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Practice Advisory:
Video Hearings in Immigration Court: "Knotty" Issues of Venue and Choice of Law[1]

December 21, 2022

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I. Introduction

The Immigration and Nationality Act (INA) explicitly permits immigration judges (IJs) to conduct hearings via video teleconference (VTC).[2] INA § 240(b)(2)(A)(iii). The ubiquity of video communication following the COVID pandemic,[3] as well as the need for the Executive Office for Immigration Review (EOIR) to address its ever-increasing backlog of cases,[4] mean that it is likely that video hearings will continue to play an important role in immigration court. In a landscape that now frequently involves parties to immigration court proceedings appearing from multiple locations, two significant and overlapping issues have arisen. The first is establishing in which federal court a petition for review's (PFR) venue lies. The second, which is determined by the first and generally of more immediate concern to practitioners, is ascertaining which circuit's precedent is binding over the proceedings.

This Practice Advisory will explain the different choices available for which circuit court should have venue over VTC removal hearings, and accordingly which circuit's law applies. It will then discuss significant agency and federal court decisions addressing these issues. Finally, it will provide recommendations to practitioners on how to navigate these complex issues and advocate to best preserve their clients' rights.

II. Locations Involved in Immigration Court Proceedings

In a traditional immigration court hearing, the respondent and Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA), appear in person before an immigration judge who sits in a particular court, and it is clear where venue lies and which

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[2] While EOIR is now often referring to these hearings as "internet-based hearings," this advisory uses VTC, for ease of abbreviation, throughout.

[3] In the past, advocates have challenged this process, arguing (unsuccessfully) that appearing via video violates the rights of noncitizens facing potential removal to dangerous countries and/or family separation. *See P.L. v. U.S. Immigr. & Customs Enf't,* No. 1:19-CV-01336 (ALC), 2019 WL 2568648 (S.D.N.Y. June 21, 2019) (Granting government's motion to dismiss in case where legal services providers argued that Immigration and Customs Enforcement should transport noncitizens to appear in person for their individual hearings). Despite the flaws in VTC hearings, it is clear that EOIR intends to use this medium as a tool to hear as many cases as possible and to address its backlog.

[4] There are currently immigration adjudication centers (IACs) located in Falls Church, VA (4th Circuit), Richmond, VA (4th Circuit), and Fort Worth, TX (5th Circuit). Department of Justice, EOIR Immigration Court Listing (updated Nov. 1, 2022), https://www.justice.gov/eoir/eoir-immigration-court-listing. Immigration judges in these IACs hear all their cases remotely. A primary purpose of these IACs is to ensure that scheduled hearings go forward even if the immigration judge assigned to the case is unavailable. *See* EOIR PM 19-11, "No Dark Courtrooms," at 2 (May 1, 2029), https://www.justice.gov/eoir/reference-materials/OOD1911/download ("To assist in addressing dark courtrooms, OCIJ managers should also be mindful of . . . the ability of immigration judges at EOIR's immigration adjudication centers to hear cases by VTC.").

federal circuit court's precedent controls. However, when the case is conducted via VTC, there are several distinct questions to answer in determining where venue is proper.

- Where was the Notice to Appear (NTA) filed?
- Has there been a change of venue motion granted, and if so, to what court?
- What court has administrative control over the case? That is, with which court are papers physically filed?[5]
- Where is the immigration judge physically located for the final hearing?
- Where is the "hearing location," that is the location where the noncitizen is physically located for the final hearing, if the noncitizen is appearing in a courtroom?[6]

In cases where there are different answers to some, or all, of these questions, courts of appeals have reached different conclusions as to where venue for the PFR lies and thus which circuit's law applies, based on their analysis of the importance they assign to the answers to each of those questions.

III. Rules Governing PFRs and Venue

A. Statutory and Regulatory Language Concerning PFRs and Venue

Section 242(b)(2) of the INA states that the "petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." The regulations further specify that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 CFR §1003.14(a). They go on to state that "[v]enue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14." 8 CFR § 1003.20(a). Moreover the "Immigration Judge may grant a change of venue only after the other party has been given notice and an opportunity to respond to the motion to change venue." 8 CFR § 1003.20(b).

Thus, the language of the regulations seems to clearly define venue as the immigration court with which the NTA is filed, with venue only changing if the IJ grants a motion to change venue. However, as discussed below, the language of the statute—which refers to where "the immigration judge completed the proceedings"—as well as the ambiguity in the EOIR operating procedures as to which court has venue and which court completes proceedings, has led to varying interpretations and confusion.

B. Administrative Control Court and Hearing Location

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[5] The administrative control court should be the court where venue lies, but some courts have confused the terms discussed herein. In the future, the concept of administrative control courts may become obsolete, at least for counseled cases, as more cases are fully electronic and papers are filed directly through the EOIR Electronic Case & Appeals System (ECAS). *See* U.S. Dep't of Justice, *EOIR Courts & Appeals System (ECAS) – Online Filing* (Feb. 11, 2022), justice.gov/eoir/ECAS.

[6] Increasingly, noncitizens may appear from their home or their attorney's office rather than in a courtroom without a judge.

Despite the relative clarity of the language of the regulation, it is not always easy to ascertain where venue lies under this rule. Some hearings are conducted from locations that are not considered immigration courts (such as certain detention or correctional facilities), but the hearing notice and judicial orders list that location in the caption. In other circumstances, there is an actual immigration courtroom in a non-detained setting, which is considered the hearing location, but documents are still filed with an "administrative control court," which could be in a different state.[7]

Pursuant to the regulations, "*Administrative control* means custodial responsibility for the Record of Proceeding as specified in § 1003.11" 8 CFR § 1003.13. [Emphasis in original]. The rules further explain that "An administrative control Immigration Court is one that creates and maintains Records of Proceedings for Immigration Courts within an assigned geographical area. All documents and correspondence pertaining to a Record of Proceeding shall be filed with the Immigration Court having administrative control over that Record of Proceeding and shall not be filed with any other Immigration Court." 8 CFR § 1003.11. The regulations further state the importance of the administrative control court in that "Motions to reopen or reconsider a decision of an immigration judge must be filed with the immigration court having administrative control over the Record of Proceeding." 8 CFR § 1003.23(b)(ii).

It is not always clear, however, which court has administrative control over a case. As described in the Immigration Court Practice Manual (ICPM)[8]:

> In some instances, two or more immigration courts share administrative control of cases. Typically, these courts are located close to one another, and one of the courts is in a prison or other detention facility. Where courts share administrative control of cases, documents are filed at the hearing location. Cases are sometimes transferred between the courts without a motion to change venue. However, if a party wishes for a case to be transferred between the courts, a motion to change venue is required. ICPM § 3.1(a)(2).

This section of the ICPM seems to indicate that if a party, that is the respondent or OPLA, wishes to transfer the case from one court to another, they must file a motion, but the court itself is permitted to transfer cases between courts within the same administrative control on its own and without requiring a motion.[9] These so-called clerical transfers should only occur between courts that EOIR lists as courts that allow for clerical transfers.[10]

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[7] According to the EOIR website, there is a remote televideo hearing location in Boise, ID (with Salt Lake City, UT as the administrative control court) and in Reno, NV (with Las Vegas, NV as the administrative control court). EOIR, Immigration Court Listing (Dec. 12, 2022), https://www.justice.gov/eoir/immigration-court-administrative-control-list.

[8] The Immigration Court Practice Manual does not have the force of regulations, but does set forth procedures that practitioners are required to follow in making filings and appearances before the immigration court. U.S. Dep't of Justice, *Immigration Court Practice Manual* (Nov. 14, 2022), https://www.justice.gov/eoir/book/file/1528921/download.

[9] U.S. Dep't of Justice, *Paired Courts—Clerical Transfers Allowed* (Jul. 8, 2022), https://www.justice.gov/eoir/paired-courts-clerical-transfers-allowed (In these situations "a case can be transferred between the paired courts with only an administrative notation.").

[10] *Id*.

EOIR maintains a list of administrative control courts.[11] The list shows which hearing locations fall under the control of which administrative control court, as well as whether clerical transfers are permitted. Below is a snapshot of the definitions on the list as well as listings for two administrative control courts, highlighting the lack of clarity on this issue, particularly when the courts which allow "clerical transfers" are nowhere near one another. **Please note, EOIR frequently changes court locations and administrative control designations; this snapshot is not intended to be used as a reference, but rather to illustrate how EOIR can assign courts and hearing locations to administrative control courts.** Practitioners should always check the EOIR website for a current list of these designations.

Administrative Control Court	**Assigned Responsibility**	**Other Hearing Locations**
An administrative control court is one that creates and maintains records of proceedings for Immigration Courts within an assigned geographic area. **See 8 C.F.R. § 1003.11.**	The administrative control court may have jurisdiction over: charging documents issued by the following DHS district offices or sub-offices; or charging documents relating to individual aliens in custody at the following detention facilities or Service Processing Centers or incarcerated alien inmates in the custody of Departments of Corrections as specified.	Detail cities or other hearing sites which may be serviced by the administrative control court.
Batavia Immigration Court 4250 Federal Drive, Room F-108 Batavia, NY 14020 Back to top	BUFFALO, NY - DHS DISTRICT OFFICE (including any sub-offices)	Clerical Transfers Allowed Richwood Correctional Center, 180 Pine Bayou Circle, Monroe, LA 71202
Boston Immigration Court John F. Kennedy Federal Building 15 New Sudbury Street Room 320 Boston, MA 02203 Back to top	BOSTON, MA - All of New England (ME, NH, VT, MA and RI) except CT Massachusetts Department of Corrections New Hampshire Department of Corrections Bristol County Jail Essex County Jail Plymouth County Jail Suffolk County Jail	Bristol County Corr. Facility, North Dartmouth, MA Essex County House of Corr., Middletown, MA Dept. of Corr.- MC 1-Concord, Concord, MA Dept. of Corr., New Hampshire State Prison Complex, Concord, NH Plymouth County Correctional Facility, Plymouth, MA DHS DRO Office, Portland, ME Wyatt Detention Center, RI Strafford County House of Corrections, NH

[11] U.S. Dep't of Justice, *EOIR Immigration Court Listing* (Oct. 4, 2022), https://www.justice.gov/eoir/immigration-court-administrative-control-list.

This list is apparently designed to provide clarity for practitioners, but is still confusing in that it states that the administrative control court has "jurisdiction over" certain responsibilities while also characterizing its role more ministerially as maintaining records of proceedings.

The ICPM states, "Individual [Department of Homeland Security] DHS offices, including [United States Citizenship and Immigration Services] USCIS and ICE OPLA field offices, are not required to file a Notice to Appear with any particular immigration court, but EOIR maintains an administrative control court list as a guide for about [sic] where DHS may file charging documents and which immigration courts generally have jurisdiction over particular DHS offices or detention locations." ICPM § 4.2(a). According to this list, hearing locations "may be serviced" by the administrative control court, implying that the hearing location is no more than a room where a noncitizen may appear by VTC. The hearing locations on this webpage are almost all in detention or correctional facilities, though there are a few, such as the immigration courts in Cleveland, OH; Hagatna, Guam; Saipan, Northern Mariana Islands; Kansas City, MO; Omaha, NE; Reno, NV; and Boise, ID, that are not in a detention setting.

C. EOIR Guidance Memos

In 2004, EOIR issued an Operating Policies and Procedures Memorandum [OPPM], OPPM 04-06, that sought to clarify policies surrounding VTC and telephonic hearings, including venue issues.[12] As discussed below, in 2020, EOIR rescinded this memorandum in favor of a new memorandum.[13] Nonetheless, OPPM 04-06 has played an important role in federal court analysis of venue issues.

OPPM 04-06 stated that "the circuit law that is to be applied to proceedings conducted via telephone or video conference is the law governing the hearing location."[14] In an example the OPPM gives, if the hearing location is Kansas City, MO (a hearing location without an actual immigration court),[15] and that is where the respondent and DHS are physically located, but the immigration judge appears via VTC from Chicago (the court with administrative control), venue would be in Kansas City, and if a PFR was filed it should be filed in the 8th Circuit, which hears cases that arise in Missouri.[16] Although the OPPM does not explicitly state in this example that the NTA was filed in Chicago, it is implied from a description just before the example that says, "the proceedings may actually take place in a location other than where the charging document is filed. Thus, it is important to record the actual location of the hearing."[17] The OPPM goes on to state, "Any order or decision by an immigration judge in a hearing conducted through video or

[12] *See* Memorandum from Michael J. Creppy, Interim Operating Policies and Procedures Memorandum No. 04-06: Hearings Conducted Through Telephone and Video Conference Operating Policies & Procedures Memorandum (OPPM) 04-06 (Aug. 18, 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/25/04-06.pdf,
[13] *See* Memorandum from James R. McHenry, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing, EOIR PM 21-03 (Nov. 6, 2020), https://www.justice.gov/eoir/page/file/1335096/download.
[14] OPPM 04-06 at 2.
[15] *Id*. Note: at the time the OPPM was written, there was a hearing location in Kansas City, MO but no immigration court there. That hearing location was serviced by the Chicago immigration court, much like the Boise, ID hearing location is currently serviced by the Salt Lake City immigration court. There is now a full immigration court in Kansas City, but when this example was included in the OPPM, there was not.
[16] *Id*.
[17] *Id*.

telephone conference where the case was docketed for a hearing location (as opposed to an administrative control court/base city court) must include the hearing location (not the administrative control court/base city court) in the caption."[18] The OPPM then includes several sample IJ order documents which each contain the hearing location in the case caption, with a notation by the IJ's name and signature specifying the administrative control court.[19]

In 2018, EOIR issued OPPM18-01, a policy memorandum on change of venue.[20] That memo did not address venue or choice of law in the VTC context.[21] It does, however, specify that for detained noncitizens, venue remains in the court where the NTA was filed, even if DHS moves the detainee to a different location and even if the detainee appears from a different hearing location.[22]

In 2020, EOIR rescinded OPPM 04-06 through the issuance of PM 21-03.[23] PM 21-03 instructs IJs in issuing orders that:

> Any order or decision by an immigration judge in a hearing conducted through VTC or telephone where the case was docketed for a hearing location (as opposed to an administrative control court/base city court) must include the hearing location in the caption. The order or decision must include a statement that the hearing was conducted through VTC or telephone and a statement that sets forth the administrative control court and address for purposes of correspondence and posthearing motions.[24]

Given the multiple factors that courts of appeals may consider in determining the appropriate federal court venue for a case (and thus which circuit's law is applied before EOIR), it is helpful that PM 21-03 requires the IJ to clearly state their location as well as the location of the court where the case is docketed.[25] The memo also clarifies that regardless of where the IJ was sitting, posthearing motions should be filed with the administrative control court.[26]

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[18] *Id*. at 3.
[19] *Id*. at Appendices. Significantly, the first example in the appendix lists Detroit, MI in the caption and only states on the last line that the IJ appeared via VTC. Although the text of the OPPM states that the IJ appeared from New York, there is no need for the IJ to state their physical location; what matters is only the docketed hearing location
[20] EOIR, Operating Policies and Procedures Memorandum 18-01: Change of Venue, at 3 (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026726/download.
[21] According to this memo, if an immigration judge changes venue, the immigration judge in the new location who takes over the case must generally follow the law of the case and not address *de novo* issues that have been settled by the prior judge. The memo clarifies that there are exceptions to this general rule which it lists as, "1) a supervening rule of law; 2) compelling or unusual circumstances; 3) new evidence available to the second judge; and 4) such clear error in the previous decision that its result would be manifestly unjust." OPPM 18-01 at 3. Notably, this list does not include a change in applicable law based on the law of the circuit where the case is now being heard. However, counsel might argue that the application of the circuit's law where the individual hearing takes place would be a "compelling circumstance" to deviate from a prior ruling in a different circuit.
[22] *Id*. at 5.
[23] Memorandum from James R. McHenry, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing, EOIR PM 21-03 1 (Nov. 6, 2020), https://www.justice.gov/eoir/reference-materials/OOD2103/download ("This Policy Memorandum (PM) cancels and replaces OPPM 04-06.")
[24] *Id*. at 5.
[25] *Id*.
[26] *Id*.

On the significant issue of which circuit's case law to apply, the memo gives no substantive guidance, instead instructing judges to adhere to federal precedent. "Finally, hearings conducted by telephone or VTC may raise knotty choice of law issues regarding the body of circuit court law applicable to a particular case when the parties and the immigration judge are in different locations. Immigration judges should continue to follow any applicable circuit precedent in resolving those issues."[27] Given the inconsistent state of the law across circuits, and even the inconsistent weight given to the variables courts consider in determining proper venue, it is an understatement to say that this instruction is not very helpful.

Thus despite three separate EOIR memos on venue and choice of law issues, there is currently no guidance from EOIR on how to navigate these thorny issues. And, as discussed below, several federal courts have relied on the reasoning in OPPM 04-06, but that memo was explicitly rescinded by EOIR.

D. VTC Proposed Rule, Never Published

As discussed below, federal courts of appeals have sought to interpret the existing regulatory language and reached very different conclusions. In 2007, long before VTC had become as commonplace as it is today, EOIR recognized the potential legal issues raised by having participants in removal proceedings appear from different locations, and it issued a proposed rule to address venue in VTC proceedings.[28] Pursuant to the proposed rule, "[v]enue lies at the designated place for the hearing as identified by the Department of Homeland Security on the charging document."[29] The proposed rule then explained that venue could only be changed via a motion to change venue that has been granted by the court. And it went on to address how venue should be interpreted when the parties are in different locations:

> (2) Venue lies at the designated hearing location, even if the immigration judge or any party or representative is not physically present at the hearing location and participates in the hearing through telephone or video conference. In that circumstance, the immigration judge shall clearly identify on the record the hearing location and the location of the immigration judge and the parties or representatives, if different.[30]

The preamble to the proposed rule also laid out an example where confusion could arise over interpreting venue, and which the rule was designed to clarify.[31] In the example, a noncitizen detained in Nebraska would have Nebraska as the hearing location even though the NTA and other documents would be filed with the Chicago court (within the 7th Circuit), which would be the administrative control court.[32] The NTA or a subsequent hearing notice would identify

[27] *Id*.
[28] *See* 72 Fed. Reg. 14494 (Mar. 28, 2007), https://www.govinfo.gov/content/pkg/FR-2007-03-28/pdf/E7-5629.pdf.
[29] Proposed 8 CFR § 1003.20(a).
[30] *Id*.
[31] 72 Fed. Reg. at 14495.
[32] *Id*.

Nebraska (within the 8th Circuit) as the hearing location.[33] In this example, EOIR notes that the immigration judge who hears the case could be located in Falls Church, VA (within the 4th Circuit).[34] The preamble explains that under the proposed rule, the hearing location, as identified on the relevant documents, determines where venue lies, and it does not matter where the judge sits, whether counsel appears remotely from a different location, or which court is considered the administrative control court. Nebraska would remain the proper venue, unless and until a party made a motion for a change of venue which the immigration court granted.[35]

EOIR correctly recognized the need for clarity on venue issues in proposing these regulations, and after weighing various options, proposed a bright line rule that courts should focus on the hearing location. Although several courts of appeals considering venue issues discuss the proposed rule, the rule was never finalized.

IV. Substantive Issues with Venue and Choice of Law

Generally, for a federal court to hear a dispute, it must have the authority—or jurisdiction—to resolve the legal issue in the case. Separately, there is the matter of venue, or the place where a case should be heard. Choice of law is the set of rules used to determine which jurisdiction's laws to apply to a case.

In the context of immigration matters, the location of the proceedings is significant for two overlapping reasons. First is the question of which circuit's law will apply before the IJ and the Board of Immigration Appeals (BIA), even if the case is never appealed to the federal court of appeals. That is a choice of law matter. Second, if the noncitizen loses before the IJ and the BIA they must determine in which circuit they should file the PFR. Once the PFR has been filed, the court decides if it is the correct court to hear the case. This is a question of venue. The answer to this question—which circuit court would hear an appeal—will determine the answer to the choice of law question for the IJ and the BIA, even if there is never a federal appeal filed.

A. Courts Have Found that INA § 242(b)(2) Addresses a Non-Jurisdictional Venue Issue

Section 242(b)(2) of the INA states that "the petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." In *Yang You Lee v. Lynch*,[36] the Tenth Circuit found that this provision was not jurisdictional, citing to similar findings by other circuit courts.[37] Likewise, in *Sorcia v. Holder*, the Fourth Circuit

[33] *Id*.
[34] *Id*.
[35] While, as discussed below, a bright-line rule is helpful to practitioners in understanding which circuit's law will apply in a case. The proposed rule adds to the confusion by stating that venue remains in Nebraska unless a change of venue motion is granted, because under the regulations, venue in this example lies in Chicago.
[36] 791 F.3d 1261, 1263 (10th Cir. 2015).
[37] *See Thiam v. Holder*, 677 F.3d 299, 301–02 (6th Cir. 2012); *Sorcia v. Holder*, 643 F.3d 117, 121 (4th Cir. 2011); *Avila v. U.S. Att'y Gen*., 560 F.3d 1281, 1284–85 (11th Cir. 2009) (per curiam); *Khouzam v. Att'y Gen*., 549 F.3d 235, 249 (3d Cir. 2008); *Moreno-Bravo v. Gonzales*, 463 F.3d 253, 258–62 (2d Cir. 2006); *Jama v. Gonzales*, 431 F.3d 230, 233 & n. 3 (5th Cir. 2005) (per curiam); *Georcely v. Ashcroft*, 375 F.3d 45, 49 (1st Cir. 2004); *Nwaokolo v. INS*, 314 F.3d 303, 306 n. 2 (7th Cir. 2002) (*per curiam*).

found that since venue is not jurisdictional in PFRs, the court was not required to dismiss or even transfer a case filed in a circuit that was the wrong venue pursuant to 28 USC § 1631.[38] The court went on to find, however, that "courts have inherent power to transfer cases over which they have jurisdiction but not venue."[39] Conversely, even if a circuit court finds that venue was proper elsewhere, it can decline to change venue in the interest of fairness.[40] The Sixth Circuit has similarly found that where an immigration court erroneously transferred venue from the Memphis, TN immigration court to the Louisville, KY immigration court without either party having filed a motion to change venue, there was no lack of jurisdiction for the court that heard the case, and no due process violation absent a showing of prejudice to the noncitizen.[41]

B. Choice of Law Issues

Immigration judges and the BIA generally "apply the law of the circuit in cases arising in that jurisdiction."[42] The BIA has not issued a precedential decision that fully considers the issue of venue and choice of law in the VTC context, though it did discuss the choice of law issue in a footnote in *Matter of R-C-R-*.[43] In *R-C-R-*, the noncitizen appeared from a detention center in Richwood, LA for his final hearing, which the IJ conducted from the administrative control court located in Batavia, NY. Even though both the court with venue and the IJ were physically in New York, the BIA applied Fifth Circuit law:

> The circuit law applied to proceedings conducted via video conference is the law governing the docketed hearing location, as opposed to the location of the administrative control court. The docketed hearing location in Richwood, Louisiana, is within the geographic area of the United States Court of Appeals for the Fifth Circuit. Therefore, like the Immigration Judge, we apply the law of that circuit.[44]

The BIA does not offer any reasoning other than citing to several decisions that applied the law based on hearing location, while also noting circuit decisions that have gone the other way.[45] The Board did not explicitly cite OPPM 04-06, but this case was decided before that memo was rescinded by PM 21-03, and the BIA's reasoning does conform with the earlier memo.

There are significant differences among circuits in interpreting key immigration law concepts such as defining particular social group for asylum, as well as interpreting the immigration consequences of criminal activity. So understanding which circuit's law to address before the IJ can be critical to the outcome of the case. That being said, the Fifth Circuit has not found a

[38] 643 F.3d 117, 122 (4th Cir. 2011), as amended (July 21, 2011).
[39] *Id*. at 122.
[40] *See Sarr v. Garland*, 50 F.4th 326, 334 (2d Cir. 2022) (finding that although venue was proper in the Fifth Circuit, the Second Circuit retained jurisdiction given the length of time the case had been pending, among other reasons).
[41] *Tobias-Chaves v. Garland*, 999 F.3d 999, 1002 (6th Cir. 2021) (" In the absence of a clear intention to depart from the standard practice of treating venue as a non-jurisdictional question concerned with convenience rather than a court's authority to hear a case, we decline to do so here.").
[42] *Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012).
[43] 28 I&N Dec. 74 (BIA 2020).
[44] *Id*. note 1 at 74–75.
[45] *Id*.

substantive right to have the law of a particular circuit applied to a particular case. “And as stated by our sister circuits, when it comes to federal law, ‘no litigant has a right to have the interpretation of one federal court rather than that of another determine his case.’”[46] Thus, at least some courts of appeals may be unsympathetic to choice of law arguments.

C. Key Federal Appeals Court Decisions

As VTC has become more and more prevalent, these issues are becoming more significant to everyday practice. Within four months of one another, there have been two precedential decisions, one by the Fourth Circuit, *Herrera-Alcala v. Garland,* and one by the Second Circuit, *Sarr v. Garland,* reaching opposite conclusions on the issue of judicial venue, with the Fourth Circuit concluding that the IJ’s physical location is what matters, while the Second Circuit determined that the immigration court where the NTA is filed is determinative of venue.[47] Prior to those two decisions, a Seventh Circuit case, *Ramos v. Ashcroft*, was a leading authority on this topic, and it held that the location of the immigration court is what mattered for venue.[48] Several courts have called on the Department of Justice to provide much needed clarity in this area.[49] Meanwhile, current EOIR guidance to judges tells them merely to “continue to follow any applicable circuit precedent in resolving those issues.”[50] As detailed below, with circuit splits, courts finding different factors dispositive, and courts relying on outdated agency guidance, following circuit precedent is no easy task. The section below discusses how each circuit that has issued a precedential decision on venue has addressed the issue.

1. First Circuit

The First Circuit has not issued a precedential decision in which the holding reached the issue of venue, but has given persuasive reasoning that the court with administrative control, and where the NTA was filed, should govern for purposes of venue. In *Georcely v. Ashcroft*,[51] the First Circuit grappled with the issue of venue in a case where the noncitizen attended his hearing from a hearing location in the U.S. Virgin Islands (located within the Third Circuit), but which is under administrative control of the Guaynabo, Puerto Rico court (located within the First Circuit.).[52] The First Circuit noted that the stamps on the court documents indicated that they had been filed with the Puerto Rico court.[53] The First Circuit observed, however, that the removal order’s typed letterhead had the Virgin Islands address.[54] While the First Circuit tentatively opined that “the most straightforward reading of the language of section 1252(b)(2) would probably lead us to conclude that the removal proceedings were completed in [Puerto Rico],”[55] the court ultimately found that it did not need to reach the issue because venue is not

[46] *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157 (10th Cir. 2006) (quoting *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993)); *Adeeko v. Garland*, 3 F.4th 741, 746 (5th Cir. 2021).
[47] 39 F.4th 233 (4th Cir. 2022).
[48] 371 F.3d 948 (7th Cir. 2004).
[49] *See Thiam v. Holder*, 677 F.3d 299, 302 (6th Cir. 2012); *Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004).
[50] EOIR PM 21-03, *supra* note 27 at 5.
[51] 375 F.3d 45 (1st Cir. 2004).
[52] *Id*. at 47.
[53] *Id*. at 48.
[54] *Id*. at note 3.
[55] *Id*. at 48.

jurisdictional and neither party timely challenged venue in the First Circuit.[56] Thus, practitioners in the First Circuit may cite this decision as somewhat persuasive reasoning, but there was no holding on the venue issue in the case.

2. Second Circuit

The court of appeals for the Second Circuit issued a significant decision addressing venue, and determined that venue should lie within the jurisdiction where the NTA was filed, unless the immigration court granted a change of venue motion. In *Sarr v. Garland*,[57] the noncitizen was located in a detention facility in Mississippi, with his NTA stamped with "Richwood" for the Richwood, Louisiana detention facility, and a received stamp on the paperwork from the Batavia immigration court in New York.[58] The first two notices Mr. Sarr received listed Batavia as the immigration court presiding over the proceedings, and the next two notices listed Buffalo, New York.[59] All four hearing notices list Richwood, LA as the immigration court[60] (even though no immigration court exists in Richwood, LA). The individual hearing took place with Mr. Sarr in a Louisiana detention facility, and the immigration judge appearing via VTC from Buffalo, NY.[61] The IJ denied relief, citing to federal precedent from several circuits, but primarily relying on Fifth Circuit precedent.[62] On appeal, the BIA applied Fifth Circuit law, upholding the denial, citing to the rescinded OPPM 04-06.[63]

Here the government argued that venue was proper in the Fifth Circuit because the case was "completed" in Louisiana.[64] The government's argument was based largely on the BIA's treatment of the case as arising in the Fifth Circuit.[65] Mr. Sarr argued that the case caption and hearing transcript identify the immigration court as Buffalo; the government conceded that the IJ sat in New York for the proceedings.[66]

The Second Circuit noted that there is no binding precedent within the circuit or from the Supreme Court on where venue lies in these situations, and found that the language of the statute—where proceedings are completed—is not clear. The Second Circuit found that the statutory language could mean "the place where the case is docketed, the physical location of the IJ during the hearings, the location of the immigration court with administrative control of the case, or the location of the petitioner at a particular point in the proceedings, to name a few potential possibilities for venue."[67]

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[56] *Id*. at 49.
[57] 50 F.4th 326 (2d Cir. 2022).
[58] *Id*. at 329.
[59] *Id*. at 329–30.
[60] *Id*. at 329.
[61] *Id*. at 330.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 331.
[65] *Id*.
[66] *Id*.
[67] *Id*.

Here, the Second Circuit looked to the certified administrative record to determine where proceedings were "completed" and found "that the IJ 'completed' the proceedings against Sarr in the same state where they began—Louisiana."[68] The court found that the Notice to Appear listed the address of the immigration court in Jena, Louisiana, and that no motion to change venue had been filed or granted in the case.[69] The Second Circuit acknowledged that the subsequent hearing notices in the case listing either the Batavia or Buffalo immigration courts as the locations to file correspondence may have caused "confusion," but since there was never a motion to change venue filed, the court reasoned that venue could not have been changed from Louisiana to New York.[70] Instead, the court found that the New York-based immigration courts were merely "administrative control" courts that "serviced" the Louisiana immigration court.[71] The Second Circuit thus held that "an IJ 'completes' proceedings and, thus, venue lies in the location where—absent evidence of a change of venue—proceedings commenced," in this case in Louisiana.[72] Nonetheless, the Second Circuit explains, in this case, that given the length of time the case had been pending, the petitioner's "understandable confusion," and that counsel for the petitioner was in New York, it denied the government's motion to change venue to the Fifth Circuit and ruled on the petitioner's motion for a stay.[73]

Sarr sets forth a clear rule that practitioners can follow—venue lies where the NTA was filed unless an immigration judge has granted a motion to change venue. Unfortunately, however, the Second Circuit misunderstood the facts of the case underscoring how confusing it can be to determine with which court venue lies in immigration court proceedings. In this case, while the NTA directed the noncitizen to appear at the LaSalle immigration court in Jena, LA, it was actually *filed* with the immigration court in Batavia, NY.[74] Thus under the rule the Second Circuit announced, it should have found that the Second Circuit had venue over this case, because Batavia was the court with which the NTA was filed, and there was never a motion to change venue made or granted. Practitioners in the Second Circuit can cite the rule laid out in *Sarr* so long as they are careful to explain the factual error that the court made. There is currently a motion pending before the Second Circuit pointing out this factual error and seeking an amendment on this issue.[75]

3. Third Circuit

The Third Circuit has touched on venue issues, but has not announced a rule on how it will decide them. In *Luziga v. Att'y Gen.*,[76] the Third Circuit found that venue was appropriate in its circuit. In that case, the court describes the locations at issue as, "the IJ entered her appearance

[68] *Id*. at 332.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*. at 331.
[74] NTA on file with the author, courtesy of Ben Winograd.
[75] Motion on file with the author, courtesy of Ben Winograd.
[76] 937 F.3d 244 (3d Cir. 2019).

over proceedings in York, Pennsylvania from Arlington, Virginia. A panel of this Court[77] previously noted that venue is proper where an IJ sitting outside our Circuit appears by video conference within our Circuit."[78] The court explained that neither party challenged venue within the Third Circuit.[79] The decision does not articulate where the NTA was filed, what court had administrative control over the case, or why the IJ appeared from Arlington, VA. However, the author has learned that the NTA was filed with the York, PA immigration court (which has subsequently closed), within the Third Circuit.[80] Thus the Third Circuit may have relied on where the NTA was filed or on the hearing location of the respondent in finding the Third Circuit to be the proper venue.

In an unpublished Third Circuit case,[81] the court questioned whether the case was properly venued in the Third Circuit, where the noncitizen appeared in a St. Thomas, Virgin Islands hearing location, and the case was docketed in St. Thomas (within the Third Circuit), but the IJ appeared via VTC from the Puerto Rico court (within the First Circuit). The court found that it did not need to reach the venue issue, however, since neither party raised it and venue was not jurisdictional.[82]

4. Fourth Circuit

In *Herrera-Alcala v. Garland*, a case decided just four months before *Sarr v. Garland,* discussed above, the Fourth Circuit reached the opposite conclusion, determining that the location of the immigration judge is what decides the court with which a PFR should be filed, and, by extension, the law that should be applied.[83] Mr. Herrera-Alcala was detained in Louisiana and appeared via videoconference from a Louisiana correctional facility (located within the 5th Circuit), however, the IJ sat in the Falls Church Virginia Adjudication Center for the hearing (located within the 4th Circuit).[84]

The BIA applied Fifth Circuit law because the noncitizen was detained at a "hearing location" in Louisiana.[85] On appeal, the government likewise argued that the PFR should be venued in the Fifth Circuit.[86] However, Mr. Herrera-Alcala filed his PFR in the Fourth Circuit, and the Fourth Circuit addressed the venue issue before proceeding to the merits.[87] The court looked to the text of INA § 242(b)(2) which says that the "petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."[88] Reasoning that it is the immigration judge who completes proceedings, the Fourth Circuit found

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[77] That previous panel issued a non-precedential decision with similar facts and found that since venue is not jurisdictional it was not necessary to decide the issue of where venue should lie when the IJ is not physically located in the hearing location. *Angus v. Att'y Gen. United States of Am.*, 675 F. App'x 193, 196 (3d Cir. 2017).
[78] 937 F.3d at 250.
[79] *Id*.
[80] Attorney Ben Winograd obtained a copy of the NTA in this case from counsel of record.
[81] *Bellot-Paul v. Att'y Gen. of U.S*., 363 F. App'x 940 (3d Cir. 2010) (unpublished).
[82] *Id*. at 942.
[83] 39 F.4th 233 (4th Cir. 2022); 50 F.4th 326 (2d Cir. 2022).
[84] 39 F.4th at 240.
[85] *Id*. at 242.
[86] *Id*. at 240.
[87] *Id*.
[88] *Id*.

the IJ's location to be dispositive of the venue issue. In reaching this conclusion the court noted that the INA had been amended to change the relevant inquiry from prior wording where "administrative proceedings . . . were conducted" to the current wording that focuses the action on the IJ—where "*the Immigration Judge* completed the proceedings."[89] As a result, the Fourth Circuit determined that the petition for review was properly filed in the Fourth Circuit.[90]

Notably, in this case, the administrative control court was located in Minnesota, within the Eighth Circuit. An amicus brief filed by the Capital Area Immigrants' Rights Coalition (CAIR Coalition) argued that the Eighth Circuit was therefore the proper venue.[91] "Though the judge and parties were not located there, amicus argues that this is the place where the proceedings as a whole were completed because it is the place where the case is formally closed and from which the written order is sent. Minnesota is also considered, by regulation, the 'venue' of the proceedings."[92] The Fourth Circuit rejected this argument, again relying on what it found to be the plain language of the statute, focusing narrowly on the words "immigration judge," and ignoring the regulatory significance of which court has venue over the proceedings.[93] Assuming jurisdiction over the case, the Fourth Circuit upheld the denial of relief.[94]

Prior to that decision, the Fourth Circuit addressed a similar issue in *Sorcia v. Holder*,[95] a case in which immigration proceedings were initiated in Atlanta, Georgia.[96] While the case was pending, Mr. Sorcia filed a motion to change venue to Charlotte, South Carolina.[97] The Atlanta IJ denied the motion to change venue but gave Mr. Sorcia the option of physically appearing in Charlotte

[89] *Id*. at 242 [Emphasis in original].
[90] Interestingly, the Fourth Circuit states in a footnote that it is not clear in which circuit the case should be filed if the IJ were physically sitting someplace outside of their office location. "Here, the Immigration Judge was at his assigned work location in Virginia during the proceedings. So we need not address whether an Immigration Judge acts from his assigned work location while physically located elsewhere, such as while on vacation." *Id*. at 241. The Fourth Circuit thus seems to leave open the possibility of venue based on the IJ's physical location, if the IJ conducts the hearing from home, which is increasingly common post-COVID. Of course, in most instances, a respondent would not know where the IJ's home is. There is no court decision that directly addresses this question, so it remains open.
[91] Amicus brief, on file with the author.
[92] 39 F.4th at 242.
[93] Amicus brief. As detailed in the amicus brief, but not in the Fourth Circuit decision, when the noncitizen was initially detained, the NTA was filed with LaSalle immigration court located in Jena, Louisiana. Amicus brief at 6. Subsequently, the noncitizen was moved to a different Louisiana detention facility, Jackson Parish Correctional Center in Jonesboro, Louisiana. *Id*. Unlike the LaSalle Court, the detention center in Jonesboro (at the time) fell under the administrative control of the Fort Snell, MN immigration court. *Id*. at 7. Although there is no order in the record changing venue, amicus assumes that the court changed venue *sua sponte* because all subsequent notices were issued by the Minnesota court. *Id.* In denying the appeal in this case, the BIA cited to the rescinded OPPM 04-06 in determining that it should apply Fifth Circuit law. *Id*. at 8. While determining that venue did not lie with the Minnesota immigration court, the Fourth Circuit did not consider the fact that venue lay in Minnesota based on the regulations. The Fourth Circuit may have rejected amicus's argument that Minnesota was the proper venue because of how incongruous a result that would be—with the noncitizen in Louisiana and the IJ in Virginia—but the amicus brief points out that this incongruity is of the government's own making by assigning a Minnesota court as the court with administrative control over the Jonesboro, LA hearing location.
[94] 39 F.4th at 253.
[95] 643 F.3d 117 (4th Cir. 2011), as amended (July 21, 2011).
[96] *Id*. at 123.
[97] *Id*.

via VTC before the Atlanta IJ.[98] Following that exchange, Mr. Sorcia received a notice of hearing, apparently erroneously, listing Charlotte as the immigration court.[99] Mr. Sorcia's counsel then contacted the Atlanta immigration court, indicating that he and Mr. Sorcia would rather appear together in person before the Atlanta court.[100] Counsel filed a motion to change venue from Charlotte to Atlanta, but the court rejected the motion.[101] The final hearing was conducted in Atlanta, with the IJ sitting in Atlanta, the noncitizen and his counsel appearing in Atlanta, and DHS appearing via VTC from Charlotte.[102] The judge stated on the record that "the court is sitting in Atlanta," but the paper titled "Order of the Immigration Judge" contained the Charlotte court heading.[103] Based on this record, the Fourth Circuit found that proceedings were completed in Atlanta.[104] In reaching this decision, the court focused on the IJ's decision indicating that the court was sitting in Atlanta, rather than the location on the court's order. Though it is not entirely clear on the facts as described in the case, it seems that venue was never changed after the NTA was filed with the Atlanta court.

Nonetheless, in this case the Fourth Circuit declined to transfer the case to the Eleventh Circuit (the circuit having jurisdiction over Atlanta cases) as a matter of discretion, finding that: a) the petitioner was understandably confused about where to file his PFR; b) the case had already been fully briefed and argued before the Fourth Circuit; and c) the weakness of Mr. Sorcia's case on the merits weighed against transferring it.[105] While the government argued that the BIA had relied on an Eleventh Circuit case in issuing its decision, the Fourth Circuit gave this argument little weight, in part because the BIA also relied on a Supreme Court and a BIA decision for the same proposition.[106]

5. Fifth Circuit

A recent Fifth Circuit decision found that venue was proper where "removal proceedings were completed." *Adeeko v. Garland*.[107] In that case, the noncitizen was detained in Otero, NM (within the 10th Circuit), but his NTA directed him to appear in El Paso, TX (within the 5th Circuit).[108] Mr. Adeeko appeared at his first hearing from Otero via VTC.[109] There was further motion practice in the case which resulted in the proceedings being terminated, appealed by DHS, and remanded to the IJ.[110] The noncitizen, *pro se*, filed a PFR with the Tenth Circuit, which transferred the case to the Fifth Circuit.[111] On appeal, Mr. Adeeko argued that the case should be transferred back to the Tenth Circuit since the BIA decision cited to Tenth Circuit law

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[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] *Id*. at 124.
[107] 3 F.4th 741 (5th Cir. 2021).
[108] *Id*. at 744.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 745.

in deciding the case.[112] The Fifth Circuit rejected this argument however, finding that as "the Tenth Circuit's transfer of Adeeko's petition to this court makes clear, venue is proper here—not in the Tenth Circuit—because Adeeko's removal proceedings were completed by an IJ sitting in a state of this circuit, Texas."[113] In this case, it seems that the El Paso court was both the court where the NTA was filed and where the IJ was physically located, so it is not clear which of those facts the Fifth Circuit found to be determinative of venue.[114]

6. Sixth Circuit

The Sixth Circuit retained venue over a case where the government attempted to move venue, without reaching a holding on which circuit was proper for venue. In *Thiam v. Holder*,[115] the noncitizen's case was on the calendar in the Cleveland, OH immigration court (within the 6th Circuit).[116] There was an *in absentia* removal order, a successful motion to reopen, and three more hearings in Cleveland, OH, "but the presiding IJ was in Arlington, Virginia (within the 4th Circuit) and conducted the hearings via videoconference."[117] Although the Cleveland court apparently became an independent court during the course of the hearings, it did not have enough judges, and for the final hearing, the noncitizen and counsel traveled to Arlington to appear in person before the IJ there.[118] After losing in immigration court, the BIA, "stated briefly that the Fourth Circuit is 'where this case arises'" and applied Fourth Circuit law.[119] The court of appeals decision noted that "venue was not raised in either side's briefs."[120] Ms. Thiam filed a PFR before the Sixth Circuit and the government moved to transfer to the Fourth Circuit arguing that the case was completed in Arlington.[121] Ms. Thiam argued that the case originated in Cleveland and there had never been a motion to change venue filed; she further made a policy argument that she should not have to give up the right to an in-person hearing to preserve venue in a particular circuit.[122]

The Sixth Circuit declined to rule on the issue, finding instead that venue is not jurisdictional, that it was reasonable for Ms. Thiam to file in the Sixth Circuit, and that in the interest of justice it would not transfer the case to the Fourth Circuit.[123] The Sixth Circuit invited EOIR to provide clarity on these issues, "We encourage the EOIR to take up this project once more and provide much needed guidance as to the meaning of § 1252(b)(2) in the new age where parties, counsel, and judge may only be virtually co-located."[124] That invitation was issued ten years ago, but EOIR has still not published regulations on these issues.

[112] *Id*. at 746.
[113] *Id*.
[114] *Id*.
[115] 677 F.3d 299 (6th Cir. 2012).
[116] *Id*. at 300.
[117] *Id*. at 300–301.
[118] *Id*. at 301
[119] *Id*.
[120] *Id*.
[121] *Id*. at 302.
[122] *Id*.
[123] *Id*.
[124] *Id*.

7. Seventh Circuit

Prior to the 2022 decisions addressing venue, the leading case on the venue issue was from 2004, and determined that the "home office" of the immigration court is what determines venue. In *Ramos v. Ashcroft*,[125] the noncitizen, the government, and witnesses, all appeared in person in Council Bluffs, IA, while the IJ appeared "on a television set" from the Chicago immigration court. The caption of the proceedings also stated Chicago immigration court.[126] In this case, the government argued that venue should be transferred from the Seventh Circuit (which presides over Chicago) to the Eighth Circuit (which presides over Iowa). Here the Seventh Circuit focused on the home office of the immigration court:

> The immigration judge completed *his* role in Chicago—something that would have been true even had this been a three-cornered teleconference (with the IJ participating from, say, a vacation home in Michigan). The immigration court's home office is where all parties were required to file their motions and briefs, see 8 C.F.R. § 1003.31(a), where the orders were prepared and entered, and where Ramos now prefers to litigate. [Emphasis in original.][127]

In this case, that court's "home office" was the same location as where the IJ was physically located, in Chicago. But the Seventh Circuit clarifies that even if the IJ had been physically sitting in a vacation home in a different state, it is still the Chicago court that completed the case.[128] In defining "home office," the Seventh Circuit says this is "where all parties were required to file their motions and briefs" in order to determine venue.[129] Although the decision does not specifically state in which court the NTA was filed, it is likely the NTA was filed in Chicago, based on the Seventh Circuit's language that that is the court where all parties were required to file their papers. The Seventh Circuit did not use the term "administrative control court," but its definition of "home office" appears to coincide with the definition of administrative control courts. *Ramos* was cited favorably in another Seventh Circuit decision, *Chavez-Vasquez v. Mukasey*, which found that venue "is determined by the location of the immigration court rather than the by location from which witnesses appear via teleconference."[130]

While *Ramos* was issued before the advent of immigration adjudication centers and widespread remote work, the Seventh Circuit nonetheless sets forth a clear rule that the court's location is determinative of venue, not the IJ's location. The court goes on to suggest that the government should consider issuing regulations clarifying this ambiguous area of the law. Interestingly, the court notes though that "all regulations could do, in the absence of statutory amendment, would be to offer the alien a choice; the statute itself ensures that the alien may petition for review in the circuit where the immigration court is located."[131] The court does not give any further reasoning as to why the statute ensures that venue lies where the immigration court is located.

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[125] 371 F.3d 948 (7th Cir. 2004).
[126] *Id*. at 949.
[127] *Id*.
[128] *Id*.
[129] *Id*. at 949.
[130] 548 F.3d 1115, 1118, note 1 (7th Cir. 2008).
[131] *Id*.

Further, as discussed above, it is often challenging to ascertain "where the immigration court is located."

8. Eighth Circuit

The Eighth Circuit recently addressed choice of law issues in *Adongafac v. Garland*.[132] In this case, Ms. Adongafac was physically in Louisiana (within the 5th Circuit) for her immigration court hearing, but the case was "docketed" with the Minnesota immigration court (within the 8th Circuit), and heard via VTC by an immigration judge who, presumably, was appearing from the Minnesota immigration court. The fact section of the decision does not specify where the NTA was filed. The Eighth Circuit determined that "venue is proper 'where the administrative hearings were completed,'"[133] here in Minnesota, and retained venue over the case. While Ms. Adongafac argued that the BIA had improperly applied Fifth Circuit law (based on the hearing location in Louisiana) rather than Eighth Circuit law, the Eighth Circuit found that she had waived this argument by failing to argue to the BIA that the IJ had erroneously applied Fifth Circuit law. Further, the Eighth Circuit determined that the error was harmless because there was not a substantial difference between Fifth and Eighth Circuit law.[134]

Prior to *Adongafac*, the Eighth Circuit decided *Sholla v. Gonzales*,[135] accepting venue, without discussion, over a PFR for a noncitizen whose case was filed in the Chicago immigration court (in the 7th Circuit). The decision states that "[a]fter a venue transfer to St. Louis [in the 8th Circuit], Sholla had his merits hearing via video conference before an IJ in Oakdale, Louisiana."[136] There is no immigration court in St. Louis, MO, so it is possible that Mr. Sholla was appearing from a hearing location in one of several St. Louis area detention facilities.[137] There are not many facts in this decision, but it appears that Mr. Sholla's case had no connection to Oakdale other than having an IJ appear via VTC from that location. Thus the Eighth Circuit seems to have accepted venue over the case based on the alleged venue transfer to St. Louis, even though there should not have been a change of venue to a hearing location where there is no immigration court.

9. Ninth Circuit

The Ninth Circuit has also issued a recent precedential decision on venue in *Plancarte Sauceda v. Garland*,[138] which found that the immigration court to which venue had been changed should determine venue for PFR purposes. In this case, Ms. Plancarte Sauceda's NTA was filed in Salt

[132] 53 F.4th 1114 (8th Cir. 2022).
[133] *Id.*
[134] *Id.*
[135] 492 F.3d 946 (8th Cir. 2007).
[136] *Id.* at 948.
[137] *See* U.S. Dep't of Justice, *EOIR Immigration Court Listing* (Oct. 4, 2022), https://www.justice.gov/eoir/immigration-court-administrative-control-list.
[138] 23 F.4th 824 (9th Cir. 2022).

Lake City, UT (within the 10th Circuit).[139] She moved to change venue to Boise, ID[140] (within the 9th Circuit) and that motion was granted.[141] There is not actually an immigration court in Boise, ID; there is a televideo hearing location.[142] It was therefore probably error for the Salt Lake City court to grant this motion.

Initially the Portland, OR immigration court (also within the 9th Circuit) had administrative control over the Boise hearing location, but that later changed and the Salt Lake City court assumed administrative control over Boise.[143] Subsequent hearing notices were issued by the Salt Lake City court, even though the hearing location was Boise.[144] At the individual hearing, the IJ and DHS counsel were in Salt Lake City, while the noncitizen and the interpreter were in Boise.[145] The IJ stated on the record that the proceedings were being conducted "at the Salt Lake City Court's Boise Idaho hearing location."[146]

In *Plancarte*, the court specifically distinguishes the 10th Circuit decision in *Yang You Lee v. Lynch*,[147] discussed below. Here, the Ninth Circuit found it significant that the Salt Lake City court had formally transferred venue to Boise and thereafter Ms. Plancarte never physically appeared in Salt Lake City.[148] Moreover, the IJ in the case indicated that proceedings were being conducted in Boise and the BIA had also found that venue was proper in the Ninth Circuit.[149] The Ninth Circuit cited to the 2007 proposed venue regulation that was never published,[150] finding that it addressed the precise issue before the court—whether venue remains with the designated hearing location, even if the IJ conducts the hearing from a different location via VTC.[151] The Ninth Circuit thus concluded that, as "contemplated by the proposed regulation, once venue was transferred to Boise, it remained there despite the fact that the IJ was in Salt Lake City."[152]

This case again highlights the significant confusion surrounding venue in VTC cases. Since there is no immigration court in Boise, ID, venue should never have been transferred there, and the Ninth Circuit should have found venue to lie in Salt Lake City, the immigration court that heard the proceedings. It does not appear, however, that any party raised this issue before the Ninth Circuit.

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[139] *Id.* at 831.
[140] It is worth noting that since there is no immigration court in Boise, ID, only a televideo hearing location, the Salt Lake City immigration court should not have granted the change of venue motion; only immigration courts, not hearing locations can have venue over removal proceedings.
[141] *Id.*
[142] *See* U.S. Dep't of Justice, *EOIR Immigration Court Listing* (Oct. 4, 2022), https://www.justice.gov/eoir/immigration-court-administrative-control-list.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] 791 F.3d 1261 (10th Cir. 2015).
[148] 23 F.4th at 832.
[149] *Id.*
[150] 72 Fed. Reg. 14494.
[151] 23 F.4th at 832.
[152] *Id.*

10. Tenth Circuit

The Tenth Circuit has determined that there is not a bright-line test to determine venue, but rather that courts should weigh a number of variables. In *Yang You Lee v. Lynch*,[153] Mr. Lee filed his PFR in the Fifth Circuit, which transferred the case *sua sponte* and without explanation to the Tenth Circuit.[154] The Tenth Circuit then assessed whether venue was proper.

In this case, the noncitizen was detained in Oklahoma (within the 10th Circuit) and attended several hearings via VTC with an IJ located in Dallas, TX (within the 5th Circuit.)[155] Mr. Lee was physically transported from Oklahoma to Dallas for the merits hearing, and he appeared in person in Dallas for that hearing.[156] Mr. Lee appealed his case to the BIA, and the BIA noted Oklahoma City rather than Dallas next to Mr. Lee's file number, "apparently indicating the BIA's view that the final hearing was located there."[157]

Here the government argued that venue was appropriate in the Tenth Circuit because that is where the case was docketed.[158] In making that argument, the government relied on both OPPM 04-06, which EOIR has since rescinded,[159] and proposed EOIR regulations which were never finalized.[160] The Tenth Circuit considered a number of factors in determining that venue was within the Fifth Circuit. First, it noted that the case was initially filed with the Dallas immigration court and that there had never been a motion to change venue.[161] Second, the hearing itself was held in Dallas.[162] And third, the noncitizen was physically in Dallas before the IJ for the final hearing.[163] Considering all of these factors, the Tenth Circuit concluded that venue was proper in the Fifth Circuit.[164] It then considered whether it was appropriate to transfer the case back to the Fifth Circuit and determined that it was because the petitioner originally filed in the Fifth Circuit (and therefore was not confused), petitioner's counsel was in Dallas, and petitioner's legal argument relied on Fifth Circuit law.[165] The Tenth Circuit therefore transferred the case back to the Fifth Circuit.[166]

In a case decided shortly before *Lee*, the Tenth Circuit had reached the opposite result. In *Medina-Rosales v. Holder*,[167] the Tenth Circuit found that Fifth Circuit law applied to a case that was heard in Tulsa, OK (located within the 10th Circuit), but where the administrative control court was in Dallas (located within the 5th Circuit). Even though the NTA was filed in Dallas, the Tenth Circuit found "the fact that proceedings were conducted by video conference did not

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[153] 791 F.3d 1261 (10th Cir. 2015).
[154] *Id*. at 1263.
[155] *Id*. at 1262.
[156] *Id*. at 1263.
[157] *Id*.
[158] *Id*. at 1264.
[159] *See* EOIR PM 21-03, *supra* note 27.
[160] *See* 72 Fed. Reg. 14494; 791 F.3d at 1263.
[161] *Id*. at 1266.
[162] *Id*.
[163] *Id*.
[164] *Id*.
[165] *Id*.
[166] *Id*.
[167] 778 F.3d 1140 (10th Cir. 2015).

change the place of the hearings from Tulsa to Dallas" and the *Medina-Rosales* court did not analyze the significance of where the NTA was filed.[168] The Tenth Circuit cited to EOIR guidance OPPM 04-06 in reaching this conclusion, however, and that guidance has now been rescinded.[169]

11. Eleventh Circuit

There does not appear to be a published Eleventh Circuit decision addressing these issues.

V. Applying the Law

A. Application of Circuit Law to a Hypothetical Example

To highlight the confusion that has resulted from the lack of uniform rules on these issues, consider the following hypothetical.

> *Ms. Garcia is scheduled for an individual hearing in New York City, before IJ Smith, who sits in the 26 Federal Plaza NY immigration court. On the day of the hearing, which is scheduled to be conducted via WebEx, Judge Smith is sick, and instead Judge Wu appears via video from the Immigration Adjudication Center in Falls Church, VA, as EOIR applies its "No Dark Courtrooms" memo[170] to ensure that the allotted hearing time does not go to waste.*

In this scenario, if Ms. Garcia lost before the IJ and the BIA, it would not be clear with which federal court she should file a PFR. Under the Second Circuit rule the case should be filed within the Second Circuit because that is where the case is docketed and there has been no motion to change venue granted. By way of contrast, under the Fourth Circuit rule, the case should be filed within the Fourth Circuit because the IJ's physical location determines venue. Presumably in this example, the practitioner could choose in which circuit to file a PFR since either circuit would likely find that venue was proper there. The "knotty issue," to quote former Director McHenry, is which circuit's case law should apply. In this example, where counsel would have had no reason to predict that a judge appearing from the Fourth Circuit would preside over the case, counsel would likely have briefed the case applying Second Circuit case law.

Not knowing which circuit's law will apply until the day of the hearing is especially problematic in cases where the legal issue is subject to a circuit split. Moreover, in asylum cases, the BIA has held that the asylum seeker must set forth their particular social group before the IJ, and cannot raise different particular social groups on appeal.[171] If counsel has crafted a particular social group that has been recognized in the circuit where the case is being heard, but not in the circuit where the IJ is sitting, the asylum seeker could suffer extreme prejudice in their case. At the

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[168] *Id*. at 1143.
[169] *See* EOIR PM 21-03, *supra* note 27.
[170] See EOIR PM 19-11, "No Dark Courtrooms," at 2 (May 1, 2029), https://www.justice.gov/eoir/reference-materials/OOD1911/download.
[171] *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).

same time, it is unreasonable to expect counsel to know all potential law in all circuits if they are not aware until the final hearing commences, that the IJ will appear from a different location. Further, given the general 25-page limit on immigration court briefs,[172] it would be impossible to adequately brief the law in multiple circuits in every brief.

B. Making the Arguments that Are Best for Your Client

In cases involving VTC where different locations are implicated, it is important for practitioners to preserve all arguments. In some circumstances, it will clearly be in the noncitizen's interest to argue for venue in one court over another. In other cases, the most important issue will be for the noncitizen to have clarity on which circuit's law applies.

Below are some tips for navigating these challenging waters:

- Unless foreclosed by circuit court precedent,[173] file a PFR in the circuit that is most favorable to the specific case being litigated. Practitioners should bear in mind that courts of appeals have not found venue to be a jurisdictional issue, so if the practitioner files in a circuit where they have a good faith argument to do so, and the court of appeals finds that venue lies elsewhere, it may still elect not to transfer the case. In the alternative, it may simply transfer the case, but will not generally dismiss the case based on improper venue.
- Carefully examine the NTA in the case to determine where the notice was actually *filed*. Finding the filing location will involve looking for the receipt stamp on the NTA, not simply looking at the hearing location in the caption. Although the caption may state the court of the hearing location, it is the court where the NTA was filed where venue lies under the regulations, unless and until a party moves to change venue, or the court changes venue where clerical transfers are permitted to a court within the same administrative control.[174]
- Ensure that the court cited as the court in which the noncitizen must appear is the court where the NTA is actually filed. If these two courts are different, explore the possibility of a motion to terminate proceedings.[175]
- If it is in your client's best interest to argue that PFR venue lies with the immigration court where the NTA was filed, and the IJ was sitting within the Fourth Circuit, argue that *Herrera-Alcara* (discussed above) was wrongly decided. The INA focuses on where

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[172] *See* ICPM § 4.19(b).

[173] Note, however, as discussed above, because different circuits give different weight to different factors in determining venue, there may be situations where the petitioner has a choice of where to file, such as in the example cited above where the hearing location is within the Second Circuit but the IJ physically appears from within the Fourth Circuit.

[174] The American Immigration Lawyers Association, and other organizations, filed an amicus brief in *Berhe v. Wilkinson*, Second Circuit, 21-6042, arguing that the immigration court with which the NTA is filed, not the physical detention location of the noncitizen, should determine venue. Practitioners could review this amicus for ideas on how to frame this argument. *See* Am. Immigration Lawyers Ass'n, AILA Doc. No. 21040930 (Urging the Second Circuit to adopt the rule that "venue remains unchanged from a case's initiation through completion unless the parties litigate, and an immigration judge grants, a change-of-venue motion.").

[175] *See* EOIR, Uniform Docketing System Manual, at I-3 (Sep. 2018), https://www.justice.gov/eoir/file/1157516/download EOIR (If the address of the immigration court "is not included on the NTA or if your court is not the administrative control office, return the NTA as improperly filed").

the case was "completed." Although the IJ plays a critical role in completing a case, after the IJ issues a decision, the case is not actually "completed" until further actions are taken by the administrative control court. These actions include docketing the IJ's decision "for the [IJ's] signature," "[p]lac[ing] the original signed order" in the Record of Proceeding, serving "one copy of the order on the DHS [counsel]," and serving another copy on the noncitizen or his attorney.[176] Furthermore, whatever action the IJ takes, whether it is granting relief, or issuing a removal order, the IJ does so under the authority of the immigration court where venue lies.

- If the IJ unexpectedly appears from an Immigration Adjudication Center (IAC) on the hearing date, consider seeking a continuance arguing unfair surprise, lack of notice, and due process violations. Under INA § 240 (b)(4), the noncitizen "shall have a reasonable opportunity to examine the evidence" against them. It is not possible to weigh the significance of the evidence in the case without knowing which circuit's law will apply.
- Make and preserve due process arguments. These arguments may be especially powerful if the noncitizen has accepted a criminal plea based on circuit law where the noncitizen resides. Under *Padilla v. Kentucky,*[177] noncitizens have a right to be counseled on the immigration consequences of particular convictions. Changing the circuit whose precedent applies after a noncitizen has accepted a plea may violate their constitutional rights.
- Communicate with other practitioners in the court where the individual hearing is scheduled. In some courts it may be common for IJs to appear from particular IACs. Knowing in advance from which circuit an IJ may appear and researching venue laws under the circuit law of both locations will help to prepare for how best to argue the law at the hearing.
- Remember, this is a rapidly developing area of the law. Practitioners should **not** rely on the information in this practice advisory without conducting your own research. Federal courts of appeals will continue to issue decisions on these issues, and EOIR may issue further guidance. It is imperative that practitioners stay informed of these issues as VTC becomes more and more common.

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[176] *Id*. at VII-2.
[177] 559 U.S. 356 (2010).

VI. Appendix—Overview of Circuit Precedent

The table below is not exhaustive but lists the key decisions, discussed in greater detail above.

Court	Primary Factor Considered for Venue Determination	Case	Notes
1st Circuit	Court where NTA filed was discussed	*Georcely v. Ashcroft*, 375 F.3d 45 (1st Cir. 2004)	Court's holding did not reach venue issue
2nd Circuit	Court where venue lies under the regulations	*Sarr v. Garland*, 50 F.4th 326 (2d Cir. 2022)	Second Circuit mistakenly identified court with venue as Louisiana when NTA was actually filed in NY and there was no change of venue motion
3rd Circuit	Unclear	*Luziga v. Att'y Gen. United States of Am*., 937 F.3d 244, 250 (3d Cir. 2019)	Court did not feel it had to decide venue issue
4th Circuit	IJ location	*Herrera-Alcala v. Garland*, 39 F.4th 233 (4th Cir. 2022)	Bright line rule that focus is on location of the immigration judge, not the court
5th Circuit	IJ location and/or location where NTA was filed and judge heard the proceeding; rejecting hearing location for venue purposes	*Adeeko v. Garland*, 3 F.4th 741(5th Cir. 2022)	IJ location and court with venue were the same in this case, so it's not clear which factor was dispositive or if the court considered both factors
6th Circuit	Declined to rule on issue and retained case as matter of discretion	*Thiam v. Holder*, 677 F.3d 299 (6th Cir. 2012)	
7th Circuit	Location of administrative control court	*Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004)	In this case the court referred to the administrative control court as the "home office."
8th Circuit	Court where case was "docketed"	*Adongafac v. Garland* 53 F.4th 1114 (8th Cir. 2022).	Unclear from facts where NTA was filed
9th Circuit	Court to which venue had been changed	*Plancarte Sauceda v. Garland*, 23 F.4th 824 (9th Cir. 2022)	9th Circuit should not have found that venue was properly changed to Boise, ID because there is a hearing location there, but no immigration court
10th Circuit	A variety of factors including venue and where noncitizen attended final hearing in person	*Yang You Lee v. Lynch*, 791 F.3d 1261 (10th Cir. 2015)	10th Circuit retained case despite determining venue lay in 5th Circuit
11th Circuit	No decisions		