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Save Me From Harm: The Consequences of the Ordinary Remand Rule's Misapplication to *Gao v. Gonzales*

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SAVE ME FROM HARM: THE CONSEQUENCES OF THE ORDINARY REMAND RULE'S MISAPPLICATION TO *GAO V. GONZALES*

BRENNA FINN^{*}

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I. INTRODUCTION

Nineteen-year-old Hong Ying Gao was worth \$2,200.¹ Her estimated value did not reflect her life savings, but rather described a purchase cost: Ms. Gao was a paid-for bride in a Chinese village.² While her fiancé’s money settled debts for Ms. Gao’s family of struggling fishermen, the marriage transaction forced Ms. Gao into the arms of an abusive man who fed his bad temperament with gambling.³ Ms. Gao’s fiancé beat her, threatened her, and harassed her parents when she refused to marry him.⁴ Ms. Gao finally escaped to another village, but when her fiancé found her and continued to threaten her family, Ms. Gao fled to the United States to escape him.⁵ The U.S. government, however, denied Ms. Gao asylum because the judicially-created ordinary remand rule required deference to decisions of the Board of Immigration Appeals (BIA), which found that Ms. Gao could return safely to China.⁶

This Note argues that the Second Circuit properly exercised its power to review the BIA decision without remanding to the BIA for reconsideration

1. See Warren Richey, *Does the Prospect of Arranged Marriage and Abuse Warrant Asylum in the U.S.?*, CHRISTIAN SCI. MONITOR, Mar. 23, 2007, at 1 (reporting that Ms. Gao’s mother sold her and used the money to pay the family’s expenses).

2. See *id.* (describing Ms. Gao’s membership in a group of rural Chinese women forced into marriage due to economic strife).

3. See *id.* (explaining that Ms. Gao sought asylum because she feared further abuse and harassment by her fiancé).

4. See *Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006), *vacated*, *Keisler v. Hong Ying Gao*, 128 S. Ct. 345 (2007) (explaining that Ms. Gao could not find refuge within China because her fiancé threatened her and her family with violence or arrest).

5. See Richey, *supra* note 1, at 1 (implying that Ms. Gao had no hope of avoiding an abusive marriage other than to seek asylum in the United States).

6. See *Gao*, 440 F.3d at 65 (evidencing the danger of allowing complete deference to an agency when that agency reaches a conclusion seemingly inconsistent with the facts provided).

of the contested issues, and asserts that the Supreme Court erroneously applied the ordinary remand rule to Ms. Gao's case. Part II provides background on the ordinary remand rule, judicial deference, and judicial review, as well as the factual history of Ms. Gao's case.⁷

This Note contends that although asylum determinations and equal protection classifications are separate areas of the law, similar standards should apply to group classifications made by agencies or courts. Part III.A critiques the Supreme Court's reliance on the ordinary remand rule because not all BIA decisions receive high degrees of deference, and more importantly, the courts and agencies both have expertise in protecting specific social groups.⁸ Part III.B argues that the Court created bad precedent in refusing to uphold the Second Circuit's decision, obscuring when and why a court should apply the rule.⁹ Part III.C recommends that the Court modify the application of the ordinary remand rule to protect the role of judicial review and to follow international humanitarian laws, such as the Vienna Convention, that address violence against women.¹⁰ Part III.D suggests ways for Congress to streamline adjudication of gender-based asylum claims.¹¹ Finally, Part IV concludes that the rule undermines the important practice of judicial review, hurts a refugee's chances of being granted asylum, and decreases the nation's reputational capital in the international humanitarian arena.¹²

II. BACKGROUND

A. *The Asylum Process*

An immigrant to the United States can, during deportation proceedings, raise asylum as a defense against removal from the United States.¹³ An

7. See *infra* Part II (detailing the relationship between the ordinary remand rule's rationale and its application to Ms. Gao's case).

8. See *infra* Part III(A) (discrediting the Supreme Court's reliance on the expertise rationale for the rule because federal courts often decide protected class determinations).

9. See *infra* Part III(B) (arguing that because the Supreme Court has refused to address varying interpretations of the rule, it has confused the rule's meaning and correct application).

10. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*] (ushering in reforms to better address discrimination against women).

11. See *infra* Part III(D) (recommending that Congress amend immigration laws to reflect a clearly defined relationship between gender-based harms and persecution).

12. See *infra* Part IV (concluding that the rule falls short of the "spirit of the law" because it often refuses immigrants protection from a country that has the capacity to grant it).

13. See United States Citizenship and Immigration Services, *Obtaining Asylum in*

Immigration Judge (IJ) makes a final determination in an adversarial hearing as to the immigrant's eligibility for asylum.¹⁴ Eligibility depends upon the immigrant's status as a refugee, which the Immigration and Nationality Act (INA) defines as any person unable or unwilling to return to his or her country of origin because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁵ The IJ will only deport an applicant that he or she classifies as a refugee if an internal safe harbor exists in the applicant's home country.¹⁶

An applicant can, however, appeal the IJ's decision to the BIA.¹⁷ The BIA reviews the IJ's eligibility ruling and decides to uphold or reverse it.¹⁸ A federal circuit court can review the BIA's decision and remand it to the BIA for reconsideration consistent with the court's opinion.¹⁹ Generally, a

the United States: Two Paths, <http://www.uscis.gov/portal/site/uscis> (follow "Services and Benefits" hyperlink; then follow "Humanitarian Benefits" hyperlink; follow "Asylum" hyperlink; then click on the hyperlink "Two Paths to Asylum") (last visited Sept. 4, 2008) [hereinafter USCIS] (explaining the process by which asylum applications come before an Immigration Judge (IJ)).

14. See *id.* (distinguishing the adversarial, defensive asylum process from the non-adversarial, affirmative asylum interview process, where applicants who are not involved in removal proceedings submit an asylum application to the United States Citizenship and Immigration Services (USCIS)).

15. See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006) (defining the term "refugee" as requiring a close nexus between persecution and the asylum applicant's race, membership in a particular social group, etc., yet failing to define "persecution" or "particular social group"); see also *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 340-41 (2d Cir. 2006) (explaining that definitions of persecution range from physical harm based upon political or religious beliefs to non-violent abuse based upon an immutable characteristic); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1992) (defining particular social group as a "collection of people closely affiliated who are actuated by some common impulse or interest, or who share a fundamental [trait]").

16. See 8 U.S.C. § 1231(b)(3) (2008) (entitling an asylum applicant to a stay of removal when the applicant shows that persecution is more likely than not to occur upon return to the applicant's home country).

17. See Executive Office for Immigration Review, *Board of Immigration Appeals*, <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Sept. 4, 2008) [hereinafter *Board of Immigration Appeals*] (noting that the BIA's decisions are still subject to judicial review in court); Executive Office for Immigration Review, *Statistical Year Book A1*, S1-2, Feb. 2007, available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> (last visited Sept. 4, 2008) [hereinafter *Statistical Year Book*] (summarizing the caseload of the IJ and the BIA and noting the number and reason for appeals from the IJ to the BIA).

18. See *Board of Immigration Appeals*, *supra* note 17, at S1-2 (stating that the BIA does not need to review all IJ decisions because the exercise of jurisdiction is discretionary).

19. See, e.g., *Almaghzar v. Gonzales*, 457 F.3d 915, 923 n.11 (9th Cir. 2006) (assessing the reasonableness of a BIA and IJ decision denying asylum to a man who opposed Yemeni Communist forces); *Zhao v. Gonzales*, 404 F.3d 295, 305, 310-11 (5th Cir. 2005) (reversing a BIA decision because a man would face persecution based upon his practice of Falun Gong upon return to China); *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (remanding with directions to recognize that a man threatened by guerrillas would face persecution upon return to Guatemala).

court does not review the BIA's decisions *de novo* because principles of administrative law demand that most BIA decisions receive deference.²⁰ Courts generally trust the BIA to make initial asylum determinations because the BIA is a specialized administrative body.²¹

B. Deference to the BIA

The degree of deference afforded to BIA decisions is not consistent.²² The highest degree of deference, established in *Chevron U.S.A., Inc. v. National Resource Defense Council*, attaches to an agency decision when Congress has expressly or impliedly delegated decision-making authority to an agency whose decision is reasonable and carries the force of law.²³ When an agency's decision lacks the force of law, the court instead grants respect to the decision based upon its reasonableness, thoroughness, and persuasiveness.²⁴ The Supreme Court described this lower level of deference in *Skidmore v. Swift*.²⁵

Beyond *Skidmore*, deference to an adjudicatory determination generally disappears in the face of a more searching review of the record.²⁶ In a practice known as "substantial evidence" review, the court examines the

20. See *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (rationalizing remand because the BIA possesses expertise that the courts lack in determining the significance of political change in foreign nations to an immigrant's life).

21. See ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* 5 (5th ed. 2006) (considering agencies to be "experts" because, unlike courts, agencies employ experts to keep abreast of developments and technical changes in their fields).

22. Compare *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 24-25 (1st Cir. 2007) (remanding to allow the BIA to address errors of suspect reasoning and unsubstantiated findings with respect to its conclusion that a Peruvian man was not eligible for asylum because he had participated in a massacre), with *Kadia v. Gonzales*, 501 F.3d 817, 824 (7th Cir. 2007) (directing the BIA to grant another hearing to a Cambodian man seeking asylum due to his fear of persecution based on his political beliefs).

23. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (requiring deference to EPA's interpretation of "stationary source" because the Clean Air Act was ambiguous as to the term's meaning and the EPA's definition was neither arbitrary nor an abuse of discretion); see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that agency opinion letters about compensatory time do not deserve *Chevron* deference because the letters lack the force of law afforded to rules or regulations).

24. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that a government guidance document concerning the Fair Labor Standards Act's application to employers and employees deserved respect because guidance documents reflect professional judgment and experience).

25. See *id.* (explaining that a court grants *Skidmore* deference to agency interpretations that lack the force of law and noting that the level of respect depends upon the thoroughness of review, the quality of reasoning, and consistency with earlier policy).

26. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (describing a refusal to grant deference to an agency decision when the evidence compelled a completely different result).

evidence to determine whether a reasonable person looking at the entire record would find that the evidence supported the decision.²⁷ Substantial evidence review frequently occurs when the BIA summarily affirms an IJ's ruling.²⁸ Where the BIA simply adopts an IJ's decision as its own without additional explanation, the level of deference is decreased because the BIA decision does not always appear well reasoned, thorough, or consistent with the record.²⁹

C. The Ordinary Remand Rule

Recently, the Supreme Court has relied on more than *Chevron* or *Skidmore* deference to protect BIA decisions from searching judicial review by implementing a judicially created doctrine known as the ordinary remand rule.³⁰ Absent rare circumstances, a case triggers the rule when the BIA has not yet reviewed or decided the issues before the court; the rule mandates that a federal court remand the case to the agency without any direction as to how the agency should find.³¹ The rationale behind the rule is that administrative agencies should have the chance to voice their expertise and evaluate evidence in light of that expertise before a circuit court reviews the case.³²

The Supreme Court most recently explained the rule in *Gonzales v. Thomas*.³³ Michelle Thomas, a white woman living in South Africa with her family, feared persecution from black South Africans because

27. See *Alvarado-Carillo v. INS*, 251 F.3d 44, 49 (2d Cir. 2001) (defining "substantial evidence" as more than a "mere scintilla" of evidence supporting the IJ's decision).

28. See *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 190-91 (2d Cir. 2005) (rejecting the argument that BIA summary affirmations of IJ decisions receive deference because they are not the type of reasoned and well-articulated decisions that would normally trigger *Chevron* or *Skidmore* deference).

29. See *id.* (refusing to uphold the BIA's grant of asylum eligibility to a man whose fiancé the government forcefully sterilized because the BIA's decision did not sufficiently explain the application of spousal eligibility to boyfriends).

30. See *Gonzales v. Thomas*, 547 U.S. 183, 184 (2006) (refusing to uphold the Ninth Circuit's grant of asylum to family members of a white, racist South African man because the BIA had yet to consider whether kinship ties constituted a protected social group).

31. See *INS v. Orlando Ventura*, 537 U.S. 12, 15, 18 (2002) (remanding to the BIA because the BIA, who possessed expertise in the matter, had not determined if conditions in Guatemala had changed enough to permit a political dissident's safe return). But see *Calle v. U.S. Att'y Gen.*, 504 F.3d 1324, 1327 (11th Cir. 2007) (ruling that the rare circumstances exception to the rule applied because the court decided a legal, not factual, issue concerning sufficient allegations of errors).

32. See *Thomas*, 547 U.S. at 186-87 (arguing that an agency should make initial determinations regarding issues before courts because application of an agency's specialized knowledge provides the court with informed discussion and analysis in later stages of litigation).

33. See *id.* (remanding to the BIA, who had yet to decide if "kinship ties" constituted a "particular social group").

Thomas's father-in-law was a white man who had abused black workers.³⁴ While the BIA refused to grant Thomas asylum, the Ninth Circuit found that Thomas's relationship to her father-in-law constituted membership in a particular social group, which qualified her and her family for asylum.³⁵ On appeal, the Supreme Court remanded the case to the BIA, explaining that the BIA, rather than the Ninth Circuit, should first review whether "kinship ties" constituted membership in a particular social group.³⁶

D. Gao v. Gonzales

In October 2007, the Court again invoked the ordinary remand rule, relying only on *Thomas* for support.³⁷ The case concerned Hong Ying Gao, who sought escape from an abusive forced marriage in China.³⁸ Though she presented compelling evidence to the contrary, her IJ refused to find that she belonged to a particular social group.³⁹ When Ms. Gao appealed the decision to the BIA, the BIA affirmed the IJ's decision without explanation.⁴⁰ Ms. Gao sought judicial review of the decision in the Second Circuit.⁴¹ The court refused to afford *Chevron* or *Skidmore* deference to the BIA ruling because the BIA had summarily affirmed the IJ decision. The court, therefore, reviewed the IJ's decision using the substantial evidence standard and found the BIA's decision contrary to all evidence presented in the record.⁴²

34. *See id.* at 184-85 (laying the foundation for asylum based upon membership in a particular social group due to Thomas's race and kinship with a man who abused black workers).

35. *See id.* at 186-87 (implying that the court usurped the BIA's role by deciding that Thomas's family ties with a racist man qualified her for asylum before the BIA decided that issue specifically).

36. *See id.* (applying the ordinary remand rule because the Court found the BIA had not yet exercised the opportunity to provide expertise and input on the social group classification).

37. *See Keisler v. Hong Ying Gao*, 128 S. Ct. 345, 345 (2007) (asserting that the BIA should decide the case because the BIA has more experience in immigration and asylum issues).

38. *See Gao v. Gonzales*, 440 F.3d 62, 71 (2d Cir. 2006), *vacated*, *Keisler v. Hong Ying Gao* 128 S. Ct. 345 (2007) (arguing that Ms. Gao was a refugee because she suffered persecution based upon her sex and membership in a group of paid-for brides who lived under a regime that enforced involuntary marriages).

39. *See id.* at 68-70 (noting the IJ's refusal to find Ms. Gao's position as a paid-for bride similar to other recognized social groups, such as African females fearing circumcision, because the IJ felt the source of her fears was domestic, not cultural).

40. *See id.* at 65-66 (stating that BIA summary affirmations do not require the same degree of deference as well-reasoned decisions).

41. *See id.* at 64 (explaining that judicial review of the BIA's decision was warranted because courts review arbitrary or capricious decisions); *see also* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 413, 463 (2007) (noting that judicial review is important for checks and balances).

42. *See Gao*, 440 F.3d at 71 (using the substantial evidence standard to find that,

Acknowledging that the INA defined its “particular social group” standard poorly, the Second Circuit relied on a large body of case law to define persecution on account of membership in a particular social group.⁴³ The court held that persecution exists when an applicant fears present or future abuse based upon an innate, immutable trait that defines the applicant’s identity.⁴⁴ Such characteristics include race, gender, kin relationships, and past experiences shared among applicants.⁴⁵ The Second Circuit concluded that Ms. Gao was the same sex as the paid-for brides, and also shared the trait of being sold into marriage in a community that enforces those marriages.⁴⁶ The court reasoned that Ms. Gao would face persecution in the form of an interminable, involuntary marriage due to her membership in an identifiable social group that consisted of paid-for brides who live in economically disadvantaged communities where the Chinese government condones and enforces involuntary marriage contracts.⁴⁷

Furthermore, the Second Circuit overruled the BIA’s affirmation of the IJ’s decision that the police could adequately protect Ms. Gao and that she could find refuge in China.⁴⁸ The record, in fact, reflected Ms. Gao’s

because Ms. Gao produced evidence of bride-trafficking in Chinese villages and of her inability to find refuge in China, the evidence compelled asylum). *But see* INS v. Elias-Zacarias, 502 U.S. 478, 486 (1992) (holding that an asylum applicant who feared conscription by guerrillas failed to provide evidence of politically motivated persecution because the applicant only feared retaliation against his parents).

43. *See Gao*, 440 F.3d at 67 (implying that Ms. Gao deserved protection because her position as a paid-for bride was similar to other already protected groups, such as Mexican transvestites, Cuban homosexual males, and women fearing genital mutilation); *see also* Mohammed v. Gonzales, 400 F.3d 785, 796-98 (9th Cir. 2005) (recognizing that women fearing genital mutilation are eligible for asylum based upon their membership in a particular social group).

44. *See Gao*, 440 F.3d at 68 (explaining that persecution may exist where the fear of future persecution is slight, though discernable, and noting that, where the applicant shows that future persecution is more likely to occur than not, the applicant qualifies for automatic withholding of removal); *see also* *In re* Acosta, 19 I. & N. Dec. 211, 232-34 (B.I.A. 1985) (finding a taxi-driver who refused to join a strike ineligible for asylum because his gender was insufficient to place him in a social group and his position as a taxi driver was not immutable).

45. *See Gao*, 440 F.3d at 67 (arguing that a refugee’s sex should qualify him or her for gender-based asylum because sex is an immutable trait); *see also* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that gay Mexican transvestites belong to a particular social group because police abuse them due to their sexuality); *In re* Kasinga, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (recognizing females who fear genital mutilation as asylum-worthy based upon a reasonable fear of future persecution because they belong to a group of Tchamba-Kunsuntu women who have been mutilated and who oppose the practice).

46. *See Gao*, 440 F.3d at 71 (refusing to give deference to the IJ’s decision because it lacked valid explanations for its conclusions).

47. *See id.* (noting that Ms. Gao belonged to a social group defined by gender and involuntary servitude in the form of a forced marriage, and finding a connection between that group classification and persecution because the group existed in a community where government officials support and enforce marriage contracts between men and paid-for brides).

48. *See id.* (explaining that a denial of asylum based upon internal refuge requires

inability to escape her fiancé's harassment and Ms. Gao's reasonable fear that, if she remained in China, her fiancé's friends in the police force would arrest her out of spite.⁴⁹ Thus, the court vacated the BIA's affirmation of the IJ's decision and remanded Ms. Gao's case back to the BIA for further review consistent with the court's opinion.⁵⁰

Ms. Gao's victory, however, never materialized. The Supreme Court reversed the Second Circuit's opinion, finding that, despite the experience federal judges have in determining group classifications in equal protection cases, the court could not compel the BIA to find that Ms. Gao belonged to a particular social group.⁵¹ The Court held instead that the ordinary remand rule required the BIA to decide Ms. Gao's group membership first.⁵² Remand to the BIA, however, ignored obligations to aid refugees because it likely returned Ms. Gao to her abuser.⁵³ Nor did the Court explain the

that refugee actually be available).

49. *See id.* at 69 (noting that asylum can be denied when refuge in the home country is a reasonable alternative to living in the United States); *see also* *INS v. Orlando Ventura*, 537 U.S. 12, 13 (2002) (holding that refuge in Guatemala existed because threats the applicant faced were not due to his political opinion).

50. *See Gao*, 440 F.3d at 71 (finding that Ms. Gao belonged to a particular social group because she shared traits with other impoverished Chinese paid-for brides); *see also* International Marriage Broker Regulation Act, 8 U.S.C. 1375 (2004), *repealed and incorporated within* the Violence Against Women Reauthorization Act, 8 U.S.C. § 1375a (2006) [hereinafter IMBRA] (forcing American citizens engaged to foreign nationals to disclose violent histories to potential mates through "marriage brokers"); *European Connections & Tours, Inc. v. Gonzales*, 480 F. Supp. 2d 1355, 1362-63 (N.D. Ga. 2007) (confirming that IMBRA sought to protect a group consisting of mail-order brides); IMMIGRATION AND NATURALIZATION SERVICES, INTERNATIONAL MATCHMAKING ORGANIZATIONS: A REPORT TO CONGRESS (1999) [hereinafter IMO REPORT] (explaining that an unregulated marriage brokerage industry is conducive to exploitation of immigrant women); Arin Greenwood, *For Mail-Order Brides, Happily Ever After*, 94 A.B.A. J. 14 (Feb. 2008) (estimating the number of paid-for brides entering the country on fiancée visas to be 11,000 to 16,500 women per year).

51. *See Keisler v. Hong Ying Gao*, 128 S. Ct. 345, 375 (2007) (remanding based upon *Thomas's* expertise rationale for the rule, which would uphold alleged BIA expertise in making protected class decisions). *But see, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (holding that because sex, like race and national origin, is an involuntary, immutable trait bearing no relationship to legal burden, a law providing different benefits based upon gender was invalid); *Strauder v. West Va.*, 100 U.S. 303, 312 (1879) (invalidating a law limiting jury service to white men because it excluded black men, a protected class).

52. *See Keisler*, 128 S. Ct. at 345 (conflating Ms. Gao's case with *Gonzales v. Thomas* in order to invoke the ordinary remand rule, arguably because both cases concerned membership in particular social groups); *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (implying that courts should not overturn BIA asylum decisions because the BIA has been explicitly tasked with ruling on asylum claims).

53. *See, e.g.,* Protocol Relating to the Status of Refugees: Chapter 1, Article 2, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter *U.N. Refugee Protocol*] (requiring signatories to uphold humanitarian duties to protect refugees from abuse in their home countries); Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Update*, Nov. 13, 1996, Section III, http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm [hereinafter *Immigration and Refugee Board of Canada*] (defining the link between

inapplicability of judicial review or acknowledge the abuse Ms. Gao suffered.⁵⁴

III. ANALYSIS

A. The Supreme Court Erred by Applying the Ordinary Remand Rule to Ms. Gao's Case Because the Second Circuit Rightly Exercised its Power to Review the BIA's Decision

The ordinary remand rule should not require that a federal court remand a case to the BIA when the BIA already has voiced its opinion on a particular issue.⁵⁵ In fact, circuit courts have begun to distinguish their cases from *Thomas*, usually by finding a rare or special circumstance that permits the court to retain jurisdiction over the issue.⁵⁶ The most frequent use of a "special exception" occurs when the reviewing court finds that the BIA already contemplated the issue before the court, and so the court sees no reason to remand to the BIA for further reconsideration.⁵⁷

B. The Rule Does Not Apply Automatically to Cases like Ms. Gao's, Where the BIA Already Had an Opportunity to Review an Asylum Eligibility Issue

The ordinary remand rule should not bind circuit court action where the BIA waives its responsibility to apply agency expertise to an asylum eligibility issue.⁵⁸ When the BIA chooses not to review certain matters and

gender, persecution, and particular social group).

54. See *Keisler*, 128 S. Ct. at 345 (ignoring that Ms. Gao's return to China promised continued physical and emotional abuse); see also Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 354 (1994) (claiming that domestic violence amounts to torture and, therefore, victims of domestic violence should receive automatic protection); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 138-39 (2007) (discussing the effect that abuse has on a woman's life and her position in society); Danette Gómez, Comment, *Last in Line – United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 979 (2004) (arguing that the United States fails to fulfill its humanitarian duties because it often fails to protect women seeking gender-based asylum).

55. See, e.g., *Almaghar v. Gonzales*, 457 F.3d 915, 923 (9th Cir. 2006) (implying that allowing the Supreme Court to clamor for remand to the BIA, when the BIA already had the opportunity to decide an issue, seems unfair and illogical).

56. See *Zhao v. Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (evidencing the consequences of the BIA's initial review of an issue because, once reviewed, the court may retain jurisdiction over that issue to ensure the BIA's decision was not arbitrary, capricious, or an abuse of discretion).

57. See *id.* at 310 (explaining that the discretion promised to the BIA is not so broad as to allow the BIA to reject a Falun Gong member's application by dismissing new, albeit similar, evidence as redundant, and supporting the decision to retain jurisdiction by reminding the BIA that it already had an opportunity to review the new evidence, yet failed to do so of its own accord).

58. See, e.g., *id.* at 311 (articulating that the ordinary remand rule is precatory,

summarily affirms an IJ decision, the BIA cannot later demand the rule's protections of agency skill and initial input.⁵⁹ The Supreme Court ignored the BIA's refusal to produce a more detailed opinion in Ms. Gao's case.⁶⁰ Instead, the Court gave only a superficial mention of expertise and failed to address any special circumstances that might have negated application of the ordinary remand rule.⁶¹ The Court's insistence on application of the rule without further clarification in Ms. Gao's case, condones a practice that permits remand to the BIA, even when the agency has already waived any exercise of its own expertise by summarily affirming an IJ's suspect opinion.⁶²

Furthermore, the Supreme Court's decision does not explain or even acknowledge that a plain-text reading of the rule does not require the remand of *every* asylum claim to the BIA.⁶³ Rather, the rule protects the BIA's role only insofar as it provides the BIA with assurance that it will have the opportunity to review threshold asylum issues before courts address them.⁶⁴ For example, in *Zhao v. Gonzales*, the court held that where the BIA refuses to review issues before it, such as "changed circumstances" in relation to persecution of Falun Gong followers, the court can rule on that issue without usurping the BIA's role.⁶⁵

Although Ms. Gao's case concerned membership in a particular social

particularly in a case where the BIA has already rendered a decision and the court's ruling does not impinge on the BIA's authority to review an issue in the first instance).

59. See, e.g., *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (holding that the court could review and reverse the BIA's denial of the applicant's asylum eligibility if that decision was manifestly contrary to law, and because the record compelled the finding that the applicant would be subject to persecution on account of his religion if he returned to Eritrea).

60. See *Keisler v. Hong Ying Gao*, 128 S. Ct. 345, 345 (2007) (supporting the BIA practice of summary affirmation, even though that practice produced an opinion that belittled Ms. Gao's suffering).

61. See *Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (obscuring ordinary remand rule jurisprudence by failing to define what special circumstances would permit a court to review the BIA's decision *de novo*).

62. See *Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006), *vacated*, *Keisler v. Hong Ying Gao* 128 S. Ct. 345 (2007) (suggesting the importance of the BIA's affirmation of the IJ decision because, once the BIA has reviewed an issue, that issue becomes available for judicial review in the federal courts without attachment of the automatic remand requirement).

63. See *Thomas*, 547 U.S. at 186 (demanding an automatic remand to the BIA because the Ninth Circuit decided whether a "kinship group" qualified as a particular social group before the BIA could consider the issue). *But see Zhao v. Gonzales*, 404 F.3d 295, 311 (5th Cir. 2005) (explaining that, while the language of the rule is strong, the text of the rule does not require the BIA to re-review each issue that has come before it or reconsider any issue that it previously reviewed in a cursory manner).

64. See, e.g., *Almaghzar v. Gonzales*, 457 F.3d 915, 923 (9th Cir. 2006) (lambasting the claim that the ordinary remand rule should apply where the BIA has already decided an issue before the court).

65. See *Zhao*, 404 F.3d at 301, 311 (noting that courts will not uphold BIA decisions that are contrary to law, arbitrary, capricious, or abuses of discretion).

group, rather than changed circumstances, the BIA already had exercised review over her social group classification before the Second Circuit considered it.⁶⁶ Thus, as recognized in *Zhao*, the ordinary remand rule should not demand that the BIA re-evaluate an issue on which it already reached an objectionable conclusion.⁶⁷ The Supreme Court, therefore, should not have required that the Second Circuit remand to the BIA.⁶⁸ Moreover, remand to the agency for further explanation would have been inefficient because returning the case to the BIA docket would tax both judicial and agency resources.⁶⁹ Furthermore, remand seems unwarranted because a court's finding that a party suffers persecution or discrimination based upon membership in a protected class should end the inquiry into that party's asylum status.⁷⁰

C. The Courts, as Well as the BIA, Have Expertise in Making Protected Class Determinations and that Expertise Should be Respected

The Supreme Court erred by relying so heavily on the BIA's proficiency in asylum matters because the knowledge relevant to Ms. Gao's case relates to making protected class determinations, an area in which the courts are greater experts.⁷¹ Arguing that agency expertise trumps court expertise in making distinctions of "particular social groups" is semantics.⁷²

66. See *Gao*, 440 F.3d at 65 (reasoning that the BIA passed on the opportunity to discuss more fully Ms. Gao's membership in a particular social group when it summarily affirmed the IJ's denial of asylum for Ms. Gao).

67. See *Zhao*, 404 F.3d at 311 (implying that overzealous use of the rule hinders a court's ability to perform important judicial review functions).

68. Compare *Gao*, 440 F.3d at 71 (criticizing the expertise rationale for the ordinary remand rule because the BIA already had the opportunity to exercise its expertise in determining applicants who qualify for asylum based upon membership in a particular social group, and yet opted to forego application of that expertise to Ms. Gao's case), with *Zhao*, 404 F.3d at 311 (refusing to apply the ordinary remand rule on the issue of changed circumstances because the court found that the BIA had already reviewed that issue, albeit in a cursory fashion).

69. See *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (explaining that the frequent failures of the IJ and the BIA to exercise an appropriate degree of care in their asylum decisions can be explained, though not justified, by an overloaded docket at the agency, and applying that observation to a case where the BIA questionably denied asylum to a Cambodian political dissident because the BIA gave too much weight to trivial inconsistencies, harmless exaggerations, and innocent mistakes in his testimony).

70. See, e.g., *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (demonstrating that, because the applicant provided evidence of certain future persecution based upon his religious beliefs, the court did not need to remand to the BIA for reconsideration of his claims because no conclusion other than a grant of asylum was possible).

71. See *Gao*, 440 F.3d at 70 (deriding the opinion of the IJ that found that the monetary exchange between Ms. Gao's family and her fiancé evidenced a strictly familial conflict, and criticizing the IJ and BIA for ignoring the U.S. government's concession that forced marriage is an abuse that amounts to persecution).

72. See *Frontiero v. Richardson*, 411 U.S. 677, 681-83 (1973) (classifying women

Classifying the group as a “particular social group” rather than a “protected class” does not change the basic intellectual foundation of the exercise.⁷³

Nevertheless, the Supreme Court has refused to abandon its dogged adherence to the idea that the BIA can best decide “particular social group” classifications.⁷⁴ The Court has failed to acknowledge that the BIA is not the only governmental body that can bring expertise to bear on class determinations, particularly where those classifications turn on race, sexuality, or gender.⁷⁵ The Supreme Court should not disturb the Second Circuit’s ruling that Ms. Gao belonged to a persecuted, particular social group because the federal courts possess extensive experience in determining the legal consequences of assigning a litigant to a protected class.⁷⁶ For example, in *Strauder v. West Virginia*, the Court concluded that discrimination against the litigant impermissibly stemmed only from an immutable characteristic: his race.⁷⁷

More akin to the sex-based categorization in Ms. Gao’s case, the Court in *Frontiero v. Richardson* considered gender classifications and struck

interchangeably as belonging to a “group,” “class,” or “sex-based classification,” any of which the law views as suspect when legislation purports to treat the class differently based solely upon sex).

73. *Compare* Mohammed v. Gonzales, 400 F.3d 785, 796-98 (9th Cir. 2005) (holding that female genital mutilation performed on a Somali asylum applicant qualified as a lifelong source of persecution which was dependent upon the applicant’s gender and that the applicant was therefore eligible for asylum), *with Frontiero*, 411 U.S. at 684-86 (deriding the ways in which men have historically used “romantic paternalism” to persecute women for being women, such as resigning them to the hearth, forbidding them from holding office or title to property, denying them education and the right to vote, and, as such, ruling that a law or regulation could not discriminate against women based upon their gender).

74. *See* Keisler v. Hong Ying Gao, 128 S. Ct. 345, 345 (2007) (remanding Ms. Gao’s case to the BIA and refusing to use the case to address issues such as international humanitarian obligations and appropriate application of the ordinary remand rule).

75. *Compare* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006) (citing immutable characteristics, such as race or nationality, as reasons one might be persecuted and considered a refugee), *and* Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (basing remand on the idea that the BIA is the governmental body best equipped to make decisions concerning refugee status because the BIA is the highest administrative body tasked with deciding immigration issues), *with Frontiero*, 411 U.S. at 682 (comparing the trait of sex to race and national origin insofar as those traits are used to group people into classes whose rights the government stringently protects, absent compelling justification to the contrary).

76. *See, e.g., Frontiero*, 411 U.S. at 686 (holding that the United States cannot apportion benefits differently to the spouse of a military serviceman or woman based upon the sex of that member’s spouse); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (finding that a law limiting jury participation to white men violated the Equal Protection Clause because it discriminated against the class of black men who could also be jury members).

77. *See Strauder*, 100 U.S. at 308 (ruling that race has no relation to legal responsibilities and forbidding the adverse treatment of a people based upon their race because such treatment implies inferiority and subjugates their rights to those of others).

down the discriminatory provision of health benefits to members of the U.S. military based upon the beneficiary's gender.⁷⁸ Just as in Ms. Gao's case, where the Second Circuit determined how Ms. Gao's gender related to her group membership, the Court in both *Strauder* and *Frontiero* began legal analysis with a delineation of factors, race and gender, that formed the basis for protected class membership.⁷⁹ Then, just as the Court in *Strauder* and *Frontiero* established an impermissible nexus between discrimination and the immutable characteristic constituting class membership, the Second Circuit also decided that Ms. Gao's gender related to her persecution in the form of forced marriage.⁸⁰

Furthermore, reliance on the expertise argument for the ordinary remand rule ignores that the judicial and legislative branches of the federal government already recognize protected classes similar to Ms. Gao's in the context of asylum law, such as women fearing culturally-supported female genital mutilation and foreign women who come to the United States as "mail-order brides."⁸¹ For example, although the court in *Mohammed v. Gonzales* recognized opposition to certain cultural practices, such as female circumcision, as supporting a grant of asylum, the Supreme Court failed to

78. See *Frontiero*, 411 U.S. at 686 (reasoning that women belonged to a protected class based upon a characteristic that they did not choose, nor could they reasonably change, and, as such, holding that women could not be discriminated against based upon their gender).

79. Compare *Gao v. Gonzales*, 440 F.3d 62, 67 (2d Cir. 2006), *vacated*, *Keisler v. Hong Ying Gao*, 128 S. Ct. 345 (2007) (determining that Ms. Gao's social group classification rests upon a detailed analysis of facts unique to her case because many different traits trigger classification), with *Strauder*, 100 U.S. at 310 (using a case-by-case analysis to invalidate a jury limitation based upon race because some limited classifications pass constitutional muster), and *Frontiero*, 411 U.S. at 686 (explaining that classifications based upon traits that bear no relationship to an ability to perform or function in society are subject to searching review).

80. Compare *Gao*, 440 F.3d at 71 (noting that Ms. Gao's gender inextricably linked her to future persecution in the form of an involuntary marriage because only women could belong to a group of paid-for brides), with *Strauder*, 100 U.S. at 310 (invalidating a law that refused a black man the opportunity to have black jury members because the law's purpose was to discriminate against African-Americans solely based upon their race), and *Frontiero*, 411 U.S. at 690 (condemning a benefits plan that gave different benefits to different parties because the divergent dissemination of benefits rested upon no ground other than the gender of the parties).

81. See *European Connections & Tours, Inc. v. Gonzales*, 480 F. Supp. 2d 1355, 1363 (N.D. Ga. 2007) (conceding that foreign mail-order brides suffer a potentially increased risk of domestic violence because they lack the knowledge or assertiveness to speak out against their fiancés' abusive behaviors); *In re Kasinga*, 21 I. & N. Dec. 357, 358, 361 (B.I.A. 1996) (recognizing Tchamba-Kunsuntu women who have not yet been victims of genital mutilation, but who oppose the practice, as members of a particular social group because female circumcision is extremely painful and enduring, as it involves cutting the genitals with knives and often produces infection, shock, and permanent damage to the urethra and anus); see also *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (holding that in Mexico, gay men with female sexual identities can be classified as belonging to a particular social group because law enforcement officials often sexually abuse these men due to their sexuality).

recognize a similar opposition to a cultural practice in Ms. Gao's case.⁸² Although Ms. Gao's fear is not of female genital mutilation, her fear is similar: Ms. Gao opposes the cultural practice of forced marriage, especially because her marriage promised to be interminable, violent, and abusive.⁸³ Ms. Gao also shares the immutable characteristic of gender with women who are victims of mutilation.⁸⁴ More importantly, the BIA's affirmation that Ms. Gao did not belong to a particular social group is unreasonable, particularly because, similar to women living in areas where female genital mutilation occurs, Ms. Gao resides under a governmental structure that enforces and approves of involuntary marriages.⁸⁵ Thus, had the Court more keenly recognized the similarities between the two groups of women, it would have seen that Ms. Gao belonged to a particular social group of paid-for brides, pushed by a government-supported enforcement regime into a class specifically due to her gender, and that she faced painful and continuing abuse based upon the group in which she is a member.⁸⁶

Women fleeing female genital mutilation are not the only group of women protected by the United States. Recent legislation passed by Congress attempted to address abuses suffered by mail-order brides.⁸⁷

82. *Compare* Mohammed v. Gonzales, 400 F.3d 785, 796-99 (9th Cir. 2005) (finding that because 98% of Somalian female villagers suffered threats of female genital mutilation, Somalian females, like Asian females fearing or subject to forced sterilization, constituted a class worthy of protection because they suffered persecution based upon their gender, plus persecution in the form of a dangerous, painful cultural practice), *with* Gomez v. INS, 947 F.3d 660, 664 (2d Cir. 1991) (finding that the applicant, who had been raped by Salvadoran guerrillas as a young girl, could not establish that she belonged to a "collection of people closely affiliated" who shared a fundamental characteristic because no evidence suggested a systematic targeting of young girls in El Salvador for rape, nor could she show that she would be singled out for attack were she to return to El Salvador in the future).

83. *See Gao*, 440 F.3d at 64 (upholding the premise that "particular social group" may be broadly construed to encompass the shared trait of gender, so long as the group also shares another involuntary characteristic that is identifiable to persecutors, such as Ms. Gao's position as a paid-for bride).

84. *Compare id.* at 71 (finding that Ms. Gao meets the "gender plus" classification for a protected group because she shares more than just her sex with her group; she also shares a common plight, which is beyond her ability to ameliorate), *with In re Acosta*, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985) (refusing to find that a male taxi driver who refused to participate in work stoppages was a member of a particular social group because he could have changed the characteristics otherwise defining his group by participating in the strike, and he therefore failed to meet the "gender plus" requirement).

85. *See Gao*, 440 F.3d at 71 (implying that Ms. Gao's situation may be even worse than other paid-for brides because law enforcement was likely to enforce the marriage over Ms. Gao's objections, despite the fact that Ms. Gao would suffer painful and continuing abuse once married).

86. *See id.* at 69 (comparing Ms. Gao's particular social group to groups already recognized as eligible for asylum, such as Mexican transvestites and African females facing or opposing genital mutilation).

87. *See* IMO REPORT, *supra* note 50, at Part I (recognizing that immigrant women often face abuse by their American fiancés and husbands because many men using

While reauthorizing the Violence Against Women Act (VAWA) in 2005, Congress incorporated the International Marriage Broker Regulation Act (IMBRA) to address incidences of domestic violence against, and human trafficking in, a group of women classified as “mail-order brides.”⁸⁸ VAWA and IMBRA’s legislative history recognized that women who lack knowledge about domestic violence remedies available in the United States, and whose American fiancés control their visas, often find themselves locked in abusive relationships.⁸⁹ IMBRA attempts to stop persecution of mail-order brides by elevating their bargaining power such that they can learn about a potential fiancé’s criminal charges and convictions before coming to the United States.⁹⁰

Ms. Gao’s position as a paid-for bride in an abusive relationship is similar to the predicament of many abused mail-order brides protected by IMBRA because Ms. Gao shares the immutable characteristic of gender with mail-order brides.⁹¹ Moreover, Ms. Gao found herself in an abusive relationship that she could not escape, just as Congress found that mail-order brides could not escape abusive marriages easily.⁹² Finally, Ms. Gao also shared a similar political powerlessness with mail-order brides. Just as pre-IMBRA mail-order brides had no one to champion their rights, no one would stop the abuse Ms. Gao suffered because Chinese officials would, in all likelihood, enforce her marriage to a violent man.⁹³ Thus, the Supreme

mail-order bride services seek women they can control).

88. *See id.* (establishing the information and resources required to regulate international marriage brokers); *see also* *European Connections & Tours, Inc. v. Gonzales*, 480 F. Supp. 2d 1355, 1363 (N.D. Ga. 2007) (suggesting that many immigrant women coming into the United States as mail-order brides often face abuse by men they marry and lack the knowledge or power to contest the marriage or speak out against the abuse).

89. *See European Connections & Tours, Inc.*, 480 F. Supp. 2d at 1362-63 (describing the class of women who suffer as mail-order brides and explaining that they need protection because they are especially vulnerable due to their lack of familiarity with the English language, U.S. laws, and customs).

90. *See IMBRA*, 8 U.S.C. § 1375a(d) (2006) (requiring American men to provide “marriage brokers” with police records and other personal information so that the brokers can turn that information over to potential wives who will then have information on a potential mate before coming to the United States).

91. *See Gao* 440 F.3d at 70 (noting that Ms. Gao’s gender was but one characteristic shared among the group of paid-for brides and indicating that her position as a paid-for bride completed the “gender plus” requirement for classification in a particular social group).

92. *Compare id.* at 71 (focusing on the fact that Ms. Gao should receive asylum because she had tried unsuccessfully to relocate in China in order to escape her fiancé’s abuse), *with European Connections & Tours, Inc.*, 480 F. Supp. 2d at 1366-67 (implying that mail-order brides needed protection because they were often locked into abusive relationships with their fiancés or husbands).

93. *Compare Gao*, 440 F.3d at 71 (implying that Ms. Gao did not deserve the treatment she suffered and so concluding her case in such a way that the law would protect and remove her from a physically abusive environment), *with European Connections & Tours, Inc.*, 480 F. Supp. 2d at 1367 (addressing mail-order-brides’ lack

Court was inconsistent and unjust when it refused to recognize the similarities between Ms. Gao and other women protected by Congress.⁹⁴

D. The Second Circuit Rightly Refused to Uphold the BIA's Decision Because the Circuit's "Substantial Evidence" Review Compelled a Conclusion Contrary to that which the BIA Expressed in its Summary Affirmation

The Second Circuit properly exercised substantial evidence review because courts need not uphold BIA decisions that are not "supported by reasonable, substantial, and probative evidence on the record considered as a whole."⁹⁵ That the BIA's affirmation of the IJ decision in Ms. Gao's case touched upon her particular social group in only a cursory fashion is irrelevant, because the Second Circuit would have given the IJ's decision significant weight during substantial evidence review had the full record actually warranted a denial of asylum.⁹⁶ Thus, the Second Circuit did not usurp an agency role by considering Ms. Gao's membership in a particular social group during substantial evidence review because the court completed its legally-mandated function of reviewing agency fact-finding to ensure that the agency conclusion comported with the record.⁹⁷

Moreover, the Second Circuit exercised its substantial evidence review in the same manner as many other federal courts. For example, in *Ghebremedhin v. Ashcroft*, the Seventh Circuit prohibited any search for new facts in the record, but rather it reviewed the record in its entirety to determine whether undisputed evidence compelled a conclusion that the applicant would face persecution in Eritrea based upon his Jehovah's Witness beliefs.⁹⁸ Just as the court in *Ghebremedhin* found that the record reflected the Eritrean military's certain persecution of the applicant, Ms.

of knowledge as a lack of power and finding that mail-order brides deserved more equal bargaining power with potential fiancés in order to preclude them from finding themselves in abusive relationships).

94. See *Keisler v. Hong Ying Gao*, 128 S. Ct. 345, 345 (2007) (granting writ of certiorari and ordering the Second Circuit to vacate its decision, which indicated the Court's failure to recognize that Ms. Gao's position as an abused paid-for bride necessitated the searching review that the Second Circuit conducted).

95. See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (incorporating an older version of the INA into case law and implying that courts do not grant high degrees of deference where a reasonable basis for the agency ruling is absent).

96. See *Gao*, 440 F.3d at 65-66 (explaining that substantial evidence review is stricter than a clear-error standard of review because, absent substantial evidence to the contrary, the IJ's and BIA's conclusions should control).

97. See *id.* at 66 (acknowledging that the court's role does not extend to review of external evidence upon which the BIA did not rely, but urging that substantial evidence review is appropriate for contested factual issues).

98. See *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 244 (holding that the court's authority extends to review and reversal of agency decisions that are either contrary to law or cannot withstand substantial evidence review).

Gao's evidence showed she had a fear of future persecution upon return to China because her abusive fiancé was likely to find her as he had in the past.⁹⁹ Moreover, similar to the Seventh Circuit's finding that denial of asylum to the applicant was patently unreasonable, rejecting Ms. Gao's asylum application also did not seem reasonable in light of the evidence that she provided.¹⁰⁰ Rather, Ms. Gao's evidence illustrated that widespread bride-trafficking in rural China affects an identifiable group of women who cannot seek protection from the government because law enforcement and other village authorities support the practice.¹⁰¹ Furthermore, just as the record in *Ghebremedhin* "compel[led] the conclusion" that the applicant qualified for asylum, the Second Circuit recognized that Ms. Gao presented "evidence [that] a reasonable mind might accept as adequate" to support the conclusion that she was a member of a particular social group: she presented a U.S. Department of State Country Report that detailed bride-trafficking in China, extensive domestic violence, and a widespread enforcement of forced marriages.¹⁰² Thus, review of the evidence showed that, contrary to the IJ's and BIA's decisions, Ms. Gao convincingly met the criteria for membership in a particular social group because she suffered persecution based upon her presence in a group of women who were forced into marriage.¹⁰³

99. Compare *id.* (implying that BIA reconsideration was unnecessary where the court could draw only one conclusion from the record), *with Gao*, 440 F.3d at 71 (concluding that the BIA's decision that Ms. Gao could return to China was unreasonable and unsupported by evidence because Ms. Gao had tried to hide in another fishing village one hour away by boat from her own and still her fiancé located her, stalked her, and threatened her and her family with violence if she refused to return home with him).

100. Compare *Ghebremedhin*, 392 F.3d at 244 (finding denial of asylum to the applicant was unreasonable because the applicant already was statutorily eligible for asylum based upon religious persecution), *with Gao*, 440 F.3d at 65, 71 (finding Ms. Gao's fear of persecution persuasive because she demonstrated that her fiancé was bad-tempered, violent, physically abusive, controlling, vindictive, obsessed with gambling, and had stalked her when she tried to escape him, harassed her family repeatedly, and vandalized her family's home).

101. See *Gao*, 440 F.3d at 71 (reviewing the record for substantial evidence and reversing the decision of the BIA because the evidence presented by Ms. Gao compelled a different conclusion from that rendered by the BIA).

102. See *id.* at 65-66, 71 (recognizing that where the evidence compels a completely different conclusion from that of the BIA or IJ, the court need not afford the BIA's affirmation of the IJ decision *Chevron* or *Skidmore* deference).

103. See *id.* at 70-71 (recognizing that Ms. Gao could not change her sex and, as such, was subject to persecution in the form of forced marriage because she lacked the ability to refuse the marriage in a culture that condones marriage for money, regardless of whether the marriage was forced upon the bride by her family or her economic position).

E. By Applying the Ordinary Remand Rule in Ms. Gao's Case, the Supreme Court Obscured When BIA Decisions Deserve Deference, and When the Courts Should Apply the Rule, Thereby Creating Bad Precedent

The Supreme Court should have upheld the Second Circuit's review of Ms. Gao's case based upon the decisions of other federal courts of appeals, many of which refuse to institute the ordinary remand rule automatically.¹⁰⁴ Problems of unpredictability and lack of uniformity regarding those decisions are more likely to arise if the Supreme Court does not clarify the rule's application among circuits.¹⁰⁵

Currently, three circuits hold that "rare circumstances" create an exception to the ordinary remand rule whereby a reviewing federal court can properly decide an issue that the BIA already has reviewed.¹⁰⁶ For example, unlike the Supreme Court, the Fifth Circuit interpreted the rule as a concept that permits remand, but does not require it. Instead, the Fifth Circuit read the Supreme Court's choice not to word the rule "categorically" as a conscious act.¹⁰⁷ According to the Fifth Circuit,

104. See, e.g., *Calle v. U.S. Att'y Gen.*, 504 F.3d 1324, 1330 (11th Cir. 2007) (holding the ordinary remand rule inapplicable where the court decides the legal issue, rather than the factual issue, of whether the asylum applicant had sufficiently alleged errors by the BIA and supported them with pertinent authority); *Almaghar v. Gonzales*, 457 F.3d 915, 923 (9th Cir. 2006) (refusing to apply the ordinary remand rule where the BIA has already considered an issue before the court); *Zhao v. Gonzales*, 404 F.3d 295, 310-11 (5th Cir. 2005) (finding that a court can review a BIA decision without intruding upon separation of powers when the BIA already had an opportunity to review an issue first).

105. Compare *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 25 (1st Cir. 2007) (promoting the idea that agency expertise should always prevail because an agency has more experience with the subject matter than a court of general jurisdiction), with *Ghebremedhin*, 392 F.3d at 242-43 (refusing to allow agency expertise to trump review of an agency decision that displays illogical reasoning or unsupported conclusions). See also Legomsky, *supra* note 41, at 422-23, 425 (explaining that overall remand rates for asylum adjudication cases range from less than two percent in the Fourth Circuit to over thirty-six percent in the Seventh Circuit, and concluding that these disparities are alarming because they allow similarly situated people to be treated very differently).

106. Compare *Castaneda-Castillo*, 488 F.3d at 24-25 (explaining that, although the BIA mischaracterized evidence presented by a Peruvian police officer seeking asylum and reached unsupportable and ill-reasoned conclusions regarding his possible participation in a massacre of a terrorist cell, remand to the agency to cure the errors is the normal course of action), with *Almaghar*, 457 F.3d at 923 (enunciating the principle that the court could deny a Convention Against Torture claim because the BIA had already reviewed the applicant's claim and found, as the court did, that the testimony was not credible), and *Zhao*, 404 F.3d at 305, 310-11 (adopting the idea that remand was not necessary because the BIA already decided the issue, albeit in a suspect manner, regarding changed circumstances and their effect on persecution of Falun Gong members), and *Ghebremedhin*, 392 F.3d at 242-43 (finding that the court did not usurp the BIA's role when it reversed a denial of asylum to an Eritrean Jehovah's Witness given that the applicant presented evidence proving persecution of Jehovah's Witnesses in Eritrea).

107. See *Zhao*, 404 F.3d at 310-11 (refusing to read the ordinary remand rule as a categorical imperative and so finding that an exception to the rule exists where the BIA

therefore, the Second Circuit would not have been required to remand Ms. Gao's issue to the BIA at all, because the BIA had already made a decision.¹⁰⁸ Thus, the Second Circuit's ruling would not impinge on the BIA's authority to review the issues in Ms. Gao's case concerning her membership in a particular social group and the availability of refuge in China.¹⁰⁹

Furthermore, the refusal of many circuit courts to apply the ordinary remand rule suggests criticism of the broad deference granted to the BIA under the rule.¹¹⁰ With an overzealous focus on remand, the rule undercuts the ability of the courts to exercise judicial review.¹¹¹ Circuit courts recognize the impropriety of limiting judicial review, particularly when faced with a glaring agency error, such as the patently unreasonable conclusion that Ms. Gao did not deserve refugee status.¹¹² In *Ghebremedhin v. Ashcroft*, for example, the Seventh Circuit similarly refused to apply the ordinary remand rule to a BIA summary affirmation that contravened settled law and displayed an unreasoned decision, because the Eritrean applicant faced likely persecution for his refusal to join the Eritrean army due to his religious beliefs.¹¹³ Moreover, the Ninth Circuit considered a situation procedurally similar to Ms. Gao's in *Almaghar v. Gonzales*; there the court ruled there was no need to remand a Convention Against Torture (CAT) claim to the BIA as the BIA already had reviewed

has already passed judgment on an issue).

108. *See id.* (articulating that the ordinary remand rule is not mandatory in a case where the BIA has made a decision, particularly because the court's ruling does not usurp powers reserved for the BIA).

109. *See Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006), *vacated*, *Keisler v. Hong Ying Gao*, 128 S. Ct. 345 (2007) (reasoning that, where the BIA voluntarily reviews a decision in a cursory manner, the Supreme Court should not strip a circuit court of jurisdiction to review the adequacy and legality of the decision).

110. *See Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (criticizing required deference when the BIA has already nonchalantly reviewed an issue, and reminding administrative agencies that deference is earned, not automatically granted).

111. *See id.* at 820 (suggesting that justice requires judicial review because recently the court has reviewed suspect credibility decisions made by an overworked and understaffed IJ and BIA, and also reporting that two-thirds of the judicial reversals of asylum decisions in the first two months of 2006 involved review of credibility determinations).

112. *See Gao*, 440 F.3d at 71 (questioning the BIA's decision to affirm the IJ's denial of asylum because Ms. Gao's membership in a particular social group seemed to be a reasonable classification, as she would certainly face persecution in the form of a forced marriage in China and she also needed protection from her abusive fiancé); *see also Legomsky*, *supra* note 41, at 463 (defending judicial review of agency decisions because the criticism of "generalist judges" deciding specialized issues ignores that judicial perspectives complement and add to the perspectives of specialist agencies such that judicial review gradually catalyzes an evolution in legal doctrine disseminated amongst multiple courts).

113. *See Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (holding that a Jehovah's Witness presented sufficient evidence that compelled a conclusion completely different from one decided by the BIA).

evidence concerning the general practice of torture in Yemen.¹¹⁴ The Ninth Circuit, therefore, rightly took jurisdiction over the CAT claim because, though the BIA had not done so, it had an opportunity to address the likelihood of torture specific to the applicant.¹¹⁵

Had the Supreme Court recognized the practices of these circuits, it most likely would have upheld the Second Circuit's decision to direct a BIA finding that Ms. Gao belonged to an asylum-qualifying group.¹¹⁶ Using the Seventh Circuit's standard of refusal to remand where the BIA's decision was contrary to law or not supported by the record on the whole, the Second Circuit rightly exercised jurisdiction over Ms. Gao's case because the evidence supported a grant, rather than a denial, of asylum.¹¹⁷ Following the Ninth Circuit's standard of refusal to remand where the BIA already has reviewed the contested issue, the Second Circuit did not need to remand to the BIA because the BIA already had the chance to review her membership in a particular social group.¹¹⁸ The Second Circuit, like sister circuits, prudently exercised judicial review by refusing to apply the rule, thereby better protecting Ms. Gao's human rights and bringing finality to a time-sensitive issue more quickly than if it were to force the case back onto the BIA's overloaded docket.¹¹⁹

114. *See* *Almaghzar v. Gonzales*, 457 F.3d 915, 923 (9th Cir. 2006) (supporting the proposition that, where the agency already has reviewed an issue generally, the court may review the issue as applied specifically to the applicant).

115. *See id.* (explaining that where the BIA has already reviewed the issue before the court, the ordinary remand rule does not apply because the rule is meant for situations where the BIA has not yet reviewed an issue and so has not yet engaged in its front-end fact-finding role).

116. *See Gao*, 440 F.3d at 71 (echoing the reasoning of other circuits by refusing to remand Ms. Gao's case to the BIA because the BIA affirmation of the IJ decision was against the weight of the evidence and the BIA had already exercised its opportunity to review Ms. Gao's claim).

117. *See id.* (arguing that Ms. Gao's evidence compelled a grant, rather than a denial, of asylum because Ms. Gao's evidence illustrated that government officials or village authorities were likely to force her to marry her abusive fiancé were she to return to China).

118. *See id.* (denying remand to the BIA because the BIA already had the chance to rule on Ms. Gao's claim in a more thorough manner, but chose to waive that opportunity in favor of a summary affirmation of an IJ opinion).

119. *See Statistical Year Book*, *supra* note 17, at A2 (illustrating that BIA case receipts have increased by fourteen percent to almost 40,000 cases from 2002 to 2006, though case completions have decreased twelve percent during the same time); *see also* Legomsky, *supra* note 41, at 418-20 (implying that attempts to streamline the BIA review process through new regulations, which made single-member affirmations without opinion the norm, have actually hampered the quality and thoroughness of BIA decisions because the number of BIA decisions reviewed by the courts surged astronomically after implementation of the regulations and, additionally, courts of appeal have issued numerous, severely critical comments on the quality of IJ and BIA opinions).

F. The Supreme Court Must Review Application of the Ordinary Remand Rule so that Use of the Rule Does Not Conflict with the Federal Judicial Review Protections or International Humanitarian Duties

The Supreme Court should modify the ordinary remand rule by elucidating further when judicial review of asylum cases is appropriate because such review often serves as an important check on unbridled agency discretion.¹²⁰ At present, the rule disregards that a discretionary reading of an adjudicatory fact-finding is not automatic, particularly when substantial evidence review produces serious questions about the adjudicatory findings.¹²¹ A rule that demands freedom from judicial review ignores the possibility that agencies make mistakes and the court often serves as an avenue to rectify them.¹²² Thus, the Supreme Court should provide for judicial review where the BIA already has benefited from consideration of the record because such guidance would provide more incentive for the BIA to proffer decisions that are grounded in evidence and that comport with a policy that better recognizes gender-based asylum claims, like Ms. Gao's.¹²³

Finally, the Supreme Court must interpret the ordinary remand rule narrowly to require agency compliance with existing humanitarian duties, such as the Vienna Convention or the 1967 Protocol Relating to the Status of Refugees ("the Protocol").¹²⁴ At present, invocation of the rule sends a

120. See, e.g., *Kadia v. Gonzales*, 501 F.3d 817, 819 (7th Cir. 2007) (reasoning that judicial review often rectifies agency error, particularly when an IJ decision displaying insensitivity to the demeanor of a foreigner is a "disturbing feature" of immigration law); see also Legomsky, *supra* note 41, at 463 (implying that judicial review promotes accountability between branches because judicial review recognizes the position of others in society, litigants and legislators alike).

121. See *Kadia*, 501 F.3d at 820-21 (analyzing deference to an agency based upon the convention that agencies know more about the subjects delegated to them than the courts do, but also acknowledging that any expertise derives from constant contact with their delegated subject matter, which is not always the determining factor in an asylum case); see also *Gao*, 440 F.3d at 65 (stating that, while the court gives great weight to the determination of the initial fact-finder and therefore rarely disturbs adjudicatory fact-findings, review can be more searching when certain cases require it).

122. See *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (reversing the IJ's and BIA's denial of asylum eligibility for an Eritrean applicant because he provided sufficient evidence that the government persecuted Jehovah's Witnesses, and holding that the decisions from the agency were manifestly contrary to law); see also *Kadia*, 501 F.3d at 819-20 (reminding agencies that deference is not automatic, nor always appropriate, because judicial review promises oversight of agency decisions and correction of agency errors).

123. See *Vienna Declaration*, *supra* note 10, at pt. I, ¶ 18 (publishing humanitarian norms that have become key parts of international law and suggesting that the human rights of women receive a more intense focus).

124. See *id.* (expressing concern for discrimination and violence suffered by women globally, and adopting as a priority program of action the eradication of discriminatory practices against women and girls); *U.N. Refugee Protocol*, *supra* note 53, at 33 (mandating that signatories cooperate with the United Nations in order to assess and

woman like Ms. Gao back to an abusive, forced marriage and disregards obligations the United States acceded to by signing the Protocol.¹²⁵ By signing on to the Protocol, the United States assumed responsibility for coordinating with the international community to protect refugees with a well-founded fear of persecution.¹²⁶ Yet in Ms. Gao's case, and in many others, the United States has ignored that obligation and instead used the ordinary remand rule to promote isolationist and xenophobic tendencies by refusing to allow review of unreasonable BIA decisions.¹²⁷ For example, the BIA and the courts have battled over remand and re-remand three times over the past thirteen years for one single claim—that of Rodi Alvarado, who sought asylum based upon a fear of her husband's vicious and repeated abuse and her inability to find safe haven in Guatemala because Guatemalan authorities would not intervene in domestic disputes.¹²⁸ Ms. Gao must not suffer Ms. Alvarado's fate.¹²⁹ One woman trapped in the legal system is one woman too many.

G. Congress Should Explain how Gender-Based Harms Relate to Asylum Claims, such that an Amorphous Definition of "Particular Social Group" Cannot Bar Protection for Women Fleeing their Abusers

Congress could forestall some applications of the ordinary remand rule by establishing concrete factors that the BIA must use to determine whether asylum-seekers like Ms. Gao belong to a "particular social group," according to the INA.¹³⁰ For gender-based asylum claims in particular, the

ameliorate the condition of refugees and to implement and enforce laws relating to refugees).

125. See *U.N. Refugee Protocol*, *supra* note 53, at 5-7 (finding that the 1951 Convention Relating to the Status of Refugees ("Convention") and the Protocol had fundamental significance for the protection, welfare, and safety of refugees and for establishing standards requiring freedom of race, religion, etc., for refugees).

126. See *id.* at 33 (requiring that states implement the Protocol in good faith by means such as alerting the U.N. Secretary-General to any laws and regulations adopted to ensure compliance with the Protocol); see also Gómez, *supra* note 54, at 961-62 (explaining that the Protocol accepted the Convention, which mandated that states could not expel or return a refugee to a place where circumstances would imperil his or her life or freedom).

127. See *Keisler v. Hong Ying Gao*, 128 S. Ct. 345, 345 (2007) (remanding Ms. Gao's case to a BIA that is, based upon its past ruling, more likely to uphold her deportation to China and less likely to afford Ms. Gao asylum protections from her abusive fiancé).

128. See Musalo, *supra* note 54, at 123, 126 (arguing that final disposition of Ms. Alvarado's case suffers based upon a lack of guidance to the courts regarding how domestic violence relates to asylum eligibility).

129. See *id.* at 125-27 (lamenting that Ms. Alvarado's case has been pending before the BIA since 2005). Presently, Ms. Gao and Ms. Alvarado are very much alike, as Ms. Gao's case also has been languishing in the BIA's docket since her 2007 loss in the Supreme Court. E-mail from Carole Neville, Partner, Sonnenschein Nath & Rosenthal LLP, to Brenna Finn (July 28, 2008, 15:10:54 EST) (on file with author).

130. See *Immigration and Refugee Board of Canada*, *supra* note 53 (distinguishing

Court must not bar substantial evidence review of particular social group classifications, especially because the human rights of litigants are at stake.¹³¹

Furthermore, guidelines would assist IJs and the BIA to apply the law uniformly to gender-based asylum claims, rather than ignoring those claims because the concept of particular social group is ill-defined.¹³² One suggestion is that the United States model its asylum laws after Canada's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, which address relationships between gender, persecution, and membership in particular social groups and also redefine recognized harms to include forced marriage, domestic violence, and infanticide.¹³³ Asylum jurisprudence in the United States should recognize these harms as well, so that Ms. Gao and others like her are not limited to seeking protection from our northern neighbor alone.¹³⁴

Canada from the United States because Canadian gender guidelines clearly relate gender-based violence to persecution of a particular social group, while such regulations do not exist in the United States); Gómez, *supra* note 54, at 986-87 (decrying the United States' so-called protection of abused female refugees based upon its failure to solidify acceptance of gender-based asylum claims, as countries like Canada, the United Kingdom, and Australia have done, and criticizing its uneven application of unpublished gender regulations and guidelines, where they exist at all).

131. See *Vienna Declaration*, *supra* note 10, pt. I, ¶ 18 (striving to promote and protect women's rights as an integral part of universal human rights); Copelon, *supra* note 54, at 293-95, 366 (applauding international recognition of official and private gender-based violence as a human rights concern in the Vienna Declaration, and arguing that international and domestic law can and should illuminate the evil of gender-based violence by punishing public and private gender violence).

132. See INA, 8 U.S.C. § 1101(a)(42) (2006) (using "particular social group" to define a possible qualification for refugee status, but failing to define the term properly); Gómez, *supra* note 54, at 976-77 (arguing that greater understanding of the harms stemming from gender-based asylum claims will allow the governmental bodies deciding those claims to better protect women fleeing their abusers, as well as more uniformly reach gender-based asylum claim decisions).

133. See *Immigration and Refugee Board of Canada*, *supra* note 53 (publishing guidelines wherein Canada interprets the definition of refugee as necessarily providing protection to women who demonstrate a well-founded fear of gender-related persecution and explaining that the Immigration and Refugee Board intended for the guidelines to streamline and unify the treatment of claimants); Gómez, *supra* note 54, at 978-79 (proffering Canada's gender-based jurisprudence as a guide for change in the United States because Canada, in 1993, became the first country to issue guidelines that specifically address gender-based claims by interpreting the Convention on Relating the Status of Refugees as providing protection for women who demonstrate a well-founded fear of gender-related persecution).

134. See *Gao v. Gonzales*, 440 F.3d. 62, 71 (2d Cir. 2006), *vacated*, *Keisler v. Hong Ying Gao*, 128 S. Ct. 345 (2007) (comporting with humanitarian duties to protect abused women by refusing to condone the IJ's downplaying of the domestic violence Ms. Gao suffered); see also *Immigration and Refugee Board of Canada*, *supra* note 53 (basing analysis upon Canadian guidelines, Ms. Gao likely would have been offered protection because Canadian guidelines allow the linkage between class and persecution to be shown by fear resulting from discrimination on the grounds of gender, including acts of violence by state or non-state actors).

IV. CONCLUSION

Hong Ying Gao is a woman seeking safety and solace and standing in her way is a rule that stubbornly adheres to a xenophobic immigration policy and is inconsistent with domestic protections of judicial review and humanitarian norms that seek to curtail violence against women.¹³⁵ Ms. Gao, and all other paid-for brides who face involuntary, government-enforced marriage, saw the United States as a land of promise and protection; if the ordinary remand rule serves to send Ms. Gao and women like her back to a world of physical and mental abuse, the reputation of the United States will diminish with each innocent turned away.¹³⁶ Thus, the United States must not assist a practice that denies and destroys a woman's power and, more abhorrently, devalues and dehumanizes a woman's identity.¹³⁷

The failure to recognize the loss in reputational capital following invocation of the ordinary remand rule in the wrong situations is most astonishing.¹³⁸ The Supreme Court erred by applying the rule to Ms. Gao's case because the BIA already had an opportunity to review her membership in a particular social group and blindly upheld the IJ's decision that Ms. Gao did not qualify for asylum.¹³⁹ Where an agency has an opportunity to speak to a matter, and the agency rules in a manner wholly inconsistent with the record, courts should feel compelled to address the egregious error before them.¹⁴⁰

Further, the ordinary remand rule suggests internal conflict in domestic

135. See Richey, *supra* note 1, at 1 (noting that Ms. Gao's case represented a civil rights case because money, and not the bride's wishes, is a crucial component of arranged marriages in China, such that a court would likely enforce the marriage despite the fears or safety of the woman, and concluding that, because the power of the Chinese state could bear down on Ms. Gao to enforce the marriage, she is a refugee who deserves protection under U.S. asylum law).

136. See Gómez, *supra* note 54, at 986-87 (criticizing the United States for its hypocrisy in touting itself as a watchdog for human rights while implicitly sanctioning human rights violations by failing to better uphold the values it professes to protect).

137. See Copelon, *supra* note 54, at 304 (explaining that domestic violence is a systemic practice in many societies that fosters patriarchal control of women by perpetuating a woman's dependence on her abuser and defining her as her abuser's property).

138. See Legomsky, *supra* note 41, at 420 (adding that IJ and BIA members have already lost credibility and support based upon damning reviews of their decisions by courts of appeals).

139. See, e.g., *Almaghar v. Gonzales*, 457 F.3d 915, 922-23 (9th Cir. 2006) (holding that remand to the BIA is not necessary where the BIA has already expressed an opinion on an issue because the requirement that the BIA act as the initial reviewer has been satisfied).

140. See Legomsky, *supra* note 41, at 430 (implying that a narrowing of judicial review opportunities in asylum cases is dangerous because the courts provide a deserving applicant with a last opportunity to seek justice).

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affairs by reorganizing separation of powers within the government.¹⁴¹ An overzealous reliance on an administrative agency's ability to make class determinations threatens more than immigration law; it chips away at the larger struggle for rights recognition in all discriminated-against groups by undermining a court's authority to make class determinations.¹⁴² Most importantly, the United States cannot sustain the ordinary remand rule as a time-tested principle of administrative law while hiding behind those tenets of law, hampering recognition of women's rights, and forcing women back into the arms of their abusers.¹⁴³

141. *See id.* at 463 (implying a separation of powers argument against decreasing judicial review because obstruction of judicial review aggrandizes an agency's authority while encroaching upon that of the judicial branch, particularly in cases where judicial review protects the accountability and quality of agency decisions).

142. *See INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (illustrating dangerous reliance on agency expertise concerning classifying people in particular social groups because the agency wrested jurisdiction and authority from the court, such that the court lost power to make class determinations without input from an agency whose expertise is questionable).

143. *See Gómez, supra* note 54, at 961-64 (condemning the United States for ignoring international humanitarian duties because those duties require that a State accept women and girls fleeing abuse).