THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 18-14563

MANUEL LEONIDAS DURAN ORTEGA,
Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR STAY OF REMOVAL

File No. [redacted]

Michelle R. Lapointe
Kristi L. Graunke
SOUTHERN POVERTY LAW CENTER
[redacted]

Attorneys for Petitioner

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutory Authorities

Rules and Regulations

INTRODUCTION

The government seeks to summarily deport Petitioner Manuel Duran-Ortega before the Court can fully consider his petition for review of the Board of Immigration Appeals ("BIA") decision denying his motion to reopen. In its response to Duran-Ortega's motion for a stay of removal, the government advances an interpretation of the "notice to appear" requirements at odds with the statute and the Supreme Court's recent decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The government's view here also flatly contradicts its position before the Supreme Court in *Pereira* on the meaning of that same statutory section. Duran-Ortega has submitted significant evidence of changed and deteriorated country conditions that the BIA failed to adequately consider. He will be irreparably injured absent a stay, given the likelihood of harm he faces as an investigative journalist in El Salvador. The chilling of his First Amendment rights and those of others who wish to speak publicly about immigration policy further bolster a finding of irreparable harm. The serious First Amendment implications of the government's actions in Duran-Ortega's case also support the public interest in a stay. Duran-Ortega's stay motion should be granted.

ARGUMENT

I. Duran-Ortega Did Not Receive Statutorily Adequate Notice and His *In Absentia* Order Should Be Rescinded.

The government concedes, as it must, that the putative Notice to Appear ("NTA") served on Duran-Ortega lacked a date and time for a hearing. Resp. Opp. at 14. It nonetheless contends that Duran-Ortega cannot rescind his *in absentia* removal order and reopen his case, despite statutory language allowing exactly that result. The government's position conflicts with the Supreme Court's unambiguous directive that a putative NTA lacking statutorily-required information is not an NTA at all. *See Pereira*, 138 S. Ct. at 2113–14. Where, as here, the government fails to provide a noncitizen with a statutorily compliant NTA, the Immigration and Nationality Act ("INA") allows the rescission of an *in absentia* order. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii). The BIA's inapposite and legally dubious decision in *Matter of Bermudez-Cota*, attempting to circumvent *Pereira*, does not alter this result. *See Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), *appeal filed*, No. 18-72-573 (9th Cir. Sept. 20, 2018).

The INA is clear that an *in absentia* removal order may be rescinded "at any time" if the noncitizen can show that he did not receive a notice to appear that specifies, *inter alia*, the "time and place at which the proceedings will be held." *See* 8 U.S.C. § 1229a(b)(5)(C); 8 U.S.C. § 1229(a)(1)(G)(i). The only putative

NTA that Duran-Ortega received lacked any information about the time and place of his hearing. *See* Ex. 4. The government acknowledges that an *in absentia* order can be rescinded if the noncitizen did not receive notice "in accordance with section 1229(a)" and lists some of the required elements of an NTA. *See* Resp. Opp. at 11-12 (citing 8 U.S.C. § 1229(a)(1)(F)(i)-(iii)). Yet the government conspicuously omits the statutory requirement that an NTA contain the date and time and of the hearing. *See* Resp. Opp. at 11-12; 8 U.S.C. § 1229(a)(1)(G)(i). This information is essential, and without it, "the Government cannot reasonably expect the noncitizen to appear for his removal proceedings." *Pereira*, 138 S. Ct. at 2115.

Notably, the government takes the precise opposite position here than it did before the Supreme Court in *Pereira*. In *Pereira*, the government recognized that omission of date and time information in an NTA carried with it the consequence of rescission of an *in absentia* order. *See* Ex. 44 (Br. for Resp. Att'y Gen.) at 25. The government argued that there was a meaningful difference between the INA subsection relating to *in absentia* orders (section 1229a(b)) and the section relating to the "stop time" rule for purposes of cancelation of removal (section 1229b). It pointed to section 1229a(b)(5)(C)(ii) and its specific cross-reference to section 1229(a)(1) to argue that "when Congress wished to refer to satisfaction of section 1229(a)'s requirements—and wished to attach consequences to compliance or

noncompliance with them—it did so expressly."[1] Ex. 44 at 25; *see also Pereira*, 138 S.Ct. at 2118.

The Supreme Court rejected the government's strained interpretation of the INA and held that *both* sections attach consequences to NTAs that fail to contain a date and time. *Pereira*, 138 S. Ct. at 2118 ("The far simpler explanation, and the one that comports with the actual statutory language and context, is that each of these three phrases [in 8 U.S.C. §§ 1229a(b)(5)(A), 1229a(b)(5)(C)(ii), and 1229b(d)(1)] refers to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)."). Aware of the outcome in *Pereira*, the government now reverses course and claims that section 1229(a)'s mandate applies only to the stop time rule and not the subsection on rescission of *in absentia* orders. *See* Resp. Opp. at 16. *Pereira* forecloses that result.

The government's citation to section 1229(a)(2) is similarly misplaced. *See* Resp. Opp. at 15. It is true that section 1229a allows for rescission of *in absentia* orders when the noncitizen did not receive notice "in accordance with paragraph (1) *or* paragraph (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(C)(ii) (emphasis added). But this is of no moment—paragraph (2) of section 1229(a) deals with a

[1] The government attempted to contrast the specific reference in section 1229a(b)(5)(C)(ii) to notice "in accordance with paragraph (1) . . . of section 1229(a)" with section 1229b(d)(1)'s vaguer reference to a "notice to appear under section 1229(a)." *See Pereira*, 138 S. Ct. at 2118.

change or postponement in the time or place of a hearing after a valid NTA; *i.e.*, one that contained a date and time of hearing, has been served. *See Pereira*, 138 S. Ct. at 2114 (noting government's concession that "only paragraph (1) bears on the meaning of a 'notice to appear'").

The *Pereira* Court rejected an argument similar to the one the government makes here, noting that "[b]y allowing for a 'change or postponement' of the proceedings to a 'new time or place,' paragraph (2) presumes that the Government has already served a 'notice to appear under section 1229(a)' that specified a time and place as required by § 1229(a)(1)(G)(i). Otherwise, there would be no time or place to 'change or postpon[e].'" *Pereira*, 138 S. Ct. at 2114 (adding that "paragraph (2) of § 1229(a) actually bolsters the Court's interpretation of the statute."). Here, Duran-Ortega was served with a putative NTA lacking any date or time for his hearing, so there was nothing to change or postpone. The government's argument that it can cure a defective notice with subsequent notice of a "new time or place of the proceedings" is without merit. *See* Resp. Opp. at 15; 8 U.S.C. § 1229(a)(2).

The government's reliance on the BIA's recent decision in *Bermudez-Cota* fares no better. Separate and apart from whether *Bermudez-Cota* is a permissible interpretation of *Pereira*, which Duran-Ortega disputes, *Bermudez-Cota* is legally and factually inapposite. The noncitizen in *Bermudez-Cota* received notice of and

attended his hearing, and sought to terminate his proceedings on the grounds that the immigration court lacked jurisdiction over his case due to the deficient NTA. *See Bermudez-Cota*, 27 I&N Dec. at 443. By contrast, Duran-Ortega is seeking to rescind an *in absentia* removal order and reopen his case. The INA provides a clear avenue for him to do so because he did not receive notice "in accordance with" section 1229(a)'s mandate that the NTA contain a date and time of hearing. The government claims that a "two-step" notice process (a defective NTA served in person followed by mailing of an actual hearing notice with a date and time) satisfies 8 U.S.C. § 1229(a) because paragraph (2) allows the government to mail a changed date or time of the hearing. As outlined above, *Pereira* bars this argument where the initial NTA failed to set a hearing date in the first instance. *See Pereira*, 138 S. Ct. at 2114.[2]

Duran-Ortega has shown a substantial likelihood of success on the merits of his claim that the BIA's decision not to reopen his proceedings was an abuse of discretion.

[2] The government erroneously claimed that Duran-Ortega does not challenge the immigration court's jurisdiction. *See* Resp. Opp. at 15 n.2. Duran-Ortega has argued in the alternative to his claim based on the rescission and reopening section of the INA that the deficient notice to appear failed to vest the immigration court with jurisdiction. Pet'r Stay Mot. at 15.

II. The BIA Failed to Reasonably Consider Evidence of Changed Country Conditions.

The BIA decision was based on a cursory review of a fraction of the record on country conditions in El Salvador. Contrary to the government's contention, the BIA decision lacks reasoned consideration of the evidence of significantly worsened conditions for journalists in El Salvador since 2007. The BIA also erroneously confined its review to a comparison of the two U.S. Department of State Country Reports ("Country Reports") on the condition of human rights in El Salvador. The BIA's inexplicable disregard of Duran-Ortega's additional evidence and its limitation of its analysis to comparison of two U.S. government-generated reports was arbitrary and capricious.

As an initial matter, the government misstates the applicable standard of review. Although the Court generally reviews denial of motions to reopen under the abuse of discretion standard, it reviews "claims of legal error . . . including claims that the BIA did not provide reasoned consideration of its decision, *de novo*." *Bing Quan Lin v. U.S. Att'y Gen.*, 881 F.3d 860, 872 (11th Cir. 2018). The government glosses over this important distinction. *See* Resp. Opp. at 17.

The BIA made only passing reference to Duran-Ortega's copious evidence of changed country conditions. The record before the BIA is replete with evidence that the conditions in El Salvador have materially worsened for journalists since

2007. The BIA and IJ failed to actually consider a full ten exhibits demonstrating *worsening* conditions, including an increase in murders of journalists and their families since 2013, the widespread intimidation of others, and the "open hostility" of the Salvadoran government "toward independent media." Ex. 30 at 1; *see also* Exs. 28-29, 33-39. The reports detail both individual cases and the Salvadoran government's overall animosity towards journalists through threats and prosecution. *See, e.g.*, Exs. 29; 30; 34-35. Those conditions differ dramatically from conditions in 2007, when "international NGOs generally commented positively on the status of press freedom in the country" and "[i]ndependent media were active and expressed a variety of views without restriction." Ex. 31 at 7. The government argues that the extensive evidence submitted "should be accorded less weight as Duran-Ortega did not provide any corresponding evidence regarding those conditions at the time of his 2007 removal hearing." Resp. Opp. at 18. Duran-Ortega presented the 2007 Country Report, which, as stated above, indicates a virtually nonexistent level of violence against journalists. *See* Ex. 31 at 7. The government provides no support for its argument that evidence should be accorded less weight if the noncitizen fails to present the same number of reports from each year.

The BIA also inexplicably affirmed, without analysis, the IJ's decision to confine his analysis to the 2007 and 2017 Country Reports. Ex. 1 at 4. This reflects

a lack of reasoned consideration such that this Court cannot determine that the BIA and the IJ "heard and thought" rather than "merely reacted." *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 948 (11th Cir. 2010); *see also Imelda v. U.S. Att'y Gen.*, 611 F.3d 724, 729 (11th Cir. 2010) ("[u]se of country reports cannot substitute for an analysis of the unique facts of each applicant's case") (quoting *Gitimu v. Holder*, 581 F.3d 769, 773 (8th Cir.2009)).

Although the BIA and the immigration judge were not required to address each piece of evidence specifically, they nonetheless needed to "consider the issues raised and announce their decision in terms sufficient to enable a reviewing court to perceive that they have heard and thought and not merely reacted." *Carrizo v. U.S. Att'y Gen.*, 652 F.3d 1326, 1332 (11th Cir. 2011) (citing *Ayala*, 605 F.3d at 948). While the BIA is afforded broad discretion in weighing of evidence, it may not *ignore* evidence wholesale, as it did here. *See Ayala*, 605 F.3d at 949 (where BIA acknowledged but "ignored the import" of evidence, Court of Appeals could not "meaningfully review" the BIA's decision). Here, the Board's confinement of its inquiry to two Country Reports, its failure to acknowledge significant material differences between those reports, and its disregard of relevant evidence of changed conditions rendered its decision "so fundamentally incomplete that a review of legal and factual determinations would be quixotic." *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1302 (11th Cir. 2015).

Even if the Court determines that the "reasoned consideration" standard is inapplicable here, the BIA's decision was an abuse of discretion because it "overlooked, or inexplicably discounted" Duran-Ortega's material evidence of a change in country conditions. *See Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009). Its failure to consider the robust record of additional evidence of changed country conditions, and its limitation of its analysis to a comparison of the Country Reports, was arbitrary and capricious. *See* Pet'r Mot. at 7-10.

III. The Government Misapprehends Duran-Ortega's First Amendment Argument.

Duran-Ortega's arrest and detention, and the threat of imminent deportation in the wake of his coverage of a peaceful protest of immigration policy implicate weighty First Amendment concerns. These concerns are relevant to both the irreparable harm and public interest factors this Court reviews in a stay motion under *Nken v. Holder*, 556 U.S. 418 (2009). Rather than respond directly to any of these arguments, the government raises several red herrings.

First, the government contends that the BIA's denial of Duran Ortega's motion to reopen was not tainted by First Amendment violations. Duran-Ortega does not argue that the BIA's decision violated the First Amendment, but that removal before this Court can consider his petition for review results in irreparable harm to the Duran-Ortega's First Amendment rights and those of his audience, and

damage to the public interest in the form of chilling of protected speech. *See* Pet'r Stay Mot. at 21-22. The First Amendment protects both Duran-Ortega's right to gather and report news and the rights of his audience to hear his expressive viewpoint. Both are harmed if his removal is not stayed, particularly in light of the evidence Duran-Ortega presented of an unsettling recent pattern of the government targeting those who speak out about immigration enforcement policy. *See id*.

Second, the government contends that Immigration and Customs Enforcement ("ICE") did not violate the First Amendment in detaining Duran-Ortega. But Duran-Ortega is not challenging his ongoing detention by ICE through his petition for review or stay motion, so this argument is of no consequence. Finally, the government argues that this Court lacks authority to review allegations that ICE targeted him for removal. *Id.* However, the jurisdiction-stripping statute it invokes does not "preclude[e] review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals," and the stay motion arises out of Duran-Ortega's filing of a petition for review. 8 U.S.C. § 1252(a)(2)(D).

Duran-Ortega's removal will result in irreparable harm and the public interest strongly favors a stay.

CONCLUSION

For the reasons stated above and in his stay motion, Manuel Duran-Ortega requests that this Court stay his removal pending adjudication of his petition for review and any resultant proceedings.

Respectfully submitted,

s/ Michelle R. Lapointe
Michelle R. Lapointe
Kristi L. Graunke
SOUTHERN POVERTY LAW CENTER
[redacted]

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. **Type-Volume**

This document complies with the word limit of Fed. R. App. P. 27(d)(2) because this document contains 2,564 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. **Typeface and Type-Style**

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

DATED: November 12, 2018

s/ Michelle R. Lapointe
Michelle R. Lapointe
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michelle R. Lapointe
Michelle R. Lapointe