Practice Advisory[1]

FIFTH CIRCUIT PETITIONS FOR REVIEW

October 22, 2021

This practice advisory addresses petitions for review (PFRs) in the Fifth Circuit Court of Appeals. While some of the rules, requirements, and concepts discussed are applicable to PFRs in all circuits, this advisory is tailored to the Fifth Circuit's local rules, information on the court's website, and Fifth Circuit case law.[2] Readers who are litigating PFRs outside of the Fifth Circuit must consult the local rules, website information, and case law of the relevant circuit court.

I. Petition for Review Basics

A PFR is a request, filed with a U.S. Court of Appeals, seeking judicial review of a final removal order. *See generally* 8 U.S.C. § 1252(a). Final removal orders include:

- Board of Immigration Appeals (BIA) decisions dismissing or denying an appeal of an immigration judge (IJ) decision ordering removal
- BIA decisions dismissing or denying an appeal of an IJ decision denying a motion to reopen or reconsider a removal order
- BIA decisions denying a motion to reopen or reconsider a removal order
- Reinstatement orders issued by the U.S. Department of Homeland Security (DHS) pursuant to 8 U.S.C. § 1231(a)(5)
- Administrative removal orders issued by DHS pursuant to 8 U.S.C. § 1228(b)
- IJ decisions affirming negative reasonable fear determinations
- BIA decisions denying claims in withholding-only proceedings
- Removal orders issued under 8 U.S.C. § 1187 to Visa Waiver Program entrants and associated BIA decisions affirming denials of claims in asylum-only proceedings

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[2] The Fifth Circuit's local rules, also called the Fifth Circuit Rules of Appellate Procedure, are available on the Court's website—https://www.ca5.uscourts.gov/—under the Rules & Procedures tab.

The court cannot review a removal order that is not final.[3] An order resulting from removal proceedings under 8 U.S.C. § 1229(a) becomes final when the BIA issues a decision affirming an IJ decision *or* the time to seek BIA review of the IJ's decision lapses. 8 U.S.C. § 1101(a)(47).[4]

In reinstatement and administrative removal cases, neither the IJ nor the BIA are involved if the individual does not express a fear of return. Nevertheless, in these cases, the Fifth Circuit has treated such orders as final upon issuance. *See*, *e.g., Anderson v. Napolitano*, 611 F.3d 275 (5th Cir. 2010) (reinstatement); *Sharif v. Holder*, 342 F. App'x 967 (5th Cir. 2009) (administrative removal); *cf.* 8 U.S.C. § 1228(b)(3) (referencing availability of judicial review over administrative removal orders). However, where the person expresses a fear of return, the Fifth Circuit has held, in a reinstatement case, that the order becomes final for purposes of judicial review upon the conclusion of reasonable fear or withholding-only proceedings. *See Ponce-Osorio v. Johnson*, 824 F.3d 502, 506 (5th Cir. 2016).

Note that filing a PFR terminates a grant of voluntary departure. 8 C.F.R. § 1240.26(i).

A. What to File

A PFR is a 1–2-page document entitled "Petition for Review" with a caption and signature block. There are only a few statutory requirements under Immigration and Nationality Act (INA). First, the PFR must name the U.S. Attorney General as the respondent to the petition. 8 U.S.C. § 1252(b)(3)(A). Second, the PFR must "state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding." 8 U.S.C. § 1252(c)(1). Third, the petition must attach the final removal order. 8 U.S.C. § 1252(c)(1); *see also* 5th Cir. R. 15.1(b). The Federal Rules of Appellate Procedure require that the petition specify the order being reviewed and that *each* party seeking review is named in the caption or body of the petition. Fed. R. App. P. 15(a)(2). Although it is not mandatory, it is advisable to include statements in the petition asserting that: the court has jurisdiction pursuant to 8 U.S.C. § 1252(a)(1), the petition is timely filed within 30 days of the final removal order pursuant to 8 U.S.C. § 1252(b)(2), and that venue is proper under 8 U.S.C. § 1252(b)(2). Lastly, the PFR should include a certificate of service. *See* Fed. R. App. P. 15(c).[5]

There is a $500 fee for filing a PFR, which is payable at the time that the petition is electronically filed.[6] A petitioner or their counsel can request not to pay the filing fee by submitting a motion to appear in forma pauperis, which must include an affidavit from the petitioner attesting to their inability to pay and stating the issues to be presented on appeal. Fed. R. App. P. 24(b); *see also* 28 U.S.C. § 1915.[7]

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[3] Under 8 U.S.C. § 1252(a)(2), circuit courts also cannot review expedited removal orders pursuant to 8 U.S.C. § 1225(b)(1) on a PFR; their review is set forth in 8 U.S.C. § 1252(e).

[4] Where the time to file a BIA appeal has lapsed and no BIA appeal was filed, the circuits cannot review the order because the petitioner failed to exhaust "all administrative remedies available . . . as of right." 8 U.S.C. § 1252(d)(1).

[5] A template Fifth Circuit PFR is available on CILA's website at: https://cilacademy.org/trainings/appellate-litigation-strategy/.

[6] *See* https://www.ca5.uscourts.gov/forms-fees/fees/fee-schedule.

[7] It is advisable to use the form affidavit which is available on the Fifth Circuit's website.

Before filing, attorneys should ensure that they are admitted to the relevant court of appeals.[8] After filing the PFR, each attorney on the case should file a notice of appearance as counsel.[9]

B. Where to File

The INA provides that a PFR "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed proceedings." 8 U.S.C. § 1252(b)(2). Therefore, in all cases arising in removal proceedings where the immigration judge (IJ) "completed proceedings" within the jurisdiction of the Fifth Circuit, the petition is filed with the Fifth Circuit.

However, telephonic and video hearings can raise thorny venue issues. When an IJ conducts a hearing by telephone or videoconference, the IJ "must create a clear record of where the hearing is taking place" by noting their location as well as the location of the respondent, respondent's representative, and DHS record. Executive Office for Immigration Review, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing, 5, Nov. 6, 2020, https://www.justice.gov/eoir/eoir-policy-manual/OOD2103/download.

The Fifth Circuit has held that § 1252(b)(2) is non-jurisdictional. *See Jama v. Gonzales*, 431 F.3d 230, 233 & n.3 (5th Cir. 2005) (per curiam). Accordingly, if venue is not proper, the court should decide whether to exercise jurisdiction over the petition anyway or whether the petition merits transfer to the proper court of appeals pursuant to 28 U.S.C. § 1631.

Where DHS issues the order under 8 U.S.C. § 1231(a)(5) (reinstatement) or 8 U.S.C. § 1228(b) (administrative removal), circuit courts regularly exercise jurisdiction if the issuing DHS office is located within their judicial circuit. Whether the court would exercise jurisdiction over a PFR if DHS issued the order outside the Fifth Circuit, but reasonable fear proceedings or withholding-only proceedings were completed in the Fifth Circuit, or vice versa, is an open question.

C. When to File

A PFR *must* be received by the court within 30 days of the date of the final removal order. 8 U.S.C. § 1252(b)(1). This deadline is mandatory and jurisdictional, which means that courts cannot waive, excuse, or extend it. *See Stone v. INS*, 514 U.S. 386, 405 (1995). The court lacks authority over PFRs filed after the 30-day deadline.

Notably, in cases involving DHS-issued removal orders with fear-based claims, the Fifth Circuit, like its sister circuits, has held that the order becomes final upon the conclusion of reasonable fear or withholding-only proceedings and a PFR is timely filed within 30 days of that date. *See Ponce-Osorio v. Johnson*, 824 F.3d 502, 506 (5th Cir. 2016). Because the Supreme Court has not addressed this issue and could disagree with these rulings, it is advisable to consider filing *two* PFRs in this situation—one within 30 days of the DHS-issued order and one within 30 days of the conclusion of the reasonable fear or withholding-only proceedings. The court, on its own, or on a motion by one of the parties, may consolidate the two PFRs. *Cf.* 8 U.S.C. § 1252(b)(6).

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[8] Fifth Circuit Local Rule 46 contains information about admission.

[9] The appearance form is also available on the Fifth Circuit's website.

D. Who to Sue and Serve

The INA requires that, in PFRs, "[t]he respondent is the Attorney General" and, for PFRs of proceedings under 8 U.S.C. § 1229a, that the petitioner serves the PFR and any attached documents on "the Attorney General and . . . the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered." 8 U.S.C. § 1252(b)(3)(A). In cases involving review of DHS-issued orders, practitioners may wish to consider also naming the DHS Secretary.

As a practical matter, this means that practitioners should serve a copy of the PFR by U.S. mail on the: (1) Attorney General, (2) Director of the Office of Immigration Litigation (OIL), a division of the U.S. Department of Justice (DOJ) that litigates immigration PFRs, and (3) U.S. Immigration and Customs Enforcement (ICE) Field Office Director for Enforcement and Removal Operations with jurisdiction over the location where the removal order was issued. The certificate of service filed with the PFR should include the names and addresses of all three individuals. *See* Fed. R. App. P. 15(c). *See supra* n.5.

II. Expectations and Considerations After Filing a PFR

A. Docketing Letter

After the Fifth Circuit dockets a PFR, the court will issue a docketing letter notifying the agency, noting the agency's obligation to file the administrative record, and requiring counsel for all parties to enter an appearance of counsel.[10]

B. Administrative Record

The agency will prepare and file the administrative record. In deciding the PFR, the court cannot consider documents outside the administrative record. 8 U.S.C. § 1252(b)(4)(A). OIL is obligated to file the administrative record within 40 days of service of the PFR, unless the court orders otherwise or OIL seeks an extension. Fed. R. App. P. 17(a). Its contents are governed by Federal Rule of Appellate Procedure 16(a). A party can move to strike extraneous documents in the administrative record or supplement it with missing documents. Fed. R. App. P. 16(b). Unlike some circuits, the Fifth Circuit does not require immigration petitioners to file an Appendix, *see* 5th Cir. R. 30.2.

C. Briefing Schedule

After OIL files the administrative record, the Fifth Circuit usually issues a briefing letter setting the deadline for petitioner to file the opening brief. The letter also contains the official case caption for use in all filings as well as helpful guidance regarding preparation of the brief.

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[10] The appearance of counsel form and Fifth Circuit Practitioner's Guide are available on the Court's website -- https://www.ca5.uscourts.gov/ -- under the Forms, Fees, and Guides tab.

D. Mediation Program

Like all circuits, the Fifth Circuit has a mediation program. All communications and negotiations in mediation are confidential. Information about the program is available on the Fifth Circuit's website under the Attorney Information tab. Only counseled cases are eligible for the program. In general, cases are placed in mediation by the program staff or the court. Importantly, however, attorneys who believe that their case may benefit from mediation should call the Mediation Program and inquire about inclusion.

III. Motions Practice

A. Format and Timing

Motions are governed by Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27. Motions must include: (a) the basis for the motion; (b) the relief sought; (c) legal argument, as necessary; and (d) supporting documents, as necessary, so long as affidavits only include factual information. Fed. R. App. P. 27(a)(2). Motions must state that the moving party has contacted, or attempted to contact, Respondent's counsel and indicate whether Respondent will file an opposition to the motion. 5th Cir. R. 27.4. Except for motions involving "purely procedural matters," the Fifth Circuit requires that motions include a certificate of interested parties. *Id*.

Motions and responses to motions must not exceed 5,200 words, while replies in support of motions must not exceed 2,600 words. Fed. R. App. P. 27(d)(2). Absent a court order otherwise, responses to motions are due within 10 days after service, and replies are due within 7 days after service of the response. Fed. R. App. P. 27(a)(3), (4). A court may decide a procedural motion even before the time for a response has elapsed. Fed. R. App. P. 27(b).

B. Types of Motions

A dispositive motion is a motion that could resolve the PFR prior to full briefing on either procedural or substantive grounds. Dispositive motions include:

- Motions to dismiss;
- Motions for summary disposition;[11]
- Motions for voluntary dismissal, *see* 5th Cir. R. 42.1; and
- Motions to remand.

Non-dispositive motions address interlocutory procedural and substantive issues. Non-dispositive motions include:

- Motions to proceed under a pseudonym;
- Motions to proceed in forma pauperis, Fed. R. App. P. 24(b);

[11] The standard for motions for summary disposition varies by Circuit; the Fifth Circuit considers whether there is a substantial question as to the outcome of a case, *see, e.g.*, *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

- Motions to consolidate two PFRs, 8 U.S.C. § 1252(b)(6);
- Motions to hold the PFR in abeyance;[12]
- Motions to supplement/strike the administrative record, Fed. R. App. P. 16;
- Motions to appoint pro bono counsel; and
- Motions to lift a stay of removal.

Motions to stay removal and motions to extend time are addressed in more detail below.

C. Motions to Stay of Removal

An immigration petitioner may only file a motion for a stay of removal *after* a PFR has been filed, and merely filing the PFR will not automatically stay removal. 8 U.S.C. § 1252(b)(3)(B). Additionally, unlike in some other circuits, in the Fifth Circuit, the filing of a stay motion will not stay removal pending full briefing and adjudication of the motion.[13] DHS may lawfully deport a petitioner unless and until the Fifth Circuit orders either a temporary or permanent stay of removal.

When the petitioner is not detained, the threat of deportation is not imminent, and any stay motion will not be adjudicated on an emergency basis. Non-emergency motions are governed by Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27. In this situation, it often is not advisable to file a stay motion given the risk of receiving a decision denying the stay motion from the Fifth Circuit.

The Fifth Circuit only will treat a motion to stay removal as an emergency if the petitioner both has a removal date and is in immigration custody. Emergency stay motions are governed by Fifth Circuit Rule 27.3.1. The Court has a Guide to Filing Emergency Motions on its website.

Motions to stay removal must demonstrate all four factors of the test set forth in *Nken v. Holder*, 556 U.S. 418 (2009). Importantly, if a circuit court denies a stay of removal, it nevertheless still retains jurisdiction over the PFR.

D. Motions to Extend Time

A motion to extend time to file a pleading requires the moving party to demonstrate good cause for an extension of the deadline. *See* Fed. R. App. P. 26(b); 5th Cir. R. 26.2, 31.4. Simply filing a motion to extend time will not excuse complying with the filing deadline. *See* 5th Cir. R. 31.4.1(b). In the Fifth Circuit, extension requests must be received 7 days in advance of the deadline, absent a detailed showing that the basis for the extension request did not previously exist or could not have been known earlier. 5th Cir. R. 31.4.1(a). Iis strongly advised to file

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[12] An abeyance motions asks the court to hold the PFR pending resolution of some collateral event, for example, a forthcoming precedent decision, adjudication of a motion to reopen or reconsider, or a pending prosecutorial discretion request.

[13] Consequently, the Fifth Circuit has decided stay motions without full briefing by the parties and without the benefit of the administrative record.

extension motions well in advance of the relevant briefing deadline to ensure that the court has sufficient time to adjudicate the motion before the relevant deadline.

Extension requests for up to 30 days may be made by telephone, by motion, or by letter; if OIL indicates that Respondent will oppose the motion, the motion must be made in writing. 5th Cir. R. 31.4.3.1. Motions seeking an extension of more than 30 days must be in writing and require a showing of "[m]ore than ordinary good cause." 5th Cir. R. 31.4.3.2. In immigration PFRs, the Court will not grant an extension of more than 40 days "absent the most compelling of reasons." 5th Cir. Internal Operating Procedures.

In the Fifth Circuit, good cause warranting an extension includes, but is not limited to, work on other litigation, the complexity of the issues presented, and extreme hardship. 5th Cir. R. 31.4.2. The Court "greatly disfavors" requests to extend the deadline for reply briefs. 5th Cir. R. 31.4.4. Motions to extend time may be decided by the court clerk and are subject to review by a Fifth Circuit judge upon a motion for reconsideration. 5th Cir. R. 27.1.1.

IV. Merits Briefing

A. Opening Brief

Attorneys who are preparing opening briefs in immigration cases before the Fifth Circuit should carefully read Federal Rules of Appellate Procedure 28, 31, and 32, as well as 5th Circuit Rules 28, 31, and 32 *before* beginning to draft their brief. In addition, it is advisable to review the brief guidance, sample briefs, and the brief compliance checklist used by the Clerk's Office, all of which are available under the Guides tab of the Fifth Circuit's website.

Opening briefs in the Fifth Circuit can be no more than 13,000 words unless the court grants a motion to extend the word limit, which is rare. Fed. R. App. P. 32(a)(7)(B)(i). They must include a cover page, certificate of interested persons, statement regarding oral argument,[14] table of contents, table of authorities, jurisdictional statement (discussed below), statement of the issues, statement of the case (facts and procedural history), summary of the argument, argument with the standard of review for each issue, conclusion, certificate of service, and certificate of compliance. *See* Fed. R. App. P. 28(a); 5th Cir. R. 28.2. It is also advisable to include a brief but compelling introduction. The clerk's office will request 7 paper copies of the brief after it deems the opening brief sufficient. 5th Cir. R. 31.1.

Notably, the Fifth Circuit deems arguments or issues that are not raised in an opening brief to be waived. *See Legate v. Livingston*, 822 F.3d 207, 211-12 (5th Cir. 2016).

1. Jurisdiction

An opening brief must have a jurisdictional section that addresses: (a) the basis for the agency's jurisdiction with citations; (b) the basis for the Fifth Circuit's jurisdiction with citations; (c) dates establishing the timeliness of the PFR; and (d) an assertion that the petition is seeking review of

[14] It is advisable to request oral argument as argument presents an opportunity to clarify any questions or concerns the panel may have before deciding the PFR.

an order that disposes of all the petitioner's claims. *See* Fed. R. App. P 28(a)(4). Compliance with these requirements need not be elaborate but must be included.

As to the basis for the Fifth Circuit's jurisdiction, the court generally has jurisdiction over all final removal order under 8 U.S.C. § 1252(a)(1). However, the INA limits a court of appeals' jurisdiction over certain discretionary decisions and over claims filed by noncitizens with certain criminal convictions. 8 U.S.C. § 1252(a)(2)(B), (C). In addition, other areas where the court's jurisdiction is purportedly limited or eliminated include, inter alia, particularly serious crime determinations, the one-year bar for filing for asylum, denials of sua sponte motions to reopen, and review of the prior order in reinstatement cases.

Importantly, however, even where most other jurisdictional bars apply, 8 U.S.C. § 1252(a)(2)(D) restores jurisdiction over legal and constitutional claims. The Supreme Court has held that this provision covers mixed questions of law and fact, i.e., the application of law to undisputed facts. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020). The Court will soon decide whether § 1252(a)(2)(D) strips jurisdiction over nondiscretionary statutory eligibility issues. *Patel v. Garland*, No. 20-979 (arg. Dec. 6, 2021).

The Supreme Court also has determined that courts of appeals have jurisdiction to review factual, legal, and constitutional challenges to orders denying protection under the United Nations Convention Against Torture (CAT) even though such orders are not the same as final orders of removal. *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020).

2. Standards of Review

The argument section of an opening brief also must include, either as a separate section or as part of each issue presented, the applicable standard of review. Fed. R. App. P. 28(a)(8)(B).

In a PFR, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). This standard requires application of a substantial evidence test to the agency's factual conclusions. *See, e.g.*, *Fuentes-Pena v. Barr*, 917 F.3d 827, 829 (5th Cir. 2019).

Legal and constitutional questions are reviewed de novo. *See, e.g.*, *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 461 (5th Cir. 2006). Mixed questions involving the application of law to established or undisputed facts are questions of law. *See Guerrera-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). Therefore, de novo review also should apply to those questions.

Determinations that are truly discretionary are reviewed for an abuse of discretion. The Fifth Circuit regularly holds that it reviews denials of motions to reopen or reconsider only for abuse of discretion. *See, e.g.*, *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 815 (5th Cir. 2020). However, even in a PFR of such denials, the court must review legal and constitutional challenges de novo review and factual determinations for substantial evidence. *See, e.g.*, *id*.

Finally, note that specific standards are required by statute for certain issues. *See, e.g.*, 8 U.S.C. § 1252(b)(4)(C) (eligibility for admission), (D) (discretionary determinations to grant asylum).

3. Fifth Circuit Exhaustion Law

Under the INA, petitioners must "exhaust[] all administrative remedies available to the [noncitizen] as of right," before seeking judicial review. 8 U.S.C. § 1252(d)(1). In cases involving IJ decisions that can be appealed to the BIA, this statute requires filing the appeal and receiving a decision from the BIA.

In addition to statutory exhaustion, courts can require prudential exhaustion. Petitioners generally are required to exhaust all issues that will be presented in a PFR subject to certain exceptions that vary by circuit. In the Fifth Circuit, for example, where the BIA reaches an issue on the merits, a claim is considered exhausted even if the petitioner did not raise it properly to the BIA. *Lopez-Dubon v. Holder*, 609 F.3d 642, 644 (5th Cir. 2010).

The Fifth Circuit is an outliner in its interpretation of the exhaustion requirements in at least two ways. First, the Court treats the statutory exhaustion requirement as jurisdictional and requires petitioners to pursue any remedy where "(1) the petitioner could have argued the claim before the BIA, and (2) the BIA has adequate mechanisms to address and remedy such a claim." *Omari v. Holder*, 562 F.3d 314, 318-19 (5th Cir. 2009). In its view, the "failure to exhaust an issue deprives th[e] court of jurisdiction over that issue." *Id.* at 319.

Second, where the "BIA's decision itself results in a new issue and the BIA has an available and adequate means for addressing that issue, a party must first bring it to the BIA's attention through a motion for reconsideration" in order to comply with the statutory exhaustion requirement. *Id*. at 320; *see also Avelar-Oliva v. Barr*, 954 F.3d 757, 766 (5th Cir. 2020).[15]

This does not require the filing of a motion to reconsider in every case—where an issue was raised to the BIA and petitioner simply is arguing that the BIA reached the wrong decision in evaluating the claim, reconsideration is not required. *See, e.g., Dale v. Holder*, 610 F.3d 294, 298-99 (5th Cir. 2010). However, where the petitioner intends to raise an issue on a PFR that the BIA did not have the opportunity to consider, even if that is because it is in response to an issue that the BIA raised in its decision on its own, practitioners are advised to seek reconsideration before the BIA to ensure that a PFR is not dismissed on exhaustion grounds.

B. Answering Brief

After petitioner files the opening brief, OIL will file an answering brief (or, in some cases, belatedly file a motion to dismiss the petition in lieu of the answering brief). The requirements for an answering brief are largely the same as for an opening brief. Although answering briefs need not contain a jurisdictional statement, statement of the issues, statement of the case, and standard of review, *see* Fed. R. App. P. 28(b), OIL usually includes them.

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[15] These decisions are not in line with exhaustion requirements in other circuits and are contrary to the language of the statute, which requires exhaustion only through remedies available "as of right." 8 U.S.C. § 1252(d)(1).

Answering briefs filed by OIL commonly highlight convictions and other bad facts, ignore positive facts and arguments, respond first to petitioner's weakest argument and last to petitioner's strongest argument, and assert a more deferential standard of review. In addition, some briefs will argue that the court should affirm on a basis not invoked by the agency, contain incorrect or skewed facts, and claim that an issue is unexhausted or waived when it is not.

C. Reply Brief

It is essential to file a reply brief; if a petitioner does not file a reply brief, the government will have the last word and the court will have to work to identify the flaws in OIL's arguments and/or representation of the facts.

The reply brief should be filed within 21 days of service of Respondent's brief. Fed. R. App. P. 31(a)(1). If oral argument is scheduled, the court has authority to accept a reply brief filed at least 7 days before argument, provided, however, that counsel has demonstrated good cause for the late filing. *Id*.

The word limit for a reply brief in the Fifth Circuit is half that of the opening brief, 6,500 words. Fed. R. App. P. 32(a)(7)(B)(ii); 5th Cir. R. 28.2. Reply briefs *must* contain a table of contents and a table of authorities, *see* Fed. R. App. P. 28(c), but it is also advisable to include an introduction and conclusion. The clerk's office will request 7 paper copies of the brief after it deems the brief sufficient. 5th Cir. R. 31.1.

Notably, circuit courts may only affirm an agency's decision on a basis invoked by the agency. *See generally SEC v. Chenery Corp.*, 332 U.S. 194 (1947). If the answering brief defends the removal order based on post-hac rationalizations by OIL (reasons that did not appear in the agency's decision), it is advisable to cite to *Chenery Corp.* and its progeny.

V. Post-Briefing

A. 28(j) Letters

After briefing is complete, counsel should continue to monitor legal developments related to the issues in the case. Counsel should raise relevant legal authorities and developments by filing a letter of no more than 350 words with the court clerk pursuant to Federal Rule of Appellate Procedure 28(j). Rule 28(j) letters can be filed before and/or after oral argument.

B. Oral Argument

Oral argument is governed by Federal Rule of Appellate Procedure 34 and Fifth Circuit Rule 34. Oral argument helps the panel understand the legal issues in the case. It can also be a sign that the court is considering designating the case as a precedent decision. It is not advisable to decline oral argument. The Fifth Circuit generally holds argument in New Orleans, but occasionally holds argument in other cities in Texas and Mississippi. In the wake of the pandemic, the Fifth Circuit also has been holding oral argument via video conference.

C. Decision

The decision on a PFR may be published or unpublished. Published decisions are binding within the circuit. Unpublished decisions are binding only on the parties. The decision is binding unless and until rehearing is granted, unless the court specifically orders otherwise. Note that in cases where the court granted a stay of removal but denied the PFR, the stay continues through issuance of the mandate (i.e., throughout rehearing period and resolution of any petition), unless the court orders otherwise. In cases in which the petitioner prevailed, counsel should assess whether a motion seeking to recover fees and costs under Equal Access to Justice Act is appropriate.[16]

D. Rehearing

Following a decision on a PFR, either party may request that the 3-judge panel that decided the PFR and/or the full court rehear the case. Petitions for en banc and/or panel rehearing are governed by Federal Rules of Appellate Procedure 35 and 40 and Fifth Circuit Rules 35 and 40. A petition for panel rehearing requests that the original panel reconsider its decision and "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. P. 40(a)(2). A petition for rehearing en banc requests that the court convene an en banc panel to rehear the case, because en banc consideration is "necessary to secure or maintain uniformity of the court's decisions"; or (2) the proceeding involves a question of "exceptional importance." Fed. R. App. P. 35(b)(1). In immigration cases, a party has 45 days after entry of judgment to file a rehearing petition. Fed. R. App. P. 35(c); Fed. R. App. P. 40(a)(1). Either party may file a motion to extend the rehearing deadline.

E. Mandate

"Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, the court's opinion, and any direction about costs." Fed. R. App. P. 41(a). The mandate issues 7 days after the time to file a rehearing petition expires or 7 days after an order denying a rehearing petition or motion for stay of mandate, whichever is later. Fed. R. App. P. 41(b). A party may move to stay or recall the mandate. Fed. R. App. P. 41(d); 5th Cir. R. 41.

F. Petitions for a Writ of Certiorari

Petitions for writ of certiorari potentially have drastic consequences for all noncitizens nationwide if the Supreme Court agrees to hear a case. If a case presents a circuit split or an issue of exceptional importance, law firms and Supreme Court law school clinics typically will offer to take the case pro bono. For help assessing the consequences and viability of a certiorari petition, practitioners are encouraged to contact the Supreme Court Working Group.[17]

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[16] Please see NILA and AIC's practice advisory, Requesting Attorneys' Fees Under the Equal Access to Justice Act, https://immigrationlitigation.org/practice-advisories/.

[17] For assistance connecting with the Supreme Court Working Group, please contact NILA at info@immigrationlitigation.org.