



## ARTICLE

## Rethinking the Administrative Remand Rule

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**Abstract.** With few exceptions, the federal courts of appeals have jurisdiction over—and only over—“final decisions” of the district courts. Yet there is a little-known but highly consequential rule, known as the “administrative remand rule,” that an order remanding an administrative agency’s decision under the Administrative Procedure Act is final only as to the agency. That is, only the agency may appeal a remand, and if the agency does not appeal, neither the plaintiff nor any intervenor may do so.

The administrative remand rule thus acts as an appellate gatekeeper in almost all cases involving remands to federal agencies. It accordingly shapes much of the administrative law coming out of the federal courts of appeals. The rule also provides insight into how the courts of appeals conceive of finality and deference to agency decisionmaking. Despite all this, the academic literature discusses the administrative remand rule only generally and only in the context of larger concerns about finality and federal jurisdiction. Academics and practitioners alike must ask themselves whether the rule, as it currently exists, makes sense.

This Article describes the administrative remand rule’s origins, formulations, and purposes. The rule emerged in the 1970s and 80s to promote judicial economy by avoiding piecemeal appeals, even at the cost of injustice in particular cases. Today, the rule still largely serves that wise purpose, but it is not without problems. The federal circuits have all adopted the rule—but very different versions of it. A nonagency party’s ability to appeal a remand thus varies significantly from circuit to circuit and, in some cases, even within the same circuit. The rule is problematic in certain categories of cases—most notably where a remand is likely to be meaningless or where it facilitates ongoing harm to parties or resources. And the rule underscores larger concerns in the fields of federal jurisdiction and administrative law, including geographic forum shopping, temporal forum shopping, politicized agency

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decisionmaking, inconsistent judicial review, and reduced access to the courts. This Article argues for modest adjustments that would make the administrative remand rule more consistent across the circuits, better balance judicial efficiency and justice, and promote better agency decisionmaking.

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## Introduction

Twenty miles due south of Lake Tahoe lies Hope Valley, a near-pristine stretch of alpine wilderness in California’s Sierra Nevada mountains. The valley weaves along the eastern flank of Carson Pass, a long corridor of time-worn granite peaks with the meandering West Carson River at its center. Like all of California, the valley was once Native land. Every winter, for millennia, members of the Washoe Tribe would traverse the valley by snowshoe along a trail they called *Peweceli Yeweš*.<sup>1</sup> After the Mexican-American War, a dispirited Mormon battalion returning to Utah declared their “hope” restored upon seeing the valley’s quiet beauty.<sup>2</sup> Ever since, the valley has been most commonly known as Hope Valley, and it has provided exceptional opportunities for outdoor recreation, especially in the winter. Two groups are especially fond of the valley, if not of each other: cross-country skiers and snowmobilers. Because Hope Valley lies within the Humboldt-Toiyabe National Forest, the task of managing these and other uses of Hope Valley falls to the U.S. Forest Service.<sup>3</sup>

In 2004, in a case called *Friends of Hope Valley v. United States Forest Service*, the U.S. District Court for the Eastern District of California ruled for a group of skiers in a challenge to the Forest Service’s decision about which winter recreational activities should be permitted where in Hope Valley.<sup>4</sup> The court found a very limited violation of federal law—one the plaintiffs had barely asserted—and remanded the Forest Service’s decision for further environmental review.<sup>5</sup> The skiers, but *not* the Forest Service, appealed. In 2006, the U.S. Court of Appeals for the Ninth Circuit dismissed the skiers’ appeal.<sup>6</sup>

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1. *Peweceli* is a character in the Washoe Tribe’s creation story, and *Peweceli Yeweš* means “Peweceli’s [t]rail” or “[p]ath,” in reference to a trade route heading west. Email from Herman Fillmore, Culture/Language Res. Dir., Washoe Tribe of Nev. & Cal., to author (Oct. 15, 2024, 1:53:46 PM PDT) (on file with author); see also Claire Cudahy, *Washoe Youth Follow Ancestors’ Footsteps in Hope Valley* (Video), TAHOE DAILY TRIB. (Jan. 15, 2018), <https://perma.cc/AG5N-AASR> (discussing the Washoe Tribe’s annual treks through Hope Valley); FOREST SERV., U.S. DEP’T OF AGRIC., EAST CARSON RIVER STRATEGY 2, 5 (2007), <https://perma.cc/XW33-8NRR> (discussing the Washoe Tribe’s history in Hope Valley). For a history of the Washoe and the lands they inhabited, see WASHOE TRIBE OF NEV. & CAL., WA SHE SHU: “THE WASHOE PEOPLE” PAST AND PRESENT (2009), <https://perma.cc/YR7E-Y669>; and *Washoe History: A Brief Summary*, WASHOE TRIBE OF NEV. & CAL., <https://perma.cc/Q523-HPTC> (archived Mar. 24, 2026).
  2. See Frank Tortorich, Jr., *The Opening of the Carson River Route*, OVERLAND J., Spring 2000, at 20, 21-22; Jeff Munson, *Emigrant Trail Tour Promises Spectacular Colors*, TAHOE DAILY TRIB. (Oct. 12, 2005), <https://perma.cc/D85N-H6EP>.
  3. See 16 U.S.C. § 528 (setting forth national forests’ multiple uses); 36 C.F.R. § 200.3(b)(2)(i) (explaining that the Forest Service administers the national forests).
  4. See *Friends of Hope Valley v. U.S. Forest Serv.*, No. 00-cv-01900, slip op. at 6 (E.D. Cal. Sept. 30, 2004).
  5. See *id.*
  6. *Friends of Hope Valley v. U.S. Forest Serv.*, 203 F. App’x 883, 883-84 (9th Cir. 2006).

In dismissing the appeal, the Ninth Circuit invoked a little-known rule called the “administrative remand rule,” under which only an agency may appeal from a district court order remanding the agency’s decision under the Administrative Procedure Act (APA).<sup>7</sup> Under this rule, where an agency chooses not to appeal, other parties—such as intervenors defending the agency’s decision or, as in *Friends of Hope Valley*, plaintiffs unsatisfied with the nature or scope of the court’s remand—may not appeal the court’s remand but must instead await the agency’s new decision in the remand process.<sup>8</sup> The primary rationale for this rule is simple: Because “agencies compelled to refashion their own rules face the unique prospect of being deprived of [appellate] review altogether,” agencies are the only party for whom such an order is final and thus appealable under 28 U.S.C. § 1291.<sup>9</sup>

The unavailability of later appellate review stems from the way administrative decisionmaking works: If an agency chooses to accept rather than appeal a remand, the agency will issue a subsequent decision that necessarily adheres to the district court’s holding that led to the remand. Following that new agency decision, the question of whether the district court’s holding was legally correct will be moot. Thus, the agency’s only chance to challenge the holding that led to the remand is to appeal the remand at the time it is issued.

*Friends of Hope Valley* was my case—I represented the Forest Service in the Ninth Circuit against, incidentally, the same environmental law clinic in which I had been a law student a few years before. But that unusual matchup is not the reason the case has haunted me for the last eighteen years. Rather, it was the feeling that I had won the case on odd, maybe even unfair, grounds. To this day, I remember standing at the lectern, the unceasing gaze of marbled angels carved into the courtroom walls staring down at me, as I worked mightily to convince two Ninth Circuit judges and one retired Supreme Court Justice sitting by designation that a rule they had never heard of barred the skiers’ appeal. They ultimately agreed, but during oral argument each expressed palpable frustration

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7. *See id.* The APA is codified at 5 U.S.C. §§ 551-553, 701-706. This Article is only concerned with APA remands. There are, of course, many other types of remands (to administrative law judges, bankruptcy courts, state courts, and so on), and in a few footnotes I have noted the ways in which jurisprudence concerning such other remands is relevant to the administrative remand rule. *See infra* notes 151-53.

8. *See Friends of Hope Valley*, 203 F. App’x at 883 (citing *Alsea Valley All. v. Dep’t of Com.*, 358 F.3d 1181, 1184-85 (9th Cir. 2004)).

9. *Alsea Valley All.*, 358 F.3d at 1184 (emphasis omitted). For more detail on Section 1291, see Part I.B below. Also, as note 25 below explains, some courts and commentators conceive of the rule as being narrower: A decision remanding an agency action is not final and appealable, and an appeal by the agency is an “exception” to that rule instead of part of the rule itself.

at the result and the esoteric rule that commanded it.<sup>10</sup> If three federal jurists with decades of experience expressed surprise and concern at the administrative remand rule, maybe it was worth investigating further.

Many years later, this Article is the product of that nagging doubt. The administrative remand rule<sup>11</sup> has deep roots, it turns out. It emerged in the federal courts of appeals in the 1970s and 80s, as the Supreme Court issued a series of seminal decisions regarding what constitutes a “final,” appealable judgment under Section 1291.<sup>12</sup> Every circuit used to strictly adhere to the administrative remand rule, but, as we shall see in Part I.D.3 below, a few cracks have started to emerge in more recent years. Even with these cracks, the rule serves as a nearly omnipresent gatekeeper to the federal courts of appeals in cases in which the federal district courts remand federal agency decisions under the APA. And by creating a jurisdictional filter for the cases that reach the courts of appeals, the rule helps determine those courts’ administrative law jurisprudence.

Yet despite its fifty-year entrenchment and significant consequences, the administrative remand rule somehow manages to remain in the shadows. The Supreme Court has never directly considered it.<sup>13</sup> The rule has likewise received relatively little attention in legal scholarship and treatises.<sup>14</sup>

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10. See Oral Argument at 18:40, *Friends of Hope Valley v. U.S. Forest Serv.*, 203 F. App’x 883, 883-84 (9th Cir. 2006) (No. 04-17376).

11. This Article uses the term “administrative remand rule,” coined by the Tenth Circuit. In 2021, it was “unique” to that circuit. *B.W. ex rel. C.W. v. Denv. Cnty. Sch. Dist. No. 1*, 994 F.3d 1215, 1220 & n.2 (10th Cir. 2021) (per curiam). However, at least two other courts have since started to use that term. See, e.g., *Mont. Env’t Info. Ctr. v. Haaland*, No. 22-36002, 2023 WL 8166779, at \*1 (9th Cir. Nov. 24, 2023); *DCOR, LLC v. U.S. Dep’t of the Interior*, No. 21-cv-00120, 2023 WL 8628322, at \*1 (N.D. Tex. Dec. 13, 2023).

12. Part I below discusses this case law in detail. The rise of the administrative remand rule coincided, unsurprisingly, with the rise of the administrative state. For more on this rise, see generally, for example, JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 21-77 (2017); *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2138-44 (2012); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 647 & n.231 (2010); and William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 46 (2001).

13. The Court came closest to considering the rule in *Sullivan v. Finkelstein*, 496 U.S. 617, 623-25 (1990), which interpreted a specific finality statute to permit appeals of district court remands in Social Security cases. See *infra* notes 88-95 and accompanying text (discussing *Finkelstein* in detail).

14. Bryan Lammon has written most extensively about the administrative remand rule, though in the more general context of finality and appellate jurisdiction. See Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1834-37 (2018) [hereinafter Lammon, *Finality*]; Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 386-93 (2017) [hereinafter Lammon, *Dizzying*].

*footnote continued on next page*

Why has the rule largely evaded scrutiny? Because it mostly makes sense. The administrative remand rule is simply an administrative law-specific application of the final judgment rule—the rule that the federal courts of appeals generally have jurisdiction only over “final” judgments of the federal district courts.<sup>15</sup> As I explain further below, administrative remands are final as to agencies but not as to nonagency parties. The final judgment rule dates back hundreds of years and is essential for a properly functioning judiciary.<sup>16</sup> It promotes judicial economy by avoiding piecemeal appeals and preserves the district courts’ role as the primary manager of litigation.<sup>17</sup>

The administrative remand rule serves similar worthwhile purposes. In a straightforward case in which a district court remands an agency’s decision—and many cases involving APA remands are straightforward—it makes perfect sense that only the agency may appeal the remand. If the agency does not appeal, and on remand grants the relief the plaintiff seeks, the agency will not be able to seek review of the remand following a final judgment. The plaintiff, meanwhile, may get the relief it seeks, avoiding the need for any further judicial review. If not, the plaintiff can seek review of the remand following a final judgment. The same goes for an intervenor who is aggrieved by the agency’s decision on remand.<sup>18</sup> The parties and the appellate court are saved from a potentially unnecessary interlocutory appeal, and the agency is given space to reconsider its decision.

But not all cases involving APA remands are straightforward. Consider a few scenarios in which the administrative remand rule could be more problematic: (1) an agency takes an unreasonably long time to complete the remand; (2) a district court remands an agency’s decision on the narrowest of a plaintiff’s many claims, or on grounds the plaintiff did not raise, and the agency does not appeal; (3) on remand an agency reverses course from its original

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Gillespie]. The rule has received passing attention in other scholarship. *See, e.g.*, Harold J. Krent, *Situating Structural Challenges to Agency Authority Within the Framework of the Finality Principle*, 98 IND. L.J. SUPPLEMENT 1, 10 n.73 (2023); Jennifer L. Biever & Ana Maria Gutierrez, *The Uncertain Question of Remedies Should a Challenge Prevail*, 2016 ROCKY MTN. MIN. L. INST., no. 5, 2016, at 13-28 to -29; Michele D. Lynch, *Remands Are a Consequence of Administrative Law, So Why Are We All So Frustrated?*, 23 TUL. J. INT’L & COMPAR. L. 383, 390-92 (2015). Finally, a few treatises discuss the rule. *See, e.g.*, 15B WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 3914.32 (West 2025); 15A *id.* § 3903; 73A C.J.S. PUBLIC ADMINISTRATIVE LAW & PROCEDURE § 561 (West 2025); FEDERAL COURT OF APPEALS MANUAL § 2:3 (7th ed., May 2025 Update).

15. Section 1291 is Congress’s enshrinement of the final judgment rule. *See infra* notes 41-54 and accompanying text (discussing the final judgment rule in detail).

16. *See infra* note 41 and accompanying text.

17. *See infra* notes 49-51 and accompanying text (discussing the final judgment rule’s rationales and benefits).

18. *See Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (“Deferring review also leaves open the possibility that no appeal will be taken in the event the proceedings on remand satisfy all parties.”).

decision, leaving high and dry a party that intervened to defend that decision; (4) take any of the first three scenarios and add vacatur of the agency's decision for the period of the remand proceedings, the normal remedy under the APA, with resulting significant on-the-ground consequences; or (5) a new President takes office during a remand and directs the agency to change course. Most, if not all, of these scenarios have arisen countless times, with some even prompting calls by circuit judges to revisit the administrative remand rule.<sup>19</sup>

Apart from these specific scenarios, there are other signs the administrative remand rule warrants a fresh look. First, the circuits have different—sometimes wildly different—tests for determining when remands are appealable and by whom. Under these tests, if you are a plaintiff or intervenor, your ability to appeal a remand is nonexistent in some circuits, vaguely possible in others, decently possible in three, and a mystery in the rest.<sup>20</sup> Second, even within the same circuit (most notably, within the Ninth Circuit), a nonagency party's ability to appeal a remand is not always predictable.<sup>21</sup> Third and finally, the administrative remand rule dovetails with ongoing developments and concerns in the fields of federal jurisdiction and administrative law. Litigants, including and especially agencies, can use the rule to engage in geographic and temporal forum shopping,<sup>22</sup> which in turn can contribute to politicized agency decisionmaking. District courts can also use (and likely are using) the rule to deny alternative avenues for appellate review. And it is worth examining how the rule, and agency and nonagency litigants under it, may fare in this era of increasing judicial (and now executive) hostility toward the administrative state.

This Article discusses the administrative remand rule, including my own brush with it in *Friends of Hope Valley*, concludes that the rule mostly makes sense but warrants some revision, and proposes modifications that would help address some of its problems. Specifically, Part I discusses the rule and its provenance. Part II discusses specific scenarios in which the rule has been or might be applied. In doing so, Part II teases out where applying the rule does and does not make sense. Part II also discusses how the rule fits in with larger federal jurisdiction and administrative law considerations and research. Part III

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19. Two Ninth Circuit judges recently called for reconsidering the rule en banc in the remand-with-vacatur context, explaining that vacatur “operates like a final judgment or an injunction such that we should have jurisdiction over appeals of remands-with-vacatur under 28 U.S.C. § 1291, § 1292, or both.” *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 596-98 (9th Cir. 2023) (Friedland, J., concurring, joined by Bennett, J.). A Second Circuit panel has expressed similar concerns. *See N.Y. Legal Assistance Grp. v. Cardona*, No. 21-888-cv, 2024 WL 64220, at \*3-4 (2d Cir. Jan. 5, 2024).

20. *See infra* Part I.D.3.

21. *See infra* notes 194-95, 264-72 and accompanying text.

22. Temporal forum shopping is “the practice of choosing the most favorable jurisdiction or court in which a claim might be heard *across time*.” Zachary D. Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WIS. L. REV. 1513, 1521-22.

proposes modifications to the rule to preserve its benefits and minimize its downsides.<sup>23</sup> Those modifications include adopting a consistent rule across the circuits and modifying the rule to allow certain nonagency appeals to move forward to optimize fairness and judicial efficiency. Finally, Part IV discusses considerations for practitioners.

## I. The Administrative Remand Rule: A Deeper Dive

We start, as we must, with the administrative remand rule itself. Stated simply, the rule provides that a district court order remanding an agency's decision is final only as to, and thus appealable only by, the agency itself—with exceptions only in rare circumstances.<sup>24</sup> As a result, nonagency parties may not appeal a remand until the district court enters final judgment, which usually follows the completion of the remand process.<sup>25</sup>

Stated more fully, the administrative remand rule goes something like this: Under 28 U.S.C. § 1291, the federal courts of appeals have jurisdiction over “final decisions of the district courts.”<sup>26</sup> There are limited statutory exceptions to this “finality” requirement, the most well-known being for district court orders granting or denying injunctive relief<sup>27</sup> and nonfinal orders certified for

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23. This Article focuses on review by the federal courts of appeals of remand orders issued by federal district courts under the APA. Various states have adopted their own versions of the administrative remand rule, which a future article could examine. *See generally*, e.g., *Jackson v. Bd. of Civ. Serv. Comm'rs of L.A.*, 318 Cal. Rptr. 3d 79, 83-89 (Ct. App. 2024) (applying *Dhillon v. John Muir Health*, 394 P.3d 1048, 1050-53 (Cal. 2017)); *Federman v. Bd. of Appeals of Marblehead*, 626 N.E.2d 8, 10 (Mass. App. Ct. 1994); *Holton Transp., Inc. v. State Corp. Comm'n*, 690 P.2d 399, 399-400 (Kan. Ct. App. 1984); *Bearns v. Dep't of Indus., Lab. & Hum. Rels.*, 306 N.W.2d 22, 25-26 (Wis. 1981).

24. The administrative remand rule applies to appeals of district court remand orders that are brought in circuit courts. There is no equivalent rule that covers appeals to the Supreme Court of circuit court remand orders or of circuit court decisions upholding district court remand orders. The Supreme Court does have, however, a longstanding general rule against interlocutory review. *See Am. Constr. Co. v. Jack., Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) (“[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters.”).

25. Some courts and commentators conceive of the rule as being narrower: A decision remanding an agency action is not final and appealable, and an appeal by the agency is an “exception” to that rule instead of part of the rule itself. *See infra* notes 31, 93, 112. This narrow framing allows a circuit court to reject an appeal of a remand by an agency, which, we will see, the circuits almost never do. As a result, under either this narrower or my broader framing, the result is the same: Typically, only agencies may appeal orders remanding their decisions for further proceedings.

26. 28 U.S.C. § 1291. Some types of administrative agency remands occur under special final judgment statutes that either mimic or intentionally depart from Section 1291. I discuss those below where relevant.

27. 28 U.S.C. § 1292(a).

interlocutory appeal.<sup>28</sup> When it comes to a district court order remanding an agency’s decision under the APA, absent certification, the administrative remand rule renders that order nonfinal and hence unappealable under 28 U.S.C. § 1291 except in certain circumstances. As discussed below, the requisite circumstances vary significantly by circuit, but the most important requirement is that “review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.”<sup>29</sup> This criterion is typically met only where the agency whose decision was remanded is the appellant, because “only agencies compelled to refashion their own rules face the unique prospect of being deprived of review altogether.”<sup>30</sup> Plaintiffs and intervenors must await the agency’s new decision on remand to seek further judicial review.<sup>31</sup>

This Part begins by briefly discussing how remands work under the APA. It then discusses the final judgment rule and important Supreme Court decisions construing it—decisions from which the administrative remand rule started to emerge in the 1960s. The Part then traces how, in the decades since, the administrative remand rule has evolved in the circuit courts of appeals, gradually becoming less consistent across, and more permissive of nonagency appeals in some, circuits. The end result—the administrative remand rule in place today—is actually a series of rules governed by different tests and yielding different and sometimes unpredictable outcomes.

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28. The two most common vehicles for certification are 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 54(b). *See infra* notes 282, 298 and accompanying text (discussing the relationship between certification under these provisions and the administrative remand rule).

29. *Collord v. U.S. Dep’t of the Interior*, 154 F.3d 933, 935 (9th Cir. 1998); *see also infra* Part I.D.3.b (discussing the primacy of this concern across the circuits and citing many cases that discuss it).

30. *Alsea Valley All. v. Dep’t of Com.*, 358 F.3d 1181, 1184 (9th Cir. 2004) (emphasis omitted); *see also id.* (“An agency, after all, cannot appeal the result of its own decision.”). As the Seventh Circuit put it, “an order remanding a case to an agency is final for purposes of 28 U.S.C. § 1291 if it terminates the agency’s judicial remedies other than contempt.” *Crowder v. Sullivan*, 897 F.2d 252, 253 (7th Cir. 1990) (per curiam).

31. This Article avoids framing the circumstances under which the circuit courts deem remands appealable as “exceptions” to the final judgment rule or administrative remand rule, even though many courts do just that. As the Third Circuit correctly observed, the “courts of appeals do not have authority to create exceptions to congressional limits on jurisdiction.” *Papotto v. Hartford Life & Accident Ins. Co.*, 731 F.3d 265, 270-71 (3d Cir. 2013) (noting several supporting cases). Rather, the circuit courts’ prudential recognition of circumstances under which remands are deemed final (despite the general rule that remands are nonfinal) simply represents a “practical construction of finality.” *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 124 (3d Cir. 1999) (Sloviter, J., concurring); *see also Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (“The collateral order doctrine is best understood not as an exception to the ‘final decision’ rule laid down by Congress in § 1291, but as a ‘practical construction’ of it . . .” (citations omitted)).

### A. Remands Under the APA

“The APA instructs federal courts to ‘hold unlawful and set aside’ arbitrary or unlawful agency action.”<sup>32</sup> Under the so-called “ordinary remand rule,” this instruction means that a court may not substitute its own decision for the agency’s. The court must instead remand the matter to the agency for reconsideration.<sup>33</sup> Remand can be with or without vacatur of the agency’s decision for the period of the remand proceedings.<sup>34</sup> An agency may also request a voluntary remand of its own decision.<sup>35</sup>

An agency action is “arbitrary or unlawful” under the APA if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>36</sup>

This test yields essentially three types of court-ordered remands: (1) the agency failed to explain its reasons for arriving at its decision; (2) the agency made implausible or erroneous factual findings; and (3) the agency’s decision cannot stand on the reasons the agency offered.<sup>37</sup>

A remand of the first type is likely to require far less additional effort by the agency than a remand of the second type or, even more, of the third. The first just requires new explanation; the second might require that or new evidence gathering; and the third requires either new evidence gathering or reinterpreting the controlling law, regulations, or both.<sup>38</sup> There is thus a

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32. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258 (2017) (quoting 5 U.S.C. § 706(2) (2016)).

33. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); see also FDA v. Wages & White Lion Invs., LLC, 145 S. Ct. 898, 929-31 (2025) (discussing the history and bounds of the ordinary remand rule); Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENV’T L. 483, 492-93 (2017) (discussing the ordinary remand rule); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 86-87 (2016) [hereinafter Walker, *Referral*] (same); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1563 (2014) (same).

34. See notes 259-63 and accompanying text below for more discussion of remands with and without vacatur.

35. Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 366-69 (2018); Toni M. Fine, *Agency Requests for “Voluntary” Remand: A Proposal for the Development of Judicial Standards*, 28 ARIZ. ST. L.J. 1079, 1080 (1996).

36. Bagley, *supra* note 32, at 258; Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

37. Lynch, *supra* note 14, at 388; Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 205-18.

38. Julie C. Mendoza & R. Will Planert, *Agency Remands Before the United States Court of International Trade: Objectives and Obstacles*, 17 TUL. J. INT’L & COMPAR. L. 463, 470-89 (2009).

spectrum of further action required by an agency on remand, ranging from ministerial (for example, the “mechanical recalculation” of statutory benefits<sup>39</sup>) to significant (for example, substantive review of a due process claim<sup>40</sup>). This spectrum plays a significant role in how many circuit courts of appeals conceive of and apply the administrative remand rule.

## B. The Final Judgment Rule

The administrative remand rule is but one offshoot of the more general and much older final judgment rule—the rule that only *final* decisions of the district courts are appealable. This rule stems from the Judiciary Act of 1789, which strictly limited review at law or in equity to “final decrees and judgments.”<sup>41</sup> That rule can be traced back to English common-law courts, which since 1615 held that no “writ of error” lies until “final disposition of an entire controversy.”<sup>42</sup> The modern articulation is that a “‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>43</sup>

This modern articulation stems from the appellate-jurisdiction statutes that Congress enacted in 1948 and that we all know today: 28 U.S.C. § 1291, which, as discussed, gives the courts of appeals jurisdiction over “final decisions of the district courts,” and 28 U.S.C. § 1292, which in subsection (a) provides for review of certain interlocutory orders, and in subsection (b) provides a mechanism for district and appellate courts to certify other interlocutory orders for immediate appellate review.<sup>44</sup> These statutes, especially Section 1292, followed a period of general loosening—starting in 1891, the year Congress created the circuit courts of appeals—of what had been the Judiciary Act’s strict final judgment rule.<sup>45</sup> During that nearly sixty-year period, Congress had come to realize “that rigid application of the final judgment rule in all cases might inflict irreparable harm upon litigants in certain instances, and might actually have the effect of unnecessarily prolonging the litigation.”<sup>46</sup> However, Section 1292 was “not an

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39. *Pauly v. U.S. Dep’t of Agric.*, 348 F.3d 1143, 1148 (9th Cir. 2003) (per curiam).

40. *See Vista Health Plan, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 31 F.4th 946, 951 (5th Cir. 2022).

41. Judiciary Act of 1789, ch. 20, §§ 21-22, 1 Stat. 73, 83-84 (codified as amended in scattered sections of 28 U.S.C.).

42. 15A WRIGHT & MILLER, *supra* note 14, § 3906 (invoking Metcalfe’s Case (1615) 77 Eng. Rep. 1193; 11 Co. Rep. 38a and intervening American cases).

43. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

44. Act of June 25, 1948, ch. 646, 62 Stat. 929 (codified as amended at 28 U.S.C. §§ 1291-1292).

45. *Bachowski v. Usery*, 545 F.2d 363, 367 (3d Cir. 1976); Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826, 826 (codified as amended in scattered sections of 28 U.S.C.).

46. *Bachowski*, 545 F.2d at 367. These “instances” included grants or denials of preliminary injunctions, orders in receivership cases, and orders determining liability in admiralty

*footnote continued on next page*

abrogation of the general rule of finality, but rather a careful delineation of narrow categories of interlocutory orders that would be appealable.<sup>47</sup> Section 1291's final judgment rule still reigned in almost all cases, including APA cases.<sup>48</sup>

The final judgment rule is indisputably essential to a "healthy legal system."<sup>49</sup> Court decisions, treatises, and scholarly dissertations describing the rule's rationales and benefits are legion.<sup>50</sup> Boiled down, they explain that the final judgment rule "strikes a presumptive balance in favor of deferring [appellate] review,"<sup>51</sup> which: (1) promotes judicial economy by preventing piecemeal appeals and avoiding unnecessary appellate intervention; (2) allocates power and duties between the appellate and trial courts, thereby preserving the trial courts' "'special role' in managing ongoing litigation";<sup>52</sup> and (3) prevents deliberate delay or harassment.

For all these benefits, to some judges much of the time, and to most judges some of the time, the final judgment rule can feel like a straitjacket. "In recent decades, the paths from federal district courts to the federal circuit courts of appeals have narrowed considerably," causing litigants and judges alike to "test the limits" of the final judgment rule.<sup>53</sup> The rule, and indeed nearly every rule about finality and appellate jurisdiction, is accordingly a study in the ambivalence (and humanness) of judges as they try to balance two worthwhile

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cases prior to the assessment of damages. *See, e.g.,* *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 753 (3d Cir. 1974). These interlocutory orders still make up the orders appealable under Section 1292(a). *See* 28 U.S.C. § 1292(a).

47. *Bachowski*, 545 F.2d at 367.

48. Congress enacted 28 U.S.C. §§ 1291 and 1292 in 1948, only two years after enacting the APA. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

49. *Cobbledick v. United States*, 309 U.S. 323, 326 (1940); *see also* 15A WRIGHT & MILLER, *supra* note 14, § 3907 (describing the final judgment rule as "the heart of appellate jurisdiction in the federal system").

50. *See, e.g.,* *Microsoft Corp. v. Baker*, 582 U.S. 23, 27-29 (2017); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-07 (2009); *Johnson v. Jones*, 515 U.S. 304, 309 (1995); *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-84 (1994); *DiBella v. United States*, 369 U.S. 121, 124-26 (1962); *Cobbledick*, 309 U.S. at 324-25; 15A WRIGHT & MILLER, *supra* note 14, § 3907; Bryan Lammon, *Disarming the Finality Trap*, 97 N.Y.U. L. REV. ONLINE 173, 177-78 (2022); *see also infra* Part I.C (discussing these and other Supreme Court finality cases, many of which examine the final judgment rule's rationales and benefits).

51. 15A WRIGHT & MILLER, *supra* note 14, § 3907.

52. *Mohawk Indus., Inc.*, 558 U.S. at 106-07 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

53. Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 979-80 (1997). Part I.C below explores this narrowing in more detail.

but competing goals: “clarity and flexibility.”<sup>54</sup> As Bryan Lammon explains, “[b]ecause the end of district court proceedings is so important, courts want to craft clear, predictable, and unchanging rules defining when that point has arrived. . . . At the same time, courts want some flexibility to reach pragmatically sound outcomes.”<sup>55</sup>

The result is that finality jurisprudence—case law concerning which trial court decisions are final for purposes of appeal—is messy. Even the Supreme Court, which has held a fairly consistent and constrained view of the final judgment rule over the last seventy-five years, has issued decisions that turned out to permit the proverbial camel’s nose under the appealability tent.<sup>56</sup> Following by example, many circuit courts of appeals have done the same in applying the administrative remand rule.

### C. The Administrative Remand Rule’s Supreme Court Origins

The administrative remand rule has deep roots in the Supreme Court’s finality jurisprudence.<sup>57</sup> In 1940, the Supreme Court decided *Cobbledick v. United States*, which considered whether an order denying a motion to quash a subpoena duces tecum was final and appealable.<sup>58</sup> The Court concluded it was not, but more interesting is the Court’s discussion of why finality matters: “Finality as a condition of review is an historic characteristic of federal appellate procedure.”<sup>59</sup> And “[s]ince the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice”—a proposition that today might strike some as axiomatic and others as odd or unfair—“Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.”<sup>60</sup>

Five years later, in *Catlin v. United States*, the Court held unappealable two nonfinal district court orders in an eminent domain case.<sup>61</sup> “The foundation of this policy is not in merely technical conceptions of ‘finality,’” the Court

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54. Lammon, *Finality*, *supra* note 14, at 1837; *see also* Richard L. Heppner Jr., *Conceptualizing Appealability: Resisting the Supreme Court’s Categorical Imperative*, 55 TULSA L. REV. 395, 398 (2020) (discussing judges’ ability to be “endlessly creative in how they conceive of different categories of orders” when considering finality).

55. Lammon, *Finality*, *supra* note 14, at 1837 (footnote omitted).

56. *See infra* Part I.C.

57. This Subpart is best read alongside 15A WRIGHT & MILLER, note 14 above, § 3909.

58. 309 U.S. 323, 324 (1940). *Cobbledick* construed 28 U.S.C. § 225, the predecessor to Section 1291, which also limited review by the circuit courts of appeals to “final decisions” of the district courts. *Id.*

59. *Id.*

60. *Id.* at 325.

61. 324 U.S. 229, 230-32 (1945).

explained.<sup>62</sup> This policy is “one against piecemeal litigation,” on the one hand, and for “conservation of judicial energy” and “elimination of delays” on the other.<sup>63</sup> The Court articulated what remains perhaps the most-quoted definition of finality: “A ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>64</sup>

*Cobbledick* and *Catlin* set the stage for a strict administrative remand rule (that is, no appeals of remand orders). But *Cohen v. Beneficial Industrial Loan Corp.*,<sup>65</sup> decided in 1949, would, in time, set a very different path. By 1949 Congress had enacted 28 U.S.C. §§ 1291 and 1292.<sup>66</sup> As the Court described in *Cohen*, Section 1292 “allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties.”<sup>67</sup> Section 1292, in other words, did what the Court had long done: It gave Section 1291 and its predecessors a “practical rather than a technical construction.”<sup>68</sup>

On that basis—specifically on what would become known as a new “collateral order” doctrine—the Court held appealable a district court decision that a plaintiff need not provide security for attorney’s fees and costs in a shareholder derivative suit.<sup>69</sup> The collateral order doctrine’s three criteria for holding an interlocutory order appealable are now well-known: The order “must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively

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62. *Id.* at 233.

63. *Id.* at 233-34.

64. *Id.* at 233.

65. 337 U.S. 541 (1949).

66. For a broader discussion of these statutes and appellate jurisdiction, see THOMAS E. BAKER, *FED. JUD. CTR., A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS* 95-103 (Kris Markarian ed., 3d ed. 2023). And for more on these and other key finality decisions, see 15A WRIGHT & MILLER, note 14 above, § 3909.

67. *Cohen*, 337 U.S. at 545.

68. Lammon, *Finality*, *supra* note 14, at 1814, 1840 (quoting *Cohen*, 337 U.S. at 546) (discussing § 1292 and other “alternative grounds for appellate jurisdiction”).

69. *Cohen*, 337 U.S. at 543, 546-47. The collateral order doctrine gets more airtime below, but for now:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

*Id.* at 546. Note that the collateral order doctrine is a *judicial* (prudential) construction of the final judgment rule in 28 U.S.C. § 1291, while 28 U.S.C. § 1292 is itself a set of *statutory* exceptions for interlocutory appeal of certain nonfinal orders. Matthew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619, 622-23 (2017).

unreviewable on appeal from a final judgment.”<sup>70</sup> Twenty years later, the circuit courts of appeals would begin using *Cohen’s* collateral order doctrine to fashion and apply the administrative remand rule, at first rigidly but over time less so.<sup>71</sup>

In the meantime, *Cohen’s* concept of “final and irreparable effect” became the principal dividing line between trial court decisions that were appealable and those that were not. In *DiBella v. United States*, the Supreme Court held unappealable a ruling on a pre-indictment motion to suppress evidence secured through an allegedly unreasonable search and seizure.<sup>72</sup> The Court concluded that a nonfinal order is appealable only where “the damage of error unreviewed before the judgment” is both “definitive and complete” and outweighs the “disruption caused by intermediate appeal.”<sup>73</sup> Two years later, in 1964, the Court applied and expanded this balancing test in *Gillespie v. United States Steel Corp.* to hold appealable an order to strike certain parts of a complaint.<sup>74</sup> The Court reasoned that the lower court’s ruling “effectively cut off” the plaintiffs’ claims for recovery,<sup>75</sup> and that “the eventual costs . . . will certainly be less” if the Court addressed the issues on appeal rather than “sen[t] the case back with those issues undecided.”<sup>76</sup> And the questions raised in the appeal were “fundamental to the further conduct of the case.”<sup>77</sup> Ten years later, *Eisen v. Carlisle & Jacquelin* held final and appealable a district court order allocating notice costs in a class action, reasoning that it was conclusive and collateral to the merits.<sup>78</sup>

Following on *Cohen’s* heels, *Gillespie* and *Eisen* seemed to herald a new era of flexible, case-by-case finality analysis, but that was not to be.<sup>79</sup> The Court in *Coopers & Lybrand v. Livesay*, decided in 1978, heralded a much more restrictive

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70. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988) (internal quotation marks omitted) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c)); *accord* *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009).

71. *See infra* Parts I.D.1-3.

72. 369 U.S. 121, 129-31 (1962).

73. *Id.* at 124.

74. *See* 379 U.S. 148, 152 (1964).

75. *Id.* at 153.

76. *Id.*

77. *Id.* at 153-54 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)).

78. *See* 417 U.S. 156, 171-72 (1974).

79. As *Wright & Miller’s Federal Practice & Procedure* puts it, *Gillespie* presented “spectacular possibilities” that have devolved into a “dismal limbo.” 15A WRIGHT & MILLER, *supra* note 14, § 3913. However, as we shall see, *Gillespie* continues to animate the administrative remand rule in at least some circuits. *See, e.g., In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (“The Supreme Court has endorsed this ‘practical’ approach to finality, particularly in the ‘twilight zone’ where ‘it is impossible to devise a formula to resolve all marginal cases.’” (quoting *Gillespie*, 379 U.S. at 152)).

era that more or less continues today.<sup>80</sup> *Coopers & Lybrand* held that an order denying class certification was not appealable under 28 U.S.C. § 1291.<sup>81</sup> Subsequent cases held nonfinal and unappealable orders denying or granting counsel disqualification motions,<sup>82</sup> orders granting permissive intervention but denying intervention as of right,<sup>83</sup> and orders denying effect to settlement agreements.<sup>84</sup>

As for case-by-case balancing under *Gillespie* and *Eisen*, the Court did all it could to kill it: “If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.”<sup>85</sup> That is, judicial efficiency outweighs the “incremental benefit” of “individualized jurisdictional inquiry.”<sup>86</sup> And the Court has “warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a ‘particular injustice[er]’ averted.”<sup>87</sup>

In more recent years, the Supreme Court has allowed slivers of light behind this firewall of finality, but they are faint and erratic. A flicker came from *Sullivan v. Finkelstein*,<sup>88</sup> the Court’s closest brush with the administrative remand rule. There the Court held that a district court remand under a particular provision of the Social Security Act was final as to, and thus appealable by, the agency.<sup>89</sup> The remand effectively invalidated the agency’s regulation for

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80. 437 U.S. 463 (1978), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c)). As my use of “more or less” implies, the Court’s enforcement of the final judgment rule has ebbed and flowed, but the general trend has been tighter appellate jurisdiction. *See, e.g.*, Adam Reed Moore, *A Textualist Defense of a New Collateral Order Doctrine*, 99 NOTRE DAME L. REV. REFLECTION 1, 11 (2023) (“In the last decade, the Court has grown skeptical of the collateral order doctrine.”); Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbonian Bog” and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 576-85 (1998) (describing such ebbs and flows and the Court’s “[r]etrenchment” from broad collateral order review after 1985 (emphasis omitted)).

81. 437 U.S. at 470.

82. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 370 (1981) (denying disqualification in civil cases); *Flanagan v. United States*, 465 U.S. 259, 270 (1984) (granting disqualification in criminal cases); *Richardson-Merrell Inc. v. Koller ex rel. Koller*, 472 U.S. 424, 426 (1985) (granting disqualification in civil cases).

83. *See, e.g.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 372, 380 (1987). In *Dickinson v. Petroleum Conversion Corp.*, the Court held that a decision denying intervention as of right is final and appealable. 338 U.S. 507, 513 (1950).

84. *See, e.g.*, *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994).

85. *Coopers & Lybrand*, 437 U.S. at 477 n.30.

86. *Id.* at 473.

87. *Digit. Equip. Corp.*, 511 U.S. at 868 (alteration in original) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)).

88. 496 U.S. 617 (1990).

89. *Id.* at 619-20.

determining benefits eligibility, and without immediate review the agency might be foreclosed from later judicial review (that is, if the agency determined the plaintiff was benefits-eligible on remand).<sup>90</sup>

*Finkelstein* could have been a crack in the final judgment rule,<sup>91</sup> but the Court worked hard to cabin its potential reach. The district court's remand was unique, the Court explained, and in any event, *Finkelstein* was not meant to address "the broad question whether remands to administrative agencies are always immediately appealable."<sup>92</sup> Moreover, as some circuits have since pointed out, remands under the Social Security Act occur under a special final judgment statute that operates as a true exception to Section 1291.<sup>93</sup> At its outer bounds, *Finkelstein* could be viewed as the Supreme Court's indirect approval of the circuit courts of appeals' general practice, by 1990, of allowing agencies to appeal remands, and as contributing to the larger idea that some remands should be appealable.<sup>94</sup> But *Finkelstein* was not itself a basis for—or articulation of—the administrative remand rule or its nuances. More than anything, *Finkelstein* stands out as a rare and faint exception in a decades-long run, starting with *Coopers & Lybrand*, of the Supreme Court strictly interpreting Section 1291. The Supreme Court occasionally allowed interlocutory appellate review of some district court rulings (such as collateral orders under *Cohen*), but the clear trend line has been to restrict, not expand, finality under Section 1291.<sup>95</sup>

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90. *Id.* at 624-25.

91. First, there was the decision itself, which allowed the government to appeal the district court's remand. Second, *Finkelstein* facilitated the Court's decision, eight years later, that a claimant could appeal the same type of remand at issue in *Finkelstein*. See *Forney v. Apfel*, 524 U.S. 266, 270-71 (1998). Third, *Finkelstein* promisingly recognized a "great variety in remands," with one example being "a remand to the agency but [where] the person seeking judicial review may seek to appeal on the ground that broader relief should have been granted by the district court." *Finkelstein*, 496 U.S. at 623 & n.3.

92. *Finkelstein*, 496 U.S. at 623. Similarly, the Court explained that the situations discussed in note 91 above were not presented and "express[ed] no opinion about appealability in those circumstances." *Finkelstein*, 496 U.S. at 623 n.3.

93. See, e.g., *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 123 (3d Cir. 1999) (Sloviter, J., concurring) (explaining that *Finkelstein* and *Forney* "represent an exception to the final judgment rule" while also noting that "the exception is one made by Congress, not the courts"); see also *supra* note 31 (explaining why "circumstance" is a better term than "exception" for instances in which appeals of remands are deemed final).

94. As Part I.D below shows, some circuit courts of appeals explicitly relied on *Finkelstein* to allow interlocutory appeals of remands by agencies outside the social security context. See, e.g., *Baca-Prieto v. A1 Guigni*, 95 F.3d 1006, 1009 (10th Cir. 1996) (allowing an agency to appeal a remand requiring it to grant habeas relief given "the special relevance, both historical and analytical, of practical finality considerations" discussed in *Finkelstein* and other cases).

95. See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-14 (2009) (continuing to recognize practical finality doctrine under *Gillespie* but nonetheless holding that adverse attorney-client privilege rulings are not immediately appealable under *Cohen*); see also Lammon, *Dizzying Gillespie*, *supra* note 14, at 410-11 (discussing the Supreme Court's repeated efforts to cabin *Gillespie*).

## D. Development in the Courts of Appeals

### 1. The early years (1965-1989)

Against this backdrop of Supreme Court finality jurisprudence, the administrative remand rule began to emerge in the circuit courts of appeals. The first glimmers came between 1953 and 1967, when the Third and Eighth Circuits issued a series of perfunctory decisions holding that claimants for Social Security disability benefits could not appeal remands because they were not final.<sup>96</sup>

Then, in 1969—twenty years after *Cohen* and five years after *Gillespie*, but nine years before *Coopers & Lybrand* and twenty-one years before *Finkelstein*—the Fifth Circuit issued what appears to be the first decision explicitly fashioning, and then applying, the administrative remand rule. In *Cohen v. Perales*,<sup>97</sup> the Fifth Circuit held that a district court order remanding a decision by the Social Security Administration to deny Social Security benefits was final as to, and therefore appealable by, the agency under 28 U.S.C. § 1291.<sup>98</sup> The court cited *Gillespie's* notion of giving finality “a practical rather than a technical construction,” as well as the collateral order doctrine.<sup>99</sup> But most compelling to the court was the effect a contrary decision would have had on the agency: “Unless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved . . . .”<sup>100</sup> Four years later, the Fifth Circuit reached a similar decision involving the same agency, citing again the same principal reason.<sup>101</sup> One year after that, the D.C. Circuit followed suit in a different context, holding that a district court’s remand to the Civil Service Commission requiring the Commission to make a certain finding as a matter of law was final and appealable by the Commission.<sup>102</sup> Like the Fifth Circuit, the D.C. Circuit relied on *Gillespie's* notion of “practical finality” and *Cohen's* unreviewability prong under the collateral order doctrine.<sup>103</sup>

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96. See *Bohms v. Gardner*, 381 F.2d 283, 284-86 (8th Cir. 1967); *Mayersky v. Celebrezze*, 353 F.2d 89, 89 (3d Cir. 1965) (per curiam); *Marshall v. Celebrezze*, 351 F.2d 467, 468 (3d Cir. 1965) (per curiam). The *Bohms v. Gardner* Court cited *Mayersky v. Celebrezze* and *Marshall v. Celebrezze*. 381 F.2d at 286.

97. 412 F.2d 44 (5th Cir. 1969), *rev'd on other grounds sub nom.*, *Richardson v. Perales*, 402 U.S. 389 (1971).

98. *Id.* at 47-49.

99. *Id.* at 48. The court held that the district court’s order was also appealable under a separate provision of the Social Security Act. *Id.*

100. *Id.*

101. *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973).

102. *Gueory v. Hampton*, 510 F.2d 1222, 1224-25 (D.C. Cir. 1974).

103. *Id.*

New rules rarely develop linearly, however. In 1976, the Third Circuit decided *Bachowski v. Usery*.<sup>104</sup> That decision held that even the Department of Labor could not appeal a district court order remanding the Department's decision not to sue to overturn the results of a union's election.<sup>105</sup> The court recognized that other circuits had "found appealable orders by district courts that remanded cases to administrative agencies for further consideration," citing principally the Fifth Circuit's decision in *Perales* (and in doing so giving the administrative remand rule its first name: the "*Perales* doctrine").<sup>106</sup> But unlike in *Perales*, the Third Circuit reasoned, there was no "inexorabl[e]" risk in *Bachowski* that the agency would be deprived of later review of whatever issue underlay the interlocutory appeal.<sup>107</sup> To allow appellate review on an interlocutory basis "would thus require an extension of the *Perales* doctrine."<sup>108</sup>

The Third Circuit was not alone in turning away appeals of remands by agencies during this period. The Federal, First, and Fourth Circuits sometimes did, too.<sup>109</sup> But these decisions were anomalies; the circuits quickly came to

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104. 545 F.2d 363 (3d Cir. 1976).

105. *Id.* at 364-66.

106. *Id.* at 367, 373.

107. *Id.* at 372-73.

108. *Id.* at 373. *Bachowski* provides a thoughtful weighing of the pros and cons of appellate review of remands and of the final judgment rule. *See id.* at 366-73.

109. *See, e.g.,* *Cabot Corp. v. United States*, 788 F.2d 1539, 1543-44 (Fed. Cir. 1986) (finding a remand was not final (under 28 U.S.C. § 1295) and appealable by an agency under practical finality or the collateral order doctrine); *Pauls v. Sec'y of the Air Force*, 457 F.2d 294, 297-98 (1st Cir. 1972) (holding a remand for further factfinding was unappealable by an agency); *Harper v. Bowen*, 854 F.2d 678, 680-81 (4th Cir. 1988) (finding that a remand to properly allocate the burden of proof was not appealable by an agency in the absence of an "egregious misstatement of a point of law of sufficient moment to warrant immediate review"). The Eighth Circuit had explained that, absent certification under 28 U.S.C. § 1292(b), remands to the Social Security Administration were not final and appealable by the agency. *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc), *abrogated by* *Forney v. Apfel*, 524 U.S. 266 (1998).

agreement that agencies,<sup>110</sup> but only agencies,<sup>111</sup> could appeal remands. Indeed, within roughly two decades, the administrative remand rule as we know it today had taken shape and root.<sup>112</sup>

These early cases, stretching from *Perales* in 1969 to the Supreme Court's decision in *Finkelstein* in 1990, had three characteristics in common. First, to initially fashion the rule, the circuits rooted their decisions in *Cohen's* collateral order doctrine and *Gillespie's* notion of "practical finality" in roughly equal measure. Second, over time, the collateral order doctrine became the administrative remand rule's primary foundation.<sup>113</sup> And third, the collateral

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110. Early (pre-*Finkelstein*) cases held that agencies could appeal district court remands. *See, e.g.,* *Doughty v. Bowen*, 839 F.2d 644, 645-46 (10th Cir. 1988) (remand requiring the payment of interim benefits); *Pierre v. Rivkind*, 825 F.2d 1501, 1503-04 (11th Cir. 1987) (remand to reconsider an asylum application); *AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1070, 1073 (3d Cir. 1987) (remand for an informal oral hearing on a dredge-and-fill permit); *Huie v. Bowen*, 788 F.2d 698, 701-03 (11th Cir. 1986) (voluntary remand to apply a new law and impose retrospective benefits to the claimant); *Regents of the Univ. of Cal. ex rel. Univ. of Cal. v. Heckler*, 771 F.2d 1182, 1186-87 (9th Cir. 1985) (remand to revise a regulation to comply with the governing statute), *overruled on other grounds by* *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *Bender v. Clark*, 744 F.2d 1424, 1426-28 (10th Cir. 1984) (remand to an administrative law judge for a determination of whether the plaintiff showed agency error by a preponderance of the evidence); *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir. 1983) (remand for specific findings as to the claimant's work functionality); *United States v. Alcon Lab'ys*, 636 F.2d 876, 884-85 (1st Cir. 1981) (remand requiring the agency to release seized inventories, which concerned "broader questions of how [agency] enforcement actions are to proceed"); *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973) (remand imposing new procedures).
111. Early cases held that nonagency parties could not appeal district court remands. *See, e.g.,* *Mall Properties, Inc. v. Marsh*, 841 F.2d 440, 441-44 (1st Cir. 1988) (per curiam) (remand not appealable by the intervenor-defendant city); *Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1579-83 (Fed. Cir. 1986) (remand not appealable by the plaintiff); *Mem'l Hosp. Sys. v. Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985) (remand to the agency to receive new evidence not appealable by the plaintiff hospital); *Farr v. Heckler*, 729 F.2d 1426, 1427-28 (11th Cir. 1984) (per curiam) (remand for further benefits eligibility determination not appealable by the claimant); *Eluska v. Andrus*, 587 F.2d 996, 999-1002 (9th Cir. 1978) (voluntary remand not appealable by the plaintiff); *Giordano v. Roudebush*, 565 F.2d 1015, 1017-18 (8th Cir. 1977) (per curiam) (remand for rehearing with new evidence not appealable by the plaintiff).
112. Writing in 1989, the D.C. Circuit explained that the courts of appeals had "uniformly held that, as a general rule," remands to administrative agencies are not final and appealable, with an "exception" for agency appellants. *Occidental Petrol. Corp. v. SEC*, 873 F.2d 325, 329-30 (D.C. Cir. 1989). Although that rule produces "asymmetrical results"—private parties cannot appeal while agencies can—"[t]hat asymmetry derives . . . from the formulation of the *Cohen* test, under which the question of appealability turns to a great extent on whether a putative appellant could challenge the remand order after a final determination on the merits." *Id.* at 331-32.
113. There were exceptions, the most notable being the Tenth Circuit's decision in *Bender v. Clark*. There, the court concluded that the collateral order doctrine did not apply to an agency's appeal of a remand, but that the court nonetheless had jurisdiction under a
- footnote continued on next page*

order doctrine’s final prong—the inability to later seek review—became the primary consideration in deciding whether a remand was final and appealable. Because only agencies faced the risk of being deprived of review of a remand, only agencies could appeal one. Post-*Finkelstein*, the circuit courts of appeals have almost uniformly held, with rare exception, that agencies may appeal remands.<sup>114</sup>

## 2. Post-*Finkelstein* to *Friends of Hope Valley* (1987-2025)

This uniform rule—that agencies, and only agencies, may appeal remands under the APA—might have been the end of the matter. But as we have learned, finality is never simple, and the administrative remand rule is no exception. After *Finkelstein*, the question has been whether there are any circumstances in which parties other than agencies may appeal remands. Before *Finkelstein* the circuit courts of appeals had held the line: With one exception, the answer was always no.<sup>115</sup> But in the thirty-five years since, they have wavered, not all of them, and not a lot, but some.<sup>116</sup> Now, in many circuits, there are cases in which

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“practical application” of 28 U.S.C. § 1291 “viewed under the circumstances of each case.” 744 F.2d at 1427 (emphasis omitted). But this is a distinction without a difference. The collateral order doctrine itself arises from a notion of “practical” finality. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

114. A consistent exception is a remand of a remedy order under the Individuals with Disabilities Education Act (IDEA), Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended in scattered sections of 20 and 42 U.S.C.). Such remands are not appealable, even by school districts and educational boards. *See, e.g., A.S. ex rel. S.S. v. Cobb Cnty. Sch. Dist.*, 43 F.4th 1165, 1171 (11th Cir. 2022) (collecting cases); *B.W. ex rel. C.W. v. Denv. Cnty. Sch. Dist. No. 1*, 994 F.3d 1215, 1222 (10th Cir. 2021) (per curiam); *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.*, 152 F.3d 1159, 1160-61 (9th Cir. 1998) (per curiam). Another, less consistent exception is a remand to Employee Retirement Income Security Act (ERISA) administrators. Some circuits allow appeals by administrators while others do not. *See Mead v. Reliastar Life Ins. Co.*, 768 F.3d 102, 108 (2d Cir. 2014) (per curiam) (discussing circuits’ differing approaches). Finally, there are rare, ad hoc exceptions. *See, e.g., World Fuel Corp. v. Geithner*, 568 F.3d 1345, 1349-50 (11th Cir. 2009) (holding that the Office of Foreign Assets Control in the United States Treasury Department could not appeal a remand directing it to develop a new legal standard under the Foreign Narcotics Kingpin Designation Act); *see also Mia. Tribe of Okla. v. United States*, 656 F.3d 1129, 1140 (10th Cir. 2011) (explaining that a prior remand likely would not have been appealable by an agency because it contemplated further district court proceedings); *Nat’l Air Traffic Controllers Ass’n v. Sec’y of Transp.*, No. 06-3466, 2007 WL 2141941, at \*3 (6th Cir. July 26, 2007) (per curiam) (stating, in rejecting an appeal of a remand by plaintiffs, that even the agency would not be able to appeal given the limited nature of the remand).

115. *See supra* Part I.D.1. The single exception is the Tenth Circuit’s decision in *Cotton Petroleum Corp. v. United States Department of the Interior*. *See* 870 F.2d 1515, 1521-22 (10th Cir. 1989) (applying the Tenth Circuit’s test to allow the appeal of a remand by plaintiffs); *see also infra* notes 178, 195, 324 and accompanying text (discussing *Cotton Petroleum* and its significance).

116. *See infra* Part I.D.3.b.

nonagency parties may appeal remands.<sup>117</sup> The question, which Parts II and III of this Article explore, is whether the circuit courts of appeals have wavered too much or not enough. And to be clear—*Finkelstein* provides a handy dividing line between the era of a simpler, more uniform administrative remand rule and the emergence of a set of divergent circuit tests and outcomes. But, as I have said, *Finkelstein* did not itself materially affect the evolution of the administrative remand rule.

Before we get to Parts II and III, though, we must explore how and why the circuit courts of appeals chose to complicate an otherwise simple rule. Above, I explained that the courts' pre-*Finkelstein* decisions shared fundamental characteristics. But lurking beneath this smooth surface were competing currents in how the circuits conceived of and fashioned the administrative remand rule. In the three decades following *Finkelstein*, these differences have morphed into different versions of the rule—that is, different tests for determining which remands are appealable and by whom.

Consider just a few examples of these early, and often enduring, fissures. In the days when artists like Elton John, Hall & Oates, the Bangles, and Heart topped the Billboard Top 100,<sup>118</sup> the Third Circuit cared whether a remand implicated an “important legal issue”<sup>119</sup> and whether denying review would pose “extreme and long-term hardship.”<sup>120</sup> The Fourth Circuit asked whether a remand involved an “egregious misstatement of an important point of law.”<sup>121</sup> The Ninth Circuit worried whether a remand without appellate review would result in a “wasted proceeding”<sup>122</sup> or was “equivalent to an order of dismissal.”<sup>123</sup> The Tenth Circuit assessed whether the appeal presented an “important” legal issue, and it ultimately crafted a multi-factor balancing test to determine when “justice” and “fairness” required immediate appellate review.<sup>124</sup> To be sure, the circuits typically considered the usual factors—later unreviewability, delay from piecemeal appeals, and so on.<sup>125</sup> They also established other common ground, distinguishing, for example, between remands that required further factfinding (no appeal allowed) and remands that imposed some new legal

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117. See *infra* Part I.D.3.b.

118. *Top Pop Singles*, BILLBOARD, Dec. 26, 1987, at 25, <https://perma.cc/KHA8-7NN4>; *Singles*, BILLBOARD, Dec. 25, 1976, at 6, <https://perma.cc/63F2-JY3B>.

119. *AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1073 (3d Cir. 1987).

120. *Bachowski v. Usery*, 545 F.2d 363, 373 n.62 (3d Cir. 1976).

121. *Harper v. Bowen*, 854 F.2d 678, 680-81 (4th Cir. 1988).

122. *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983); see *Regents of the Univ. of Cal. ex rel. Univ. of Cal. v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985), *overruled on other grounds by* *Good Samaritan Hospital v. Shalala*, 508 U.S. 402 (1993).

123. *Eluska v. Andrus*, 587 F.2d 996, 999 (9th Cir. 1978).

124. *Paluso v. Mathews*, 573 F.2d 4, 8 (10th Cir. 1978); *Bender v. Clark*, 744 F.2d 1424, 1427-28 (10th Cir. 1984).

125. See *supra* Part I.D.1.

principle or process (appeal allowed).<sup>126</sup> But despite generally grounding their decisions in the collateral order doctrine and broader notions of “practical finality,” almost from the start the circuits employed different considerations in deciding whether to review remands.<sup>127</sup>

This divergence is not surprising; indeed, its absence would be far stranger. But the circuits’ divergent approaches also highlight a few things. First, they underscore just how messy the concept of finality is; once there is a potential crack (*Cohen, Gillespie, Eisen*) in the statutory dam (Section 1291), the water quickly spreads out. This phenomenon is well-documented,<sup>128</sup> and shortly we shall see it in the circuits’ different tests for determining which remands are final—tests that are still in place today. Second, despite their different tests, the circuits arrive at similar decisions in most cases (agencies can almost always appeal remands, and nonagency parties rarely can).<sup>129</sup> Third, similarity is not equivalence: Today, it is easier in some circuits for nonagency parties to appeal a remand than in others.<sup>130</sup> Finally, that disparity in outcomes exists even within the same circuit.<sup>131</sup>

### 3. The circuits’ divergent tests

Let’s begin with the circuits’ divergent tests, which vary in both footing and form. As to footing, a few circuits find jurisdiction over remands under a so-called “administrative law exception” to the final judgment rule, separate from the collateral order doctrine, while many still conceive of the administrative remand rule as an application of the collateral order doctrine itself. Still others rely on more general notions such as “practical finality.”<sup>132</sup> As to form, there are

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126. *Contrast, e.g.,* *Howell v. Schweiker*, 699 F.2d 524, 526-27 (11th Cir. 1983) (holding that a remand was not appealable partly because the agency simply had to employ a vocational expert on remand), *with, e.g.,* *Stone*, 722 F.2d at 467 (holding that a remand to apply a new legal standard was appealable and collecting cases showing different outcomes based on the nature of remands), *Gueory v. Hampton*, 510 F.2d 1222, 1224-25 (D.C. Cir. 1974) (holding that a remand was appealable partly because it required the agency, as a matter of law, to make a certain finding), *and* *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973) (holding that a remand was appealable partly because it imposed new agency procedures).

127. *See supra* Part I.D.1.

128. *See, e.g., supra* note 54 and accompanying text. Lammon explains that the courts of appeals continue to rely on a mix of case-by-case balancing, “practical finality,” and the collateral order doctrine to determine their jurisdiction over appeals from district court orders. Lammon, *Dizzying Gillespie*, *supra* note 14, at 385-86, 410-12.

129. *See infra* notes 184-86 and accompanying text.

130. *See infra* notes 187-88 and accompanying text.

131. *See infra* notes 194-95, 264-72 and accompanying text.

132. Lammon does a heroic job of explaining the relationship between finality, practical finality, *Gillespie* case-by-case balancing, and the collateral order doctrine. *See* Lammon, *footnote continued on next page*

myriad differences, discussed below, but the collateral order doctrine's third factor—the unavailability of later review without immediate appeal—is almost always required. Where it is the chief or only factor a circuit considers, I note that below; otherwise, it should be assumed to be required even though I do not separately mention it.

To navigate this complexity, I present the information in a detailed, circuit-by-circuit discussion and in a Table summarizing the detailed discussion.<sup>133</sup>

a. Circuit-by-circuit discussion

For those who want all the gory details, below is a detailed discussion of the circuits' versions of the administrative remand rule. Those who do not should skip to the Table and summary at the end of this Subpart.

*D.C. Circuit.*—Like the Tenth Circuit (see below), this court has come to conceive of the administrative remand rule as separate from the collateral order doctrine. But unlike the Tenth Circuit's multifactor test, the D.C. Circuit principally relies on just one criterion: Is the agency the appellant—in which case the remand is appealable—or is a private party the appellant—in which case it usually is not?<sup>134</sup> I say “usually” because the D.C. Circuit also typically considers whether the remand precludes further review (for private parties it never seems to<sup>135</sup>) or leaves nothing or only ministerial things for the agency to

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*Dizzying Gillespie*, *supra* note 14, at 373-74, 377-78. He also rightly points out that the administrative remand rule is best conceived of as a “true finality rule”—that is, appeals from remands come at the effective end of litigation, if not the end of agency proceedings. Lammon, *Finality*, *supra* note 14, at 1834-35. But as he acknowledges, there is “confusion that sometimes arises in determining when the end of district court proceedings is a final decision.” *Id.* at 1836. The result is that many circuits continue to examine appeals from remands under the collateral order doctrine, which provides for interlocutory review of decidedly nonfinal orders. See 15B WRIGHT & MILLER, *supra* note 14, § 3914.32.

133. See *infra* note 183 and accompanying text.

134. See generally, e.g., *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656-57 (D.C. Cir. 2013) (emphasizing this distinction and discussing the collateral order doctrine separately to hold that a private intervenor-defendant could not appeal remand); *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 857 (D.C. Cir. 2012) (stating that “[i]t is axiomatic that a private party—unlike the government—may not appeal a district court’s order remanding to an agency because it is not final” and holding that the court could consider the plaintiff’s arguments on appeal only because the agency also appealed remand).

135. See *Lake Pilots Ass'n v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004) (denying an appeal by plaintiffs of a remand order on the grounds that later unreviewability is met where an agency is the appellant but explaining that this “principle is not normally available to the agency’s adversary”); see also *N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 19-20 (D.C. Cir. 2008) (describing as “black letter law” the rule that remands are not final and describing appeals by agencies as a “limited exception” that is “not normally available to a private party” to hold that plaintiffs could not appeal a remand of a fishery management plan); *Oceana, Inc. v. Gutierrez*, 179 F. App'x 703, 703 (D.C. Cir. 2006)

*footnote continued on next page*

do.<sup>136</sup> It is under this last factor—the litigation is effectively over despite the remand—that private parties can occasionally appeal remands.<sup>137</sup>

*Federal Circuit.*—While this court has issued few relevant decisions, its principal criterion for assessing whether a remand is final is whether it effectively terminates the litigation, leaving at most only ministerial action by the agency on remand.<sup>138</sup> This rather strict rule is no surprise given the court’s early precedent that even an agency could not appeal a remand, although the court has since allowed appeals by agencies and, occasionally, nonagency parties.<sup>139</sup>

*First Circuit.*—Like the Federal Circuit, this court has decided few relevant cases, but most recently it has cited the Ninth Circuit’s test (see below) and

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(denying an appeal by a plaintiff because the plaintiff “will have a later opportunity to appeal”); *NAACP, Jefferson Cnty. Branch v. U.S. Sugar Corp.*, 84 F.3d 1432, 1436 (D.C. Cir. 1996) (distinguishing between appeals by an agency and private defendants).

136. *See* *Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379, 385-86 (D.C. Cir. 2017) (distinguishing between two remands, one of which was not appealable because it left the “core dispute unresolved,” and the other of which was because it “did not return the ‘core dispute’ . . . back for further proceedings by the agency” but instead “effectively terminated” the case (quoting *Am. Haw. Cruises v. Skinner*, 893 F.2d 1400, 1403 (D.C. Cir. 1990) (per curiam))); *In re Long-Distance Tele. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (holding a remand appealable where it was effectively final because agency intended not to comply with it). *But see* *Sierra Club*, 716 F.3d at 657-58 (holding unappealable a remand requiring further environmental review which involved substantial further proceedings); *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 881-82 (D.C. Cir. 2000) (finding that an intervenor-defendant could not appeal a remand that contemplated substantial further proceedings by agency).
137. *See, e.g., Limnia, Inc.*, 857 F.3d at 386 (finding that a plaintiff could appeal the remand because it “effectively terminated” the case).
138. *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1097 (Fed. Cir. 1996) (holding that the remand to the agency to fix “two computer programming errors” required only ministerial action and so was appealable by plaintiff); *Travelstead v. Derwinski*, 978 F.2d 1244, 1248 (Fed. Cir. 1992) (holding that the agency could appeal remand of its decision denying waiver of indebtedness on a veteran’s home loan because the remand effectively terminated the litigation).
139. *Contrast Cabot Corp. v. United States*, 788 F.2d 1539, 1543-44 (Fed. Cir. 1986) (holding that remand to the U.S. International Trade Administration was not final under 28 U.S.C. § 1295 and was not appealable by an agency under practical finality or the collateral order doctrine), *and Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1583 (Fed. Cir. 1986) (holding that a remand to the International Trade Commission was not appealable by the plaintiff and explaining that *Cabot Corp. v. United States* established a “broad[er]” rule that was binding), *with Koyo Seiko Co.*, 95 F.3d at 1097 (finding a remand order appealable by a plaintiff), *and Travelstead*, 978 F.2d at 1248 (finding a remand order appealable by an agency).

emphasized whether immediate review will enhance judicial efficiency.<sup>140</sup> Both agencies and nonagency parties have been able to appeal remands.<sup>141</sup>

*Second Circuit.*—The Second Circuit has had little occasion to consider when remands to administrative agencies are appealable and by whom. The seminal decision goes back to 1991, in which the Second Circuit held that an agency could immediately appeal a remand because it would otherwise be unreviewable.<sup>142</sup> Since then, the court has issued decisions that either rigidly enforce the administrative remand rule with respect to nonagency parties or entirely skirt the issue of appealability.<sup>143</sup> Some decisions in other contexts suggest nonagency parties could appeal remands if certain criteria are met (for example, no further district court proceedings or the district court does not retain jurisdiction).<sup>144</sup>

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140. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 36 (1st Cir. 2020) (citing *Collord v. U.S. Dep’t of Interior*, 154 F.3d 933, 935 (9th Cir. 1988)).

141. *See, e.g.*, *Global Naps, Inc. v. Mass. Dep’t of Telecomms. & Energy*, 427 F.3d 34, 42-43 (1st Cir. 2005) (holding an appeal final and appealable as to a state agency due to later unreviewability); *Littlefield*, 951 F.3d at 36 (holding a remand final and appealable as to a tribal defendant, as the Ninth Circuit’s criteria were satisfied and there was “no gain, and only potential loss, to judicial efficiency by dismissing this appeal”). *But see* *Mall Props., Inc. v. Marsh*, 841 F.2d 440, 443-44 (1st Cir. 1988) (per curiam) (holding a remand unappealable by the intervenor-defendant city in part because of efficiency gains from the final judgment rule).

142. *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991).

143. *See, e.g.*, *N.Y. Legal Assistance Grp. v. Cardona*, No. 21-888-cv, 2024 WL 64220, at \*2 (2d Cir. Jan. 5, 2024) (avoiding the question of jurisdiction over an appeal of remand to an agency by remanding certain issues to the district court); *Silver v. Smith*, 70 F. App’x 17, 19 (2d Cir. 2003) (employing the administrative remand rule to deny an appeal by plaintiffs of a putative remand to the IRS).

144. *See, e.g.*, *Bey v. City of New York*, 999 F.3d 157, 163 (2d Cir. 2021) (“When assessing whether a particular decision meets that criteria [sic], we eschew formalism in favor of a pragmatic approach. We instead look to whether, following the district court’s decision, further proceedings are contemplated or required.” (citation omitted)).

*Third Circuit.*—This court straightforwardly applies the collateral order doctrine,<sup>145</sup> allowing appeals of remands by nonagency parties in only very narrow circumstances.<sup>146</sup>

*Fourth Circuit.*—This court also simply applies the collateral order doctrine and asks whether the remand will be unreviewable absent immediate appeal.<sup>147</sup> The court has left open the question whether nonagency parties could appeal remands.<sup>148</sup>

*Fifth Circuit.*—This court considers whether the further administrative proceedings required by the remand are ministerial (if they are, the remand is

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145. See *Papotto v. Hartford Life & Accident Ins. Co.*, 731 F.3d 265, 270 (3d Cir. 2013) (citing *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 118 (3d Cir. 1999)). *Papotto v. Hartford Life & Accident Insurance Co.* was an ERISA case but announced the Third Circuit’s rule for all administrative agency remands. It and *Kreider Dairy Farms, Inc. v. Glickman* synthesized this test from prior cases applying various combinations of the collateral order doctrine’s three criteria. See, e.g., *Bhd. of Maint. of Way Emps. v. Consol. Rail Corp.*, 864 F.2d 283, 286 (3d Cir. 1988) (“Our precedent holds that when the issue on appeal is limited to the right to a procedure that once granted is not susceptible as a practical matter to subsequent review, remand orders directing such procedures are final.”); *AJA Assocs. v. Army Corps of Eng’rs*, 817 F.2d 1070, 1073 (3d Cir. 1987) (holding that the agency could appeal a remand that could not receive later appellate review); *United Steelworkers of Am. Loc. 1913 v. Union R.R. Co.*, 648 F.2d 905, 910 (3d Cir. 1981) (holding that the railroad company could appeal a remand to railway labor board that effectively ended the litigation and involved an issue that would be unreviewable later).

146. See, e.g., *United Steelworkers of Am. Loc. 1913*, 648 F.2d at 910-11 (holding that the railroad company could appeal a remand to the railway labor board that effectively ended the litigation and involved an issue that would be unreviewable later).

147. See *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 240 (4th Cir. 2009) (holding that the agency could appeal portions of a remand of a coastal-vessel decision but that the intervenor-defendant vessel owner could not appeal other portions given availability of later review); *W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 243-44 (4th Cir. 2003) (holding that the agency could appeal a remand requiring calculation of attorney’s fees owed to plaintiffs because review would be unavailable after a fees award); *Hanauer v. Reich*, 82 F.3d 1304, 1307 (4th Cir. 1996) (holding that the Labor Secretary could appeal a remand under the Federal Employees’ Compensation Act because, if executed by an agency, it was made unreviewable by statute); *Colvin v. Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991) (holding that the agency could appeal a remand requiring a recalculation of foster care reimbursement owed to Maryland due to later unreviewability); see also *Nielsen v. Hagel*, 666 F. App’x 225, 230 (4th Cir. 2016) (holding that the agency could appeal a remand of a decision on equal employment opportunity complaint due to later unreviewability).

148. In *Shipbuilders Council of America v. United States Coast Guard*, the Fourth Circuit found jurisdiction over part of the private intervenor-defendant’s appeal because the agency also appealed. 578 F.3d at 240. As to other parts of the intervenor-defendant’s appeal, the court stated that it “need not reach the question of whether such an order could be appealed by a party other than the agency, because the order itself is not final and therefore not properly subject to review under the collateral order doctrine.” *Id.*

final and appealable).<sup>149</sup> Presumably nonagency parties could satisfy this test in certain cases, but the Fifth Circuit has not so concluded.

*Sixth Circuit.*—This court asks whether (1) the remand involves a legal standard that cannot be reviewed later, and (2) the appellant is an agency as opposed to a private party. Because both criteria must be met for an appeal to lie,<sup>150</sup> this court does not appear to permit appeals by nonagency parties.

*Seventh Circuit.*—This court has no firm rule, likely because it has seen few appeals from remands to administrative agencies. The court has assessed its jurisdiction in cases involving, for instance, remands to bankruptcy courts,<sup>151</sup> to arbitrators,<sup>152</sup> in Employment Retirement Income Security Act (ERISA) cases,<sup>153</sup> and in Social Security cases<sup>154</sup> (which we know from *Finkelstein* and *Forney* are governed by a special finality statute). In many of these cases, as in the Federal Circuit, jurisdiction turns on whether a remand “is effectively unreviewable after a resolution of the merits of the litigation”<sup>155</sup> and/or effectively terminates the litigation (that is, any proceedings on remand will be ministerial<sup>156</sup>). Thus, whether nonagency parties may appeal a remand remains an open question.

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149. See *Vista Health Plan, Inc. v. U.S. Dep’t of Health & Human Servs.*, 31 F.4th 946, 951 (5th Cir. 2022) (finding a remand unappealable by plaintiffs because it “was more than ‘ministerial’ in nature”); *Adkins v. Silverman*, 899 F.3d 395, 401 (5th Cir. 2018) (finding a remand appealable by an agency because it required only a “ministerial accounting to calculate” new terms of insurance policies); see also *BNSF Ry. Co. v. Am. Train Dispatchers Ass’n*, 426 F. App’x 265, 267 (5th Cir. 2011) (per curiam) (“[T]he distinction between remands based on conclusions of law and remands to consider further evidence is unavailing.”).

150. See *Schuck v. Frank*, 27 F.3d 194, 196-97 (6th Cir. 1994) (applying these criteria to hold that a remand was final and appealable as to an agency); see also *Nat’l Air Traffic Controllers Ass’n v. Sec’y of Transp.*, No. 06-3466, 2007 WL 2141941, at \*2-3 (6th Cir. July 26, 2007) (per curiam) (applying these criteria to hold that the plaintiffs—and even the agency if it had tried—could not appeal remand); *Ackerman v. U.S. Dep’t of Agric.*, No. 22-1056, 2022 WL 2965613, at \*1 (6th Cir. July 20, 2022) (applying these criteria to hold that plaintiffs could not appeal a remand); see also *Loc. 1982, Int’l Longshoremens’ Ass’n v. Midwest Terminals of Toledo, Int’l, Inc.*, 944 F.3d 607, 612-13 (6th Cir. 2019) (Thapar, J., concurring) (emphasizing the general unreviewability of remands of all kinds).

151. See, e.g., *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984).

152. See, e.g., *Am. Train Dispatchers Dep’t of Int’l Bhd. of Locomotive Eng’rs v. Norfolk S. Ry. Co.*, 67 F.3d 301 (7th Cir. 1995).

153. See, e.g., *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 980 (7th Cir. 1999).

154. See *supra* note 93 and accompanying text.

155. *Travis v. Sullivan*, 985 F.2d 919, 922-23 (7th Cir. 1993) (citing *Crowder v. Sullivan*, 897 F.2d 252, 252-53 (7th Cir. 1990) (per curiam)) (employing the notion of “practical finality”).

156. *In re Riggsby*, 745 F.2d at 1156.

*Eighth Circuit.*—This court also has no coherent test. At times, the court assesses only the availability of later review.<sup>157</sup> At others, the court considers factors like whether the remand contemplates only ministerial proceedings and judicial economy concerns.<sup>158</sup> The court has consistently denied appeals by nonagency parties.<sup>159</sup>

*Ninth Circuit.*—This court’s test is among the most clearly and consistently stated: A “remand order will be considered final” and appealable in the Ninth Circuit “where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.”<sup>160</sup>

This test is effectively the collateral order doctrine,<sup>161</sup> with three differences. First, whereas the collateral order doctrine requires that an interlocutory order involve an issue that is both separable from the merits and “important,” the Ninth Circuit considers only separability.<sup>162</sup> That is distinct from other circuits’ (and the Supreme Court’s) decisions.<sup>163</sup> Second, the Ninth Circuit considers, as it has from the start, whether a remand without appellate

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157. *See, e.g., Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 763 (8th Cir. 2009) (“The collateral order doctrine or a similar administrative law exception to the final judgment rule may well apply when an agency seeks to appeal a remand order to raise an issue that could not be appealed after the proceedings on remand.”).

158. *See, e.g., City of Council Bluffs v. U.S. Dep’t of the Interior*, 11 F.4th 852, 856-58 (8th Cir. 2021) (citing unreviewability and ministerial-proceedings criteria to reject an appeal of a remand by plaintiff cities and states); *Davies v. Johanns*, 477 F.3d 968, 971 (8th Cir. 2007) (holding that an agency could appeal a remand of a farm appreciation survey under all these criteria).

159. *See, e.g., City of Council Bluffs*, 11 F.4th at 856 (holding that plaintiff cities and states could not appeal a district court remand to the National Indian Gaming Commission); *Izaak Walton League of Am.*, 558 F.3d at 763 (holding that a private intervenor-defendant could not appeal a remand absent an agency appeal); *Giordano v. Roudebush*, 565 F.2d 1015, 1017-18 (8th Cir. 1977) (per curiam) (holding that plaintiffs could not appeal a remand to an agency for rehearing with new evidence).

160. *Alsea Valley All. v. Dep’t of Com.*, 358 F.3d 1181, 1184 (9th Cir. 2004) (internal quotation marks omitted) (quoting *Collord v. U.S. Dep’t of the Interior*, 154 F.3d 933, 935 (9th Cir. 1998)).

161. *Cf. Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1091-92 (8th Cir. 2005) (describing the similarity between the Ninth Circuit test and the collateral order doctrine). *See generally supra* note 70 and accompanying text (describing the collateral order doctrine’s three-part test).

162. *See, e.g., Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 594 (9th Cir. 2023); *Alsea Valley All.*, 358 F.3d at 1184.

163. Arguably the “importance” requirement is implicit, and implicitly met, in the Ninth Circuit’s case law, if not also the Ninth Circuit’s requirement that a remand “forces the agency to apply a potentially erroneous rule.” *Alsea Valley All.*, 358 F.3d at 1184. Still, the Ninth Circuit does not require an explicit finding of legal “importance,” even though the Supreme Court has stressed that “importance” is, well, important. *See Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878-79 (1994).

review might result in a “wasted proceeding.”<sup>164</sup> That factor is not part of the collateral order doctrine. Third, the Ninth Circuit’s test is one of “considerations, rather than strict prerequisites,” on essentially a doubling-up of the theory that “we apply a practical construction to the finality requirement.”<sup>165</sup>

The Ninth Circuit has repeatedly said that usually only agencies can satisfy the court’s test.<sup>166</sup> Yet the court has allowed appeals of remands by nonagency parties in more cases and more contexts than any other circuit.<sup>167</sup> To be sure,

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164. *Alea Valley All.*, 358 F.3d at 1184; *see also Collord*, 154 F.3d at 935 (“On remand, the Board is required to determine the Collords’ eligibility for fees under the EAJA. If the district court’s interpretation is erroneous, the remand will result in a wasted proceeding applying an erroneous rule of law.”); *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (“The court recognized that if the court of appeals were to dismiss for lack of jurisdiction, the next proceeding would be the ALJ’s application of a possibly incorrect standard to the facts. If this standard were indeed wrong, the proceeding would be wasted.”).

165. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Cir. 2011) (choosing to look past the unreviewability requirement); *see also United States v. U.S. Bd. of Water Comm’rs*, 893 F.3d 578, 594 (9th Cir. 2018) (reiterating the “considerations” language from *Sierra Forest Legacy v. Sherman*). *But see Gallatin Wildlife Ass’n v. U.S. Forest Serv.*, 743 F. App’x 753, 756 (9th Cir. 2018) (stating that “[w]e may treat a remand order as a final decision *only if*” the Ninth Circuit’s three criteria are met (emphasis added)). *Sierra Forest Legacy’s* repudiation of any firm test brings the Ninth Circuit closer than any other to the case-by-case balancing the Supreme Court established in *Gillespie* (and subsequently rejected). *See supra* Part I.C.

166. *See, e.g., Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 816 (9th Cir. 2018) (“A remand order is ordinarily final only for purposes of a *government* appeal under 28 U.S.C. § 1291.”); *Or. Wild v. Bureau of Land Mgmt.*, 690 F. App’x 987, 988 (9th Cir. 2017) (“When, as here, the agency subject to the remand order chooses not to appeal, private litigants generally cannot appeal the remand order.”); *Alea Valley All.*, 358 F.3d at 1184 (“In previous cases, the remand orders we have recognized as satisfying this requirement [of unreviewability] have been uniform in one respect: all were challenged on appeal by an administrative agency. This is no mere coincidence. Rather, it underscores that only *agencies* compelled to refashion their own rules face the unique prospect of being deprived of review altogether.” (citations omitted)).

167. *See, e.g., Crow Indian Tribe v. United States*, 965 F.3d 662, 676 (9th Cir. 2020) (holding that private intervenor-defendants could appeal a remand, in largest part because the issue would later be unreviewable as to those parties—although the agency also appealed); *U.S. Bd. of Water Comm’rs*, 893 F.3d at 594-95 (holding that a nonprofit plaintiff could appeal a remand to an agency, although it mattered that another agency joined as an appellant); *Sierra Forest Legacy*, 646 F.3d at 1175-76 (holding that nonprofit and state plaintiffs could appeal a narrow remand that failed to address the majority of plaintiffs’ claims and where “the work of both the district court and the agency is complete”); *Pauly v. U.S. Dep’t of Agric.*, 348 F.3d 1143, 1148 (9th Cir. 2003) (per curiam) (holding that plaintiff farmers could appeal a remand because it left only ministerial action for the agency to complete); *Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996) (holding that plaintiff Medicare provider could appeal a remand where the remand was “meaningless” because it could not provide the relief the provider sought). Many unpublished decisions are to the same effect. *See, e.g., Neighbors Against Bison Slaughter v. Nat’l Park Serv.*, No. 21-35144, 2022 WL 1315302, at \*1 (9th Cir. May 3, 2022) (holding that nonprofit plaintiffs could appeal a remand because it “conclusively resolved Plaintiffs’ claim” and the issue would be later be unreviewable).

these cases are outnumbered by those that reject such appeals.<sup>168</sup> A 2018 decision tried to synthesize a rule for the “rare circumstances” in which remands are final as to nonagency parties, or at least plaintiffs: A “remand order may be final for purpose of a plaintiff’s appeal in cases ‘when the broad relief sought could not be achieved through the action the district court directed the agency to undertake’”<sup>169</sup>—that is, when the remand is “extremely narrow.”<sup>170</sup> However, a 2020 decision more accurately (if unhelpfully) explained that remands are always final as to agencies,<sup>171</sup> and as to everyone else, it is, well, the same as it ever was (that is, the three-“consideration” test set forth above).<sup>172</sup>

*Tenth Circuit.*—This court conceives of and applies the collateral order doctrine and the “broader” practical finality doctrine separately in cases involving remands to administrative agencies.<sup>173</sup> Where a remand does not

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168. *See, e.g.,* Ctr. for Biological Diversity v. Bureau of Land Mgmt., 69 F.4th 588, 595 (9th Cir. 2023) (holding that putative private intervenor-defendants could not appeal a remand of a decision granting rights-of-way because the issue could be reviewed later); Zen Magnets, LLC v. Consumer Prod. Safety Comm’n, 968 F.3d 1156, 1165-66 (9th Cir. 2020) (holding that the Ninth Circuit lacked jurisdiction over portions of the plaintiff’s cross-appeal from remand not covered by the government’s appeal because the unreviewability factor was absent); *Nat’l Wildlife Fed’n*, 886 F.3d at 816-17 (holding that a prior interim remand was not final as to plaintiffs because it was not “extremely narrow” (quoting *Pauly*, 348 F.3d at 1148)); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1076 (9th Cir. 2010) (holding that tribal and nonprofit plaintiffs could not appeal a remand because review could be had later, even though the remand essentially dismissed the case). As before, many unpublished decisions reach the same result. *See, e.g.,* *Mont. Env’t Info. Ctr. v. Haaland*, No. 22-36002, 2023 WL 8166779, at \*1 (9th Cir. Nov. 24, 2023) (holding that an intervenor-defendant mining company could not appeal a remand to an agency because, while the separability and wasted proceeding criteria were met, the unreviewability criterion was not).

169. *Nat’l Wildlife Fed’n*, 886 F.3d at 816-17 (quoting *Sierra Forest Legacy*, 646 F.3d at 1175).

170. *Id.* (quoting *Pauly*, 348 F.3d at 1148).

171. Countless Ninth Circuit decisions allow appeals by agencies; I will name just two of the most recent ones: *Bair v. California Department of Transportation*, 982 F.3d 569, 577 (9th Cir. 2020), which stated that, under *Alsea Valley Alliance* and other administrative remand-rule cases, the court had jurisdiction over an appeal by California Department of Transportation of a remand under the National Environmental Policy Act; and *Crow Indian Tribe v. United States*, which held that the U.S. Fish and Wildlife Service could appeal a remand because a “remand of an agency’s rulemaking is a final order as to the government and therefore appealable,” 965 F.3d at 670.

172. The “same as it ever was” should need no attribution, but for anyone younger than Gen X, see TALKING HEADS, *Once in a Lifetime, on Once in a Lifetime* [Single] (Spotify, Sire Records, 1981). The 2020 case is *Crow Indian Tribe*. *See* 965 F.3d at 675-76 (holding that agency defendants could appeal “since, absent an appeal, the agency would not be able to obtain review of the remand ordering it to conduct further proceedings,” and nonagency intervenor-defendants could appeal under the Ninth Circuit’s three-factor test).

173. *See* *W. Energy All. v. Salazar*, 709 F.3d 1040, 1049 (10th Cir. 2013) (explaining that the practical finality doctrine borrows concepts from but is “broader” than the collateral order doctrine); *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153, 1158 & n.3 (10th Cir. 2007) (distinguishing the practical finality and collateral order doctrines);

*footnote continued on next page*

qualify as final and appealable under the former, it may under the latter.<sup>174</sup> The court first asks whether the administrative remand rule applies, which turns on whether the agency decision at issue is adversarial (meaning the administrative remand rule does not apply), legislative (the rule probably does not apply), or adjudicative (the rule applies).<sup>175</sup> If the rule applies, then the court asks whether: (1) the remand implicates an “important” legal issue and (2) immediate review is “urgent,” either because the legal issue is “important” or because there will be adverse effects on the parties or the public without immediate review.<sup>176</sup> If those criteria are met, the court must determine that two more are met: (3) the danger of “injustice” by delaying review outweighs the “inconvenience and costs” of piecemeal review (that is, the balancing test first established in *Bender v. Clark*); and (4) the remand does not contemplate additional district court proceedings.<sup>177</sup> The Tenth Circuit has only rarely permitted appeals by

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*Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984) (establishing a balancing test apart from the collateral order doctrine to assess finality).

174. See, e.g., *Bender*, 744 F.2d at 1427-28 (holding that government’s appeal of a remand was proper under the practical finality, but not the collateral order, doctrine).

175. *N.M. Health Connections v. U.S. Dep’t of Health & Hum. Servs.*, 946 F.3d 1138, 1157 (10th Cir. 2019). That is, an appeal may come from a remand in a case involving a challenge to an agency’s rule (legislative), or where the agency is acting as a party to an action (adversarial), rather than as a decisionmaking body (adjudicative). See generally *Merit Energy Co. v. Haaland*, Nos. 21-8047 & 21-8048, 2022 WL 17844513, at \*4 (10th Cir. Dec. 22, 2022). The “adversarial” category is the most confusing; the Tenth Circuit’s most illuminating discussion of it is in *American Wild Horse Preservation Campaign v. Jewell*, 847 F.3d 1174, 1184-85 (10th Cir. 2016). “Adjudicative” agency actions may still be subject to appeal, though far less frequently than “legislative” or “adversarial” ones.

176. *N.M. Health Connections*, 946 F.3d at 1158 & n.17 (quoting *W. Energy All.*, 709 F.3d at 1049-50).

177. See *Trout Unlimited v. U.S. Dep’t of Agric.*, 441 F.3d 1214, 1218-19 (10th Cir. 2006) (describing the “urgent and important test” to be followed by *Bender* balancing test, and under these tests concluding that a remand of a water-storage permit was not final as to the intervenor-defendants); see also *Rocky Mountain Wild v. Dallas*, 98 F.4th 1263, 1282-86 & n.4 (10th Cir. 2024) (applying these criteria to hold that a remand to federal agencies of a land-management decision and endangered species biological opinion was appealable by agencies and by an intervenor-defendant under pendent jurisdiction); *N.M. Health Connections*, 946 F.3d at 1158 & n.17 (holding that the administrative remand rule did not apply because the relevant agency decision was legislative and the district court order did not require further administrative proceedings); *Mia. Tribe of Okla. v. United States*, 656 F.3d 1129, 1140 (10th Cir. 2011) (holding that a prior remand would not have been appealable by an agency because it contemplated further district court proceedings); *Baca-Prieto v. A1 Guigni*, 95 F.3d 1006, 1008-09 (10th Cir. 1996) (citing an early version of these tests and the Tenth Circuit’s special consideration of remands in the administrative agency context to hold that the Immigration and Nationalization Service could appeal a remand requiring it to grant habeas relief).

nonagency parties under this test—again, usually when the agency action at issue is legislative or adversarial (not adjudicative).<sup>178</sup>

*Eleventh Circuit.*—This court cares most about the nature of the remand. Where a remand requires an agency to proceed “under a certain legal standard,” the agency may appeal it.<sup>179</sup> Where the remand simply requires factfinding, presumably no party can.<sup>180</sup> The rationale for this distinction relates to unreviewability: “A remand order generally is found appealable in the former cases because the agency, forced to conform its decision to the district court’s mandate, cannot appeal its own subsequent order.”<sup>181</sup> This test is so strict that the Eleventh Circuit has issued one of the few post-*Finkelstein* decisions rejecting an agency appeal outside the Individuals with Disabilities Education Act (IDEA)

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178. See *Merit Energy Co.*, 2022 WL 17844513, at \*4 (holding that the administrative remand rule did not bar plaintiffs’ appeal of a remand because the relevant agency decision was “quasi-legislative” or adversarial, and the remand effectively ended the litigation); *Am. Wild Horse Pres. Campaign*, 847 F.3d at 1184-85 (holding that the plaintiff could appeal a remand because the relevant agency decision was adversarial). Contrast, e.g., *Cotton Petroleum Corp. v. U.S. Dept’ of the Interior*, 870 F.2d 1515, 1522 (10th Cir. 1989) (applying the *Bender* test to allow an appeal of a remand by plaintiffs), with, e.g., *W. Energy All.*, 709 F.3d at 1049-51 (holding that the remand of a land-use plan was not final as to plaintiffs because the “importance” and “urgency” criteria were unmet), *S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966, 970 (10th Cir. 2008) (holding that a remand of a decision approving oil and gas leases on public lands was not final as to proposed intervenor-defendant lessees because the “importance” and “urgency” criteria were unmet), *Rocky Mountain Wild v. Dallas*, Nos. 17-1366 & 17-1413, 2018 WL 11225766, at \*4-5 (10th Cir. Dec. 11, 2018) (holding that a remand to the U.S. Forest Service was not final as to intervenor-defendants), and *Diné Citizens Against Ruining Our Env’t v. Klein*, 439 F. App’x 679, 681-82 (10th Cir. 2011) (holding that a remand of a decision granting an application to revise a mining plan was not final as to the intervenor-defendant mining company and that the issue “may be important” but not “urgent” and could be reviewed later).
179. See, e.g., *World Fuel Corp. v. Geithner*, 568 F.3d 1345, 1348-49 (11th Cir. 2009) (holding that the Office of Foreign Assets Control in the Treasury Department could not appeal a remand directing it to develop a new legal standard, which is distinct from imposing a specific legal standard); *MCI Telecomms. Corp. v. BellSouth Telecomms. Corp.*, 298 F.3d 1269, 1271 (11th Cir. 2002) (per curiam) (holding that a state public service commission could appeal a remand that imposed a specific interpretation of federal law). Earlier cases relied on more mixed rationales. See, e.g., *Pierre v. Rivkind*, 825 F.2d 1501, 1504 (11th Cir. 1987) (holding that the INS could appeal a remand to reconsider an asylum application because only a ministerial action was required); *Huie v. Bowen*, 788 F.2d 698, 701-03 (11th Cir. 1986) (holding that an agency could appeal a remand under the collateral order doctrine criteria).
180. See, e.g., *Fla. Wildlife Fed’n, Inc. v. Adm’r, U.S. EPA*, 737 F.3d 689, 694 (11th Cir. 2013) (per curiam) (holding that environmental NGO plaintiffs could not appeal a remand that “simply requires an agency to engage in fresh rulemaking based on the evidence, or to explain why new rulemaking was not necessary”).
181. *MCI Telecomms. Corp.*, 298 F.3d at 1271. Note that the court permitted both a state agency defendant and a private defendant to appeal a remand in this case, though without discussion as to the private defendant. See *id.* at 1272.

or ERISA context.<sup>182</sup> Correspondingly, the court does not appear to have ever permitted a nonagency party to appeal a remand.

b. Table

That’s a lot to absorb, so here are the circuits’ tests distilled to their essence:

**Table 1**  
Administrative Remand Rule by Circuit

<b>Circuit</b>	<b>Defined rule?</b>	<b>Primary requirements and factors<sup>183</sup></b>	<b>Allows appeals by nonagency parties?</b>
D.C.	Yes	Agency or nonagency appellant? Is further review precluded without immediate appeal? Does the remand leave only ministerial action for the agency?	Yes
Federal	Yes	Does the remand effectively terminate the litigation? Does the remand leave only ministerial action for the agency?	Yes
First	Sort of	(Best guess) Ninth Circuit test (see below) Will immediate review yield judicial efficiency gains?	Yes
Second	No	(Best guess) Agency or nonagency appellant?	Open question

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182. *See World Fuel Corp.*, 568 F.3d at 1349 (holding that an agency could not appeal a remand directing it to develop a new legal standard, reasoning that developing a new legal standard is distinct from imposing an existing one).

183. Unavailability of later review is a factor in all circuits and thus only mentioned in the Table if it is especially important in that circuit’s test.

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		Nonagency context applicable?	
Third	Yes	Collateral order doctrine	Barely
Fourth	Yes	Collateral order doctrine	Open question
Fifth	Yes	Does the remand leave only ministerial action for the agency?	Presumably, but open question
Sixth	Yes	Does the remand impose a legal standard that would later be unreviewable? Agency or nonagency appellant?	Probably not
Seventh	No	(Best guess) Is further review precluded without immediate appeal? Does the remand effectively terminate the litigation? Does the remand leave only ministerial action for the agency?	Open question
Eighth	No	(Best guess) Is further review precluded without immediate appeal? Does the remand leave only ministerial action for the agency? Will immediate review yield judicial efficiency gains?	Probably not
Ninth	Yes	Does the remand conclusively resolve a separable legal issue?	Yes (best chance)

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		Does the remand force the agency to apply a potentially erroneous rule that may result in a wasted proceeding? Is further review precluded without immediate appeal?	
Tenth	Yes	Is the challenged agency decision adjudicative versus legislative or adversarial? Is the issue on appeal important? Is review urgent? If yes to all of the above, does the injustice of delayed review outweigh the costs of piecemeal review?	Yes (but only occasionally)
Eleventh	Yes	Does the remand impose a legal standard or simply require further factfinding? Is further review precluded without immediate appeal?	No

4. Summary

To sum up the Subparts above, and to surface some of the observations that lurk deep within the Mariana Trench of footnotes, the circuits have very different tests for determining when a remand under the APA is appealable and by whom. There is not one administrative remand rule, but twelve or thirteen. Some circuits have no real test at all, some have tests that are only half-baked, and some have complex, multifactor tests. Regardless of the test (or lack thereof), qualifiers like “usually” and “typically” are necessary, which is a sign of just how amorphous these tests are.

At the same time, for all their differences, the circuits generally reach similar decisions in similar circumstances. Whether under the Third Circuit’s straightforward application of the collateral order doctrine or the Tenth

Circuit's multistep, multifactor test, an agency may appeal a remand while a nonagency party usually may not.<sup>184</sup> And the circuits are especially consistent in rejecting appeals of remands by intervenor-defendants,<sup>185</sup> except where the agency also appeals.<sup>186</sup>

The biggest difference among the circuits is whether nonagency parties, especially plaintiffs, may appeal a remand. While even the Ninth Circuit consistently avows that appeals of remands are for agencies alone, that is not true.<sup>187</sup> A plaintiff's chances of being able to appeal a remand vary significantly according to circuit, from decent (D.C., First, Ninth Circuits) to slim (Federal, Tenth Circuits) to unknown but theoretically possible (Second, Fourth, Fifth, Seventh Circuits) to practically or entirely hopeless (Third, Sixth, Eighth, Eleventh Circuits). Where courts of appeals permit appeals by plaintiffs, one or both of two things tend to be true: (1) The plaintiff faces at least some prospect of being unable to review the remand, or the issue(s) underlying it, following a final judgment, and/or (2) the agency simply needs to perform some discrete task on remand, which renders the remand "final" because it effectively terminates the litigation.<sup>188</sup>

By now you know what's coming: There is nuance to these nuances, most commonly in the Ninth Circuit.<sup>189</sup> In at least three cases the Ninth Circuit has

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184. *See supra* notes 145-46, 173-78 and accompanying text.

185. *See, e.g.*, *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656-57 (D.C. Cir. 2013); *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 763 (8th Cir. 2009); *Trout Unlimited v. U.S. Dep't of Agric.*, 441 F.3d 1214, 1218-19 (10th Cir. 2006).

186. *See, e.g.*, *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1150-52 (10th Cir. 2019) (allowing appeal by an intervenor-defendant tribe where an agency also appealed). The courts are careful to limit their review to the issues the agency raises. *See, e.g.*, *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156, 1165-66 (9th Cir. 2020) (holding the Ninth Circuit lacked jurisdiction over those portions of plaintiff's cross-appeal of a remand that were not covered by the government's appeal because the later-unreviewability factor was absent).

187. *See supra* notes 166-67 and accompanying text.

188. *See, e.g.*, *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1146, 1148 (9th Cir. 2003) (per curiam) (holding that plaintiff farmers could appeal a remand to the Department of Agriculture because it left only ministerial action for the agency to complete); *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1097 (Fed. Cir. 1996) (remanding to an agency to fix "two computer programming errors" required only ministerial action and therefore was appealable by a plaintiff); *see also* 15B WRIGHT & MILLER, *supra* note 14, § 3914.32 ("Appeal also may be available on final judgment theory if the remand leaves nothing for the agency to do but complete a ministerial function.").

189. Probably before now I should have offered this possible defense of the Ninth Circuit's variance (trenchantly raised by the intrepid editors of the *Stanford Law Review*): That circuit sees more APA cases than any other circuit. *See* U.S. Cts., Table B-1: U.S. Courts of Appeals Statistical Tables for the Federal Judiciary (2025), <https://perma.cc/R9XH-FZ7M> (aggregating APA appeals across the circuits). More occasions to apply (or not) the administrative remand rule could mean greater variance in outcomes. A future empirical analysis could compare the number of nonagency appeals of APA remands, and the number of such appeals permitted, across the circuits.

allowed an appeal by a plaintiff without addressing the first criterion (unreviewability),<sup>190</sup> and admitted in another it was not met.<sup>191</sup> As to the second criterion (ministerial remand/finality), it is largely a guessing game: “Litigants often don’t know whether the remand is final until the court of appeals tells them as much.”<sup>192</sup> The cases therefore reveal “the confusion that sometimes arises in determining when the end of district court proceedings is a final decision.”<sup>193</sup> In short, there is coherence to the circuits’ treatment of appeals of remands by plaintiffs but, like a nice Seurat, one has to view the case law from some distance to see it.

Finally, we see that just as the circuits apply different tests for assessing the finality of administrative agency remands, different panels within the same circuit apply a particular test to different ends. As just one example of the several discussed in Part II below, in 2006, the Ninth Circuit applied its administrative remand rule to bar an appeal by the plaintiffs in *Friends of Hope Valley* but bent the rule to allow appeals by similar plaintiffs in subsequent similar cases.<sup>194</sup> The same is true in other circuits.<sup>195</sup>

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190. *See Pauly*, 348 F.3d at 1146, 1148 (holding that plaintiff farmers could appeal a remand to the Department of Agriculture solely because it left only ministerial action for the agency to complete); *Chang v. United States*, 327 F.3d 911, 918, 925 (9th Cir. 2003) (allowing an appeal by a plaintiff solely because of the risk of a wasted proceeding in a case where the agency also appealed); *Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996) (allowing an appeal by a plaintiff solely because on remand the plaintiff “would not meet the jurisdictional requirements for review”).

191. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). I discuss these and similar Ninth Circuit cases in notes 229-53, 265-72 and accompanying text below.

192. Lammon, *Finality*, *supra* note 14, at 1836.

193. *Id.*

194. *Compare Friends of Hope Valley v. U.S. Forest Serv.*, 203 F. App’x 883, 883 (9th Cir. 2006), with *Sierra Forest Legacy*, 646 F.3d at 1175-76 (allowing the appeal of a “narrow” remand to the Forest Service to prepare an updated environmental review to study alternative courses of action), and *Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv.*, 833 F. App’x 89, 90 (9th Cir. 2020) (allowing the appeal of a “narrow” remand to the Forest Service concerning bicycle restrictions in wilderness study areas). For a discussion of these and other cases, see also notes 229-53, 265-72 and accompanying text below.

195. *See, e.g., In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (stating that the administrative remand rule “is not absolute” and allowing an appeal by plaintiffs despite that court’s long precedent denying such appeals). Interestingly, the Tenth Circuit has gone the other direction—pretty early on allowing appeals by plaintiffs in *Cotton Petroleum Corp. v. United States Department of the Interior, Bureau of Indian Affairs*, 870 F.2d 1515, 1522 (10th Cir. 1989), but restricting appeals by nonagency parties in later cases, *see, e.g., W. Energy All. v. Salazar*, 709 F.3d 1040, 1049-51 (10th Cir. 2013); *Stubblefield v. Windsor Cap. Grp.*, 74 F.3d 990, 996 (10th Cir. 1996); *Boughton v. Cotter Corp.*, 10 F.3d 746, 752 (10th Cir. 1993). *See also supra* notes 176-78 and accompanying text (discussing when the Tenth Circuit allows nonagency appeals).

5. Why do the circuits diverge?

We have covered how, in the thirty-five years since *Finkelstein* was decided, the circuit courts of appeals have complicated an otherwise simple administrative remand rule. But we have not yet covered *why* they did so. Two reasons are obvious. First, case-by-case adjudication under a statute like the APA is inherently iterative and nonlinear.<sup>196</sup> Second, we return to a fundamental truth about judges: They do not like to be told which cases they can and cannot hear.<sup>197</sup> And finality, despite its age-old and repeatedly delineated boundaries, is especially fertile ground for prudential resourcefulness.<sup>198</sup>

There are other, perhaps less obvious reasons. One might be judicial discomfort over the “asymmetry” between parties who traditionally can appeal remands (agencies) and those who cannot (everyone else).<sup>199</sup> More likely, the courts oscillate between intense skepticism of, and intense deference to, administrative agency decisionmaking. There was, and there remains, an epic game of tug-of-war between the judiciary and the administrative state.<sup>200</sup>

A final reason might reflect a more consistent relationship between the judiciary and agencies. While many scholars “question the constitutionality of today’s administrative state, they are also aware that it is here to stay.”<sup>201</sup> The same can be said of most of the public and most judges (if not the conservative

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196. See Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 460 (2004) (“Regulatory statutes inject sudden uncertainty into a common law judicial system based on stare decisis, which is ideally suited to incremental adjustments in response to changing circumstances. Absent established precedent or clear understanding of the statute’s objective, a common law system begins a slow iterative process of case-by-case adjudication to resolve the uncertainty.”).

197. See *supra* Part I.B.; Lammon, *Dizzying Gillespie*, *supra* note 14, at 373-74 (“[T]he balancing approach’s persistence—in the face of the Supreme Court seemingly burying it—suggests that appellate judges cannot resist approaching their jurisdiction with some flexibility.”); see also *id.* at 411-12 (discussing this tendency in more detail).

198. See *supra* Part I.B.

199. The circuits have described, and usually defended, this “asymmetry,” despite their discomfort with it. See, e.g., *Rocky Mountain Wild v. Dallas*, Nos. 17-1366 & 17-1413, 2018 WL 11225766, at \*3 (10th Cir. Dec. 11, 2018) (quoting *Lake Pilots Ass’n v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004)); *Sierra Club v. U.S. Dep’t of Agric.*, 716 F.3d 653, 656-57 (D.C. Cir. 2013); *Nat’l Air Traffic Controllers Ass’n v. Sec’y of Transp.*, No. 06-3466, 2007 WL 2141941, at \*2 (6th Cir. July 26, 2007) (per curiam); *Lake Pilots Ass’n*, 359 F.3d at 625; *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 331-32 (D.C. Cir. 1989).

200. See, e.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1194 (1986); Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 474-75 (1996); see also Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 659-60 (2004) (critiquing Linda Cohen and Matthew Spitzer’s conclusions but underscoring their assessment of changes in judicial deference over time).

201. *Developments in the Law—Presidential Authority*, *supra* note 12, at 2138 (footnotes omitted).

majority of the current Supreme Court and the second Trump Administration<sup>202</sup>). Yet even among those who support a robust fourth branch of government, there is unease at the thought of giving administrative agencies too much unchecked discretion. As Rachel E. Barkow writes:

The puzzle for the law has been how to keep this potential Leviathan [(the administrative state)] in check. If the officials at these agencies could exercise their authority without oversight, citizens would become subjects to unelected bureaucrats and democracy would be compromised.

This dilemma is familiar to anyone with a basic understanding of administrative law, as the overriding purpose behind almost every doctrine in administrative law is to control the exercise of agency discretion. Indeed, that is why most legal scholars writing in administrative law are preoccupied with the central question of whether agencies are accountable for their exercises of discretion and are therefore legitimate.<sup>203</sup>

Viewed in this light, the circuits' decisions to allow appeals of remands—first by agencies and increasingly by other parties—are not an exercise of indulgence or justice but one of control. Combined with the nature of administrative law—the centrality of governing statutes, the APA's judicial-review provisions, longstanding conceptions of administrative law with adjudication at its center<sup>204</sup>—and a persistent “legal culture [that] looks to judges as uniquely qualified to solve inequities in a law’s application,” the administrative remand rule’s squishiness and porosity are just another example of the “primacy of judges” in our legal system.<sup>205</sup>

Whatever its explanation, the expansion of appellate review under the administrative remand rule was arguably inevitable. Absent intervention by

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202. See generally, e.g., *infra* notes 275-79 and accompanying text (discussing recent Supreme Court decisions curtailing administrative agency power); Austin Vertesch, Note, *Poseidon's Executive: How the Unitary Executive Theory Could Impact Coastal Fisheries*, 15 ARIZ. J. ENV'T L. & POL'Y 198, 200 (2025) (“While the speed and breadth of [the administration’s early] actions have caught many off guard, for years high-ranking members of this administration have signaled their intentions to demolish the administrative state and radically reshape the federal government.”).

203. Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1336 (2008); see also Bagley, *supra* note 32, at 315 (“Judges of whatever political stripe are acculturated into a legal community that views the administrative state as a leviathan that can be tamed only through zealous judicial oversight.”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004) (“The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power.”).

204. Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143, 1170-71 (2014); Barkow, *supra* note 203, at 1336.

205. Barkow, *supra* note 203, at 1355-58. Bagley similarly explains that “[n]o longer episodic and unusual, judicial review [under the APA] became the norm—and it has stayed the norm. Indeed, it is fair to say that the necessity of robust judicial review has hardened into an infrequently challenged convention of administrative law.” Bagley, *supra* note 32, at 261.

Congress or the Supreme Court, the administrative remand rule as we know it today—with all its variability and unpredictability—is here to stay. But should it, and what exactly should it look like? Those are the questions Parts II and III ask and try to answer.

## II. Does the Administrative Remand Rule Make Sense?

The administrative remand rule is little known and yet controls which remands to agencies under the APA are final and appealable and by whom. That gatekeeping function yields profound consequences for courts, agencies, and other litigants. This Part explores those consequences using specific cases, including *Friends of Hope Valley*, and broader issues with an eye toward Part III, which considers what the administrative remand rule should be.

### A. What's to Like (*Friends of Hope Valley*)

By now you know a little about *Friends of Hope Valley*. The case involved a dispute over how the U.S. Forest Service managed conflicts between cross-country skiers and snowmobilers. The skiers (sort of) won in the district court, the Forest Service accepted the remand and the skiers appealed, and the Ninth Circuit relied on its administrative remand rule to dismiss the skiers' appeal. Those are the highlights, but as with any contest, we understand and care only if we really know the players and their stories.

The controversy in *Friends of Hope Valley* began in the 1980s and 90s. Snowmobiling had become increasingly popular nationally, especially on public lands (including Hope Valley) that were remote but still accessible by oversnow vehicles.<sup>206</sup> So, to account for the growing snowmobile use in the Valley, in 1992 the Forest Service issued a “travel map” for the Carson Ranger District, of which the Valley is part.<sup>207</sup> The 1992 travel map barred snowmobiles from only a portion of Hope Valley.<sup>208</sup> The *Friends of Hope Valley* (the “Friends”), a

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206. See, e.g., John Prusak, *Exclusive: 2022 Snowmobile Sales Data Shows Winners, Losers*, SNOWGOER (June 13, 2022), <https://perma.cc/UTF7-MKXR> (displaying chart of national snowmobile use between 1980 and 2022, with a peak in the 1990s); HILARY EISEN, WINTER WILDLANDS ALL., WINTER RECREATION ON NATIONAL FOREST LANDS: A COMPREHENSIVE ANALYSIS OF MOTORIZED AND NON-MOTORIZED OPPORTUNITY AND ACCESS 2-3, 20 (2015), <https://perma.cc/838G-X99M> (discussing changes in snowmobile technology in 1990s that increased snowmobiles' popularity, especially on National Forest System lands, and showing current snowmobile visits per year in the Lake Tahoe Basin).

207. See *Friends of Hope Valley v. U.S. Forest Serv.*, No. 00-cv-01900, slip op. at 1-2 (E.D. Cal. Sept. 30, 2004), *aff'd in part, dismissed in part*, 203 F. App'x 883 (9th Cir. 2006); Christopher Reynolds, *A Line in the Snow*, L.A. TIMES (Feb. 8, 2005, 12:00 AM PT), <https://perma.cc/SVX9-QZZK>.

208. *Friends of Hope Valley*, slip op. at 1-2.

conservation group,<sup>209</sup> successfully challenged the 1992 travel map in the U.S. District Court for the Eastern District of California, forcing the agency back to the drawing board under a stipulated judgment.<sup>210</sup> In 1998, the Forest Service issued a revised travel map.<sup>211</sup> As part of this revision, the Forest Service decided against limiting snowmobiles on Forestdale Creek Road, which runs through part of Hope Valley and provides especially good access for snowmobiles into and throughout the valley, including in areas prized by the Friends and other nonmotorized recreationists.<sup>212</sup>

On cross-motions for summary judgment, the district court agreed with the Friends that the 1998 travel map was flawed, but not because of anything concerning Forestdale Creek Road. Instead, the court concluded that the Forest Service had violated the National Environmental Policy Act<sup>213</sup> in relying on “unscientific and unreliable” surveys to assess conflicts between cross-country skiers, snowmobilers, and other users.<sup>214</sup> The Friends had not made this argument, although it fit vaguely within their claim that the Forest Service had relied on inadequate information about user conflicts, and the Forest Service had defended its user-conflicts assessment using the surveys.<sup>215</sup> Thus, the district court vacated the 1998 travel map and supporting environmental review and remanded them for further administrative proceedings.<sup>216</sup>

The Friends, but not the Forest Service, appealed. The Forest Service, represented by the U.S. Department of Justice (that is, me), defended against the appeal on many grounds, including that the Ninth Circuit lacked jurisdiction over the appeal under the administrative remand rule.<sup>217</sup> Specifically, under the Ninth Circuit’s three-part test, later review of the district court’s judgment vacating and remanding the Forest Service’s 1998 travel map was precluded only as to the agency, and the agency had chosen not to appeal.<sup>218</sup> After a spirited oral

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209. Friends of Hope Valley, FACEBOOK, <https://perma.cc/JS85-P4RC> (archived Apr. 7, 2026).

210. *Friends of Hope Valley*, slip op. at 2.

211. *Id.*

212. The Associated Press, *Latest Snowmobile Debate Centers on Small California Road*, TAHOE DAILY TRIB. (Dec. 25, 2001), <https://perma.cc/N2AB-CENA>.

213. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

214. *Friends of Hope Valley*, slip op. at 6.

215. First Amended Complaint for Declaratory and Injunctive Relief at 13-17, *Friends of Hope Valley v. U.S. Forest Serv.*, No. cv-S-00-01900 (E.D. Cal. Mar. 18, 2002); *Friends of Hope Valley*, slip op. at 6.

216. *Friends of Hope Valley*, slip op. at 6.

217. Another ground was a more obvious one: The Friends were the prevailing parties and therefore lacked standing to appeal. I discuss this issue more fully in notes 246-52 and accompanying text below.

218. Brief of the Federal Appellee at 11-16, *Friends of Hope Valley v. U.S. Forest Serv.*, 203 F. App’x 883 (9th Cir. 2006) (No. 04-17376), 2005 WL 4120955.

argument, the Ninth Circuit agreed in an unpublished decision dismissing the Friends' appeal.<sup>219</sup> The court explained that the district court's decision was not final as to the Friends, in large part because the Friends could participate in the remand process and/or seek further judicial review once the Forest Service issued a new decision.<sup>220</sup>

And indeed, that is exactly what happened. The Forest Service, rather than simply conduct new user surveys and update its environmental review accordingly (the only actions the district court's remand required), decided to more comprehensively review winter recreation in Hope Valley to arrive at a "plan which would provide quality opportunities for all users and would have broader acceptance."<sup>221</sup> That 2007 plan significantly restricted snowmobile use in the Forestdale Creek Area,<sup>222</sup> just as the Friends had wanted.<sup>223</sup> In 2008, the Forest Service closed Forestdale Creek Road as part of that decision.<sup>224</sup> The Friends of Hope Valley supported both outcomes.<sup>225</sup>

In short, at the time of the Ninth Circuit's decision in *Friends of Hope Valley*, the administrative remand rule seemed senseless; it sanctioned a narrow agency remand that barely addressed the plaintiffs' claims. Had the Forest Service considered only the user-survey issue on remand, the agency almost certainly would have arrived at the same decision, likely leading to more litigation. But instead, the administrative remand rule worked as intended: The district court remanded the agency's decision; the Ninth Circuit declined review of the plaintiffs' interlocutory appeal; and on remand the agency looked holistically at the problem before it and arrived at a decision that meaningfully addressed the plaintiffs' concerns, even though the remand order itself did not. As a result, the costs of piecemeal judicial review were avoided.

*Friends of Hope Valley* shows that the administrative remand rule, for all its promise of peril, can work. First, the case underscores that in most administrative remand cases, where there is little (if any) daylight between what a plaintiff seeks and a district court grants, and there are no other problems, the rule unquestionably contributes to efficient judicial review and efficient and

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219. *Friends of Hope Valley*, 203 F. App'x at 883.

220. *Id.*

221. GARY SCHIFF, U.S. FOREST SERV., DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT 1 (2007). Specifically, the Forest Service considered a larger area, hired a consultant, collaborated with local government, and prepared a new environmental review. *Id.*

222. *Id.* at 2-3; see also Sean McAlindin, *The Debate over Snowmobile Access: Forest Service Eye Plans on Snowmobiles*, TAHOE GUIDE (Dec. 5, 2018), <https://perma.cc/S7ZN-4CLE>.

223. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 215, at 5-7.

224. SCHIFF, *supra* note 221, at 2; *Winter Recreation Plan*, FRIENDS HOPE VALLEY NEWSL. (Friends of Hope Valley, Markleeville, Cal.), Spring 2008, at 1.

225. *Winter Recreation Plan*, FRIENDS HOPE VALLEY NEWSL. (Friends of Hope Valley, Markleeville, Cal.), Winter 2007, at 1; *Winter Recreation Plan*, *supra* note 224, at 1.

productive agency decisionmaking. Second, *Friends of Hope Valley* shows that even where there is some daylight between a plaintiff's ask and a district court's give, the administrative remand rule can still make good sense.

B. What's Not to Like (Other Scenarios and Broader Issues)

But what if things had not gone so swimmingly in *Friends of Hope Valley*? What if, on remand, the Forest Service had taken ten years to arrive at a new decision? What if the Forest Service had focused solely on the "unscientific and unreliable" user surveys that were the focus of the district court's decision—an issue that distracted from the deeper problems that concerned the plaintiffs? What if the snowmobilers had intervened to defend the Forest Service's decision and, troubled by the district court's order to conduct new surveys, had sought to appeal? Or what if the district court's decision to vacate the 1998 revised travel map—which presented no problems in that case—had instead thrown winter recreation in Hope Valley into a free-for-all that satisfied no one and harmed the parties or the environment?

This Subpart discusses scenarios that, like these, better highlight where the administrative remand rule can fall short, as well as larger concerns in the fields of federal jurisdiction and administrative law to which the rule can contribute. In practice, I think that some scenarios and issues are more problematic than others, so I've organized the discussion from, in my view, least to most problematic.

1. Specific scenarios

*Remands in Cases with Intervenors.*—Under the administrative remand rule, intervenor-defendants—private parties and NGOs who intervene to defend an agency's decision—cannot appeal unless the agency does.<sup>226</sup> This is true even though the agency may grant (and sometimes does grant) the plaintiff the relief it seeks on remand.

This scenario is not especially concerning, in part because it is likely rare. I have principally my own anecdotal experience (representing and challenging agencies in federal court) to rely on, and I have found that many agencies make the same policy choice on remand.<sup>227</sup> That is especially true where the remand directs the agency to provide a better explanation or better factual findings

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226. See *supra* notes 185-86 and accompanying text.

227. See also Bagley, *supra* note 32, at 302-07 (discussing such cases). As one of countless examples from my own experience, in 2015, the U.S. Fish and Wildlife Service withdrew a proposal to list the bi-state sage grouse for protection under the Endangered Species Act. A group of conservation organizations (my clients) sued and won. On remand, the agency issued precisely the same decision. See *Desert Survivors v. U.S. Dep't of the Interior*, No. 20-cv-06787, 2022 WL 1539530, at \*1-2 (N.D. Cal. May 16, 2022).

(rather than to fix a legal error).<sup>228</sup> The risk of an intervenor-defendant being deprived of review is therefore low, especially since it can participate in the remand proceedings.

Further mitigating any concern is that an intervenor-defendant can, of course, appeal following a final judgment. So, for example, a remand requiring an agency to prepare a new environmental review that causes an agency to deny a permit it had previously granted would be reviewable by the permittee following a final judgment (though the associated delay would be a sunk—that is, unreviewable—cost).<sup>229</sup> Moreover, where the agency also appeals<sup>230</sup> or where there is a real risk an issue will escape later appellate review,<sup>231</sup> the circuits generally allow the appeal. For these reasons, in most instances intervenor-defendants are not unfairly denied appellate review under the administrative remand rule.

*Meaningless Remands.*—A remand may grant a plaintiff incomplete relief, relief it did not ask for, or, as in *Friends of Hope Valley*, relief on grounds the plaintiff did not really raise. Yet under the administrative remand rule, the plaintiff typically cannot appeal unless the agency does too. These scenarios can result in a wasted remand proceeding or more litigation down the line. The same is true for an intervenor-defendant, but the difference is that a plaintiff is, by nature, the putatively aggrieved party at the point a remand is issued.

The Ninth Circuit has allowed plaintiffs to appeal “meaningless” remands.<sup>232</sup> These have included, in *Skagit County Public Hospital District No. 2 v. Shalala*, a remand directing a healthcare reimbursement review board to engage in proceedings a hospital never sought (which was like “inviting [the appellant hospital] to a party with no cake”);<sup>233</sup> in *Chang v. United States*, a remand to the

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228. See *supra* notes 37-40 and accompanying text (discussing the three types of APA remands).

229. See *Sierra Club v. U.S. Dep’t of Agric.*, 716 F.3d 653, 657-58 (D.C. Cir. 2013) (explaining that later reviewability weighs against immediate appeal, despite recognizing the costs associated with such delayed review); *Diné Citizens Against Ruining Our Env’t v. Klein*, 439 F. App’x 679, 681-82 (10th Cir. 2011) (same); see also, e.g., *S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966, 970 (10th Cir. 2008) (determining that the remanding decision approving oil and gas leases on public lands was not final as to proposed intervenor-defendant lessees because, among other things, review of an unfavorable decision could come later).

230. See, e.g., *Rocky Mountain Wild v. Dallas*, 98 F.4th 1263, 1277, 1282-86, 1283 n.4 (10th Cir. 2024); *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1151-52 (10th Cir. 2019).

231. See, e.g., *Crow Indian Tribe v. United States*, 965 F.3d 662, 670 (9th Cir. 2020) (holding that court had jurisdiction to consider intervenor-defendants’ appeal of remand on issue not covered by agency appeal because issue was “conclusively determined by the district court and cannot be taken into account in the [agency] proceedings upon remand”).

232. *Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996).

233. *Id.* (allowing an appeal by a plaintiff of an order remanding an agency’s decision where the plaintiff sought declaratory relief, vacatur, and monetary reimbursement, not a remand for more proceedings).

Immigration and Nationalization Service to conduct an analysis the agency said it could not and would not do;<sup>234</sup> in *United States v. United States Board of Water Commissioners*, a remand “where the relief sought by appellants cannot possibly be achieved through the district court’s directions”;<sup>235</sup> and, in *Sierra Forest Legacy v. Sherman*, a “narrow” remand to the Forest Service to prepare an updated environmental review to study alternative courses of action.<sup>236</sup> As in *Friends of Hope Valley*, the remand at issue in *Sierra Forest Legacy* left in place a critical decisionmaking framework that the plaintiffs challenged and “placed a judicial imprimatur on the vast majority” of the agency’s original analysis.<sup>237</sup> The D.C. Circuit has also gestured at the notion of a meaningless remand to allow a plaintiff to appeal a remand.<sup>238</sup>

There is much to be said for these decisions. The Ninth and D.C. Circuits, by allowing plaintiffs to appeal remands that were only technically favorable to plaintiffs, circumvented the possibility of “wasted proceedings” and associated delays and thereby enhanced administrative and judicial economy, despite the added interlocutory appeals. In the right cases, the same approach would (or at least could) lead to the same benefits.

There are two problems, though. First, how do we know which cases are the “right” ones? In *Skagit County*, the remand offered relief the plaintiff never sought.<sup>239</sup> In *Chang*, even the agency agreed the district court’s remand was an abuse of discretion.<sup>240</sup> In *Sierra Forest Legacy*, there were unusual signs the remand really would be pointless: The district court had left the agency’s decision in place during the remand, and by the time the Ninth Circuit issued its decision, the agency had already prepared a new draft environmental review that rejected the plaintiffs’ proposed alternatives.<sup>241</sup> The court observed that, “[a]s a practical matter, the work of both the district court and the agency [was]

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234. 327 F.3d 911, 925 (9th Cir. 2003). However, the agency also appealed and supported the Ninth Circuit’s jurisdiction over its counterclaim. *Id.*

235. 893 F.3d 578, 595 (9th Cir. 2018).

236. 646 F.3d 1161, 1175 (9th Cir. 2011).

237. *Id.*; cf. *Bhd. of Maint. of Way Emps. v. Consol. Rail Corp.*, 864 F.2d 283, 287 (3d Cir. 1988) (rejecting a private defendant’s appeal of a remand even though the court was “not entirely comfortable with leaving in place without review a district court order which on its face appears to be in stark violation of the principle of limited judicial review of arbitration orders”).

238. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (explaining that, because the IRS “has not taken any reviewable action in the two years since the district court’s remand order,” the issue on remand was effectively unreviewable, making the remand pointless).

239. 80 F.3d 379, 384 (9th Cir. 1996).

240. 327 F.3d 911, 925 (9th Cir. 2003).

241. 646 F.3d at 1175-76.

complete.”<sup>242</sup> The same was true in the D.C. Circuit’s decision.<sup>243</sup> In each of these cases, the remands came toward the end of the district court proceedings (and sometimes the end of the agency proceedings), consistent with the vast majority of cases that allow appeals of remands by plaintiffs.<sup>244</sup>

Most cases, however, do not have these clear hallmarks of finality. The Ninth Circuit might have allowed the plaintiffs’ appeal in *Friends of Hope Valley*, which might have avoided a meaningless remand if the Forest Service had turned out to be harder-nosed. But mid-litigation, there were few warnings of such recalcitrance, and in fact the Forest Service ended up using the remand proceeding to review and manage user conflicts in a lasting way.<sup>245</sup> Without more evidence that the remand would have been pointless, it would have been a mistake to find appellate jurisdiction. The signs of a pointless remand must be plain.

The second problem is thornier: Prevailing parties ordinarily lack standing to appeal favorable decisions.<sup>246</sup> Not Article III standing, as a party appealing a remand still retains a stake in the ultimate disposition of the case. Instead, it is prudential standing to appeal that may be missing,<sup>247</sup> given the general rule that appellate courts review “judgments, not statements in opinions.”<sup>248</sup> Nuances exist, but how capacious should they be when it comes to appeals by plaintiffs of administrative remands? The Supreme Court tells us that an appeal may lie from a decision “granting in part and denying in part the remedy requested.”<sup>249</sup> So a plaintiff who seeks a remand with vacatur but gets only a remand (or vice versa) can and should be able to appeal, similar to the mismatched claim and remedy at issue in *Skagit County*.<sup>250</sup>

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242. *Id.* at 1176.

243. See *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d at 633 (citing the IRS’s delay on remand, and concession that it was not planning to engage in future rulemaking, as “unusual circumstances” justifying appellate review).

244. See, e.g., *supra* notes 136-37 and accompanying text.

245. See *supra* notes 221-25 and accompanying text.

246. *Deposit Guar. Nat’l Bank of Jackson v. Roper*, 445 U.S. 326, 333-34 (1980).

247. See *Env’t Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001).

248. *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Lab’ys*, 351 U.S. 292, 297 (1956)).

249. *Forney v. Apfel*, 524 U.S. 266, 271 (1998) (quoting *United States v. Jose*, 519 U.S. 54, 56 (1996) (per curiam)).

250. See, e.g., *id.* at 267, 271 (allowing an appeal by a party that was granted a remand but denied the preferred relief of reversal); *Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996) (allowing an appeal by a plaintiff of an order remanding an agency’s decision where the plaintiff sought declaratory relief, vacatur, and monetary reimbursement, not a remand for more proceedings). Obviously there are other nuances, such as when a party denied interlocutory appellate review of a remand appeals from a favorable final judgment. See, e.g., *Mia. Tribe of Okla. v. United States*, 656 F.3d 1129,

*footnote continued on next page*

More difficult is a case in which a party seeks to challenge on appeal the grounds for a district court's remand, as the plaintiffs did in *Sierra Forest Legacy* and *Friends of Hope Valley*.<sup>251</sup> Appellate courts' "resources are not well spent superintending each word a lower court utters en route to a final judgment in the [appealing] party's favor."<sup>252</sup> And if there is any time and place we want the least appellate interference, it is in the temporal and substantive middle of a case. That is especially true when we multiply one such case over the tens, scores, or hundreds of such cases a circuit court of appeals might see in a year.

In short, it seems to make sense to allow plaintiffs to appeal remands that are truly meaningless—that is, a remand that grants incomplete or wrong relief, or a remand for which there is no practicable chance the agency's new decision will address the plaintiff's core claim.<sup>253</sup> Outside these narrow circumstances, it is wise to decline a plaintiff's invitation to flyspeck an otherwise favorable district court remand.

*Protracted Remands.*—Justified or not, administrative agencies can take a long time to issue decisions, even when compelled to do so by statute or court order.<sup>254</sup> An agency can buy even more time, leading to extra delay, under the administrative remand rule. For example, in *In re Center for Biological Diversity*, the D.C. Circuit granted a writ of mandamus to compel the Environmental

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1140-41 (10th Cir. 2011) (allowing the Board of Immigration Appeals to appeal an otherwise unappealable remand following a final judgment).

251. See, e.g., *Nat. Res. Def. Council v. Gutierrez*, 457 F.3d 904, 906 (9th Cir. 2006) ("Essentially [the agency-appellants] want us to line-edit the district court's ruling. But they have no standing to challenge the district court's legal rulings in the abstract; they must seek a reversal or a modification of the relief granted by the district court.").
252. *Camreta v. Greene*, 563 U.S. 692, 704 (2011); see also *Crow Indian Tribe v. United States*, 965 F.3d 662, 670 (9th Cir. 2020) (distinguishing between appeals that "challenge only the reasoning behind a district ruling" and those that challenge "the relief granted").
253. As the Ninth Circuit put it in *United States v. United States Board of Water Commissioners*, "remand orders are sufficiently 'final' under § 1291, where the relief sought by appellants cannot possibly be achieved through the district court's directions." 893 F.3d 578, 595 (9th Cir. 2018) (quoting *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011)). Contrast *Cottonwood Env't L. Ctr. v. Gianforte*, No. 20-36125, 2022 WL 612673, at \*1 (9th Cir. Mar. 2, 2022) (rejecting an appeal by a plaintiff of a remand requiring further environmental review), with *Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 21-35144, 2022 WL 1315302, at \*1 (9th Cir. May 3, 2022) (allowing an appeal by another plaintiff in the same case of a portion of a remand denying a request to impose a strict deadline for further environmental review to be completed). The Eighth Circuit implicitly recognized denial of relief as a basis for appealing a remand as far back as 1967, see *Bohms v. Gardner*, 381 F.2d 283, 285 (8th Cir. 1967), and the Supreme Court picked up on it in *Finkelstein*, 496 U.S. 617, 623 n.3 (1990). And, of course, the concern about meaningless remands seeps into multiple areas. See *Walker*, *supra* note 33, at 87-88 (discussing cases in which courts, especially the Ninth Circuit, refuse to follow the ordinary remand rule).
254. See Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 927 (2008) ("[D]elay is an increasingly prominent fixture in administrative law.").

Protection Agency (EPA) to comply with a remand issued five years earlier.<sup>255</sup> The remand had directed the EPA to evaluate the effects of a pesticide on an endangered species, but five years later, the agency had made no progress in doing so.<sup>256</sup> Though no party had tried to appeal the remand, the administrative remand rule likely would have blocked them if they had.<sup>257</sup> The D.C. Circuit had reached a similar decision nearly eight years earlier.<sup>258</sup> These cases of extreme foot-dragging may be unusual, but they happen in part because the administrative remand rule allows them to.

*Remands with Vacatur.*—In every circuit, the administrative remand rule has evolved to treat remands with and without vacatur the same. But as two Ninth Circuit judges observed in a recent concurrence, they are not. “In a case in which a district court remands but does not vacate a challenged regulation,” Judge Michelle Friedland and Judge Mark Bennett explain, “the remand itself merely returns jurisdiction to the agency where the proceedings continue.”<sup>259</sup> And during the remand, the regulation (or other agency decision) remains in effect and enforceable.<sup>260</sup> However, they add:

[W]hen the district court also vacates an agency rule, that order is fundamentally a final judgment. A remand *with* vacatur terminates the parties’ “core dispute” over whether the challenged agency action will remain in effect. The remand-with-vacatur grants relief to the plaintiff and restores the state of the law to the status quo before the challenged agency action, ushering in real-world consequences—at least for the time that it takes for the agency to make a new decision and potentially indefinitely.<sup>261</sup>

The judges continue:

In [our] view, it is critical to the finality analysis that an agency may take years to reevaluate its rule (and may not issue a new rule at all), causing vacatur of the agency action to have consequences in the meantime at least as severe and as final as other ‘final’ judgments.<sup>262</sup>

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255. 53 F.4th 665, 667, 673 (D.C. Cir. 2022).

256. *See id.* at 669.

257. In a similar case, the D.C. Circuit cited an agency’s two-year delay in complying with a remand as a basis for allowing an appeal by plaintiffs who would otherwise be deprived of review. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014).

258. *See id.* (recognizing that the IRS’s failure to act on the district court’s remand, issued two years earlier, might effectively preclude review); *see also* Glicksman & Hammond, *supra* note 33, at 485-86, 494-95 (discussing agency delays on remand).

259. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 598 (9th Cir. 2023) (Friedland, J., concurring, joined by Bennett, J.).

260. *Id.*

261. *Id.* (citation omitted) (quoting *In re Clean Water Act Rulemaking*, 60 F.4th 583, 593 (9th Cir. 2023)).

262. *Id.*

The administrative remand rule, these two judges urge, should be modified to account for this reality.<sup>263</sup>

## 2. Broader issues

Apart from the specific scenarios described above, the administrative remand rule ties into, and arguably contributes to, larger concerns within the fields of federal jurisdiction and administrative law. As with the specific scenarios above, I have organized the discussion below from, in my view, the least to most problematic.

*Inconsistent/Unpredictable Results.*—Again, we know the basic problem in *Friends of Hope Valley*: The district court remanded the Forest Service’s decision on a narrow issue the plaintiffs barely raised.<sup>264</sup> The plaintiffs were accordingly concerned about a “wasted proceeding” on remand. That concern did not carry the day in that case, and things turned out well enough, but other Ninth Circuit panels have decided very similar cases very differently.

Most on point is *Sierra Forest Legacy v. Sherman*.<sup>265</sup> There, the Ninth Circuit concluded that a remand was final and appealable as to the environmental NGO plaintiffs because the remand addressed a narrow issue and “placed a judicial imprimatur on the vast majority of the challenged” environmental review at issue in the case.<sup>266</sup> The remand, the court concluded, “permits adherence to rules that plaintiffs continue to challenge and the Forest Service continues to defend on appeal,” which could “result in a wasted proceeding.”<sup>267</sup> Although later judicial review of the NGOs’ concerns was not necessarily foreclosed, the Ninth Circuit reasoned that “the final judgment rule deals in practice, not theory,” and “we have ignored this requirement in the face of a ‘cakeless’ remand.”<sup>268</sup>

Each of these statements applied to *Friends of Hope Valley*, yet the Ninth Circuit there employed the administrative remand rule to opposite effect in the two cases.<sup>269</sup> The same can be said of the Ninth Circuit’s decision in *Bitterroot*

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263. *Id.* at 598, 601.

264. *See supra* notes 213-16 and accompanying text.

265. 646 F.3d 1161 (9th Cir. 2011).

266. *Id.* at 1175.

267. *Id.* at 1176 (quoting *Collord v. U.S. Dep’t of the Interior*, 154 F.3d 933, 935 (9th Cir. 1998)).

268. *Id.* at 1175-76 (citing *Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996)).

269. I admit there are differences between the two cases. Unlike in *Friends of Hope Valley*, in *Sierra Forest Legacy* the challenged decision was not vacated (but the Forest Service agreed to stay the decision pending appeal), and the Forest Service had already completed much of the remand process by the time the Ninth Circuit issued its decision. *Id.* These facts increased the likelihood of a “meaningless remand” in *Sierra Forest Legacy*. Still, that probability was high in *Friends of Hope Valley* when the Ninth Circuit heard argument and issued its decision.

*Ridge Runners Snowmobile Club v. United States Forest Service*, in which the court allowed an appeal by the plaintiffs simply “[b]ecause the lower court upheld the ‘vast majority’ of the agency’s challenged decision.”<sup>270</sup>

Arguably these results are inconsistent. In my view, though, they are within the range of difference we expect across cases within a circuit, and they are (mostly) unique to the Ninth Circuit. Moreover, the avenues we already have for dealing with any outliers—panel rehearing, rehearing en banc, and Supreme Court review—are likely sufficient.<sup>271</sup>

The bigger concern might be that, at least in the Ninth Circuit, the administrative remand rule is now sufficiently unpredictable for nonagency parties such that they are unsure whether they may appeal a remand (or indeed whether they *must*).<sup>272</sup> There just are not enough cases with enough explanation to know how a plaintiff will fare in any given case. (Or perhaps there are too many cases pointing in disparate directions.) A uniform, clear test would help minimize this unpredictability.

*Eroding Judicial Deference to Administrative Agencies.*—The Introduction and Part I above discussed the benefits of the administrative remand rule. Most have to do with judicial efficiency, but one does not. By generally barring appeals of remands by nonagency parties, the rule gives space to agencies to reconsider their decisions during the remand process. In this way the rule is inherently deferential to agencies.<sup>273</sup>

Part I also showed that there is a constant tug-of-war between agencies and the courts.<sup>274</sup> In more recent years, the Supreme Court has tugged harder, broadly curtailing judicial deference to agencies (and therefore agency power itself). The Court has eliminated the *Chevron* doctrine,<sup>275</sup> weakened deference to

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270. 833 F. App’x 89, 90 (9th Cir. 2020).

271. Judge Friedland, joined by Judge Bennett, explained in *Center for Biological Diversity* that she did “not think this particular case is a good vehicle for reconsidering [the Ninth Circuit’s administrative remand rule] en banc.” *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 597 n.2 (9th Cir. 2023) (Friedland, J., concurring, joined by Bennett, J.); see also David R. Thompson, Comment, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365, 377 (2000) (“Moreover, to the extent any inconsistent decisions may occur, the court is dealing with them effectively through its internal structures.”).

272. See *supra* notes 187-93, 232-44 and accompanying text.

273. See Andrew Mergen, Sidebar, *The Rule—And Agency Risk Management*, ENV’T F., Sept./Oct. 2025, at 45 (discussing the value of administrative agency rulemaking from the federal government’s perspective).

274. See Part I.D.4 above in particular.

275. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an agency’s interpretation of an ambiguous statute). One decision is a narrow counterpoint to *Loper Bright*: *Seven County Infrastructure Coalition v. Eagle County*, which emphasized the “substantial judicial deference required in” cases brought under the National Environmental Policy Act. 145 S. Ct. 1497, 1510 (2025).

agencies' interpretations of their own regulations,<sup>276</sup> limited agencies' administrative enforcement procedures,<sup>277</sup> breathed life into the murky major questions doctrine,<sup>278</sup> and extended the statute of limitations for challenges to agency action under the APA.<sup>279</sup> None of these decisions directly affects administrative remands or the administrative remand rule, but the diffidence they exhibit toward an independent administrative state might make the circuits less likely to rigidly enforce the rule against nonagency parties seeking appellate review of remands.

On the other hand, there is a good chance these decisions will increase the number of actions filed in the federal courts.<sup>280</sup> If that happens, appellate judges may be *more* likely to rigidly enforce the rule so as to limit the number of appeals of remands they hear.

Finally, in the unlikely event the Supreme Court itself takes up a case concerning the administrative remand rule, the Court's current conservative majority might be torn between these two ends: weakening the independence of the federal administrative state versus reinforcing the Court's strict view of what constitutes a "final" order for purposes of appellate review. My money would be on the latter. The administrative remand rule is merely tangential to the relationship between the judiciary and the administrative state but central to finality and the courts' operation. Indeed, Supreme Court intervention might return the administrative remand rule to its status in 1988: strictly employing the collateral order doctrine's criteria, under which only agencies may appeal remands. Absent a special exception by Congress, like with the Social Security

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276. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-18 (2019) (limiting where there is judicial deference to an agency's regulation by enumerating requirements for such deference).

277. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2137-39 (2024) (holding that the SEC may not rely on administrative law judges to enforce "legal" claims, which must instead be brought in Article III courts (quoting *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 52 (1989))).

278. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2374-75 (2023) (voiding the Biden Administration's student loan cancellation program under the major questions doctrine); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609, 2615-16 (2022) (voiding the EPA's Clean Power Plan); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam) (upholding an injunction against the Centers for Disease Control and Prevention's nationwide eviction moratorium during the COVID-19 pandemic).

279. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2450 (2024) (holding that the default six-year statute of limitations in 28 U.S.C. § 2401(a) does not begin to run in an APA suit until the plaintiff is injured by the final agency action).

280. See, e.g., Deborah A. Sivas, Q&A with Sharon Driscoll, *Stanford's Deborah Sivas on SCOTUS' Loper Decision Overturning Chevron and the Impact on Environmental Law*, STAN. L. SCH. (June 28, 2024), <https://perma.cc/HW2K-FA69> (explaining that recent Supreme Court decisions in similar contexts spurred new litigation, and the "same trajectory may play out in the *Chevron* context").

Act appeals in *Finkelstein* and *Forney*, the plain language of 28 U.S.C. §§ 1291 and 1292 probably prevails. But who knows.<sup>281</sup>

*The Spiral of Shrinking Appellate Review.*—The administrative remand rule has resulted in two more consequences; neither was predictable, but both are problematic. First, at times the circuits have justified applying the administrative remand rule to deny appellate review of a remand on the ground that the appellant could have sought certification of an order for interlocutory appeal under 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 54(b).<sup>282</sup> Yet an increasing number of *district courts* are using the administrative remand rule itself to deny such certification.<sup>283</sup> This puts the cart before the horse, because the administrative remand rule should come into play only *after* a district court has determined whether the standards in Section 1292(b) or Rule 54(b) have been met. Moreover, only appellate courts (not district courts) apply and enforce the administrative remand rule. District courts, or at least some of them, are in essence denying applicants admission to law school because they have not yet passed the bar exam. The administrative remand rule was never intended to be put to such tail-chasing, self-defeating ends.

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281. *Cf.* Cohen & Spitzer, *supra* note 200, at 474-75 (“We have argued that the Supreme Court uses jurisprudence so as to further its policy goals in regulation. Our tests show that the Court does not uniformly endorse judicial deference, but rather does so discriminately in the years where the doctrine yields policy outcomes more to the Court’s liking.”).

282. *See, e.g.*, *Mia. Tribe of Okla. v. United States*, 656 F.3d 1129, 1139 & n.12 (10th Cir. 2011); *Utah State Dep’t of Health v. Kennecott Corp. ex rel. Utah*, 14 F.3d 1489, 1492 n.3, 1495 (10th Cir. 1994); *see also* *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc) (holding that absent Section 1292(b) certification, the remand would not have been final and appealable), *abrogated by* *Sullivan v. Finkelstein*, 496 U.S. 617 (1990); 15A WRIGHT & MILLER, *supra* note 14, § 3913 (“Interlocutory review can be achieved as to matters outside [specifically delineated categories] by joint permission of the district court and court of appeals under § 1292(b) . . .”). Rule 54(b) permits a district court to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties,” but “only if the court expressly determines that there is no just reason for delay.” FED. R. CIV. P. 54(b). Meanwhile, 28 U.S.C. § 1292(b) vests a court of appeals with jurisdiction over an otherwise unappealable order where a district court determines that the “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” although the circuit still must choose to hear the appeal.

283. *See, e.g.*, *DCOR, LLC v. U.S. Dep’t of Interior*, No. 21-cv-00120, 2023 WL 8628322, at \*1-2 (N.D. Tex. Dec. 13, 2023) (citing the Fifth Circuit’s administrative remand rule to hold that the court’s “final judgment remanding the case back to [the agency] for further consideration is thus not an appealable final judgment” under Rule 54(b)); *Aaron P. v. Dep’t of Educ.*, No. 10-00574, 2011 WL 6934560, at \*4-5 (D. Haw. Dec. 30, 2011) (same, using the Ninth Circuit’s rule); *Mia. Tribe of Okla. v. United States*, No. 03-2220, 2006 WL 3848949, at \*3 (D. Kan. Dec. 29, 2006) (same, using the Tenth Circuit’s rule); *cf.* *Associated Mortg. Bankers, Inc. v. Carson*, No. 17-0075, 2019 WL 2996992, at \*3 (D.D.C. July 9, 2019) (citing the D.C. Circuit’s administrative remand rule to raise the question of whether remand is final under Federal Rule of Civil Procedure 60 or interlocutory under Rule 54(b)).

Second, the administrative remand rule could be used to block an appellant from appealing a ruling that theoretically could have been raised in an earlier appeal.<sup>284</sup> Specifically, where an appellant (agency or nonagency) appeals a final judgment that, through the merger doctrine,<sup>285</sup> includes an issue implicated in a mid-litigation remand, and the appellant did not try to appeal the remand at the time it was issued, a creative lawyer or judge could argue that the appeal is barred. One Ninth Circuit judge has done just that. In Judge Carlos Bea's view, the Ninth Circuit's porous version of the administrative remand rule permitted a plaintiff to appeal an earlier remand, and any unfairness from the court's refusal to consider the plaintiff's claims after final judgment would be "a consequence of its own litigation strategy."<sup>286</sup> Under this view, a "party gets one opportunity—and only one opportunity—to seek appellate review of an adverse judgment on a claim."<sup>287</sup>

This line of thinking is troubling, at least if it becomes law somewhere. Under it, agency and nonagency parties alike would have to appeal a remand at the time a district court issues the remand or risk being barred from doing so later. In many cases this problem would not arise, simply because later review would be foreclosed anyway (again, because the agency would satisfy the terms of the remand and render any dispute about it moot). But it is not always predictable when that will be the case, and as discussed, that test is often *not* met for nonagency parties. In this world, the administrative remand rule could operate to entirely bar appellate review of an issue, encouraging exactly what the rule is designed to prevent in the first instance: lots of interlocutory appeals and all the costs that come with them. As *Federal Practice and Procedure* observes about the collateral order doctrine, "the theory should not be used to defeat appeal from a subsequent final judgment on the ground that appeal could have been taken earlier"; thus, the "[c]ollateral-order doctrine creates an opportunity, not a trap."<sup>288</sup> So it should be for the administrative remand rule.

*Temporal Forum Shopping and Politicized Agency Decisionmaking.*—Agencies theoretically derive their direction from acts of Congress, and yet they are

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284. See *All. for the Wild Rockies v. Bradford*, 601 F. App'x 488, 493-94 (9th Cir. 2015) (Bea, J., concurring) (opining that the court should not have considered the nonprofit plaintiff-appellant's arguments under the Endangered Species Act because, under *Sierra Forest Legacy*, the nonprofit could have appealed a prior, interim remand).

285. See *Mia. Tribe of Okla.*, 656 F.3d at 1137 ("With a final judgment from a district court, 'a notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment.'" (quoting *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002))); 16A WRIGHT & MILLER, *supra* note 14, § 3949.4 (discussing the merger doctrine).

286. *All. for the Wild Rockies*, 601 F. App'x at 494 (Bea, J., concurring).

287. *Id.*

288. 15B WRIGHT & MILLER, *supra* note 14, § 3914.32.

housed within, and take substantial direction from, the Executive.<sup>289</sup> Administrative lawyers therefore know that an agency acting under one presidential administration will not necessarily reach the same decision under a different one.<sup>290</sup> Litigants exploit that fact by engaging in temporal forum shopping: “the practice of choosing the most favorable jurisdiction or court in which a claim might be heard *across time*.”<sup>291</sup>

The administrative remand rule gives agencies a powerful tool for engaging in such temporal forum shopping. The rule allows new presidential administrations to abandon their predecessors’ administrative decisions and insulate them behind a wall of judicial deference, with no political accountability. How? Instead of appealing a remand, an agency acting under a new administration may choose to accept the remand (or request a voluntary remand). The agency can then issue a new decision on remand that is more in line with the new administration’s direction.<sup>292</sup> Carefully timed settlements can have the same effect,<sup>293</sup> but they require the buy-in of multiple parties. Administrative remands are manipulable by agencies acting alone, without the assent of other litigants.

The administrative remand rule therefore provides a potentially powerful maneuver for parties, especially agencies, to engage in temporal forum shopping.<sup>294</sup> To the extent this problem exists (or could come to exist), it favors not only uniformity among the circuits but also decoupling, in at least some circumstances, a nonagency party’s ability to appeal a remand from whether the

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289. See Farber & O’Connell, *supra* note 204, at 1146, 1160-67.

290. See Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 473 (2011) (discussing the effects of political shifts on agency rulemakings); see also Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 889-90, 905-09, 918, 943-44, 968-69 (2008) (same).

291. Clopton & Shaw, *supra* note 22, at 1521-22.

292. See, e.g., *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 592, 596 (9th Cir. 2023) (finding that a voluntary agency remand following a change in presidential administration blocked a subsequent appeal by a proposed intervenor); see also Revesz, *supra* note 35, at 377-81 (discussing the political motivations behind voluntary remands following changes in presidential administrations); Glicksman & Hammond, *supra* note 33, at 496-99 (hypothesizing a connection between presidential administration and agency actions on remand).

293. See Clopton & Shaw, *supra* note 22, at 1517 (describing the practice of “midnight litigation,” where “government lawyers might choose to settle cases on terms that would be unacceptable to future administrations”); Farber & O’Connell, *supra* note 204, at 1172 (“Agencies also work to keep cases out of court entirely by relying heavily on settlement.”).

294. Cf. Farber & O’Connell, *supra* note 204, at 1171 (“Even if agency actions are reviewable, deference doctrines have developed that generally favor agency discretion and therefore foster White House influence.”). Query where these “deference doctrines” are headed in light of the Supreme Court’s recent jurisprudence. See *supra* notes 274-79 and accompanying text.

agency appeals. That could go in either direction—toward what the rule used to be (only agencies may appeal remands) or toward a rule that gives nonagency parties a more consistent opportunity to appeal remands.<sup>295</sup>

### III. Toward a Better Administrative Remand Rule

In 1892, the Supreme Court lamented: “Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees.”<sup>296</sup> Even at that time, the Court recognized that its finality decisions “[were] not altogether harmonious.”<sup>297</sup>

So it is with the administrative remand rule. Ever do appellate judges try to craft and apply a rule that balances efficiency and justice, and ever do they get it right and wrong. There is much to be said for the circuits’ current approach: Adopt a rule that fits a particular circuit’s judicial philosophy and caseload; apply that rule as best it can in any given case; and accept that, in some cases, efficiency and justice are in fact zero sum. From *Friends of Hope Valley* and Part I above, we see that this approach generally yields sensible outcomes.

Still, the courts can do better than “generally.” How the circuits conceive of and fashion the administrative remand rule is inconsistent and confusing. For nonagency parties, in many circuits the rule serves as a total or likely bar to appeal, even of a remand that is likely to be truly meaningless or cause concrete harm. Even in those circuits that sometimes allow appeals by nonagency parties, the general rule against them is either still too tight or too unpredictable. Allowing appeals by nonagency parties in selected circumstances would reduce any geographic and temporal forum shopping, both by agencies and nonagency parties. And while they are important, alternative avenues for appealing district court orders (for example, certification under 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 54(b)) are not replacements.<sup>298</sup>

The following modifications would preserve the administrative remand rule’s benefits while ensuring and regularizing fairness in more cases where the rule should give way.

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295. It may also be fruitful to adopt standards for voluntary remands, which federal courts reflexively grant. *See generally* Revesz, *supra* note 35, at 395-407 (observing courts’ current practice of granting voluntary remands and proposing reforms).

296. *McGourkey v. Toledo & Ohio Cent. Ry. Co.*, 146 U.S. 536, 544-45 (1892).

297. *Id.* at 545.

298. Rule 54(b), 28 U.S.C. § 1292(b), and other avenues for appellate review apply to different orders and therefore serve different functions. *See, e.g.*, *Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1581-83 (Fed. Cir. 1986) (discussing the differences between Rule 54(b) and the collateral order doctrine); *see also supra* notes 69, 282 (discussing Rule 54(b) and § 1292(b)).

*Greater Uniformity Among the Circuits.*—This Article has shown that the circuits have different tests for determining the appealability of remands.<sup>299</sup> Indeed, the circuits are not even consistent in whether they conceive of the administrative remand rule and “exceptions” to it as an extension of the final judgment rule, as a product of “practical finality,” or as a straightforward application of the collateral order doctrine.<sup>300</sup> Yes, the circuits arrive at similar outcomes most of the time, but it took me (and, more unfortunately, you) plodding through Part I to understand that. Furthermore, the differences are confusing for courts and parties, and the differences do sometimes matter, especially for nonagency parties. Bryan Lammon helpfully advises that the courts should “more candidly distinguish the different contexts in which they interpret § 1291” in order to bring clarity and transparency to their finality decisions.<sup>301</sup> In the administrative remand context, I would go a step further and advocate for a single rule, grounded in a clear and single basis, across all the circuits.

A better rule would be one that always allows appeals by agencies and typically prohibits appeals of remands by nonagency parties but permits appeals by nonagency parties when necessary to reach “important” legal questions, avoid “wasted proceedings,” and avoid harm during the remand process. There is something to be said for each of the circuits’ versions of the administrative remand rule (or at least for the versions that are clearly articulated). Some are simple and clear, some find firm footing in Supreme Court case law, some get at key criteria, and some are appropriately flexible.

In my view, the D.C., Ninth, and Tenth Circuits’ tests all have positive attributes worth carrying forward but with some tinkering. The Ninth Circuit’s test is (mostly) rooted in a practical conception of the *collateral order doctrine* (conclusive determination, separability, and later review precluded) but adds an important criterion: whether, without appellate review, the remand might result in a *wasted proceeding*.<sup>302</sup> The D.C. Circuit’s test (as well as other circuits’) helpfully asks *when* the remand comes in the litigation.<sup>303</sup> A remand that leaves little for the agency or the court to do would support review, while one that leaves significant further proceedings would weigh against it.<sup>304</sup> And the Tenth Circuit’s test helpfully asks whether the remand concerns an *important legal issue*

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299. See *supra* Parts I.D.3-4.

300. See *supra* notes 127, 132 and accompanying text.

301. Lammon, *Finality*, *supra* note 14, at 1850.

302. See cases cited *supra* notes 160-64.

303. See cases cited *supra* note 136.

304. See cases cited *supra* notes 136-37. Lammon argues that this factor—whether a case is essentially over—could form the basis of an “different conception of finality” for purposes of appeal. Lammon, *supra* note 50, at 190-93.

and whether appellate review is *urgent*.<sup>305</sup> One basis for finding urgency would be a *substantial risk of irreparable harm*, such as through vacatur of the agency's decision during the remand.<sup>306</sup>

Under the test I propose, a district court order or decision remanding an agency's decision under the APA would *not* be final and appealable under 28 U.S.C. § 1291 unless:

1. The appellant is the agency; or
2. The appellant is a nonagency party, the remand conclusively resolves a separable<sup>307</sup> and important legal issue, and any of the following is true:
  - a. The remand is effectively a final decision because it leaves little for the court and agency to do;
  - b. Later review would be precluded without immediate appeal;
  - c. The remand is likely to result in a wasted proceeding, such as by forcing the agency to apply a potentially erroneous rule or engage in proceedings that are not relevant to the plaintiff's claims or desired relief; or
  - d. Immediate appellate review is urgent, for example, because the remand creates a substantial risk of irreparable harm during the remand proceedings.

For the sake of clarity, I would propose that district courts *not* retain jurisdiction over cases while agencies comply with remand orders absent special circumstances (for example, evidence of unusual agency recalcitrance).

Almost needless to say, while I advocate for greater uniformity and a single test, I am not endorsing a bright-line rule.<sup>308</sup> Absent codification by Congress or the Supreme Court, my proposal therefore would not satisfy the Supreme

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305. See cases cited *supra* note 176. I also agree with the Tenth Circuit that the type of agency decision at issue in a case (adversarial, legislative, or adjudicative) may help determine whether the administrative remand rule should apply. See cases cited *supra* note 175. But those distinctions can be confusing, and I wonder whether they may unwittingly cement undesirable asymmetries in the appealability of remands by different parties.

306. The Tenth Circuit explicitly linked “urgency” with irreparable harm in *Southern Utah Wilderness Alliance v. Kempthorne*. 525 F.3d 966, 970 (10th Cir. 2008).

307. As the Tenth Circuit implicitly recognized long ago, few remands are truly separable from the merits, as the collateral order doctrine traditionally requires. See *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984). More commonly, remands resolve one merits issue that is separable from others. See, e.g., *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 36 (1st Cir. 2020) (allowing tribal defendants to appeal where the remand flowing from summary judgment for plaintiffs on their first cause of action involved a “separable” legal issue). Thus, for APA remands, “separability” is appropriately construed loosely.

308. Except that, under my proposal, as under the current rule, agencies would always be allowed to appeal remands. This change would slightly loosen the current rule with respect to agencies. See *supra* notes 114, 179 (citing the few post-1990 cases in which courts have held or suggested that agencies could not appeal remands).

Court's prohibition against new judge-made appealability doctrines and its mandate to categorically apply the ones that already exist.<sup>309</sup> But my proposal would not violate the Supreme Court's prohibition any more than any existing circuit tests, either. In the end, I think the tradeoffs that come with a squishier, more porous rule are worth it. In the administrative remand context, a bright-line, categorical approach isn't necessary; the number of appeals by nonagency parties the circuits currently allow is low, and my proposed rule would likely not meaningfully change that.

In any event, it is not clear that the Supreme Court's categorical approach is even possible. The Federal Circuit recognized thirty years ago that "remands are not all of the same nature. Some are final; some are not."<sup>310</sup> The administrative remand rule must be squishy because remands themselves are. And judges, like all of us, do not think in terms of rigid categories but rather rely on fuzzier "radial conceptual thinking"—we can identify clear prototypes at the center of a category but, as we move toward the periphery, we rely on "intuitive understandings based on perceived similarity."<sup>311</sup> Many administrative remand cases lie at the edges of any rule we might craft, and it is there that "judges have reshaped, and will continue to reshape, the categories of orders deemed final for appeal."<sup>312</sup> As I suggest earlier, the Ninth Circuit arguably has been doing just that.<sup>313</sup> Some variance, even under my rule, is inevitable.

*Clear Direction that Failure to Appeal a Remand Will Not Preclude Later Review or Foreclose Alternative Avenues for Appellate Review.*—A party's failure to appeal a remand when it is issued should not preclude it from doing so following a final judgment. Where the administrative remand rule gives way to appealability, it must create "an opportunity, not a trap."<sup>314</sup> Similarly, the administrative remand rule should not itself be used to deny certification under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b).<sup>315</sup>

*The Vehicle(s) for These Reforms.*—These reforms could be implemented at least in part through the normal process of judicial decisionmaking. Such a

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309. See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113-14 (2009); *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("[We] have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular unjustic[e]' averted . . ." (second alteration in original) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988))).

310. *Travelstead v. Derwinski*, 978 F.2d 1244, 1249 (Fed. Cir. 1992). Interestingly the Federal Circuit credited *Finkelstein* with this insight. *Id.*

311. Heppner, *supra* note 54, at 399.

312. *Id.*

313. See *supra* note 271 and accompanying text.

314. 15B WRIGHT & MILLER, *supra* note 14, § 3914.32; see also *supra* notes 284-88 and accompanying text.

315. See *supra* notes 282-83 and accompanying text.

case-by-case approach would arguably “undermine the certainty, predictability, and ease of application of any categorical rules” the courts might otherwise try to follow,<sup>316</sup> though even categorical rules are ultimately implemented through iteration. If a more categorical rule would be preferable, Lammon suggests one for finality generally: a codified rule with a “discretionary catchall.”<sup>317</sup> To create such a rule, Congress could of course amend the APA or 28 U.S.C. §§ 1291 or 1292, but that seems unlikely.<sup>318</sup> The better bet, also as Lammon suggests, might be to get the Supreme Court to exercise its power under 28 U.S.C. § 2072(c) to issue rules regarding when a district court’s decision is final under Section 1291.<sup>319</sup> A companion authority, 28 U.S.C. § 1292(e), allows the Supreme Court to issue rules that permit immediate appeal of district court orders.<sup>320</sup> Perhaps the “discretionary catchall” could account for what I propose above; if not, a separate, remand-specific rule and catchall might be required.

In addition, or as an alternative minimum, district courts could craft better remands in the first place. The appeal in *Friends of Hope Valley* (and your time reading this Article) might have been saved had the district court been more thoughtful about what the Friends’ concerns were and what the Forest Service might have done on remand to address them. A rule, a Supreme Court decision, or even judicial training that requires or encourages district courts to, for example, utilize the “judicial toolbox for agency dialogue” proposed by Christopher J. Walker and James R. Saywell could go a long way toward improving remands and their outcomes.<sup>321</sup> Such commonsense changes in APA adjudication would do nothing to clear up inconsistencies between the circuits, but they would minimize appeals and provide greater fairness in some number of cases. And by encouraging district courts to think more carefully about the

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316. Lammon, *Dizzying Gillespie*, *supra* note 14, at 374.

317. *Id.*

318. Perhaps I am too skeptical; Congress has created special appellate jurisdiction statutes for bankruptcy cases, *see* 28 U.S.C. § 158(d), habeas cases, *see* 28 U.S.C. § 2253, the Federal Circuit, *see, e.g.*, 28 U.S.C. § 1295; 38 U.S.C. § 7291, and in other contexts.

319. Lammon, *Finality*, *supra* note 14, at 1851; *see* 28 U.S.C. § 2702(a) (granting the Supreme Court the power to prescribe rules concerning “practice and procedure . . . for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals”); 28 U.S.C. § 2702(c) (“Such rules [prescribed under subsection (a)] may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”).

320. Lammon, *Finality*, *supra* note 14, at 1851-52; *see* 28 U.S.C. § 1292(e) (“The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”).

321. Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198, 1218-23 (2021) (capitalization altered) (describing this “toolbox” to include thirteen tools, including, among others, requiring agencies to provide notices of their final determinations, retaining panel jurisdiction, and setting deadlines for agency action on remand); *see* Walker, *Referral*, *supra* note 33, at 88.

purpose and terms of their remands, these or similar changes might minimize the number of remands that are not warranted in the first place, thereby promoting Nick Bagley's aim of facilitating "remedial restraint" in appropriate cases.<sup>322</sup>

#### **IV. Considerations for Practitioners**

As a clinician, I care about what the administrative remand rule means for lawyers who practice administrative law. After all, it was one of my own cases that led me to write this Article.

I'll start with the obvious. First, because the administrative remand rule takes different or unknown forms and is variously rigid or porous across the circuits, it takes real work to understand the rule and predict its effect in any given case. That is good for lawyers who work by the billable hour but bad for everyone else. Second, predictability is now gone in many circuits. If you represent federal agencies, you can no longer count on the administrative remand rule to uniformly bar an appeal of a remand if your agency client does not appeal, at least in some circuits. If you represent plaintiffs or nonagency defendants, the inverse is true, but there is great uncertainty, and the factors and rationales you must grasp vary from circuit to circuit.

Less obvious are the challenges associated with client counseling, especially for plaintiffs' lawyers. Under the federal venue provisions, plaintiffs suing federal agencies typically can choose where to file suit. Should a plaintiff factor into their choice whether it could appeal a remand? In the average case, probably not, but what about one in which the plaintiff stands a better chance on appeal than in the trial court? Once a remand issues, how does a lawyer advise a client about whether to try to appeal the remand? Appeals are costly. On the other hand, might the circuit have expected you to try if you later appeal the agency's decision following the remand? And once a remand issues, should a nonagency party who wants to appeal ask the district court *not* to retain jurisdiction, on the theory that the remand is effectively a final decision? Conversely, should an agency argue in favor of retained jurisdiction to try to oppose a nonagency appeal, and buttress the interlocutory nature of the appeal?

There are no clear answers to these questions, at least in circuits where there is an opening, however slight, for a nonagency party to appeal a remand. This ambiguity favors a more uniform, clearer rule.<sup>323</sup> Until one exists, the best prescription I can offer my fellow practitioners is increased awareness of the rule and how it operates in a given circuit, alongside a recommendation to consider the rule early in and throughout a case.

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322. Bagley, *supra* note 32, at 257.

323. See *supra* notes 299-301 and accompanying text.

## Conclusion

Skiers and snowmobilers seem an unlikely genesis for a law review article about a remote solar system in the galaxy of federal appellate jurisdiction and administrative law. But as I said at the beginning, every litigator is haunted by a case, and, even though I won it, *Friends of Hope Valley* has haunted me for the last eighteen years. I have seen in so many new cases the specter of this old one, a murky shadow that just won't quit.

*Friends of Hope Valley* turned out okay. Indeed, the case emerged as a reason to support, rather than critique, the administrative remand rule. But my research led me to other cases and contexts, in the farther reaches of the administrative remand cosmos, where the rule still controls but its light is dimmer, its consequences far less comforting.

That's the thing about rules. They're good—until they aren't. And then they leave us wondering whether there might be something better. The administrative remand rule makes sense and does what it is designed to do in many, maybe even most, cases. But where that isn't true—where the rule is too hard to discern, or too harsh in its consequences, or too unpredictable, or used for questionable ends—those instances counsel in favor of modest change. Sure, the administrative remand rule could be *stricter*—a return to 1988, before any federal appellate court had complicated it by allowing nonagency parties to appeal a remand.<sup>324</sup> But I think the rule should be standardized in the opposite direction: to allow appeals by nonagency parties in cases where fairness and efficiency warrant it.

The reforms I propose are not the only ones that could be made to improve the administrative remand rule. Some readers will find them too meek; others, too brash. I welcome these critiques and the important debate to which they will contribute.

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324. The Tenth Circuit was first. See *supra* note 115 and accompanying text (discussing *Cotton Petroleum Corp. v. U.S. Department of Interior*, 870 F.2d 1515, 1521-22 (10th Cir. 1989)).