National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Advisory[1]

Riley v. Bondi: Impact on Petitions for Review

July 3, 2025

In *Riley v. Bondi*, 606 U.S. __, 2025 WL 1758502 (June 26, 2025), the Supreme Court held that the 30-day deadline for filing a petition for review (PFR) at 8 U.S.C. § 1252(b)(1) is a non-jurisdictional claim-processing rule. But the Court did not rule on whether the rule is mandatory, *i.e.*, applicable only subject to waiver and/or forfeiture by the Department of Justice (DOJ), or also subject to equitable tolling by the courts of appeals. This is an open question that now will be litigated in the circuit courts.

The Supreme Court also held that Board of Immigration Appeals (BIA) decisions at the conclusion of withholding-only proceedings are not final orders of removal for purposes of judicial review. The Court's rationale likewise means that immigration judge (IJ) decisions affirming negative reasonable-fear determinations also are not final orders. Rather, in these cases, the final removal orders are the Department of Homeland Security (DHS)-issued reinstatement orders under 8 U.S.C. § 1231(a)(5) or the DHS-issued administrative removal order under 8 U.S.C. § 1228(b), even if the person is in reasonable fear or withholding-only proceedings. Thus, individuals subject to these orders must file a PFR within 30 days of the DHS-issued decision and can file a motion to hold the PFR in abeyance pending the conclusion of the reasonable fear and/or withholding-only proceedings.

In any case in which reasonable fear or withholding-only proceedings are presently ongoing before the immigration court or BIA, individuals should file a PFR ***as soon as possible*** and argue that the deadline is subject to equitable tolling. Filing as soon as possible strengthens the argument that tolling is merited because the petitioner acted diligently to pursue their right to judicial review. While it is understandable that petitioners and their counsel may not have filed a PFR within 30 days of the DHS-issued decision because they relied on prior circuit-court precedent finding that the PFR filing deadline commenced upon the conclusion of reasonable fear or withholding-only proceedings, *Riley* overturns those decisions. Moreover, earlier

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representations by DOJ agreeing to waive the deadline based on reliance on prior circuit precedent may no longer be dependable.

This advisory provides a brief overview of PFRs. It then addresses the *Riley* decision, including the questions presented, the Court's rationale, and how the decision affects the PFR deadline generally and in the reasonable fear and withholding-only contexts. Finally, the advisory addresses other implications of the Court's ruling.

The advisory is accompanied by: (a) a template PFR for filing within 30 days of a reinstatement order or administrative removal order where reasonable fear or withholding-only proceedings are ongoing; (b) a template PFR for filing after 30 days since a reinstatement order or administrative removal order where reasonable fear or withholding-only proceedings are ongoing; and (c) a template motion to hold the PFR in abeyance pending the conclusion of those fear-based proceedings and, if applicable, an alternative motion to brief equitable tolling if DOJ does not waive a timeliness objection. These templates will download Word documents.

NILA is amenable to providing amicus or co-counseling support to attorneys pursuing equitable tolling claims. Please email info@immigrationlitigation.org with case information.

General Overview of Petitions for Review

1. What is a petition for review of a removal order?

A PFR is a written petition (request) filed by, or on behalf of, an individual seeking review of one of the following types of final removal orders:

- a Board of Immigration Appeals (BIA) decision denying and/or dismissing an appeal of an immigration judge (IJ) decision;
- a BIA decision affirming an IJ's denial of a motion to reopen or motion to reconsider;
- a BIA decision denying a motion to reopen or motion to reconsider that was filed with the BIA;
- a removal order issued under 8 U.S.C. § 1187 (Visa Waiver Program);
- a reinstatement order issued under 8 U.S.C. § 1231(a)(5); or
- an administrative removal order issued under 8 U.S.C. § 1228(b).

A PFR is usually a 1 or 2 page document. It must name the Attorney General as the respondent, *see* 8 U.S.C. § 1252(b)(3)(A), and attach a copy of the order, *see* 8 U.S.C. § 1252(c)(1).

2. Where and how is a petition for review filed?

PFRs are filed with the U.S. Court of Appeals "in which the immigration judge completed proceedings," 8 U.S.C. § 1252(b)(1). In many cases, this is straightforward: it will be the court

with jurisdiction over the location where an IJ issued the underlying removal order.[2] If the removal order was issued by the U.S. Department of Homeland Security (DHS), individuals may argue that venue lies in the circuit in which DHS issued the order *or*, if the individual is subsequently placed in reasonable-fear or withholding-only proceedings, in the circuit where those proceedings are ongoing or completed.[3]

There is a $600 filing fee. However, the court may waive the filing fee if it grants a motion to appear *in forma pauperis*.

A copy of the removal order should be attached to the petition for review, and the petition should include a statement as to whether a court has previously upheld the validity of the order and, if so, the name of the court, the date of the ruling, and the type of proceeding in which it occurred. *See* 8 U.S.C. § 1252(c).

Check the local rules for the court of appeals where the petition will be filed for the correct procedure to use when filing. Generally, filing of a petition for review will be through the court's online filing system, either the Case Management/Electronic Case Files (CM/ECF) system or, in the Second and Ninth Circuits, the Appellate Case Management System (ACMS). However, certain courts may provide for filing via a specifically designated email address for new petitions for review or by overnight mail to the courthouse. Pro se filers may be directed to use a different process than attorneys.

3. What is the deadline for filing a petition for review?

The Immigration and Nationality Act provides that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1).

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[2] The situation may be more complex if an IJ issued a removal order after conducting proceedings by video and/or teleconference. *See, e.g.*, *Matter of Garcia*, 28 I. & N. Dec. 693, 702-05 (BIA 2023); *Castillo v. Att'y Gen.*, 109 F.4th 127, 131-34 (3d Cir. 2024); *Bazile v. Garland*, 76 F.4th 5, 11-14 (1st Cir. 2023); *Sarr v. Garland*, 50 F.4th 326, 331-33 (2d Cir. 2022); *Herrera-Alcala v. Garland*, 39 F.4th 233, 240-43 (4th Cir. 2022). 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/page/file/1335096/dl?inline=.

[3] The government may argue that venue is only proper in the circuit in which DHS issued the order and has moved to transfer PFRs based on that contention. However, as courts have held, the venue statute is not jurisdictional *See, e.g.*, *Moreno-Bravo v. Gonzales*, 463 F.3d 253, 257-62 (2d Cir. 2006); *Khouzam v. Att'y Gen.*, 549 F.3d 235, 249 (3d Cir. 2008); *Bibiano v. Lynch*, 834 F.3d 966, 970-73 (9th Cir. 2016); *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1284-85 (11th Cir. 2009). As such, venue over a PFR is subject to waiver, forfeiture and other equitable exceptions such that it could be proper in the circuit where fear-based proceedings occur.

In 1995, the Supreme Court classified § 1252(b)(1)'s 30-day deadline as "mandatory and jurisdictional." *See Stone v. INS*, 514 U.S. 386, 406 (1995). As discussed below, the Supreme Court's recent decision in *Riley* supersedes the Court's earlier decision in *Stone.*

The Supreme Court's Decision in *Riley v. Bondi*

4. What were the questions presented in *Riley v. Bondi*?

The two questions presented in *Riley* were:

> (1) whether the 30-day deadline in § 1252(b)(1) is jurisdictional; and
>
> (2) whether a noncitizen satisfies the deadline in § 1252(b)(1) by filing a PFR challenging an agency order denying withholding of removal or CAT protection within 30 days of the issuance of that order.

After DHS issued a removal order against Mr. Riley under 8 U.S.C. § 1228(b), he expressed a fear of deportation to Jamaica. An asylum officer found Mr. Riley's fear was reasonable and DHS placed him in withholding-only proceedings. The IJ granted his application for protection under the Convention Against Torture (CAT), but the BIA reversed on appeal. Mr. Riley filed a PFR within 30 days of the BIA's decision. The Fourth Circuit dismissed the petition for lack of jurisdiction, concluding that it was untimely because the filing deadline commenced on the date DHS issued the § 1228(b) removal order, not the date of the BIA's decision.

5. What did the parties argue before the Supreme Court?

In briefing and oral argument before the Supreme Court, both Mr. Riley and the Office of the Solicitor General (OSG) argued that § 1252(b)(1) is a non-jurisdictional claim-processing rule. Both parties relied heavily on the Supreme Court's decision in *Santos-Zacaria v. Garland*, which held that the INA's exhaustion provision, 8 U.S.C. § 1252(d), is a non-jurisdictional claim-processing rule. *See Santos-Zacaria v. Garland*, 598 U.S. 411, 419 (2023).[4] However, the OSG argued that § 1252(b)(1) was a mandatory rule, and that DOJ could waive or forfeit application of the deadline if it elected to do so, but that the deadline was not subject to other equitable exceptions. In contrast, Mr. Riley (and NILA as amicus) argued that the deadline was subject to equitable tolling, a doctrine permitting courts to extend a deadline where an extraordinary circumstance prevents a litigant from timely filing and the litigant pursues the claims at issue diligently. At oral argument, the OSG represented that DOJ would honor its previous representations that it would waive application of the deadline in Mr. Riley's case. Transcript of Oral Argument at 35, *Riley v. Bondi*, No. 23-1270. In addition, both Mr. Riley and the OSG argued that the 30-day PFR deadline did not commence until the BIA issued its decision at the conclusion of withholding-only proceedings.

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[4] For a detailed discussion of *Santos-Zacaria v. Garland*, see NILA's practice advisory Exhaustion of Administrative Remedies in Petitions for Review.

Because Mr. Riley and the OSG took similar positions, the Supreme Court appointed amicus to defend the Fourth Circuit's decision. Amicus argued that the PFR deadline was jurisdictional and that it commenced at the time DHS issued the removal order under § 1228(b) against Mr. Riley.

6. What did the Supreme Court hold in *Riley v. Bondi*?

The Supreme Court ruled on the questions presented out of order, addressing the second question first. This advisory addresses the questions in the order in which they were presented and briefed.

As to the nature of the 30-day PFR filing deadline, the Court held that it is a non-jurisdictional claim-processing rule. Claim-processing rules are always subject to equitable exceptions including, at a minimum, waiver and forfeiture.[5] The Court did ***not*** go further; namely, it did not decide whether the deadline is a mandatory rule, subject only to waiver and/or forfeiture, or a non-mandatory rule, subject to waiver, forfeiture, and also equitable tolling.

For purposes of judicial review, the Court held that the DHS-issued removal order under § 1228(b), not the agency's decision at the conclusion of withholding-only proceedings, is the final removal order that triggers the 30-day PFR filing deadline.

In so holding, the Supreme Court overturned decisions from every court of appeals except the Second and Fourth Circuits holding that the deadline commences at the end of fear-based proceedings, including recent decisions that had affirmed prior precedents after the Supreme Court's decision in *Santos-Zacaria*.[6]

7. What rationale did the Court employ for holding that 8 U.S.C. § 1252(b)(1) is a non-jurisdictional claim-processing rule?

The Court unanimously found that § 1252(b)(1) is not a jurisdictional rule because Congress did not "clearly signal that the rule is meant to have [jurisdictional] status," as required by the Court's "clear statement rule." *Riley*, 2025 WL 1758502, at *8, *10. To find a rule jurisdictional, the Court said, the "signal" from Congress must be "exceedingly strong." *Id.* at *8. The Court reasoned that Congress did not clearly state the deadline was jurisdictional because the statute (1) directs "what [noncitizens] must do if they want judicial review, but [] provides no directives to *courts*"; (2) "makes no reference to jurisdiction" or courts' authority; and (3) is not located in a

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[5] *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

[6] *See Inestroza-Tosta v. Att'y Gen.*, 105 F.4th 499 (3d Cir. 2024); *Argueta-Hernandez v. Garland*, 87 F.4th 698, 705 (5th Cir. 2023); *Kolov v. Garland*, 78 F.4th 911, 919 (6th Cir. 2023); *F.J.A.P. v. Garland*, 94 F.4th 620 (7th Cir. 2024); *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1042 (9th Cir. 2023); *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1137 (10th Cir. 2023); *accord G.P. v. Garland*, No. 21-2002, 2023 WL 4536070 (1st Cir. July 13, 2023); *see also Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Lara-Nieto v. Barr*, 945 F.3d 1054 (8th Cir. 2019); *Jimenez-Morales v. U.S. Atty Gen.*, 821 F.3d 1307 (11th Cir. 2016).

section or subsection concerning jurisdiction (such as 8 U.S.C. § 1252(a)(2) or (b)(4)). *Id*.

The Court also distinguished *Stone v. INS*, 514 U.S. 386 (1995), an earlier decision labeling § 1252(b)(1)'s predecessor provision as jurisdictional. It briefly addressed the last 20 years of Supreme Court precedent employing the clear-statement test, concluding that, except for its decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), "our cases have almost uniformly found that the provisions at issue failed to meet this very demanding test." *Riley*, 2025 WL 1758502, at *9. The Court noted that, in *John R. Sand & Gravel Co.*, the Court relied on decisions involving rules that were "truly jurisdictional" and, even in that case, the Court recognized its ability to overturn an earlier jurisdictional interpretation where "Congress provided a clear contrary directive." *Id*. The Court found it permissible to overturn *Stone* because the *Stone* Court had "used the term 'jurisdictional' loosely" and did not apply the clear statement test currently employed. *Id*. (quoting *Santos-Zacaria*, 598 U.S. at 421). The Court found that *Stone*'s "suggest[ion] that all mandatory filing requirements are jurisdictional" was inconsistent with subsequent decisions in which the Court has "repeatedly found that filing deadlines, including some couched in mandatory terms, are not jurisdictional." *Id*.

8. What rationale did the Court employ for holding that timely-filed PFRs must be filed within 30 days of a DHS-issued administrative removal order?

A 5-4 majority of the Court found that a BIA decision denying deferral of removal in withholding-only proceedings was not a "final order of removal." *See Riley*, 2025 WL 1758502, at *4-7. The Court first reviewed the definition of an "order of deportation" in 8 U.S.C. § 1101(a)(47)(A) and when such orders become final pursuant to § 1101(a)(47)(B). The Court found that the DHS-issued administrative order was the qualifying removal order because it required a removability determination and that such orders become final "as soon as the [order] is issued," since there is no BIA review of administrative removal orders. *Riley*, 2025 WL 1758502, at *4. The Court found that its prior decisions in *Nasrallah v. Barr*, 590 U.S. 573 (2020), and *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021), supported this conclusion, and rejected the argument that a removal order's finality for the purposes of judicial review should be interpreted differently than finality for purposes of detention. *Riley*, 2025 WL 1758502, at *5-7.

The Court understood that its decision will now require noncitizens to file PFRs within 30 days of the DHS-issued order and that, during that 30-day period, fear-based proceedings may be ongoing or may not have commenced. The Court acknowledged "the practical problems that [DOJ] fears will arise if a removal order becomes final before the issue of withholding-only relief is decided," as "legitimate," but found that it "must nevertheless follow the statutory text and our prior precedents." *Id.* at *7. The Court suggested that the practical concerns could be assuaged if DHS notified noncitizens that the 30-day deadline runs from DHS's issuance of the § 1228(b) order and "alert[s] the court of appeals to the pendency of a withholding-only proceeding so that review there can wait until that issue is decided." *Id*. The Court also noted that if DOJ "makes a general practice of what it has done in Riley's case, *i.e.*, declining to press for enforcement of the 30-day filing rule, [noncitizens] who are mistaken about when a petition for review must be filed will not be hurt." *Id*.

Implications of *Riley v. Bondi - Going Forward*

9. After *Riley v. Bondi*, when should individuals file PFRs?

The 30-day deadline for filing a PFR applies in all cases in which an individual is challenging a final removal order under 8 U.S.C. § 1252(a)(1).

Riley **DOES NOT** change the PFR timing for:

- Individuals challenging BIA decisions in removal proceedings under 8 U.S.C. § 1229a and asylum-only proceedings under 8 U.S.C. § 1187. These individuals must file **within 30 days of the BIA's decision (unless the BIA affirms removability but remands either a withholding/CAT claim to the IJ, *see infra* Question 16)**; and

- Individuals challenging reinstatement orders under § 1231(a)(5) or administrative removal orders under § 1228(b) who do NOT articulate a fear of removal. These individuals must file **within 30 days of the DHS-issued order**.

Riley **DOES** change the PFR timing for individuals challenging reinstatement orders or § 1228(b) orders who have articulated a fear of removal. These individuals must now file a PFR **within 30 days of the DHS-issued order**, *i.e.*, the reinstatement order or the § 1228(b) order. *See infra* Question 10.

The *Riley* Court stated that, in this situation, DHS "can inform [noncitizens] of the need to file a [PFR] within 30 days" of the DHS-issued decision and "can alert the court of appeals to the pendency of a [fear-based] proceeding so that review there can wait until that issue is decided." *Riley*, 2025 WL 1758502, at *7. These are permissive actions DOJ *can* take, but it remains uncertain whether DOJ *will* take them. Thus, practitioners are advised to file PFRs within 30 days of the reinstatement or § 1228(b) order and affirmatively move to hold PFRs in abeyance pending resolution of the reasonable fear or withholding-only proceedings.[7]

If the court of appeals refuses to hold the PFR in abeyance, the petitioner would have to brief any challenge to the DHS-issued order and move to file supplemental briefing once fear-based proceedings have concluded.[8] If the court of appeals refuses to hold the PFR in abeyance and either the petitioner voluntarily dismisses the PFR because there is no basis to challenge the DHS-issued order and/or the court of appeals dismisses the PFR, the petitioner would have to

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[7] Note: there is no guarantee that the courts of appeals *will* hold PFRs in abeyance to await the outcome of fear-based proceedings. Disturbingly, Justice Thomas' concurrence suggests that the courts of appeals lack jurisdiction to review any PFR that challenges the outcome of fear-based proceedings and does *not* challenge the underlying DHS-issued order. *Riley*, 2025 WL 1758502, at *10-12 (Thomas, J., concurring). That position raises serious constitutional concerns. Please contact NILA if DOJ takes this position in opposition to a PFR.

[8] DOJ or the petitioner would have to supplement the administrative record to add the record of the fear-based proceedings. *See* Fed. R. App. P. 16(a).

file a second untimely PFR at the conclusion of fear-based proceedings and then ask DOJ to waive any objection to timeliness and/or pursue an equitable tolling claim in that second PFR. *See infra* Question 14.

10. When does a final administrative removal order or reinstatement order become final?

Riley involved a DHS-issued administrative removal order under § 1228(b), a statute that applies to noncitizens who are not lawful permanent residents and whom DHS has charged with removability for having been convicted of an aggravated felony. To proceed with a removal order pursuant to 8 U.S.C. § 1228(b), DHS must make certain findings, including that the person subject to removal is not a U.S. citizen or lawful permanent resident, that the person has a criminal conviction, and that the conviction is an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii), as that term is defined in 8 U.S.C. § 1101(a)(43). *See* 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1. In *Riley*, the Supreme Court held that a § 1228(b) order, which it calls a FARO, "is the final removal order in the case," even where an individual subsequently seeks fear-based protection in reasonable fear and/or withholding-only proceedings. *See Riley*, 2025 WL 1758502, at *7. Thus, the date on the certificate of service of Form I-851A, Final Administrative Removal Order, is the date the removal order becomes final in § 1228(b) cases, even where an individual seeks fear-based protection in reasonable fear and/or withholding-only proceedings.

The reinstatement statute, 8 U.S.C. § 1231(a)(5), allows DHS to issue removal orders, known as reinstatement orders, to noncitizens who have been previously ordered removed, departed under the prior removal order, and reentered unlawfully. 8 U.S.C. § 1231(a)(5); *see also* 8 C.F.R. § 241.8. As in § 1228(b) proceedings, DHS officers/agents must make specific findings in reinstatement proceedings, including that the person is a noncitizen, is subject to a prior order, departed under that order, and reentered the United States without inspection and admission. One officer/agent makes these findings and reviews any evidence the noncitizen has the capacity to present at the time, a supervisory officer/agent then signs the bottom portion of Form I-871, Notice of Intent/Decision to Reinstate Prior Order, which is labeled "Decision, Order and Officer's Certification." Because the reasoning in *Riley* on the finality of removal orders applies equally to reinstatement orders, the date a DHS supervisory officer/agent signs the bottom portion of Form I-871 might be the date that the 30-day period for filing a petition for review begins to run in reinstatement cases, even where an individual seeks fear-based protection in reasonable fear and/or withholding-only proceedings. However, unlike § 1228(b) orders, reinstatement orders do not have a certificate of service and DHS regularly does not timely serve the order or does not serve it at all. In these situations, it will be necessary to assert and argue that the date that petitioner or counsel receives the order constitutes the service date and thus triggers the 30-day deadline.

11. What is *Riley*'s impact on cases where the noncitizen is currently in reasonable-fear or withholding-only proceedings?

Riley changes the date by which a PFR challenging either the IJ's negative reasonable-fear determination or the BIA's decision in withholding-only proceedings must be filed. Under *Riley*, the PFR must be filed within 30 days of the DHS-issued order, not the agency's fear-based decision. This means that the PFR must be filed *before* those proceedings are completed—and, in some cases, before those proceedings have begun.

If fewer than 30 days have elapsed since DHS issued the reinstatement order or § 1228(b) order, file a PFR no later than 30 days after the order.

If more than 30 days have elapsed since DHS issued the reinstatement order or § 1228(b) order, file a PFR ***as soon as possible*** (and at a minimum no later than 30 days after *Riley*, *i.e.*, by July 26, 2025), in order to present the strongest possible claim for equitable tolling of the PFR filing deadline.

In addition, after filing a PFR, practitioners are advised to move to hold the PFR in abeyance pending resolution of reasonable fear or withholding-only proceedings.[9] As stated earlier, there is no guarantee that the courts of appeals *will* hold PFRs in abeyance to await the outcome of fear-based proceedings. *See supra* n.6.

If the court refuses to hold the PFR in abeyance, the petitioner will have to brief any challenge to the DHS-issued order and move to file supplemental briefing once fear-based proceedings have concluded. *See supra* n.7. If the court of appeals refuses to hold the PFR in abeyance and either the petitioner voluntarily dismisses the PFR because there is no basis to challenge the DHS-issued order and/or the court of appeals dismisses the PFR, the petitioner would have to file a second untimely PFR at the conclusion of fear-based proceedings and then ask DOJ to waive any objection to timeliness and/or pursue an equitable tolling claim in that second PFR. *See infra* Question 14.

[9] As discussed *supra* in Question 9, the Court in *Riley* indicated that DHS could ask the courts of appeals to await the outcome of fear-based proceedings "so that review there can wait until that issue is decided." *Riley*, 2025 WL 1758502, at *7.

12. If DOJ previously affirmatively represented that it would waive any objection to timeliness of a PFR in a particular case if the Supreme Court deemed the PFR filing deadline non-jurisdictional, is that representation reliable?

As discussed above, the Court held that the PFR deadline is a claim-processing rule. A claim-processing rule is always subject to waiver and forfeiture,[10] and, if it is a non-mandatory rule, may also be subject to equitable tolling. Thus, DOJ has the authority to waive or forfeit any objection to an untimely PFR.

It is too soon to tell whether the Trump administration's DOJ will honor representations the Biden administration's DOJ made to lower courts that DOJ would waive any objection to the timeliness of PFRs in cases where the petitioner relied on past precedent and filed the PFR within 30 days of the conclusion of fear proceedings. However, based on DOJ's actions to date, it is prudent to assume the Trump DOJ will not honor its commitment to waive the PFR filing deadline. Counsel should make inquiries in individual cases to ask whether DOJ will adhere to its prior representations. It is advisable to make the inquiry in writing or memorialize in writing any conversation with opposing counsel in order to have a record of DOJ's position on waiver.

If DOJ does not respond or does not agree to honor its prior representation to waive the PFR filing deadline, practitioners are advised to take the steps discussed below in Question 13.

13. What are next steps for pending PFR cases?

For purposes of this question, pending cases include cases in which (a) a PFR has been filed within 30 days of the conclusion of fear-based proceedings in reliance on prior precedent; (b) a PFR was filed prior to the conclusion of fear-based proceedings based on the Supreme Court's decision to grant certiorari in *Riley*; and (c) a PFR was filed more than 30 days after the issuance of a reinstatement or § 1228(b) order in the Second and Fourth Circuits after those courts' decisions in *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022), and *Martinez v. Garland*, 86 F.4th 561, 566-67 (4th Cir. 2023).

In these cases, NILA recommends contacting opposing counsel to ascertain whether DOJ will honor any prior representation to waive its timelines objection and/or will otherwise agree to waive objection to timeliness.

If DOJ will not honor its prior representation and/or will not waive a request to forfeit a timeliness objection, the petitioner should file a motion asking the court to permit briefing on whether the PFR deadline is subject to equitable tolling and whether tolling is warranted in the case. The template abeyance motion accompanying this advisory contains an alternative motion

[10] *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

to brief these issues. Please contact NILA for co-counseling or amicus support if/when briefing this issue.

14. What equitable tolling arguments are available if DOJ does not waive timeliness or a PFR is not timely filed?

Equitable tolling is a doctrine permitting courts to extend a non-jurisdictional filing deadline. The Supreme Court has held that there is a "rebuttable presumption" that equitable tolling applies to all federal limitations periods. *See Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95-96 (1990). In 2022, the Supreme Court held that the 30-day deadline for filing a petition for review in the Tax Court was not jurisdictional, noting that "nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Boechler v. Comm'r of Internal Revenue*, 596 U.S. 199, 209 (2022) (citing *Irwin*). Applying this presumption, courts have found that the deadline for filing a motion to reopen is subject to equitable tolling.[11]

To merit tolling of a filing deadline, a litigant must show (1) that they have been pursuing their rights diligently, and (2) that some extraordinary circumstance stood in the way of timely filing. *See generally Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Notably, a litigant must act with "reasonable diligence," not maximum feasible diligence. *Holland*, 560 U.S. at 653; *see also Lugo-Resendez*, 831 F.3d at 344.

When seeking tolling of the 30-day PFR filing deadline based on reliance on prior circuit precedent, first, invoke the rebuttable presumption favoring equitable tolling to argue that the 30-day PFR deadline is subject to tolling as a general rule. Second, show that tolling is warranted in the case at issue because the petitioner pursued their rights diligently (by filing promptly after the conclusion of fear-based proceedings as required under prior precedent and/or promptly filing a PFR after the Supreme Court's decision in *Riley*)[12] and that an extraordinary circumstance

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[11] *See, e.g.*, *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (overruled in part on other grounds by *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc)); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc); *cf. Matter of Morales-Morales*, 28 I. & N. Dec. 714 (BIA 2023) (finding the BIA appeal deadline is subject to equitable tolling).

[12] Note that individuals must establish reasonable diligence both before and after the extraordinary circumstance that stood in the way of timely filing. Under this rule, some courts of appeals have rejected the notion that equitable tolling essentially resets the clock for filing – and so a petitioner likely will not necessarily establish diligence for equitable tolling simply by filing within 30 days of when he/she/they knew or should have known about the extraordinary circumstance. *See, e.g.*, *Smith v. Davis*, 953 F.3d 582, 598-600 (9th Cir. 2020) (en banc); *Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008).

prevented timely filing (for example, reliance on prior precedent, ineffective assistance of counsel, or misinformation/malfeasance by DHS, the immigration court, or the BIA).[13]

Implications of *Riley v. Bondi – Other Cases*

15. What are the implications of *Riley* in cases involving removal proceedings under 8 U.S.C. § 1229a and/or asylum-only proceedings under 8 U.S.C. § 1187?

The *Riley* Court's construction of § 1252(b)(1) applies with equal force to untimely PFRs of BIA decisions arising from removal proceedings under 8 U.S.C. § 1229a and asylum-only proceedings under 8 U.S.C. § 1187. *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases"). Thus, DOJ may waive or forfeit an objection to an untimely PFR and, if it does not do so, petitioners can argue that the deadline is subject to equitable tolling and tolling is warranted in the case. *See supra* Question 14.

16. What are the implications of *Riley* in cases involving BIA decisions where the BIA remands withholding or CAT claims to the IJ?

Relying on the definition of finality in 8 U.S.C. § 1101(a)(47)(A), the Supreme Court held that a removal order must "conclud[e] that [a noncitizen] is deportable or order[] deportation." *Riley*, 2025 WL 1758502, at *5. It also found that a removal order becomes final upon either (1) the BIA's affirmance of an immigration judge order, or (2) the expiration of the time to appeal to the BIA. *Riley*, 2025 WL 1758502, at *5 (citing 8 U.S.C. § 1101(a)(47)(B)). The Court further determined that a BIA order in withholding-only proceedings that denies withholding of removal or CAT protection does not meet this definition.

In many cases, however, the BIA will affirm a removability finding but remand to the IJ some aspect of the claim related to eligibility for withholding of removal or CAT protection. This seemingly will create the situation where there is a final removal order (the BIA's decision) even though part of the case has been remanded for further proceedings. In this situation, to protect the noncitizen's right to judicial review of the BIA's decision and/or the protection claim, file a PFR within 30 days of the BIA decision on removability and move to hold the PFR in abeyance pending resolution of the remaining withholding and/or CAT claims. The template abeyance motion accompanying this advisory may be modified for this situation.

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[13] *See, e.g.*, *Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Inestroza-Tosta v. Att'y Gen.*, 105 F.4th 499 (3d Cir. 2024); *Argueta-Hernandez v. Garland*, 87 F.4th 698 (5th Cir. 2023); *Kolov v. Garland*, 78 F.4th 911 (6th Cir. 2023); *F.J.A.P. v. Garland*, 94 F.4th 620 (7th Cir. 2024); *Lara-Nieto v. Barr*, 945 F.3d 1054 (8th Cir. 2019); *Alonso-Juarez v. Garland*, 80 F.4th 1039 (9th Cir. 2023); *Arostegui-Maldonado v. Garland*, 75 F.4th 1132 (10th Cir. 2023); *Jimenez-Morales v. U.S. Atty Gen.*, 821 F.3d 1307 (11th Cir. 2016).