"HEADS WE WIN; TAILS, LET'S PLAY AGAIN": The Split Over the Credit-as-True Rule in the Ninth Circuit†

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"If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[1]

I. INTRODUCTION

In 2015, Social Security Disability Insurance paid out $143,282 million in cash benefits.[2] Although one might balk at that amount, the average monthly benefit to the roughly nine million eligible recipients[3] was only about $1,165—just "barely enough to keep a beneficiary above the 2014 poverty level ($11,670 annually),"[4] or $972.50 a month. Over one million individuals are currently waiting for a disability appeals hearing decision from an

† Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1111 (2014) (Tashima, J., dissenting) ("Remanding for further proceedings even when the credit-as-true rule is met, as the majority does, ignores these values and permits the Commissioner to administer 'an unfair 'heads we win; tails, let's play again' system of disability benefits adjudication.'" (quoting Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004))).

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On the eve of this Comment's publication, the Honorable Stephen R. Reinhardt of the Ninth Circuit Court of Appeals passed away. Judge Reinhardt authored the 1988 opinion that adopted the credit-as-true rule in the Ninth Circuit. His decisions in this area illustrate a long judicial career of applying the law with justice and humanity. I dedicate this Comment to Judge Reinhardt and his service on the federal judiciary.

1. Abrams v. United States, 250 U.S. 616, 630 (1919).

2. *Total Annual Benefits Paid, by Type of Benefit and Trust Fund, 1937–2015*, SOC. SECURITY & MEDICARE BENEFITS, https://www.ssa.gov/oact/STATS/table4a4.html (last visited Jan. 22, 2018) ($142,703 million in 2016).

3. *Facts*, SOC. SECURITY, https://www.ssa.gov/disabilityfacts/facts.html (last visited Feb. 11, 2018) ("As experts projected for decades, the number of people qualifying for Social Security disability benefits has increased.").

4. *Id.* ("Social Security disability payments are modest.").

administrative law judge ("ALJ").[5] Those individuals can expect to wait between nine to twenty-seven months to receive a decision once they file a petition for a hearing.[6] If a claimant receives an unfavorable result from the Social Security Administration ("SSA")[7] and appeals to a federal district court, she can expect to wait between three[8] to twelve years[9] before receiving the court's decision, which may only remand her case to an ALJ for additional proceedings.

The cost of Disability Insurance and other Social Security programs to the federal government extends beyond cash benefits. In 2015, of the 277,290 civil cases filed in all federal district courts, 18,051 were Social Security related.[10] The district courts in the Ninth Circuit adjudicated 20.61% of those

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5. David Fahrenthold, *Breaking Points: The Biggest Backlog in the Federal Government*, WASH. POST (Oct. 18, 2014), http://www.washingtonpost.com/sf/national/2014/10/18/the-biggest-backlog-in-the-federal-government/.

6. For wait times at each hearing office, see Hearings And Appeals, *Average Wait Time Until Hearing Held Report (For the Month of February 2017)*, SOC. SECURITY, https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (last visited Feb. 11, 2018) ("Archived Data Files" tab for past months' data); *see also* OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., THE SOCIAL SECURITY ADMINISTRATION'S ABILITY TO PREVENT AND DETECT DISABILITY FRAUD: SPECIAL REPORT (2014), https://oig.ssa.gov/sites/default/files/testimony/SSA%27s%20Ability%20to%20Prevent%20and%20Detect%20Disability%20Fraud_0.pdf [hereinafter OIG SPECIAL REPORT] (estimating that the average wait time in 2015 would be 470 days (15.67 months)).

7. Courts refer to the Social Security Administration as "the Agency," "the Commissioner," or "the Secretary." The Article refers to the administration as "SSA."

8. In ascending number of years, see, for example, Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989) (nearly three years from date of the ALJ's denial until heard by the circuit court); Varney v. Sec'y of Health & Human Servs., 846 F.2d 581, 582 (9th Cir. 1988) ("*Varney I*") (five years from when Varney applied for benefits until the circuit court awarded her benefits in *Varney v. Secretary of Health & Human Services*, 859 F.2d 1396, 1401 (9th Cir. 1988) ("*Varney II*")); Connett v. Barnhart, 340 F.3d 871, 872 (9th Cir. 2003) (six years from when Connett applied for benefits until the circuit court remanded to the ALJ for another hearing); Harman v. Apfel, 211 F.3d 1172, 1173–74 (9th Cir. 2000) (nearly six years from when Harman applied for benefits until the circuit court affirmed the denial of benefits); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1094–95 (9th Cir. 2014) (over seven and a half years from when Treichler filed for benefits until the circuit court remanded for additional proceedings).

9. In ascending number of years, see, for example, Swenson v. Sullivan, 876 F.2d 683, 685 (9th Cir. 1989) (nine years from when Swenson applied for benefits until the circuit court heard the case a second time and remanded for benefits); Lingenfelter v. Astrue, 504 F.3d 1028, 1030 (9th Cir. 2007) (over ten years from when Lingenfelter applied for benefits until the circuit court remanded for an award of benefits); Grant v. Comm'r, 111 F. Supp. 2d 556, 557 (9th Cir. 2000) (twelve years from when a class of disability claimants filed an action against an allegedly biased ALJ after his denial of their applications until the circuit court remanded for new hearings).

10. *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_1231.2015.pdf (last visited Feb. 11, 2018).

Social Security related cases.[11] And adjudicating disability claims is expensive.[12] In fiscal year 2011, "the unit cost of adjudicating a disability hearing was $2,752.00, whereas the unit cost of processing an initial disability claim was $1,058.44."[13] In other words, federal courts spent more than twice as much adjudicating a disability appeal as SSA spent processing that claim in the first instance.[14] In light of these figures and the increasing number of individuals who qualify for disability benefits,[15] it seems a prudent question of law and public policy to ask if more effort or prioritization should go into delivering services to those who qualify, or into weeding out those who do not.

Addressing a similar policy question, the Ninth Circuit Court of Appeals, in *Varney v. Secretary of Health and Human Services* ("*Varney II*"), adopted the credit-as-true rule from the Eleventh Circuit.[16] In short, when the credit-as-true rule was originally adopted it stated that if an ALJ failed to properly explain in the record why he discredited a claimant's pain testimony, then the district court reviewing the ALJ's decision would credit the claimant's testimony as true.[17] After crediting the testimony as true, the court would remand the case to the ALJ with an order to award benefits instead of remanding to the ALJ to make findings on the same testimony again.[18] The court originally embraced the rule as a "prophylactic measure"[19] in response to the wait times, multiple adjudicatory hoops, and uncertainty that disability claimants commonly experience.[20]

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11. *Id.* at 5.

12. Although reported data identifying how many of those Social Security related cases were disability claims is not readily available, see discussion *infra* Part III.B for the Article's estimations.

13. Daniel F. Solomon, *Save the Social Security Disability Trust Fund! and Reduce SSI Exposure to the General Fund*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 142, 203 (2016).

14. For the first comprehensive discussion of Social Security disability determination litigation in federal courts, see JONAH B. GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY DISABILITY LITIGATION IN FEDERAL COURTS (2016), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2669&context=faculty_scholarship/.

15. *See supra* note 3.

16. *Varney II*, 859 F.2d 1396, 1396 (9th Cir. 1988).

17. *Id.* at 1401.

18. *Id.*

19. Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1100 (9th Cir. 2014).

20. *Varney II*, 859 F.2d at 1398–99.

But after years of distillation, the credit-as-true rule is now a discretionary measure.[21] Two parallel case lines have developed over the last three decades: the first line began in 1988 with *Varney II*, and the second line began in 2003 after the Ninth Circuit decided that the rule was optional in *Connett v. Barnhart*.[22] The first line of cases (the *Varney* line) has continued to cite primarily pre-*Connett* cases,[23] tends to apply the rule mandatorily and more frequently, and contains more remands to SSA for an award of benefits.[24] The second line (the *Connett* line) builds off of and primarily cites *Connett* and its progeny, tends to exercise discretion to not apply the rule, and results in more remands to SSA to conduct additional proceedings, often on the exact same evidence.[25]

Given the contradictory precedent for district courts in the Ninth Circuit,[26] the Ninth Circuit should hear a case en banc to clarify the law and resolve the apparent intra-circuit split. One panel evidently attempted to do so in *Treichler v. Commissioner of Social Security Administration* in 2014.[27] But one panel alone does not have the power to resolve discrepancy in case law.[28] And given Judge Tashima's strong dissent in that case, the Ninth Circuit should hear a case en banc to resolve three outstanding issues after *Treichler*.[29]

Unless an en banc panel clarifies *Treichler* and the inconsistencies between the *Varney* and *Connett* lines, districts courts must continue to choose between two sets of instructions. And parties can cite, unhelpfully, to either line to support their preferred outcome. The policy reasons for clarifying this tension in the case law are similar to those which surrounded the original adoption of the credit-as-true rule. Those reasons included: (1) giving district courts clear guidance on whether to remand for benefits or for additional proceedings by the ALJ; (2) reducing the wait time for

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21. There may be separation of powers issues between SSA and Article III courts which are relevant to the credit-as-true rule. But the constitutionality of the credit-as-true rule is beyond the scope of the Article.

22. Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).

23. But also post-*Connett* cases that adhere to more traditional *Varney II* application. *See* discussion *infra* Part II.B.

24. *See* discussion *infra* Part II.B.

25. *See* discussion *infra* Part II.B.

26. *See* discussion *infra* Part II.B; *see also* Fong v. Colvin, No. CV 14–6351 JC, 2016 WL 1695347, at *1, *7–8 (C.D. Cal. Apr. 27, 2016).

27. 775 F.3d 1090, 1099–1102 (9th Cir. 2014).

28. Vasquez v. Astrue, 572 F.3d 586, 602 (9th Cir. 2008) (O'Scannlain, J., dissenting) ("Of course, because the crediting-as-true rule is part of our circuit's law, only an en banc court can change it.").

29. *See* discussion *infra* Part III.C.

claimants; (3) increasing the predictability of disability claims results; and (4) increasing judicial and administrative efficiency.[30] These considerations work together to further the purpose of the Social Security Act by ensuring that eligible claimants receive benefits as quickly as possible.[31]

Section A of Part II provides a brief overview of the life of a disability claim. In Section B, the Article outlines one interpretation of the history of the credit-as-true rule's origin and distillation, from 1988 to present. In Part III, the Article (1) notes the flawed reasoning behind *Connett*; (2) estimates some of the financial consequences of the ambiguous caselaw; (3) summarizes how the credit-as-true rule can improve the determination process; and (4) describes the three outstanding issues about which there is disagreement between the majority and dissent in *Treichler*. Finally, Part III argues the Ninth Circuit should hear a case en banc to resolve these three disagreements, which are predated by thirty years of irreconcilable tension in the law.

II. BACKGROUND

A. The Life Cycle of a Social Security Disability Claim

If a claimant receives a wholly or partially unfavorable result at each step of the disability determination process, then the following is a brief overview[32] of the steps she takes to appeal. First, a claimant files her application and receives an initial determination at the local Disability Determination Services Office ("DDS"),[33] and then she requests a reconsideration of that initial decision.[34] Next, she requests a hearing with an ALJ.[35] Then, she appeals to the Council of Appeals, which has discretionary

30. *See Varney II*, 859 F.2d 1396, 1398 (9th Cir. 1988).

31. *See id.*

32. For a discussion on the beginning of Social Security, see, for example, EDWARD D. BERKOWITZ & LARRY DEWITT, THE OTHER WELFARE: SUPPLEMENTAL SECURITY INCOME AND U.S. SOCIAL POLICY (2013); Sarah Hoffman, Comment, *Falling Through the Cracks: How the 20/40 Rule Discriminates Against Women Seeking Social Security Disability Insurance Benefits and What Congress Can Do About It*, 113 PENN ST. L. REV. 621, 621–31 (2008). The SSA administers several programs. *Benefits*, SOC. SECURITY ADMIN., https://www.ssa.gov/site/menu/en/ (last visited Feb. 11, 2018).

33. For a discussion on these sequential steps, see, for example, OIG SPECIAL REPORT, *supra* note 6, at 7–42; discussion *infra* Part II.A and accompanying footnotes.

34. OIG SPECIAL REPORT, *supra* note 6, at 7–8.

35. *Id.*

review power.[36] She then appeals to the district court for review of SSA's decision, and then finally to the Ninth Circuit Court of Appeals.[37]

1. Filing Application and Initial Determination

Once a claimant applies for disability benefits,[38] DDS makes the initial determination to approve or deny the claim.[39] DDS uses a "sequential evaluation process"[40] for each claim.[41] First, DDS determines whether a claimant does "substantial gainful activity;"[42] if yes, then she is not disabled.[43] Second, DDS considers the durational aspect of the claimant's impairments.[44] The claimant's "severe medically determinable physical or mental impairment[s]" must meet the statutory duration requirements.[45] Third, DDS considers whether the claimant's impairments meet the statutory level for medical severity.[46] Fourth, DDS considers its own assessment of the claimant's residual functional capacity ("RFC") and if the claimant can do past relevant work.[47]

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36. *Id*.

37. *Id.*

38. 20 C.F.R. § 404.603 (2017); *see also Checklist for Online Adult Disability Application*, SOC. SECURITY ADMIN., https://www.ssa.gov/hlp/radr/10/ovw001-checklist.pdf (last visited Feb. 11, 2018) (listing information claimants must gather).

39. 20 C.F.R. §§ 404.902–.906 (2017); *see also* Jacob Bender, Note & Comment, *Torn Between Two Masters: Flaws in the Social Security Disability Process*, 45 U. TOL. L. REV. 619, 620 (2014) ("There is a 31.8% approval rate at this point in the process . . . . There is only an 11.6% approval rate at the staff reconsideration stage." (footnotes omitted)). The legal standard is preponderance of the evidence. 20 C.F.R. § 404.902. DDS mails notice to the claimant of its decision, including the evidentiary basis for its decision. 20 C.F.R. § 404.904.

40. Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 18 (2003) (citing 20 C.F.R. § 404.1520 (2017) and discussing the sequential determination process).

41. The process for claimants under eighteen is slightly different. *Id.* at 18 n.65.

42. 20 C.F.R. § 404.1510 (2017); Nathan O. Hubley, Note, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot Be Touched*, 43 VAL. U. L. REV. 353, 362 (2008).

43. Hubley, *supra* note 42, at 362.

44. 20 C.F.R. § 404.1520 (a)(4)(ii); *see also id.* § 404.1509.

45. 20 C.F.R. § 404.1520 (a)(4)(ii); Hubley, *supra* note 42, at 362; *see also* Solomon, *supra* note 13, at 203 (discussing severity requirements and arguing that the severity standard is too weak as practiced by SSA now).

46. 20 C.F.R. § 404.1520 (a)(4)(iii).

47. *Id.* § 404.1520 (a)(4)(iv).

The claimant has the burden of proof for steps one through four, then SSA has the burden at step five.[48] Fifth, DDS considers the claimant's RFC, along with her age, education, and work experience to determine whether she can make an adjustment to other work.[49] SSA's sequential determination means the result of each step determines if SSA proceeds to the next step.[50]

2. Review by an ALJ

If the claimant disputes a determination, then she can request[51] a hearing with an ALJ.[52] At the hearing, the claimant may present new evidence and witnesses,[53] and the ALJ issues a decision based on the preponderance of the evidence.[54] The five steps of the ALJ's decision-making mirror the five steps of the initial determination.[55] Because the heart of this discussion is how Article III judges respond to inadequacies in the ALJ's determination, the Article makes a few more notes on ALJs in general and the evidence upon which they rely for their decisions.

a. *ALJs Generally*

The caseload for ALJs nationally rose from 589,449 cases in fiscal year 2008 to 810,715 cases in fiscal year 2014.[56] That means that for the 1,445 ALJs employed by SSA in 2014,[57] each had an average backlog of 561 cases.

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48. Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009).

49. 20 C.F.R. § 404.1520 (a)(4)(v).

50. OIG SPECIAL REPORT, *supra* note 6, at 9. SSA does not consider factors in the market, a claimant's age or education in making these decisions, nor does it consider whether the claimant would, in fact, be hired, only that she is capable of being hired and working. *See* Hubley, *supra* note 42, at 366 nn.50–51. A claimant can request a Reconsideration of Initial Determination, which DDS conducts using the same process. 20 C.F.R. § 404.907 (2017). The initial determination is binding unless the claimant requests reconsideration within the stated time period. 20 C.F.R. § 404.905 (2017).

51. 20 C.F.R. § 404.933 (2017).

52. *See generally* 20 C.F.R. §§ 404.929–.943 (2017).

53. 20 C.F.R. §§ 404.935, .950 (2017).

54. 20 C.F.R. § 404.929.

55. 20 C.F.R. § 404.1520 (2017).

56. Fahrenthold, *supra* note 5.

57. *Id.* SSA employed 1,618 judges in fiscal year 2016. *ALJ Disposition Data*, SOC. SECURITY ADMIN., https://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html (last visited Feb. 11, 2018) (For Reporting Purposes: 10/01/2016 through 12/30/2016); *see also* Doug Walker, *Answer the Call to Public Service, Become an Administrative Law Judge*, SOC. SECURITY ADMIN. (Mar. 28, 2016), http://blog.ssa.gov/answer-the-call-to-public-service-become-an-administrative-law-judge/ (reporting that SSA employs about 1,500 of the 1,700 federal ALJs).

Wait times in 2008 caused SSA to push ALJs to work faster,[58] and backlogs and wait times did fall.[59] But this success had an interesting result, or perhaps happened for an interesting reason. The approval rate for cases during that time was sixty-two percent on average.[60] One reason for the increase in approvals was that finding a claimant disabled required less writing and less time.[61] ALJs do not have clerks; they read all medical records and testimony themselves.[62] SSA eventually backed off of its push for speed.[63] ALJs are limited to completing 720 cases a year now and only approve about forty-four percent of cases.[64]

b. *ALJ Tools: Pain and Symptom Testimony and Vocational Expert Evidence*

ALJs conduct a two-step analysis to determine if a claimant's subjective pain testimony is credible. First, the ALJ determines if "objective medical evidence" reasonably supports the claimant's alleged impairment.[65] If so, the ALJ can only reject her testimony by stating specific reasons for discrediting it.[66] In other words, if the ALJ rejects the claimant's own testimony about her pain, then he is implicitly saying she is malingering.

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58. Fahrenthold, *supra* note 5.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* Perhaps it is unsurprising then that the ALJ who approved 94% of the thousand cases he heard every year between 2005 and 2013 (awarding $2.5 billion in benefits) allegedly fell asleep in one of his hearings. *Id.*

63. *Id.*

64. *Id.* Bias and inconsistency in ALJ determinations remain a serious problem. *See* Bender, *supra* note 39, at 619 ("Despite the average approval rate in 2012 being 56.1%, some ALJs approved more than 90% of claimants while others approved less than 5%. Since it seems unlikely that these ALJs would see markedly different groups of claimants from their peers, these disparities would seem to suggest that some ALJs are misapplying the rules of the SSA when they make their decisions."); *see also ALJ Disposition Data*, *supra* note 57. *See* Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 770 (2005).

65. Lingenfelter v. Astrue, 504 F.3d 1028, 1035–36 (9th Cir. 2007). At this step, a claimant does not need to show that it is reasonable her impairment would cause the severity of the symptoms she professes to have, she just has to show it is reasonable that her impairment could cause some degree of her alleged symptoms. Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996).

66. Moore v. Comm'r of Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002) (noting the standard is clear and convincing—"the most demanding required in Social Security cases").

ALJs consider Vocational Expert ("VE") evidence at the third step of the five-step determination process.[67] The VE is an independent consultant hired by SSA to give an opinion about work the claimant could perform with her skills.[68] At the fourth step of the sequential process, the VE compares the claimant's RFC to the claimant's past relevant work to determine if she would be able to hold any of the jobs she had previously held in the past fifteen years.[69]

3. United States District Court Reviews SSA's Decision

The Council of Appeals has discretionary review of an ALJ's decision.[70] Assuming the Council declines review or affirms the denial, the ALJ's decision becomes final, at which point a claimant may appeal the decision in federal district court.[71] The district court reviews SSA's decision de novo but will uphold the ALJ's determination unless the ALJ committed legal error or substantial evidence did not support the decision.[72]

4. Claimant Appeals to the Ninth Circuit Court of Appeals

a. *Circuit Court of Appeals' Standard of Review*

The circuit court reviews the district court's order de novo, but reviews its decision to remand for additional proceedings or benefits for abuse of

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67. DDS Office considers this same evidence at its third step of the process as well. *See supra* notes 32–50.

68. Hubley, *supra* note 42, at 368. The VEs refer to the Dictionary of Occupational Titles ("DOT"). *Id.* at 353. "The DOT is a publication of the U.S. Department of Labor that provides basic occupational information by classifying jobs into occupations based on their similarities and also defining the structure and content of all listed occupations. Interestingly, this source was last modified twenty-five years ago, and the latest edition, the Fourth Edition, of the DOT was last updated in 1991." *Id.* at 371. The "archaic" DOT includes many jobs that do not exist anymore, and fails to include many jobs that do exist in the current economy. *Id.* at 372.

69. *Id.* at 373.

70. *See* 20 C.F.R. § 404.970 (2017).

71. 42 U.S.C. § 405(g) (2012) ("The court shall have power to enter . . . a judgment affirming, modifying, or reversing the decision of [SSA], with or without remanding the cause for a rehearing.").

72. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). Substantial evidence is "more than a mere scintilla, but less than a preponderance." *Id.* (citing Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007)). The court considers the entire record, and cannot affirm on a ground different than the one upon which the ALJ made her decision. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003).

discretion.[73] In the Social Security Act, Congress granted the district courts the "additional power" to reverse or change SSA's decision without remanding for additional proceedings.[74] In other words, if the district court disagrees with the ALJ, the court can reverse the ALJ's decision and remand for an immediate award of benefits. Without this grant of power, the district court could only remand a case for additional proceedings to address the error, but never for an immediate award of benefits.[75]

b. *Ordinary Remand Rule*

If the district court finds SSA erred in denying benefits, the court can reverse SSA's decision and remand for additional proceedings or an immediate award of benefits.[76] But the ordinary remand rule[77] states: "the proper course, except in rare circumstances"[78] is to remand for additional proceedings when the record does not support SSA's action, when SSA has not considered all the relevant factors, or when the reviewing court cannot evaluate SSA's decision based on the record before it.[79] The tension between remanding for benefits or additional proceedings, whether legal or ideological, is at the heart of this intra-circuit split. Put one way, when a court remands for additional proceedings it gives SSA a second pass at the case to address its error. In contrast, when a court remands for an immediate award of benefits, it remedies the error in favor of the claimant. In the Social Security Disability Insurance context, this tension may be condensed as a choice between the ordinary remand rule and the credit-as-true rule.[80]

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73. Harman v. Apfel, 211 F.3d 1172, 1173 (9th Cir. 2000).

74. *Id.* at 1177–78.

75. *Id.* at 1178 ("[T]he district court's exercise of such authority was intended to be discretionary and should be reviewed for abuse of discretion.").

76. Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1099 (9th Cir. 2014).

77. The "ordinary remand" rule applies in all agency decision-making contexts. UOP v. United States, 99 F.3d 344, 351 (9th Cir. 1996) ("The general rule is that when an administrative agency has abused its discretion or exceeded its statutory authority, a court should remand the matter to the agency for further consideration." (quoting Abramowitz v. EPA, 832 F.2d 1071, 1078 (9th Cir. 1987))).

78. INS v. Ventura, 537 U.S. 12, 16 (2002) ("No one disputes the basic legal principles that govern remand . . . . '[J]udicial judgment cannot be made to do service for an administrative judgment.' Nor can an 'appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency.' A court of appeals 'is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" (citations omitted) (quoting SEC v. Chenery Corp., 318 U.S. 80, 88 (1943))).

79. *See Treichler*, 775 F.3d at 1099–1100.

80. The ordinary remand rule applies in review of other agencies' decisions too. In 2008, Judge O'Scannlain voted, unsuccessfully, to grant a petition for a rehearing en banc of a Social

B. Case History of the Intra-Circuit Split: From Varney II *(1988) to* Treichler *(2014)*

After the Ninth Circuit adopted the credit-as-true rule from the Eleventh Circuit in 1988,[81] two lines of circuit court cases diverged over whether the rule was mandatory or discretionary.[82] The lines nearly exist in silos; research beginning in one line of cases may not immediately reveal the other. The credit-as-true rule's development spans over eighteen Ninth Circuit Court of Appeals decisions and nearly thirty years without true resolution.[83]

The first line of cases, the *Varney* line,[84] includes cases with language indicating the credit-as-true rule is more or less mandatory after the three-part test is satisfied. Although cases in the *Varney* line seem to adhere to the rule's origin, the *Varney* line still admits flexibility as other panels distill the rule in the second line of cases. The second line is the *Connett* line.[85] As a

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Security disability case. Vasquez v. Astrue, 572 F.3d 586, 601 (9th Cir. 2008) (O'Scannlain, J., dissenting). Dissenting from the denial, he cited the United States Supreme Court's then-recent decision in an immigration case, *INS v. Ventura*, for the proposition that the credit-as-true rule might be unconstitutional. *Id.* In *Ventura*, the Supreme Court overturned the Ninth Circuit's decision. 537 U.S. at 18. Instead of remanding to the immigration judge to address issues in the record, the Ninth Circuit had reversed the immigration judge and granted Ventura asylum. *Id.* at 15. In language reminiscent of reasoning from disability cases, the Ninth Circuit stated that it did "not [need to] remand . . . when it [was] clear that [it] would be compelled to reverse the . . . decision if [it was] decided . . . against the applicant." *Id.* The Supreme Court rebutted: "Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 16. The Court stated: "[E]very consideration that classically supports the law's ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17.

81. *Varney II*, 859 F.2d 1396, 1401 (9th Cir. 1988).

82. *See* discussion *infra* Part B.

83. *See* discussion *infra* Part B.

84. *See infra* notes 131–41 and accompanying text.

85. The line began to develop with *Swenson v. Sullivan*, 876 F.2d 683 (9th Cir. 1989), but the court most emphatically stated the new distilled rule in *Connett v. Barnhart*, 340 F.3d 871 (9th Cir. 2003).

blueprint for how the case history progressed, the two lines include the following cases:

Date	***Varney* Line**	***Connett* Line**	Date
1988	*Varney I*,[86] *Varney II*[87]	*Bunnell v. Sullivan*[88]	1991
1989	*Hammock v. Bowen*[89]	*Dodrill v. Shalala*[90]	1993
1989	*Swenson v. Sullivan*[91]	*Byrnes v. Shalala*[92]	1995
2002	*McCartey v. Massanari*[93]	*Nguyen v. Chater*,[94] *Smolen v. Chater*[95]	1996
2004	*Benecke v. Barnhart*[96]	*Connett v. Barnhart*[97]	2003
2009	*Vasquez v. Astrue*[98]	*Moisa v. Barnhart*[99]	2004
2014	*Garrison v. Colvin*[100]	*Treichler v. Commissioner of Social Security*[101]	2014

The Article discusses the two lines in tandem in chronological order. Section II.B.1 discusses the Ninth Circuit's adoption of the credit-as-true rule. Section II.B.2 notes a slight expansion but still mostly traditional application. Section II.B.3 discusses the distillation of the rule and refining of its test. Section II.B.4 addresses the beginning of divergence regarding the rule's application. Section II.B.5 comprises an analysis of the majority and dissent in *Vasquez v. Astrue*, where the court noted the split but did not review en banc. Finally, Section II.B.6 discusses the latest attempt by the Ninth Circuit to clearly state the law in *Treichler*.

86. *Varney I*, 846 F.2d 581 (9th Cir. 1988).
87. *Varney II*, 859 F.2d 1396 (9th Cir. 1988).
88. Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991).
89. Hammock v. Bowen, 879 F.2d 498 (9th Cir. 1989).
90. Dodrill v. Shalala, 12 F.3d 915 (9th Cir. 1993).
91. Swenson v. Sullivan, 876 F.2d 683 (9th Cir. 1989).
92. Byrnes v. Shalala, 60 F.3d 639 (9th Cir. 1995).
93. McCartey v. Massanari, 298 F.3d 1072 (9th Cir. 2002).
94. Nguyen v. Chater, 100 F.3d 1462 (9th Cir. 1996).
95. Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996).
96. Benecke v. Barnhart, 379 F.3d 587 (9th Cir. 2004).
97. Connett v. Barnhart, 340 F.3d 871 (9th Cir. 2003).
98. Vasquez v. Astrue, 572 F.3d 586 (9th Cir. 2008).
99. Moisa v. Barnhart, 367 F.3d 882 (9th Cir. 2004).
100. Garrison v. Colvin, 759 F.3d 995 (9th Cir. 2014).
101. Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090 (9th Cir. 2014).

1. Beginning and Expansion: *Varney I* and *Varney II* (1988); *Hammock v. Bowen* (1989)

In *Varney v. Secretary of Health and Human Services* ("*Varney I*"), the precursor to *Varney II*, the Ninth Circuit reversed the denial of disability benefits to Betty Varney and remanded her claim to SSA for additional proceedings, because the ALJ failed to give specific reasons for discrediting Varney's pain testimony.[102] Although Varney received her requested relief in *Varney I*, she petitioned for a rehearing in *Varney II*.[103] Varney requested that the court adopt the credit-as-true rule from the Eleventh Circuit, which stated that if the ALJ did not give adequate reasons for discrediting pain testimony, then the court would accept the testimony as true on appeal.[104] Varney argued there was no need for additional administrative proceedings in her case and requested a remand for an immediate award of benefits.[105]

The *Varney II* court noted the delay[106] that disabled applicants can experience while waiting to receive benefits and stated that the credit-as-true rule helped to further the purpose of the Social Security Act by avoiding adjudicative redundancies.[107] It held that:

> In cases where there are no outstanding issues that must be resolved before a proper disability determination can be made, and where it is clear from the administrative record that the ALJ would be required to award benefits if the claimant's excess pain testimony were credited, we will not remand solely to allow the ALJ to make specific findings regarding that testimony. Rather, we will . . . take that testimony to be established as true.[108]

In other words, if the ALJ failed to make the required, specific findings to discount pain testimony or medical evidence, and if it is clear from the record that the claimant would otherwise be entitled to benefits if her testimony were

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102. *Varney I*, 846 F.2d 581, 584–86 (9th Cir. 1988).

103. *Varney II*, 859 F.2d 1396, 1396, 1397 (9th Cir. 1988) (Browning, Hug & Reinhardt, JJ.).

104. *Id.* at 1397.

105. *Id.*

106. *Id.* at 1398–99 ("Perhaps most important, by ensuring that credible claimants' testimony is accepted the first time around, the rule reduces the 'delay and uncertainty' often found in this area of the law, and ensures that deserving claimants will receive benefits as soon as possible . . . . [A]pplicants for disability benefits often suffer from painful and debilitating conditions, as well as severe economic hardship. Delaying the payment of benefits by requiring multiple administrative proceedings that are duplicative and unnecessary only serves to cause the applicant further damage—financial, medical, and emotional. Such damage can never be remedied." (citations omitted)).

107. *Id.*

108. *Id.* at 1401 (footnote omitted) (citation omitted).

credited as true, then the court will take the testimony as true and remand for benefits. Before the credit-as-true rule, the court would reverse the ALJ for failing to make specific findings and then remand for the ALJ to do what he should have done the first time.

The court reasoned that mandating ALJs to identify the discrediting factors in the first instance would improve their performance by "discouraging them from 'reach[ing] a conclusion first, and then attempt[ing] to justify it by ignoring competent evidence'" later.[109] The court also stated that the rule ensured eligible claimants received benefits as quickly as possible.[110] If ALJs were to discover valid reasons for discrediting a claimant's pain testimony, it was reasonable to require them to articulate those reasons in the initial decision.[111] The court did not decide whether the credit-as-true rule applied when remand was required for other reasons—such as to clarify an issue unrelated to an ALJ's failure to make specific findings about discrediting pain testimony. A year later, in *Hammock v. Bowen*,[112] the court applied the rule in such a case.

In *Hammock*, the court held that the credit-as-true rule applied to medical opinion evidence as well, and that it could apply even in cases where the application would not result in the immediate remand for benefits.[113] The *Hammock* court remanded the case back to the ALJ for additional VE evidence, but ordered the ALJ to credit the claimant's pain testimony as true for determining if benefits were due: "We extend *Varney II* to cover the present case because the delay experienced by Hammock has been severe and because of Hammock's advanced age."[114]

Thus, *Hammock* represents an expansion of the credit-as-true rule.[115] There were outstanding issues in the record that required resolution—for which the court remanded—and it was not clear that Hammock was entitled to benefits, even if her testimony were credited as true.[116] But the court

109. *Id.* at 1398 (quoting Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984)).
110. *Id.* at 1398–99.
111. *Id.* at 1398.
112. Hammock v. Bowen, 879 F.2d 498, 504 (9th Cir. 1989).
113. *Id.* at 503.
114. *Id.* at 503–04.
115. But perhaps only under the facts of that case. *See* Vasquez v. Astrue, 572 F.3d 586, 599–600 (9th Cir. 2008) (Hawkins, J., concurring) (arguing that *Hammock* was a narrow expansion under the facts of that case). *But see id.* at 603 (O'Scannlain, J., dissenting) (arguing that *Hammock* represented an irreconcilable expansion of the rule); *see also* Trevizo v. Berryhill, 871 F.3d 664, 683 (9th Cir. 2017) (finding "exceptional facts" supporting a remand for benefits included that claimant was sixty-five and had been seeking benefits for seven years).
116. *Hammock*, 879 F.2d at 504.

applied the rule out of consideration for Hammock's age and the delay she had experienced adjudicating her claims.

2. Holding Steady: *Swenson v. Sullivan* (1989)

In *Swenson v. Sullivan*, the court[117] applied the credit-as-true rule in traditional *Varney*-like fashion.[118] The court found the ALJ failed to state sufficient reasons for rejecting Swenson's testimony and the VE's testimony contradicted the reality of Swenson's condition.[119] The VE's evidence showing that "several thousand jobs existed" for a person with Swenson's impairments (minus evidence of Swenson's professed depression and fatigue) was "dubious" given that the VE also testified there would be fewer jobs for someone disabled under the conditions Swenson testified he experienced.[120] The ALJ failed to clarify the inconsistencies in the VE's testimony or state why he believed the evidence that there were several thousand jobs for Swenson.[121]

The court did not view the VE's inconsistent testimony as an outstanding issue that needed resolution, and so it found Swenson disabled and remanded for benefits.[122] Although the court cited *Varney II*, its language allowed—it seems, unintentionally—for more flexibility in the rule: "The decision whether to remand a case for additional evidence or simply to award benefits is in *our discretion*. We *may* direct the award of benefits where no useful purpose would be served by further administrative proceedings and the record has been thoroughly developed."[123] Here, the court used its discretion to apply the credit-as-true rule. But later panels used this "no useful purpose" language to justify their decisions not to apply the rule.[124]

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117. Swenson v. Sullivan, 876 F.2d 683, 684 (9th Cir. 1989) (Wright, Sneed & Alarcon, JJ.).

118. *Id.* at 688.

119. *Id.* at 688–89.

120. *Id.*

121. *Id.* This inconsistency could have easily constituted an outstanding ambiguity in the record, providing the court with an option that it did not take. The court could have taken the expanded *Hammock* approach and remanded for proceedings, instructing the ALJ to credit Swenson's testimony as true for purposes of determining disability but still allowing the ALJ to make findings regarding the VE testimony. *See Hammock*, 879 F.2d at 504.

122. *Swenson*, 876 F.2d at 689.

123. *Id.* (emphasis added) (citations omitted).

124. The court's language in *Lester v. Chater* six years later seemed to once again strengthen the mandatory, straightforward nature of the rule. *See* Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). Finding that Lester would have been disabled if his testimony was true, the court credited his pain testimony and remanded for benefits, citing *Hammock* and *Varney II*, because "[n]o

3. Distillation and Development of the Three-Part Test: *Smolen v. Chater* (1996); *McCartey v. Massanari* (2002)

After the Ninth Circuit adopted the two-pronged inquiry in *Varney II*,[125] the panels used various reiterations to determine whether to remand for additional proceedings or benefits. These re-formulations always centered on the ALJ's failure to state sufficient reasons for rejecting evidence but varied with the "outstanding issues" or "no useful purpose" tests. In *Smolen v. Chater*,[126] the court solidified the three-part test for applying the credit-as-true rule:

> In the past, we have credited evidence and remanded for an award of benefits where (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.[127]

Although the court noted it had discretion, it remanded for benefits once the three-part test was satisfied.[128] Given the conflicting evidence in the record before it, the court certainly could have remanded for additional proceedings. Yet, the *Smolen* test and the court's application of it still reflected an adherence to the original *Varney II* rule.

Still proceeding along the *Varney* line, the court's decision in *McCartey v. Massanari*[129] demonstrates how much force the credit-as-true rule once had. Judge Reinhardt, who authored the majority opinion in *Varney II*, wrote the majority opinion. The *McCartey* court[130] decided, as a matter of first impression, that Veterans Affairs ("VA") disability determinations are to be given "great weight" in an ALJ's disability determination.[131] Even though the

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purpose would be served by remanding for further proceedings." *Id.* (footnotes omitted) (citation omitted).

125. *See Varney II*, 859 F.2d 1396, 1401 (9th Cir. 1988).

126. Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996).

127. *Id.* at 1292. The courts have the statutory power to exercise discretion to reverse, remand, or modify a decision under 42 U.S.C. § 405(g). When the Article discusses the courts' discretion to remand for benefits or additional proceedings it is referring to the discretion to do so under the credit-as-true rule. In other words, the statute allows courts to remand; but the credit-as-true rule—as originally adopted—instructed the courts when remand for additional proceedings was not within their discretion.

128. *Id.*

129. McCartey v. Massanari, 298 F.3d 1072, 1077 (9th Cir. 2002).

130. *Id.* at 1073 (Schroeder, Nelson & Reinhardt, JJ.).

131. *Id.* at 1076.

ALJ did not have this guiding law when he denied McCartey's disability application, the court still found that the ALJ erred.[132] The court determined that McCartey was disabled and remanded for benefits.[133] The court recognized the new standard of "discretion" to remand for additional evidence or for benefits, and recited the three-prong *Smolen* test.[134] But it stated "a finding of disability [was] clearly required"[135] rather than remanding for the ALJ to make new findings in light of the new law the court had just declared. Perhaps *McCartey* was Reinhardt's attempt to apply the credit-as-true rule in the manner he initially envisioned when he authored *Varney II*.

4. The Split: *Connett v. Barnhart* (2003); *Benecke v. Barnhart* (2004)

One year after *McCartey*, the court decided *Connett v. Barnhart*.[136] From 1988, when the Ninth Circuit adopted the credit-as-true rule, until 2003, just before *Connett*, the court had only slightly distilled the rule. Except for the discretionary *Smolen* test, the rule essentially remained intact as circuit law, with few exceptions regarding its application. *Connett* represented a marked departure, and the *Connett* decision is now cornerstone support for the proposition that courts have discretion to remand a case to the ALJ for additional proceedings on specific findings alone.

In 2003, the *Connett* court[137] declared:

> [W]e are not convinced that the "crediting as true" doctrine is mandatory in the Ninth Circuit. Despite the seemingly compulsory language in *McCartey* and *Swenson*, there are other Ninth Circuit cases in which we have remanded solely to allow an ALJ to make specific credibility findings. In *Dodrill*, for example, our court specifically remanded for the ALJ to "articulat[e] specific findings for rejecting [the claimant's] pain testimony and the testimony of lay witnesses." . . .
>
> . . . .
>
> Moreover, the propriety of remanding for reconsideration of credibility determinations was implicitly approved by our court en banc in *Bunnell v. Sullivan*. . . . The en banc court specifically

132. *Id.* at 1076–77.
133. *Id.* at 1077.
134. *Id.* at 1076–77.
135. *Id.* at 1077.
136. 340 F.3d 871 (9th Cir. 2003).
137. *Id.* at 872 (Lay, Wallace & Tallman, JJ.).

> affirmed the "district court decision in *Bunnell* remanding the case to the Secretary."
>
> These opinions establish that we are not required to enter an award of benefits upon reversing the district court. Instead of being a mandatory rule, we have some flexibility in applying the "crediting as true" theory. There is no other way to reconcile *Dodrill*, *Bunnell*, *Nguyen*, and *Byrnes* with our other opinions.[138]

The court's language is telling for two reasons. First, in spite of the *Smolen* test's discretionary language that was already part of the application of the credit-as-true rule, the *Connett* court was still compelled to explain why the rule was not mandatory. This explanation suggests that the view that the credit-as-true rule was mandatory must have been a common enough interpretation of precedent among enough of the other panels at that time that the court needed to address it. "[W]e are not convinced" seems to suggest that other judges—outside of this single panel in the largest circuit in the country—may have been convinced of the opposite.

Second, the court cited four cases as support for the proposition that the rule was not mandatory.[139] *Connett* marked a major shift in how the Ninth Circuit applied the credit-as-true rule, beginning—or, perhaps, simply emphasizing—the tension within the circuit. Yet, in spite of the court's argument that its holding was the only way to reconcile those four cases with the rest of the circuit's case law,[140] those four cases do not contain the words "credit-as-true rule," nor did they quite address what the court claimed.

a. Bunnell v. Sullivan *(1991)*

The *Connett* court cited *Bunnell v. Sullivan*[141] as support for the conclusion that the Ninth Circuit had "implicitly approved" remanding for additional proceedings.[142] However, the *Bunnell* decision[143] was a rehearing of two earlier decisions to decide the proper standard for evaluating pain testimony.[144] In both cases, the ALJs had discredited the claimants' pain testimony because the claimants had not presented objective evidence to fully

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138. *Id.* at 876 (citations omitted).
139. *Id.*
140. *Id.*
141. Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (en banc).
142. *Connett*, 340 F.3d at 876.
143. *Bunnell*, 947 F.2d at 342 (en banc) (Tang, Schroeder, Fletcher, Pregerson, Reinhardt, Beezer, Wiggins, Kozinski, Thompson, O'Scannlain & Trott, JJ.).
144. *Id.*

corroborate their pain.[145] The court determined the standard for discrediting pain testimony,[146] and then affirmed one remand and remanded the second case back to SSA for additionally proceedings.[147] The court remanded because it had just decided, as a matter of first impression, the proper standard for evaluating pain testimony. Simply, the court remanded because a proper hearing of the evidence under the correct legal standard had never occurred. It did not remand the cases to the ALJ to make additional findings under the circumstances contemplated when the credit-as-true rule is at issue. In fact, the words "credit-as-true" appear nowhere in the opinion.

b. Dodrill v. Shalala *(1993)*

The *Connett* court cited *Dodrill* for the proposition that the court had previously remanded a case to the ALJ to make specific findings about pain testimony that he had discredited—contrary to the credit-as-true rule.[148] In *Dodrill v. Shalala*, the ALJ had found Dodrill was not disabled because she had sufficient RFC to perform past work.[149] The *Dodrill* court[150] found that the ALJ failed to make sufficient findings regarding why he rejected Dodrill's pain testimony[151] and improperly discredited her witnesses, but the court speculated as to why he may have done so.[152] Even though the court found the ALJ's decision was unsupported by substantial evidence, it remanded to the ALJ to conduct additional proceedings, with the same evidence, to provide sufficient reasons for rejecting Dodrill's testimony and witnesses.[153]

The court did not find that the record was incomplete. The only outstanding issue the ALJ failed to resolve was whether Dodrill's obesity was

145. *Id.* at 343.

146. *Id.* at 343–46. The court held that an adjudicator must make specific findings based on the evidence, but that he could discredit pain testimony based on inconsistencies in the record. *Id.* at 346–47. But the court stated an adjudicator "may not discredit a claimant's testimony of pain and deny disability benefits solely because the degree of pain alleged by the claimant is not supported by objective medical evidence." *Id.*

147. *Id.* at 348.

148. Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).

149. Dodrill v. Shalala, 12 F.3d 915, 917 (9th Cir. 1993).

150. *Id.* at 917 (Goodwin, Camby & Kozinski, JJ.).

151. *Id.* at 918.

152. *Id.* at 918–19. The court also found the ALJ failed to properly consider Dodrill's obesity in his determination. *Id.* at 919.

153. *Id.* Again, the *Smolen* test to apply the credit-as-true rule is when "(1) the ALJ has failed to provide legally sufficient reasons for rejecting . . . evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited." Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996).

remedial.[154] The court indicated evidence that Dodrill's obesity may not have been remedial; if it was not, the court directed the ALJ to weigh that factor as contributing to her disability and then re-weigh her impairments.[155] Regardless of what the ALJ determined on that fact, he was evaluating the exact same evidence again. If the court did not find substantial evidence to support the ALJ's findings and did not find an incomplete record, then the court should have applied the credit-as-true rule. But the court did not even mention the rule nor justify why it did not apply. To remand an entire record for re-evaluation by the same ALJ who failed to state sufficient reasons for a denial the first time was exactly the result that *Varney II* and the credit-as-true rule meant to avoid.[156]

c. Byrnes v. Shalala *(1995)*

As with *Bunnell* and *Dodrill*, a search through *Byrnes v. Shalala*[157] will not yield the words "credit-as-true." The *Connett* court cited *Byrnes* language in a parenthetical to support that it could remand the same record to an ALJ to further evaluate a claimant's credibility.[158] This parenthetical needs context. In *Byrnes*, the ALJ used an incorrect legal standard to evaluate Byrnes' testimony regarding the severity of his symptoms, and the court[159] remanded for the ALJ to evaluate Byrnes' same testimony again because the court could not tell if the ALJ had otherwise permissibly discredited it.[160] In the *Byrnes* court's barely three-page opinion, it did not discuss why, with a complete record and an ALJ's insufficient findings before it, it did not apply the credit-as-true rule. Nor did the *Connett* court sufficiently explain why a case that did not even mention the credit-as-true rule supported its proposition that the rule was discretionary. The case law preceding *Byrnes* would have, at a minimum, instructed a discussion of why the rule did not apply under those circumstances.[161]

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154. *Dodrill*, 12 F.3d at 919.

155. *Id.*

156. *See Smolen*, 80 F.3d at 1292; *Varney II*, 859 F.2d 1396, 1401 (9th Cir. 1988).

157. Byrnes v. Shalala, 60 F.3d 639 (9th Cir. 1995).

158. Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).

159. *Brynes*, 60 F.3d at 640 (Schroeder, Beezer & Thompson, JJ.).

160. *Id.* at 642.

161. There is always the possibility that the claimant did not raise the rule in her argument. But the rule is circuit law, and *Byrnes* was pre-*Connett*; if the necessary and sufficient conditions for the rule were present, *Varney II* instructed the court to apply it.

d. Nguyen v. Chater *(1996)*

The *Connett* court cited *Nguyen v. Chater*[162] for implicit support that the court could remand to the ALJ to make additional credibility findings. The *Nguyen* court found the ALJ improperly credited a non-treating medical witness over Nguyen's examining witness and vacated the ALJ's denial of benefits and remanded for additional proceedings.[163] Because the ALJ failed to state his reasons, his conclusion that Nguyen could do previous work was unsupported by substantial evidence.[164] The court did not state the record was incomplete but only noted its decision did not preclude the ALJ from gathering other evidence.[165] The court did not remand for the ALJ to make *new* credibility findings, it remanded for the ALJ to state why he had credited one witness over the other. But the *Nguyen* court did not mention why the credit-as-true rule did not apply.[166]

In summary, when the *Connett* court declared that the credit-as-true rule was not mandatory, it relied on four cases which did not mention the rule at all: one, *Bunnell*, which did not pertain to the rule, and three, *Dodrill*, *Byrnes*, and *Nguyen*, which arguably should have applied the rule but failed to even address it. One must question why these three panels were silent about the credit-as-true rule—which was valid precedent—prior to *Connett*, and further, why the *Connett* court ignored this fact when it cited their reasoning.

In contrast to *Connett*, one year later the court, in *Benecke v. Barnhart*,[167] with Judge Reinhardt on the panel, wrote a straightforward analysis and application of *Smolen* and *Varney II*. Finding the *Smolen* test satisfied, the court credited Benecke's testimony and remanded for benefits, holding it was an abuse of discretion for the district court to have done otherwise.[168] Perhaps

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162. *Connett*, 340 F.3d at 876 (citing Nguyen v. Chater, 100 F.3d 1462, 1466–67 (9th Cir. 1996)).

163. *Nguyen*, 100 F.3d at 1463–64 (9th Cir. 1996) (Leavy, Coyle & Reinhardt, JJ.).

164. *Id.* at 1467.

165. *Id.* at 1464.

166. *Id.* Interestingly, Judge Reinhardt authored *Nguyen*, remanding a complete record—or, at least, not an explicitly incomplete record—back to the ALJ to make findings again. *Id.* at 1467. But a closer reading of *Nguyen* shows that it is still a credit-as-true-friendly decision. Although Judge Reinhardt did not apply the rule, perhaps the dissent in the case, which argued for affirming the ALJ's outright denial, *Nguyen*, 100 F.3d at 1468 (Leavy, J., concurring in part and dissenting in part), suggests that Judge Reinhardt could not get a second signature in the majority to remand for benefits. *Id.* at 1468–69 (Leavy, J., dissenting). Or, it is possible Judge Reinhardt doubted the claimant's credibility. But in light of the "liberal lion's" previous decisions, it is odd that he does not even mention the rule he first adopted. *Id.*; *see infra* note 193.

167. Benecke v. Barnhart, 379 F.3d 587, 589 (9th Cir. 2004) (Fletcher, Reinhardt & Restani, JJ.).

168. *Id.*

the court's reiteration of the rule's rationale was related to the *Connett* decision the previous year. The court noted that remand for additional proceedings "can delay much needed income for claimants who are unable to work and are entitled to benefits, often subjecting them to 'tremendous financial difficulties.'"[169] The court also mentioned efficiency concerns, and highlighted that remand for additional proceedings any time the VE did not answer a precise hypothetical situation "would contribute to waste and delay and would provide no incentive to the ALJ to fulfill her obligation to develop the record."[170]

The court restated that when the *Smolen* test was satisfied, it would not remand to the ALJ to make specific findings on the same record.[171] Notably, the court framed the new *Connett* decision as such: "*but cf. Connett v. Barnhart* (holding that the court has flexibility in crediting petitioner's testimony if substantial questions remain as to her credibility and other issues must be resolved before a determination of disability can be made)."[172] The "substantial questions" language in the court's characterization of the *Connett* holding is not in the *Connett* decision. Perhaps the *Benecke* panel was attempting to limit *Connett*, which at that point was an outlier and an obvious departure from the preceding line of cases.

5. Judge O'Scannlain and En Banc Review: *Vasquez v. Astrue* (2008)

Five years after *Connett*, Judge O'Scannlain acknowledged the intra-circuit split in *Vasquez v. Astrue*.[173] The district court had affirmed the ALJ's denial of benefits, but the Ninth Circuit reversed, credited the testimony as true, and remanded for additional proceedings based on the credited testimony.[174] SSA then petitioned for a rehearing en banc, arguing that under *INS v. Ventura*, the credit-as-true rule was invalid.[175] The court voted the

169. *Id.* at 595.

170. *Id.*

171. *Id.* at 593. The court calls this "the *Harman* test," but the *Harman* court cited the earlier *Smolen* language. Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000) (citing Smolen v. Chater, 80 F.3d 1273, 1192 (9th Cir. 1996)).

172. *Benecke*, 379 F.3d at 593 (citation omitted).

173. Vasquez v. Astrue, 572 F.3d 586, 593 (9th Cir. 2008).

174. *Id.* at 593–94.

175. *Id.* at 588–89.

petition down.[176] Dissenting from the court's denial,[177] Judge O'Scannlain[178] acknowledged the split over the rule and argued for its resolution.[179] Concurring with the court's decision, Judge Hawkins argued there was no need for en banc review because any tension in the case law could be reconciled; further, even if there was a split, *Vasquez* was not the proper case to rehear en banc.[180]

As the preceding and following cases demonstrate, tension certainly exists in how courts apply the credit-as-true rule. Perhaps Judge Hawkins was correct that, at that point in 2008, the cases could have been reconciled. But if this was true, at least one district court three years later struggled to do so.[181] The court's attempt to reconcile *Connett* and *Benecke* is telling:

> Although Ninth Circuit panel decisions have, as explained above, repeatedly endorsed the credit-as-true rule and have held that district courts should remand for payment of benefits when the three-part test is met, at least one Ninth Circuit panel has held that district courts retain discretion in deciding whether to remand for payment of benefits or for further administrative proceedings in such a situation. *See Connett v. Barnhart* (discussing Ninth Circuit cases that appeared not to follow the credit-as-true rule, and concluding that the court must have "some flexibility in applying the crediting as true theory"); *Vasquez* (discussing a "split in authority" in the Ninth Circuit over whether the credit-as-true rule is mandatory or discretionary, but not resolving the conflict); *id.* (Judge O'Scannlain, in dissent, calling for *en banc* review of the

176. *Id.* at 599.

177. Carol J. Williams, *Conservatives Gaining Sway on a Liberal Bastion*, L.A. TIMES (Apr. 19, 2009), http://www.latimes.com/local/la-me-9th-circuit19-2009apr19-story.html ("The circuit courts have their own appeals process, known as an 'en banc' rehearing, in which 11 judges can take up a case after a three-judge panel has already decided it. A court's active judges vote in secret to grant or deny a rehearing. If a rehearing is denied, a judge may write a dissent from denial. Experts inside and outside the court say the conservatives have effectively used those dissents as a signal flare to the U.S. Supreme Court. The maneuver is used almost exclusively at the 9th Circuit."). "'The en banc process is a mechanism for correcting panel opinions,' said Kozinski, noting that with 48 judges available across the political spectrum, 'it is entirely possible you'll get an outlier opinion from a three-judge panel.'" *Id.*

178. *Id.*

179. *Vazquez*, 572 F.3d at 601 (O'Scannlain, J., dissenting).

180. *Id.* at 599 (Hawkins, J., concurring) ("While *Varney II* and *Connett* do appear to be in conflict over the applicability of the credit-as-true rule where there is no other reason to remand the case to the ALJ, this case does not and should not provide an opportunity to resolve that dispute en banc.").

181. Esposito v. Astrue, No. CIV S-10-2862 EFB, 2012 WL 1027601, at *1 (E.D. Cal. Mar. 26, 2012).

> credit-as-true rule to resolve the "irreconcilable conflict" between *Connett* and the *Benecke* line of cases).
>
> District courts are thus commanded by the *Benecke* line of cases to remand for payment of benefits if the three-part test discussed above is met, but simultaneously instructed by *Connett* that they need not remand for payment of benefits under the same circumstances. As the *Benecke* line of authority appears to require this court to remand for payment of benefits if the precedent conditions are met, and the *Connett* line of cases merely permits, but does not require, this court to remand for further proceedings in the same circumstances, this court seems bound to apply the *Benecke* line of cases.[182]

The district court stated that the *Connett* approach and lack of instruction regarding its flexibility could lead to "arbitrary decision-making and impermissible re-weighing" of evidence by the court.[183] The court concluded it would follow the *Benecke* line of cases until the Ninth Circuit resolved the split.[184] Later decisions and dissents prove this court was not the last to find tension in the law.

6. Recent Reconciliation Attempts: *Garrison v. Colvin* (2014); *Treichler* (2014)

Eleven years after *Connett*, in its first published opinion on the credit-as-true rule since then, the court decided *Garrison*.[185] The *Garrison* court (including Judge Reinhardt on the panel), attempted to clarify and qualify *Connett* in a manner that still honored the original *Varney II* rule.[186] This attempt was short-lived and seemingly rejected by *Treichler* in 2014.[187]

a. Garrison v. Colvin *(July 2014)*

In *Garrison*, the court[188] stated it was applying the "settled" credit-as-true rule and remanded for benefits.[189] The court explained when the "flexibility"

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182. *Id.* at *8 (citations omitted).
183. *Id.*
184. *Id.*
185. Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014).
186. *Id.*
187. Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1107 (9th Cir. 2014). And the court affirmed *Treichler* again in 2015 in *Dominguez v. Colvin*, 808 F.3d 403, 410 (9th Cir. 2015).
188. *Garrison*, 759 F.3d at 998 (Farris, Reinhardt & Tashima, JJ.).
189. *Id.* at 999.

referenced in *Connett* applied in other cases.[190] The court stated that *Connett* flexibility is appropriate when the record "as a whole creates serious doubt that a claimant is, in fact, disabled"—even when all three of the preconditions for the credit-as-true rule are satisfied.[191] This "interpretation best align[ed] the credit-as-true rule, which preserves efficiency and fairness in a process that can sometimes take years before benefits are awarded to needy claimants, with the basic requirement" of disability.[192]

Thus, the exercise of *Connett* flexibility—remanding for additional proceedings and not benefits, even when the *Smolen* test is satisfied—is an abuse of discretion if the district court does so when all the credit-as-true elements are established and the record as a whole does not provide a reason to find the claimant is not disabled. One reading of *Garrison* is that the court created a large and ambiguous caveat to the credit-as-true rule. Seemingly, it would not be difficult to find that inconsistencies in the record as a whole create doubt about a claimant's disability, which could then be argued as *serious* doubt.[193]

But perhaps *Garrison* was Judge Reinhardt's attempt to reconcile the case law and create a clear—albeit flexible—exception to the credit-as-true rule. Perhaps Judge Reinhardt was trying to encapsulate the distillation from *Varney II* to *Smolen* to *Connett*: unless the record as a whole creates *serious* doubt that a claimant is disabled, the credit-as-true rule must apply when the analysis is satisfied. Judge Reinhardt, quoting a large portion of his *Varney II* opinion, reaffirmed the same considerations, including efficiency and fairness to claimants.[194]

Moreover, Judge Reinhardt made sure to note the "workable and stable framework for applying the credit-as-true rule" which courts had developed and applied in the "nearly two dozen published opinions" since *Varney II*.[195]

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190. *Id.* at 1020.

191. *Id.* at 1021.

192. *Id.*

193. Of course, it is possible that Judge Reinhardt was questioning the utility or proper application of the credit-as-true rule. But given Judge Reinhardt's reputation and previous decisions related to the credit-as-true rule, perhaps there are more likely explanations. *See* Adam Bonica et al., *The Political Ideologies of Law Clerks and Their Judges* 38 (Coase-Sandor Working Paper Series in Law & Econ., Paper No. 754, 2016); *see also* John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES (Apr. 24, 2010), http://www.nytimes.com/2010/04/25/us/25sfninth.html (Judge Reinhardt known as the "liberal lion"). *But see* Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L. REV. 1, 3 (2003); *The Crucial Importance of the Ninth Circuit*, LEADERSHIP CONF. (Apr. 14, 2003), http://archives.civilrights.org/judiciary/courts/ninth-circuit.html.

194. *Garrison*, 759 F.3d at 1019–20.

195. *Id.* at 1020.

Then, Judge Reinhardt—in artful understatement—summarized *Connett* as a case where the court "cautioned" that the rule "may not be dispositive of the remand question in all cases."[196] Purporting to explain what those other cases might look like, *Garrison* seems to be yet another attempt by a single panel to clarify the rule's development and eliminate the possibility for exceptions. Any success was short-lived.

b. Treichler *(December 2014)*

Garrison was couched in the idea that, under the credit-as-true analysis, remand for benefits is the norm and *Connett* flexibility is the exception. But the history of the credit-as-true rule according to Judge Ikuta in *Treichler* is such that the ordinary remand rule is the norm and the credit-as-true rule is the exception. Accordingly, the court[197] summarized most of the distillation the Article has just described[198] but emphasized the discretionary nature of this grant of power.[199]

The *Treichler* majority stated it relies on the district court's discretion to remand for additional proceedings or for benefits because "narrow rules" do not function well in fact-intensive disability determinations.[200] The court insisted: "Our case law strikes a balance between the ordinary remand rule that generally guides our review of administrative decisions and the additional flexibility provided by § 405(g)."[201] The court stated it must determine whether there were unresolved issues before crediting testimony as true, and it reiterated that even when those "rare circumstances" are present, the decision to remand for additional proceedings or benefits is within the court's discretion.[202]

The majority worked through the three-step *Smolen* test to determine whether it should remand Treichler's case for benefits. Under the first-step analysis, the majority found the ALJ erred by failing to provide specific

196. *Id.*

197. Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1093 (9th Cir. 2014) (Alarcon, Ikuta & Tashima, JJ., dissenting). Judge Ikuta was appointed by President Bush. Williams, *supra* note 177. *But see infra* note 237 and accompanying text.

198. *Treichler*, 775 F.3d at 1099–1102.

199. *Id.* at 1101–02 ("When all three elements of this *Varney* rule are satisfied, a case raises the 'rare circumstances' that allow us to exercise our discretion to depart from the ordinary remand rule. Of course, even when those 'rare circumstances' are present . . . [w]e have frequently exercised our discretion to remand for further proceedings, rather than for benefits."(internal citations omitted)).

200. *Id.* at 1100 (quoting Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000)).

201. *Id.* Section 405(g) gives the district courts authority to reverse or modify SSA's decision. *See supra* note 80.

202. *Treichler*, 775 F.3d at 1099.

reasons for rejecting Treichler's medical evidence and symptom testimony.[203] But under the second step, the court found it was unclear that Treichler would be entitled to benefits, and under the third step, it found serious doubt that Treichler was disabled.[204] The court's characterization of the rules under the second-step inquiry includes two important additions from previous rule statements of the same step.

In its first rule statement of the step-two inquiry, the court cited a ten-year old case from the Sixth Circuit, a circuit that does not apply the credit-as-true rule: "Where there is conflicting evidence, and not all essential factual issues have been resolved, a remand for an award of benefits is inappropriate."[205] One wonders why the court cited to a circuit that does not even apply the rule it had at hand when the Ninth Circuit has ample relevant language. The court's next addition may illuminate the ideology behind this choice.

In its second rule statement of the second-step inquiry, the court asked whether "the record as a whole [was] free from conflicts, ambiguities, or gaps, whether all factual issues ha[d] been resolved, and whether the claimant's entitlement to benefits [was] clear under the applicable legal rules."[206] Judge Ikuta cited *Moisa v. Barnhart*[207] for this language. However, this language is only Judge Ikuta's. The *Moisa* court, verbatim from *Smolen*, stated its second-step inquiry thus: whether "there are no outstanding issues that must be resolved before a determination of disability can be made."[208] In disability determination cases, with years of voluminous medical evidence and subjective pain testimony, there might be conflicts, ambiguities, gaps, or unresolved factual issues under Judge Ikuta's test, but, under the *Smolen* test, no outstanding issues that would prevent making a disability determination. Thus, the *Treichler* court created, arguably, a more rigorous inquiry.

Under the court's second-step analysis, it concluded there were "significant factual conflicts in the record between Treichler's testimony and objective medical evidence," rebutting "the dissent's assertion that 'the record amply support[ed] Treichler's testimony.'"[209] According to the majority, both Treichler and the dissent argued that, because the ALJ erred under the first step, the court must credit Treichler's testimony as true and

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203. *Id.* at 1107.

204. *Id.* at 1106–07.

205. *Id.* at 1101 (citing Faucher v. Sec. of Health & Human Servs., 17 F.3d 171, 176 (6th Cir. 1994)).

206. *Id.* at 1103–04.

207. *Id. See* Moisa v. Barnhart, 367 F.3d 882, 887 (9th Cir. 2004).

208. *Moisa*, 367 F.3d at 887.

209. *Treichler*, 775 F.3d at 1104.

then determine if there were outstanding issues to resolve.[210] The majority disagreed. Thus, the court remanded to SSA for additional proceedings[211] seven years after Treichler's claim was first denied.[212]

The majority's reading of the case law regarding when crediting of testimony occurs was consistent with the *Garrison* court's that same year: when "there are no outstanding issues that must be resolved before a proper disability determination can be made, and where it is clear from the administrative record that the ALJ would be required to award benefits if the claimant's excess pain testimony were credited," the court will credit the claimant's testimony as true.[213] Thus, it seems the court must first determine whether there are outstanding issues. If none, then the court credits the claimant's testimony as true if it is clear from the record that the claimant would be entitled to benefits if her testimony were, in fact, true. In essence, if the claimant's pain testimony is the only disputed issue because the ALJ failed to sufficiently discredit it, then the court will credit it as true. Of course, *Connett* flexibility provides an alternative.

The majority and dissent in *Treichler* disagreed about more than the timing of when consideration of the whole record in light of crediting the testimony as true occurs. Fundamentally, the majority and dissent disagreed about whether there were outstanding issues under the second step. But how they evaluated whether there were outstanding issues is key to their disagreement.

Dissenting, Judge Tashima found all three of the credit-as-true factors satisfied and no serious doubt that Treichler was disabled.[214] On a factual level, Judge Tashima described how the VE expert considered all relevant testimony and testified that Treichler's professed symptoms would have prevented him from performing substantial gainful activity.[215] But on the legal question, Judge Tashima rejected the majority's basis for remand.[216] Judge Tashima asserted that application of the rule did "not depend on the absence of contradictory evidence in the record,"[217] and that such a basis would only be valid if the contradictory evidence was "extensive and

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210. *Id.* at 1105–06.

211. *Id.* at 1107 (Tashima, J., dissenting).

212. *See id.* at 1095 ("Treichler's disability claim was denied on August 22, 2007, and again upon reconsideration on January 9, 2008. Treichler filed a written request for a hearing on February 4, 2008."). The court remanded Treichler's case back to SSA again in December 2014.

213. Garrison v. Colvin, 759 F.3d 995, 1019 (9th Cir. 2014) (quoting *Varney II*, 859 F.2d 1396, 1401 (9th Cir. 1988)).

214. *Treichler*, 775 F.3d at 1107–08 (Tashima, J., dissenting).

215. *Id.* at 1108–09.

216. *Id.*

217. *Id.* at 1109.

compelling."[218] The default, once the three-part test is satisfied, is to award benefits, unless "the record as a whole creates serious doubt that a claimant is, in fact, disabled."[219] Judge Tashima then listed the extensive medical evidence that supported Treichler's professed symptoms.[220]

Judge Tashima characterized the majority's second-step inquiry as meaning the step was unsatisfied when the record does not "unquestionably establish that a claimant's testimony is true."[221] Judge Tashima maintained the mere existence of inconsistency in the record did not amount to an incomplete record under the second step.[222] He argued that the record was fully developed when "the 'claim of disability has been developed by an evidentiary hearing and numerous medical reports'" [223] before the ALJ.[224] And the second step is unsatisfied only when the record is "not sufficiently developed."[225] Examples of which may include if (1) "critical portions of [a treating physician's] testimony" were not presented to the ALJ but only to the Council of Appeals;[226] or (2) when "additional assumptions should have been incorporated into the ALJ's hypothetical;"[227] or (3) when "no vocational expert has been called upon to consider all of the testimony that is relevant to the case."[228] Judge Tashima argued none of these applied to Treichler.

In other words, the majority determined whether the record was complete under the second step by evaluating inconsistencies in the record and asking if Treichler's testimony was convincingly true. The majority did not say there was a lack of evidence, they simply concluded there was contradictory evidence. In contrast, the dissent asked if the ALJ had all critical evidence before him: "Fundamentally, the credit-as-true rule asks whether '*taking the claimant's testimony as true*, the ALJ would clearly be required to award

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218. *Id.*

219. *Id.*

220. *Id.* at 1109–10.

221. *Id.*

222. *Id.* ("But the fact 'that there is material in the record upon which the ALJ legitimately could have rejected . . . testimony' does not justify remand for further proceedings. The credit-as-true rule does not consider 'whether the ALJ might have articulated a justification for rejecting' claimant testimony." (quoting Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000))).

223. *Id.* (quoting Vertigan v. Halter, 260 F.3d 1044, 1053 (9th Cir. 2001)).

224. *Id.* (citing McCartey v. Massanari, 298 F.3d 1072, 1077 (9th Cir. 2002); Moore v. Comm'r of Soc. Sec. Admin., 278 F.3d 920, 926 (9th Cir. 2002); Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996)).

225. *Id.*

226. *Id.* (quoting *Harman*, 211 F.3d at 1180). Incidentally, Judge Tashima's example here was the *Swenson* case, but the court still remanded for benefits there.

227. *Id.* (quoting Hill v. Astrue, 698 F.3d 1153, 1162 (9th Cir. 2012)).

228. *Id.* (quoting Bunnell v. Sullivan, 947 F.2d 341, 348 (9th Cir. 1991)).

benefits.'"[229] The rule does not ask, as the majority did, whether the claimant's testimony is clearly established as true by the record.

The dissent correctly noted that Judge Tashima and the majority disagreed about how to determine whether the record was complete under the second step. And indeed, the credit-as-true rule does ask if the ALJ would be required to award benefits if the claimant's testimony were true—but, it only asks that question after the second step is satisfied. There is undoubtedly a factual disagreement between the dissent and majority in this case at the second step. But there is also a legal disagreement about how to evaluate its satisfaction. Perhaps there is a third legal disagreement (as the majority characterizes the dissent's position) about when the credit-as-true question initiates, whether before or after the second step inquiry.

As Judge Tashima reflected, the *Benecke* court applied the credit-as-true rule even with contradictory medical evidence that Benecke was not disabled because the entire record did not give rise to "serious doubt" that he was disabled.[230] No reason existed, Judge Tashima argued, for why the court should not do the same in Treichler's case.[231] By not doing so, the majority "contravene[d] the spirit and purpose of the credit-as-true rule,"[232] which was adopted out of consideration for claimants' extensive emotional and financial costs due to an ALJ's error.[233] Judge Tashima critiqued that remanding for more proceedings when the rule was satisfied "permits [SSA] to administer an unfair heads we win; tails, let's play again system."[234]

According to Judge Tashima, SSA should not have gotten another opportunity to discredit Treichler on remand, "any more than [Treichler], had he lost, should have [gotten] an opportunity for remand and further proceedings to establish his credibility."[235] Yet, "the majority gives [SSA] precisely that second bite at the apple and makes a shambles of the credit-as-true rule."[236]

To date, the Ninth Circuit has published nine decisions citing *Treichler* or implicating the credit-as-true rule since *Treichler*.[237] District courts overwhelmingly cite *Treichler* in their credit-as-true analyses.

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229. *Id.* (quoting Lingenfelter v. Astrue, 504 F.3d 1028, 1041 (9th Cir. 2007)).
230. *Id.* at 1111.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. In the first, *Burrell v. Colvin*, which the court decided one week after *Treichler*, Judge Schroeder split with the majority. Burrell v. Colvin, 775 F.3d 1133, 1142 (9th Cir. 2014)

III. ANALYSIS

The preceding case history has several implications. Section A briefly addresses the faulty foundation upon which *Connett* was decided and its progeny relies. Section B estimates the financial consequences of lengthy and inconsistent adjudication, the legal implications for advising clients in Social Security determinations, and how a strong credit-as-true rule can assist as a remedy. Section C highlights the three points of disagreement between the *Treichler* majority and dissent that the Ninth Circuit should clarify.

A. Past Problem: The Faulty Connett Foundation

The Ninth Circuit frequently cites thirteen-year-old *Connett*, and it is undeniably integral to this body of law. As best as the Article identifies, *Connett* is the beginning of the intra-circuit split and the first readily identifiable declaration of the court's discretionary power in applying what had previously been a simple three-element test. Only speculation serves in determining why the *Connett* court chose to do so when it relied on four cases that did not mention the credit-as-true rule once.[238] Although recognizing where the tension began is informative, it does not illuminate a solution or clarify existing ambiguities. Consequently, the Article does not focus its

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(Schroeder, J., dissenting). Finding no serious doubt the claimant was disabled, her dissent critiqued the majority's failure to apply the credit-as-true rule once the three-part test was satisfied. *Id.* at 1142–45.

In the second, *Dominguez v. Colvin*, Judge Ikuta, who wrote the majority in *Treichler*, restated *Treichler*'s language even more firmly and remanded for additional proceedings. Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Our case law precludes the district court from remanding a case for an award of benefits unless certain prerequisites are met . . . [u]nless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direct to provide benefits."); *see also* Revels v. Berryhill, 874 F.3d 648, 668–69 (9th Cir. 2017) (applying the credit-as-true rule and remanding for benefits); Trevizo v. Berryhill, 871 F.3d 664, 683 (9th Cir. 2017) (applying the credit-as-true rule and remanding for benefits); Laborin v. Berryhill, 867 F.3d 1151, 1154 (9th Cir. 2017) (finding the ALJ did not state sufficient reasons for discrediting pain testimony but not applying the credit-as-true rule); Brown-Hunter v. Colvin, 806 F.3d 487, 495–96 (9th Cir. 2015) (not applying the credit-as-true rule, stating "although we conclude that the ALJ committed legal error by failing to specify which testimony she found not credible and why, we will not remand for an immediate award of benefits because we are not satisfied that 'further administrative proceedings would serve no useful purpose'").

Three of those decisions are not relevant here. *See* Wellington v. Berryhill, 878 F.3d 867, 872 (9th Cir. 2017) (citing *Treichler* for another proposition and not implicating the credit-as-true rule); Leon v. Berryhill, 880 F.3d 1041, 1045–46 (9th Cir. 2017) (reviewing a district court's decision to remand before *Treichler* was decided); Diedrich v. Berryhill, 874 F.3d 634, 644 (9th Cir. 2017) (not implicating the credit-as-true rule).

238. *See* discussion *supra* Part II.B.4.

argument on overturning or dissecting the flawed reasoning in *Connett* any further.

B. Current Problems: Inconsistency and Financial Consequences

The inconsistencies in the application and distillation of the credit-as-true rule are self-evident. No one panel has the power to change circuit law, yet that is precisely what occurred to initiate the split in *Connett*. The split has tangible problems for academics and attorneys alike. Attorneys—of course, advocating for the best interests of their clients—can cite to whichever line advances their case. Although the *Connett* line or *Varney* line will appeal to judges on various doctrinal levels, an attorney's ability to cite to two inconsistent interpretations of the law does not help district court judges make consistent and predictable decisions for litigants. The need for district courts to have clear definitions of the law seems beyond self-evident to belabor further.

What may not be as self-evident is that the inconsistencies in how district and circuit court judges interpret the law in Social Security disability determinations have far-reaching financial consequences for SSA and federal courts. In 2011, the unit cost of adjudicating a disability hearing was over twice as expensive as processing the initial claim.[239] The Article has attempted to explore this fact by estimating how much money from the Social Security Disability Insurance program is awarded as a result of adjudication in the Ninth Circuit.

Due to the distinct roles that SSA and the federal judiciary play, the Article could not find a source identifying how much Disability Insurance money is administered because of judgments in Ninth Circuit courts. However, with the aid of available information, the Article pursues a reasonable hypothesis. For the last five years, the district courts in the Ninth Circuit have adjudicated between 15.96% and 17.2% of all civil cases filed in the United States, which is nearly one-fifth.[240] As reasonably expected, in 2015, the Ninth Circuit adjudicated about one-fifth of all Social Security related claims as well.[241]

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239. Solomon, *supra* note 13, at 203 ("[T]he unit cost of adjudicating a disability hearing was $2,752.00, whereas the unit cost of processing an initial disability claim was $1,058.44.").

240. U.S. COURTS, CASELOAD STATISTICS DATA TABLES, U.S. DISTRICT COURTS—CIVIL CASES FILED, BY DISTRICT 4 tbl.4.2 (2015), http://www.uscourts.gov/sites/default/files/data_tables/Table4.02_0.pdf. Calculated by dividing the number of civil cases filed in the Ninth Circuit into the total number in a given year.

241. U.S. COURTS, CASELOAD STATISTICS DATA TABLES, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT AND DISTRICT, DURING THE 12-MONTH PERIOD ENDING

Given several methodological assumptions based on those two facts, the Article estimates that the Ninth Circuit annually adjudicates over cash benefits totaling between 15.96% and 20.61% of total Disability Insurance benefits.[242] The total expenditure for Disability Insurance benefits in 2016 was $142,703 million.[243] Thus, the Article hypothesizes[244] that between $22,867 million and $29,530 million dollars in Disability Insurance cash benefits are awarded every year in the Ninth Circuit.

Those figures only estimate what SSA spends on the program in the Ninth Circuit's geographic region. They do not factor in that for every one of those claims resulting in benefits after adjudication in an Article III court, that federal court spent more than twice as much to reach its determination as SSA would have spent to process the claim in the first instance. Those figures also do not factor in costs for judges' salaries and time, law clerks' salaries and time, litigants' lost wages, emotional distress, or attorneys' fees and time.

Further, and perhaps most importantly, SSA has no greater or lesser stake in awarding a claim or not. Of course, SSA must pay the benefits for an initially denied claim that a federal court later reverses. But SSA has little incentive to approve and process a claim first when it can deny a claim instead (correctly, incorrectly, or incorrectly but unintentionally), which then puts the burden on the claimant to appeal to the district and circuit courts. The courts then spend twice as much to determine if SSA's determination was correct, and if it was not correct, SSA has not spent any more of its funding. SSA ALJs have backlogs of hundreds of cases, and perhaps this is a further disincentive to awarding benefits first when another branch will pay to check the work.

DECEMBER 31, 2015, at 5–6 tbl.C-3 (2015), http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_1231.2015.pdf.

242. The proportion of general Social Security related cases that the Ninth Circuit reviews is within three to four percentage points of the Ninth Circuit's share of total civil cases. *See supra* notes 240–41 and accompanying text. Thus, the Article hypothesizes that the percentage of Social Security disability cases that the Ninth Circuit reviews is similar to the percentage of general Social Security related cases it reviews.

243. *Facts*, *supra* note 3.

244. This assumption relies upon the following reasoning: the Ninth Circuit district courts typically adjudicate just less than one-fifth of all civil cases. Similarly, in 2015, the Ninth Circuit district courts' dockets had about one-fifth of the total Social Security related claims. Therefore, it is likely that the percentage of all disability claims adjudicated in the Ninth Circuit follows this trend, and that approximately one-fifth of all disability appeals end up in the Ninth Circuit. The Article assumes there is not a disproportionate number of disability claims filed within or without the Ninth Circuit. And the Article assumes consistent benefit award amounts. In other words, the Article assumes (for simplicity and for lack of data) the cost of one hundred disability claims resulting in benefits in the Ninth Circuit is roughly similar to the cost of one hundred claims resulting in benefits in any other circuit.

Certainly, ALJs work hard to correctly apply the law to each claim. But when the cost of an error is not born by the body in a position to change the error (here, SSA), the cost of preventing that error—spending additional time to deliberate, or the award of benefits—is not the reasonable or logical expenditure to make. As a result, the denied claimant must make the decision to continue litigating and waiting. If she believes her claim has merit and the ALJ erred, she may still litigate for up to eleven more years, only to reach the Ninth Circuit and have her claim remanded to another ALJ, perhaps for another denial.

But, assume an alternative. Assume the ALJ erred in discrediting that claimant's subjective pain testimony, the record was complete, and it was clear from the record she would be entitled to benefits if her testimony was true. That claimant could go to an attorney who could tell her the credit-as-true rule would apply as a matter of law if the ALJ was incorrect. If that attorney could actually advise her client on reliable circuit law, and this particular claimant had a good case, then the result would be very different. She might only spend a year or two before a district court judge heard her case, and if the *Smolen* test was satisfied, that judge would apply the credit-as-true rule. And if the rule was mandatory circuit law, and the claimant truly had a meritorious claim, then the Ninth Circuit would not have much of a task to affirm.

Conversely, if SSA knew that it would pay more benefits to more claimants due to an ALJ's failure to adequately state in the record his reasons for discrediting pain testimony, then SSA would instruct its ALJs to spend more time creating a thorough record. Thus, ineligible claimants would receive definitive answers, which would help them decide not to pursue an appeal. And eligible claimants, if the ALJ did err, would receive benefits as quickly as possible, without being punished with years of litigation for SSA's mistake. But right now, the consequences of an unclear credit-as-true rule are born by claimants and the courts, which are the wrong parties to shoulder the cost of statutory compliance, compliance which only SSA can ensure.

The credit-as-true rule thus corrects errors and protects claimants and litigants. It provides certainty to attorneys and judges and informs SSA's policy with respect to how it instructs its ALJs. But the rule Judge Reinhardt adopted for these reasons has been disfigured and does not function so.

C. Solution: Hear a Case En Banc and Clarify Three Outstanding Issues from Treichler

To correct the inconsistencies addressed above and provide certainty to courts and claimants, the Ninth Circuit should hear a case en banc to clarify

the three ambiguities from *Treichler*. First, the court should resolve how to evaluate whether there are outstanding issues that need resolution in the record under the second step of the *Smolen* analysis. It is likely that there will always be some level of inconsistency in disability determinations because of their voluminous records and the nature of medical and subjective testimony. If the existence of inconsistency is the measure of whether there are outstanding issues, as the *Treichler* majority suggested, then the credit-as-true rule may never apply and remands will abound.

But Judge Tashima argued in his dissent that the second-step analysis means a record is complete and there are no outstanding issues when the ALJ had everything before her that she needed to make her decision. These are two distinct tests. And between the two tests in *Treichler*, it is not clear if contradictory evidence alone is enough to qualify as an outstanding issue and end the step two inquiry, even if the record is otherwise developed. Perhaps the en banc court will hold that a different test applies altogether.

Second, the Ninth Circuit should clarify under what conditions "serious doubt" arises that a claimant is disabled. Serious doubt of disability is relevant when the *Smolen* test is satisfied, and the court would apply the credit-as-true rule and remand for benefits unless there is serious doubt that the claimant is not disabled. If there is serious doubt, the court will remand for additional proceedings. The court should address what inconsistencies or gaps in the record amount to serious doubt. The *Treichler* majority seemed to obfuscate that question with the second step of the *Smolen* analysis, finding inconsistencies in the record synonymous with serious doubt. But the dissent found no such doubt at the end of the *Smolen* analysis given the same record. Clear guidance is necessary to prevent this severe range in judgments and outcomes.

Third, the Ninth Circuit should clarify the relationship between the third step and applying the rule. The majority and dissent in *Treichler* disagreed about *when* the judge asks if the claimant would be entitled to benefits if her testimony were credited as true. The majority asserted that all three steps must be satisfied, and then it would look at the whole record to see if there is "serious doubt" that the claimant is disabled; if not, then the court would credit the testimony as true. But the dissent argued that at the third step, the court assumes the testimony is true and then asks if, given the claimant's pain testimony, would she then be entitled to benefits? These two tests lead to disparate results.

The Article acknowledges the political realities behind why the Ninth Circuit has not resolved these issues. Social Security is a complex and burdensome machine for claimants; one might reasonably presume it has a similar effect on judges. Disability determinations may not elicit the same

urgency or intellectual thrill that other issues do. But it seems tantamount to inefficiency to maintain two lines of conflicting cases and a system that obliges multiple rounds of remand. In the busiest circuit in the country, Social Security may rank low on priorities for which to expend the reputational capital of achieving an en banc hearing. But hopefully, the need for judicial economy and speedy resolution for claimants will spur the Ninth Circuit to clarify these issues.

IV. CONCLUSION

The painful realities surrounding the disability application process which informed Judge Reinhardt's adoption of the credit-as-true rule in 1988 still exist in modern Social Security adjudications. The Ninth Circuit should hear an appropriate case en banc to clarify the law. The credit-as-true rule is a valuable tool for litigants and courts that the Ninth Circuit can refine to help address some of the difficulties with these adjudications. If clarified and applied with uniformity, the rule will incentivize SSA and ALJs to create thorough records in their determinations, and it will provide a remedy to eligible litigants after years of waiting. The district courts, claimants, litigants, and ALJs need and will benefit from a clear and strong credit-as-true rule. The Article is confident that the esteemed judges of the Ninth Circuit will meet that need.