“[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.”).

This aligns, moreover, with the Executive's broad authority over foreign affairs.¹³⁷

Negusie recognized the unique nature of the Executive in immigration. "Judicial deference [to agencies] in the immigration context is of special importance," Justice Kennedy wrote, because "executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"¹³⁸ Scholars have advocated as much in immigration¹³⁹ and in other contexts.¹⁴⁰ So the Article II power, rather than any sort of Article III prerogative, is due in part to the Executive's "inherent power as sovereign to control and conduct relations with foreign nations."¹⁴¹ Add to that the reality that Congress has delegated these decisions to the Article II agency, and the result is two levels of separation of powers that the courts must respect.

B. Expertise

Perhaps the courts' primary policy case for remanding, indeed the one offered by the Supreme Court in its immigration trilogy, is so that "[t]he agency can bring its expertise to bear upon the matter."¹⁴²

¹³⁷ See *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).

¹³⁸ *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

¹³⁹ Walker Toolbox, *supra* note XX, at ("[The] 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."); MORE

¹⁴⁰ Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (arguing that the Executive has an independent and constitutionally mandated gap-filling power under Article II even when Congress has not expressly delegated such authority to the Executive, subject to congressional override).

¹⁴¹ *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982), in turn citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

¹⁴² *Negusie v. Holder*, 555 U.S. 511, 524 (2009) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186-87 (2006) (per curiam), in turn quoting *INS v. Ventura*, 537 U.S. 12, 17 (2002). (per curiam)). So too in the statutory interpretation context. See *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) ("Congress, when it left ambiguity 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."); see also Walker, *Brand X Constitutional*

Agency expertise allows it to better “evaluate the evidence” so “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.”¹⁴³

This consideration makes great intuitive sense, especially when it comes to tasks such as factfinding and areas of the law such as immigration. The courts of appeals are not expert when it comes to those tasks and to the matters addressed in those cases. This understanding of comparative agency expertise dates back to “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.¹⁴⁴ “An agency with expertise in a particular area of regulation has an enormous advantage over a reviewing court in making this complicated judgment.”¹⁴⁵

Take the immigration context as an example. Many of the cases reviewed, in many different circuits, remanded primarily because the courts were less expert than the agency.¹⁴⁶ Some courts noted that the case involved “element[s] of fact,” which they were not experts at resolving.¹⁴⁷ And other courts noted that the area of law was one in which the agency could resolve better than they could, at least in the

Avoidance, *supra* note XX, at 176-77 (exploring in more detail *Chevron*’s separation-of-powers goals).

¹⁴³ *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam).

¹⁴⁴ Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 441 (2007).

¹⁴⁵ II Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.9, at 377 (4th ed. 2002). For more on the comparative expertise policy justification, see 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 et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246-47 (1987); Walker, *Brand X Doctrine of Constitutional Avoidance*, *supra* note XX, at 159-61.

¹⁴⁶ *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); *Habttemicael v. Ashcroft*, 370 F.3d 774, 783 (8th Cir. 2004); *Alcaraz v. I.N.S.*, 384 F.3d 1150, 1162 (9th Cir. 2004).

¹⁴⁷ *See, e.g.*, *Barakat*, 621 F.3d at 406.

first instance.¹⁴⁸ Either way, agency expertise is another policy reason for courts to follow the ordinary remand rule.

3. *Efficiency*

Agencies' higher quality and more consistent decisions also make the system more efficient. Efficiency is, of course, an admirable policy goal of administrative law. Yet the current system, one where courts improperly fail to remand about 20% of the time, is not nearly as efficient as it can be.

At first blush, one might wonder why it would not be the most efficient for the courts to decide all issues rather than send them back to the agencies for more work—the exact opposite of the ordinary remand rule. That would take the least amount of time, at least in the short run. Why waste time giving the agency a second bite when the court can confidently predict the outcome and resolve the case itself?

To see why that is indeed a highly inefficient way of handling these cases, consider two sources of inefficiency that system produces.

First, in that system, the courts must duplicate the precise work the agency has already done. In trying each case afresh, the court must not only determine whether the agency answered the right *questions*, but it also must decide whether the agency came to all of the right *answers*. On a legal question, that might not seem all that bad, but what about on a factual question? The court will have to decide those too, rather than letting the agency bring its expertise to the matter. This duplication of the agency's work is one major source of inefficiency in a system where the ordinary remand rule is neglected.

Second, an agency in such a system has misaligned incentives, leading to an increased likelihood of poor decisionmaking and ultimately to system-wide inefficiency in the long run. 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 has an incentive to hastily decide the case without proper regard for reaching the correct result. But if it knows that it will have to redo its decision if it is improperly done, then it has more incentive in the first instance of working hard to get it right.¹⁴⁹ In a system where the

¹⁴⁸ 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).

¹⁴⁹ 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) ("Agencies 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

ordinary remand rule is routinely followed, we will see better agency decisions, leading to less work for the courts, less work for the petitioners, and, yes, eventually less work for the agencies. We will see a more efficient system.

D. Consistency

Routine remands have a systemic effect, one that “*ad hoc* decisionmaking by federal courts” cannot realistically achieve.¹⁵⁰ When courts follow the ordinary remand rule, “there is a real opportunity for the [agency] to take the lead in the establishment of uniform national standards for deciding” the issues.¹⁵¹ Indeed, the Supreme Court has justified judicial deference in this way—on “the value of uniformity in [an agency’s] administrative and judicial understandings of what a national law requires.”¹⁵² The ordinary remand rule furthers this policy goal in three ways.

First, it allows agencies to create national rules. If every circuit court decided a particular issue for itself, chances are there would be multiple rules on any given issue. And in “a legal system in which the supreme court can review only an insignificant proportion of the decided cases,”¹⁵³ chances are these inconsistent decisions will remain inconsistent if left to the courts. Not so, though, if every circuit court rather than deciding the issue remanded the case to the single agency charged with deciding it. The BIA by regulation, for instance, must “provide clear and uniform guidance to the [Executive branch] and the general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations.”¹⁵⁴ Courts recognize the agency’s role in providing, and ability to provide, such uniform guidance when they follow the ordinary remand rule.¹⁵⁵ Uniformity is especially important when

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.”).

¹⁵⁰ *Liu*, 455 F.3d at 117.

¹⁵¹ *Id.* at 117.

¹⁵² *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

¹⁵³ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

¹⁵⁴ 8 C.F.R. § 1003.1(d)(1).

¹⁵⁵ *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).

there is a “divergence of views,” either “among the circuits” or “within [one] circuit.”¹⁵⁶

Second, an agency’s consistent and national rule allows petitioners to know the rules in advance. In a system in which fewer than two in five immigrants in removal proceedings have legal representation,¹⁵⁷ and in which less than half of those represented have legal representation at all during their agency hearings,¹⁵⁸ knowing the standards in advance is especially important.

Third, an ordinary remand forces the agency to recognize and correct its mistakes, leading to system-wide improvement. While remands give the agency more work in the short-term, that increased workload is a strong incentive to get it right on remand—and get it right to avoid a remand the next time. Agencies may also seek to avoid remands by, say, training their employees in best practices or by providing the employees with written guidance. These changes should increase the consistency and quality of the agency determinations, which in turn will make fairer proceedings for petitioners, whether they are represented or not.

5. *Equity*

We will also see a more equitable system. Sad to say, the system as is often produces unfair results. Indeed, that is why many courts fail to remand: they understand that petitioners on remand may not get a fair shake, may get lost, or, at the least, may be in limbo for longer than they ought to be. 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. Pro se immigrants, for instance, obtain a successful outcome only 2% of the time, ten-and-a-half times less than immigrants with counsel.¹⁵⁹ And when it comes to relief from removal for these otherwise similarly situated petitioners, “the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal.”¹⁶⁰ Other studies point to the same

¹⁵⁶ *Rajah*, 544 F.3d at 455.

¹⁵⁷ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 7 (2015) (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012.”).

¹⁵⁸ *Id.* at 8.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *Id.*

result and offer reasons for why it happens—that, for example, unrepresented immigrants are far less likely both to ultimately seek further review of an unfavorable decision.¹⁶¹

Yet when courts follow the ordinary remand rule, they produce a more equitable system in the long run. Because most petitioners never reach court, the courts cannot protect most petitioners, unless their decisions affect the agency’s conduct systematically. And a court’s decision cannot affect the agency’s conduct in a systemic way when it makes one-off decisions without engaging the agency in a productive dialogue. But when courts employ the ordinary remand rule, coupled with the tools to enhance dialogue, the system as a whole benefits. Agency actors have incentive to do a better job initially, agencies have more tools to reach the correct result, and all petitioners, pro se and not, receive fairer treatment.

III. COURT-AGENCY DIALOGUE: AN EMPIRICAL ASSESSMENT

To test our theory—that by following the ordinary remand rule and by employing dialogue-enhancing tools courts produce positive effects across the agency adjudicative system—we obtained every agency decision that followed a court remand. We thoroughly analyzed those decisions and unearthed some fascinating results. In this Part, we discuss what was available from the court decisions alone, our methodology to obtain the agency decisions not readily available, and, most importantly, what our more-than-two-year findings show. In the end, our novel empirical analysis of the court–agency dialogue confirms what previous work has hypothesized: that there is a rich dialogue taking place between the agency and the circuit courts, and that such a dialogue is having beneficial effects on the system as a whole.¹⁶²

A. Initial Review

Let us first discuss two potentially disputed premises. *First*, do agencies in fact respond to courts on remand, and do courts respond to agencies post-remand? The answer, apparent from the previous study’s 239 cases remanded, is yes. Westlaw KeyCite showed that

¹⁶¹ David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1193 (2016) (“More than half of all immigrants with lawyers appeal if they lose before the immigration judge, while only 3% of immigrants without lawyers appeal.”).

¹⁶² [Authors’ Note: This is a really rough and preliminary report of our FOIA project, and it will obviously be fleshed out in much greater detail in later drafts.]

twenty (8 percent) of those cases returned to the court of appeals after remand.¹⁶³ Using Westlaw alone, we can extrapolate some things from those cases. Fourteen (70 percent) of the cases were denied when they returned to the court, meaning the court subsequently agreed that the agency had acted within its lawfully delegated authority on remand. In the other six cases (30 percent), the courts reversed, but they remanded again in four of the six cases.¹⁶⁴

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 positive back-and-forth between the courts and agencies. Take *Ucelo-Gomez v. Mukasey* as an example.¹⁶⁵ The Second Circuit remanded for the immigration judge to decide an issue in the first instance.¹⁶⁶ On remand, the BIA reached the same determination as the immigration judge, and the panel subsequently denied the petition.¹⁶⁷ The court felt 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 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.”¹⁶⁸ Other cases showed even more give and take. In *Valdiviezo-Galdamez v. Attorney General*,¹⁶⁹ 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.¹⁷⁰

¹⁶³ Walker Toolbox, *supra* note XXX, at 161.

¹⁶⁴ 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. Attorney 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).

¹⁶⁵ *Ucelo-Gomez v. Gonzales*, 464 F.3d 163 (2d Cir. 2006) (per curiam).

¹⁶⁶ *Id.* at 165.

¹⁶⁷ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72 (2d Cir. 2007).

¹⁶⁸ 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.”).

¹⁶⁹ *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582 (3d Cir. 2011).

¹⁷⁰ *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.”).

Second, can we even call this back-and-forth a *dialogue*, or is it more appropriately classified as a *compromise* (or worse, a court order)? Even these twenty cases show that this is in fact a *dialogue*—*i.e.*, a “conversation in which the participants strive toward learning and understanding to promote more effective deliberation and outcomes”¹⁷¹—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.”¹⁷²

But there is no need to stop with these twenty cases. Digging deeper only reinforces, indeed makes quite clear, that as an empirical matter, the courts and agencies are in fact engaging in a meaningful dialogue. For the rest of this Part, we will show how we can be so sure. First, we explain our methodology—how we obtained the agency remand-decisions, how we bypassed their redacted nature, and how we coded them. Next we discuss our findings. And finally we make the empirical assessment that backs up what has to this point been a purely theoretical assertion: that there is a meaningful, ongoing dialogue between .

B. Methodology

Previous work has made many of these points in a theoretical way, supposing (quite correctly, we think) that following the ordinary remand rule and engaging the agencies in dialogue improves the system. But such work did “not pretend to provide a full—or fully satisfactory—answer” to whether the dialogue was actually working in practice.¹⁷³ Hampered by “limitations” such as agency decisions not being “readily and publicly available”¹⁷⁴ and by the lack of “rich literature on dialogic considerations in [administrative] law,”¹⁷⁵ previous work has made only “preliminary observations” while

¹⁷¹Hammond, *supra* note 31, at 1773.

¹⁷²Gillian Metzger, *Serial Litigation in Administrative Law: What Can Repeat Cases Tell Us About Judicial Review?*, JOTWELL (June 25, 2012), <http://adlaw.jotwell.com/serial-litigation-in-administrative-law-what-can-repeat-cases-tell-us-about-judicial-review/>.

¹⁷³Walker Toolbox, *supra* note XX, at 161.

¹⁷⁴Walker Toolbox, *supra* note XX, at 161; Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L.J. 53, 53 (1989).

¹⁷⁵Hammond, *supra* note 31, at 1724–25 & nn.3–5 (citing literature).

acknowledging that “it is difficult empirically to measure and evaluate the court-agency dialogue.”¹⁷⁶

In this piece, however, we found a way to shed some additional, meaningful light of this empirical question. In June 2013, we used the Freedom of Information Act to request all of the agency remand decisions in all of the cases in the previous study. The agency actors did not act quickly. They began to release decisions on a rolling basis in August 2014. But these decisions were highly redacted, and they came in at snail’s pace. Much work still needed to be done.

When we finally received all of the decisions, in __insert date__, we began to decode them. Because the agency decisions were so highly redacted, this was no easy task.

After matching 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. Here is what we coded:

Final Remand—BIA or IJ

Length between the court and agency decision

The disposition

Whether there was discussion of the court’s decision

Whether there was discussion of the tools the court used>

C. [Preliminary] Findings

We were able to code 258 cases 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 forty-five decisions (17 percent) that did not follow the ordinary remand rule.¹⁷⁷ In those cases, the agency would still get the case back and would still have to take some action. That percentage is consistent with the overall percentage of decisions from the previous study that failed to follow the ordinary remand rule, meaning our matched sample should be 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.

There is a lot to be learned from this data.

Disposition. We begin with the outcome—whether the petitioner won, whether he lost, or whether something else happened to the case.

¹⁷⁶ Walker Toolbox, *supra* note XX, at 161.

¹⁷⁷ I am counting *Montes-Lopez v. Holder*, 694 F.3d 1085, 1092 (9th Cir. 2012), as a decision that fails to follow the ordinary remand rule. It is marked as an “x” for whether or not it remanded.

Recall that many courts in the cases we reviewed worried that if they did not grant relief, the petitioner would not prevail before the agency.¹⁷⁸ The data does not support that fear. Petitioners lost in only 46 (21.5 percent) of the ordinary remands and in only 48 cases (18.5 percent) overall. The petitioner won outright in 97 (45.5 percent) of the ordinary remands and in 132 of all of the matched cases (51 percent) overall.

Many of the cases—seventy of the ordinary remands and seventy-eight of all of the matched cases—could not easily be classified as a win or a loss. The great majority of these cases, however, has resulted or will result in the petitioner winning. Some of the cases, for example, resulted in a settlement agreement of some sort where the petitioners received withholding from removal.¹⁷⁹ The petitioners prevailed for one reason or another in many other cases—say, because the immigrant was no longer removable as charged,¹⁸⁰ because the government no longer opposed the immigrant’s petition,¹⁸¹ because the petitioner obtained asylum status,¹⁸² or for various other reasons.¹⁸³ In many of these cases, perhaps a plurality, the BIA acknowledged its error (as the court did) and remanded to the immigration judge for a new hearing, which has not yet been conducted.¹⁸⁴ In only a small minority of the cases—about one in ten—did the petitioner do anything close to “lose.”¹⁸⁵

If we roughly classify these cases into win and loss columns, the evidence becomes even clearer that courts’ fears of petitioners losing

¹⁷⁸ See, e.g., ____ insert cases ____.

¹⁷⁹ See, e.g., *Abulashvili v. Attorney Gen. of U.S.*, 663 F.3d 197, 209 (3d Cir. 2011).

¹⁸⁰ *Barakat v. Holder*, 621 F.3d 398, 406 (6th Cir. 2010).

¹⁸¹ See, e.g., *Bi Xia Qu v. Holder*, 618 F.3d 602, 609 (6th Cir. 2010) (no response from the government); *Haider v. Holder*, 595 F.3d 276, 289 (6th Cir. 2010).

¹⁸² See, e.g., *Castro v. Attorney Gen. of U.S.*, 671 F.3d 356, 371 (3d Cir. 2012); cf. *Hosseini v. Gonzales*, 471 F.3d 953, 958 (9th Cir. 2006).

¹⁸³ See, e.g., *Benyamin v. Holder*, 579 F.3d 970, 978 (9th Cir. 2009) (immigration judge granted asylum and then granted IJ granted the unopposed motion to administratively close the proceedings).

¹⁸⁴ See, e.g., *Castro v. Attorney Gen. of U.S.*, 671 F.3d 356, 371 (3d Cir. 2012); *Campbell v. Holder*, 698 F.3d 29, 36 (1st Cir. 2012); *Seck v. U.S. Atty. Gen.*, 663 F.3d 1356, 1368 (11th Cir. 2011); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010); *Chen v. Holder*, 607 F.3d 511, 512 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902, 907-08 (9th Cir. 2010); *Diallo v. U.S. Atty. Gen.*, 596 F.3d 1329, 1333-34 (11th Cir. 2010); *Magala v. Gonzales*, 434 F.3d 523, 527 (7th Cir. 2005).

¹⁸⁵ See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 129 (4th Cir. 2011) (BIA ordered removal to El Salvador and then closed the proceedings based on government’s prosecutorial discretion); *Bonilla v. Mukasey*, 539 F.3d 72, 81-82 (1st Cir. 2008) (petitioner left the United States); *Hassan v. Gonzales*, 484 F.3d 513, 519 (8th Cir. 2007) (petitioner left the United States).

on remand are unfounded. Of the over two hundred matched cases we reviewed, the petitioner prevailed at least in part close to seventy-five percent of the time. And remember, all of these cases were ones where the petitioner originally *lost* before the agency. All of this means that agencies are listening to the courts when they call them on their mistakes.

But what is making them listen? How long is it taking them to listen? And most importantly, are they *talking*? To answer these questions, let us dive further into the data.

Representation. One thing that seems to make the agencies listen—and respond—to the courts is whether the petitioner is represented by counsel. Using our data and the data from other studies, it is clear that a pro se petitioner faces a much steeper climb in getting the agencies and courts listen to their pleas. Ingrid Eagly and Steven Shafer, for example, recently discovered that fewer than two in five immigrants in removal proceedings had legal representation,¹⁸⁶ and less than half of those represented had legal representation during their agency hearings.¹⁸⁷ And the pro se petitioners in that study succeeded only two percent of the time, compared to twenty-one percent for those represented by counsel.¹⁸⁸

Our study, remember, included only those individuals who won at court—only those, that is, that successfully overturned the agency’s decision and obtained a remand. It makes sense, then, that in 236 of the 258 matched cases—over ninety-one percent—the petitioner had counsel. That includes the 196 cases (92 percent) where the petitioner had counsel and where the court followed the ordinary remand rule.¹⁸⁹ In the 132 cases where the petitioner won outright, 122 were represented, meaning represented immigrants were slightly more likely to prevail on remand than pro se petitioners.

¹⁸⁶Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 7 (2015) (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012.”).

¹⁸⁷*Id.* at 8.

¹⁸⁸*Id.* at 9.

¹⁸⁹One of those immigrants obtained counsel on his second trip to the BIA. *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 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 changed 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. Yet after he obtained counsel, the BIA remanded to IJ on February 7, 2014. The agency has not yet completed its review.

All in all, our study adds support to the body of writings supporting the importance of counsel in immigration proceedings.

Timing. Another serious concern of the courts when they fail to follow the ordinary remand rule is timing. “[F]inal resolution would never be reached” with constant remands,¹⁹⁰ 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.”¹⁹¹

Our empirical analysis, however, found <Insert findings as to time, once it has been properly coded. It will be especially interesting to look at the cases where the court put a time limit on the action on remand, or where they commented on how long it was taking.¹⁹²>

Discussion. That agencies listen does not mean they engage, or, more, that they *talk back*. A conversation—a dialogue—of course cannot take place unless both sides communicate. So are the agencies communicating with the courts? And are the courts listening to the agencies?

The short answer is yes. Start with the basics of dialogue: fully understanding what the other side says and why they say it. The agencies, our study found, do just that—they discuss and understand why the court remanded the case, often at great length. In one hundred and sixty six (78 percent) of the ordinary remands, the agency discussed the court decision that sent the case back. That means that in only 47 of the ordinary remands (22 percent), the agency received the case back without engaging the discussion. Those percentages remain about the same when we look at all of the matched cases in our study. Only sixty agency decisions out of the 258 matched cases (23 percent) failed to discuss the court that sent the case back to the agency, while the other 198 (77 percent) discussed the case.

Much of the discussion was extensive. In *Gui Cun Liu v. Ashcroft*, for example, then-Judge Alito for the Third Circuit found legal error in the Board’s admissibility of evidence rulings.¹⁹³ 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]

¹⁹⁰ *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003).

¹⁹¹ *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).

¹⁹² <Insert a refashioned version of blog post Chris Walker, *Administrative Law’s Ordinary Remand Rule*: In re Negusie Edition, YALE J. ON REG.: NOTICE & COMMENT (July 2, 2018), <http://yalejreg.com/nc/administrative-laws-ordinary-remand-rule-in-re-negusie-edition/>>

¹⁹³ 372 F.3d 529, 534 (3d Cir. 2004).

question.”¹⁹⁴ On remand, the Board immediately acknowledged the court’s decision, and it explained its holding in some depth.¹⁹⁵ In a separate order, the Board then conditionally granted asylum and granted the immigrant’s withholding of removal.¹⁹⁶

Agencies discuss and engage the issues even they disagree with the court. A terrific example of this is the *Lemus-Losa v. Holder* out of the Seventh Circuit.¹⁹⁷ The court of appeals, Judge Wood, found fault in the BIA’s decision, which had ordered Lemus-Losa removed. It remanded the case to the BIA. On remand, the Board carefully “carefully considered the issues raised by the Seventh Circuit,” yet ultimately disagreed with the court.¹⁹⁸ “Upon consideration of the Seventh Circuit’s decision,” the Board wrote, “we respectfully reaffirm our prior determination.”¹⁹⁹

That covers the basics, but what of the more advanced parts of dialogue: a true back-and-forth with the courts? Our study revealed that such dialogue also occurred. 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. For example, in *Castaneda-Castillo v. Holder*,²⁰⁰ the court remanded to the Board to analyze whether “Peruvian military officers whose names became associated with the Accomarca massacre constitutes a cognizable particular social group.” The Board thoroughly discussed the First Circuit’s decision before holding that it was a particular social group.²⁰¹ It remanded to the immigration 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.²⁰² The immigration judge performed factfinding and the Board granted relief to the petitioners.²⁰³ And all of that happened within about eleven months of when the court issued its opinion. The

¹⁹⁴ *Id.* at 534 n.9.

¹⁹⁵ E3 at 1–2.

¹⁹⁶ E3 at 4; *see also* E20.

¹⁹⁷ 576 F.3d 752 (7th Cir. 2009).

¹⁹⁸ *Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 746 (BIA 2012); *see also id.* at 740.

¹⁹⁹ *Id.* at 734. The Board nevertheless remanded to the IJ “for supplemental fact-finding and the entry of a new decision that accounts for all relevant intervening developments.” *Id.* at 746. The petitioner conceded removability and was removed. D45 at 1.

²⁰⁰ 638 F.3d 354, 363 (1st Cir. 2011).

²⁰¹ D34.

²⁰² D34.

²⁰³ E01.

First Circuit then entered final judgment (because it had kept jurisdiction of the case), approving of what the Board had done.²⁰⁴

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.²⁰⁵ The court originally disagreed with the BIA's legal standard on an issue and remanded the case back to the agency after disagreeing. The Board analyzed the case through the lens of the Ninth Circuit's decision, clarified the issues, and sent the case back to the immigration judge.²⁰⁶ The immigration judge found that Zheng was not credible, but when the case reached the Ninth Circuit again, the Ninth Circuit lost patience for the agency.²⁰⁷ It discussed and quoted what the agency had done, but it disagreed with it and did not give it another chance to perform its analysis.

Effect of dialogue-enhancing tools. Potentially the most fascinating part of our analysis is seeing how the courts' dialogue-enhancing tools work in action.

<Here are my notes on each dialogue-enhancing tool>

Notice of Agency Decision on Remand

Sinha v. Holder, 564 F.3d 1015, 1025–26 (9th Cir. 2009). The court “directed” the parties “to notify [it] immediately after the BIA’s decision on remand.” *Id.* at 1026. The remand decision was B27. In that decision, the BIA remanded to the IJ without mentioning the dialogue-enhancing tool. That happened on June 19, 2009. The IJ eventually granted the order. B27 at 1–2. That happened on August 12, 2010.

This does not appear to be a good example support the use of the tool.

Panel retains jurisdiction

Castaneda-Castillo v. Holder, 638 F.3d 354, 363 (1st Cir. 2011). D34.

Ucelo-Gomez v. Gonzales, 464 F.3d 163, 170 (2d Cir. 2006). B2.

Jian Hui Shao v. Board of Immigration Appeals, 465 F.3d 497, 502-03 (2d Cir. 2006). D38.

Lavira v. Attorney Gen. of U.S., 478 F.3d 158, 172 (3d Cir. 2007) overruled by *Pierre v. Attorney Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008)

Oh v. Gonzales, 406 F.3d 611, 613-14 (9th Cir. 2005)

Viridiana v. Holder, 646 F.3d 1230, 1238 (9th Cir. 2011)

²⁰⁴ *Castaneda-Castillo v. Holder*, 676 F.3d 1, 3 (1st Cir. 2012).

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

²⁰⁶ C30 at 15–16.

²⁰⁷ *Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005).

Time limit on remand

Castaneda-Castillo v. Holder, 638 F.3d 354, 363 (1st Cir. 2011). The Board “shared the sentiment” of the court to resolve the case expeditiously. D34.

Ucelo-Gomez v. Gonzales, 464 F.3d 163, 170 (2d Cir. 2006). B2.

Jian Hui Shao v. Board of Immigration Appeals, 465 F.3d 497, 502-03 (2d Cir. 2006). D38.

Hypothetical solutions

The Board seems to often listen to the “suggestions” of the court. See, e.g., Castaneda-Castillo v. Holder, 638 F.3d 354, 363 (1st Cir. 2011) and D34.

Certification of an issue for remand. The agencies seem to engage these issues.

Soto-Olarte v. Holder, 555 F.3d 1089, 1093-94 (9th Cir. 2009);

Kamara v. Attorney Gen. of U.S., 420 F.3d 202, 215-16 (3d Cir. 2005).

Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 663 (9th Cir. 2003)

Ucelo-Gomez v. Gonzales, 464 F.3d 163, 170 (2d Cir. 2006)

Government concessions at oral argument

Sandoval v. Holder, 641 F.3d 982, 983, 988 (8th Cir. 2011). This one looks like a success story. The Eighth Circuit noted that on appeal, “the government does not buy everything it is trying to sell.” It obtained a concession, weakening the government’s position, before remanding. Then, on remand, the government joined in the immigrant’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.” A48 at 2. It granted relief.

Owino v. Holder, 575 F.3d 956, 958-59 (9th Cir. 2009). Only conceded jurisdiction. C24.

Zheng v. Ashcroft, 397 F.3d 1139, 1148-49 (9th Cir. 2005)

Ucelo-Gomez v. Gonzales, 464 F.3d 163, 170 (2d Cir. 2006)

Suggestion to transfer to different administrative law judge

Bace v. Ashcroft, 352 F.3d 1133, 1141-42 (7th Cir. 2003). The agency acknowledged that “[t]he court remanded the case to the Board, noting its view that the case should be assigned to a different Immigration Judge on remand.” C16 at 3. But the BIA does not appear to do anything about that suggestion. It simply “remanded to the Immigration Court for a further hearing consistent with the court’s decision.” C16 at 4. The immigration judge was James R. Fujimoto, but I am not sure who the IJ was on the first case. He granted the application for asylum.

One problem we found. Many of the cases just remand to the IJ. Take *Barakat v. Holder*, 621 F.3d 398, 406 (6th Cir. 2010). The Sixth Circuit has some great discussion about why the BIA was wrong, and it properly applied *Ventura* to remand. But then the BIA just remanded to the IJ for more fact-finding. We don't get a full analysis of what the agency did.

With that said, however, even that intra-agency remand can be insightful. In that same case, for example, the BIA discussed the Sixth Circuit's reasoning, acknowledged that it was wrong, and only then remanded. And this case is amazing: *Lemus-Losa v. Holder*, 576 F.3d 752 (7th Cir. 2009). Board carefully considers the Seventh Circuit's decision, yet disagrees anyway.

And it seems that sometimes the final disposition ends up getting included in the FOIA document. For example, in C36 (for *Bi Xia Qu v. Holder*, 618 F.3d 602, 609 (6th Cir. 2010)), the Board remanded, but then there is an order from the IJ that withholds asylum. Same with *Abebe v. Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005) (en banc) and C28.

CONCLUSION

<CJW Note: The conclusion will zoom out beyond immigration adjudication to talk about the importance of remand and dialogue in high-volume agency adjudications more generally.>