THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. _____

MANUEL LEONIDAS DURAN ORTEGA,
Petitioner.

v.

JEFFERSON B. SESSIONS III,
United States Attorney General,
Respondent.

On Appeal from the Executive Office of Immigration Review
Board of Immigration Appeals
File No. [redacted]

PETITIONER'S EMERGENCY MOTION FOR STAY OF REMOVAL PENDING APPEAL

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[redacted]

Attorneys for Petitioner

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in the Eleventh Circuit Rule 26.1-2(a) have an interest in the outcome of this case:

Cole, David, Warden of the LaSalle Detention Facility

The Honorable Scott D. Criss, United States Department of Justice, Executive Office for Immigration Review

The Honorable Dee Drell, United States District Court for the Western District of Louisiana

Duran Ortega, Manuel *(Petitioner)*

Graunke, Kristi L. *(Counsel for Petitioner)*

Jong, Jeremy *(Counsel for Petitioner)*

Joseph, David C., United States Attorney for the Western District of Louisiana

Lapointe, Michelle R. *(Counsel for Petitioner)*

Memphis (Tennessee) Police Department

Nielsen, Kirstjen, Secretary of the U.S. Department of Homeland Security

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The Honorable Joseph Perez-Montes, United States District Court for the Western District of Louisiana

Rivera, David, Director of the New Orleans Field Office of U.S. Immigration and Customs Enforcement

The Honorable Grace A. Sease, United States Department of Justice, Executive Office for Immigration Review

Sessions, Jefferson B., United States Attorney General (*Respondent)*

Shelby County (Tennessee) Sheriff Department

Southern Poverty Law Center

U.S. Department of Homeland Security *(Respondent)*

U.S. Immigration and Customs Enforcement

Walker, Cristina, Assistant United States Attorney for the Western District of Louisiana

Willis, Gracie *(Counsel for Petitioner)*

The undersigned counsel of record certifies that there are no publicly traded companies or corporations that have an interest in the outcome of the case or appeal.

Respectfully submitted this 30th of October, 2018,

s/ Michelle R. Lapointe
Michelle Lapointe
Counsel for Petitioner

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PETITIONER'S EMERGENCY MOTION FOR A STAY OF REMOVAL PENDING APPEAL

Pursuant to Fed. R. App. P. 18 and 27 and 11th Cir. R. 18-1 and 27-1, Petitioner Manuel Duran Ortega ("Duran-Ortega") moves for a stay of his likely imminent removal from the United States,[1] pending this Court's review of his removal order and the Board of Immigration Appeals ("BIA") October 17, 2018 order affirming the denial of his Motion to Reopen. *See* Ex. 1.

Duran-Ortega's removal, arising from a 2007 *in absentia* removal order entered at a hearing for which he never received statutorily-required notice, could strip him of the opportunity to present claims for asylum based on increasingly dangerous conditions for journalists in El Salvador. Duran-Ortega has worked as a journalist in Tennessee for the last decade. On April 5, 2018, he was taken into Immigration and Customs Enforcement ("ICE") custody after he was unlawfully arrested by the Memphis Police Department ("MPD") while reporting on a peaceful demonstration. Because Duran-Ortega was falsely arrested and turned over to ICE in retaliation for journalism that was critical of law enforcement, allowing his removal would chill the exercise of basic First Amendment freedoms.

[1] This Motion meets requirements for an emergency motion because, upon information and belief, Duran-Ortega faces a substantial likelihood of imminent removal, meaning that the Motion will be moot within seven days if not granted, and because it addresses the other criteria specified in 11th Cir. R. 27-1(b).

FACTS

Duran-Ortega is a journalist and native of El Salvador. Ex. 2 ¶ 3. In 2005, he was managing a television station in El Salvador. *Id*. A rival television station employee used connections with the police to have Duran-Ortega arrested and falsely charged with crimes. *Id*. After those charges were dismissed, Duran-Ortega broadcast stories that criticized police and judicial corruption. *Id.* As a result, his life was threatened and he fled to the United States in June 2006. *Id.*

Shortly after his arrival, Duran-Ortega was arrested by Customs and Border Protection ("CBP"). *Id.* ¶ 4. Duran-Ortega provided CBP with the address of a relative with whom he would be staying. Ex. 3 ¶ 3. CBP gave Duran-Ortega a Notice to Appear ("NTA") which failed to specify the date and time of any future proceedings. Ex. 4; Ex. 3 ¶ 4. The Atlanta Immigration Court later mailed notice of Duran-Ortega's January 2007 hearing to "[redacted]." Ex. 5. That notice was returned to the court citing "insufficient address." *Id*. At the hearing, an immigration judge ordered Duran-Ortega removed *in absentia*. Ex. 6.

Over the past decade, Duran-Ortega has worked as a well-known journalist for Spanish-language media outlets in Memphis, Tennessee. Ex. 2 ¶ 5; Ex. 7 ¶ 6; Ex. 8 ¶ 3; Ex. 9 ¶¶ 3-4. In 2016, he founded *Memphis Noticias*, an independent news outlet. Ex. 2 ¶ 6. Through *Memphis Noticias*, Duran-Ortega

has reported on controversial issues involving the MPD and immigration authorities. Ex. 2 ¶ 7, *see, e.g.*, Exs. 10-13. His recent reporting on collaboration between ICE and the MPD contradicted MPD's public statements that it does not cooperate with ICE. Exs. 10-11. MPD asked Duran-Ortega to take down at least one such report, but he refused. Ex. 2 ¶ 10; Ex. 14.

On April 3, 2018, Duran-Ortega was reporting on a peaceful protest of MPD's cooperation with ICE. Ex. 2 ¶14; Ex. 15 ¶ 6. Duran-Ortega wore his press credentials to the protest and was filming the event for Facebook Live. Ex. 2 ¶ 16; Ex.15 ¶ 6. After protestors and members of the media began crossing the street at a crosswalk, MPD officers instructed them to clear the street. Ex. 2 ¶ 17; Ex. 8 ¶ 7; Ex. 15 ¶¶ 7-9. Duran-Ortega complied immediately by moving towards the sidewalk. Ex. 2 ¶ 17; Ex. 15 ¶ 12; Ex. 16 ¶ 6. Multiple MPD officers nonetheless pointed at and arrested Duran-Ortega.[2] Ex. 2 ¶ 17; Ex. 15 ¶ 12; Ex. 9 ¶ 7; Ex. 16 ¶ 8; Ex. 17. Several protestors notified the officers that Duran-Ortega was a member of the press, but he was not released. Ex. 15 ¶ 11; Ex. 9 ¶ 7. He was the sole member of the press arrested, even though several other reporters had

[2] Videos of the arrest are available at: https://www.facebook.com/memphisnoticias/videos/1807922945897801/UzpfSTUxMjIzMDMzNTQ2NzA3NToxODA3OTg1NDM1ODkxNTUy/ and https://www.youtube.com/watch?v=VSCoXe8vR0w&app=desktop .

remained in the street after MPD officers instructed them to move. Ex. 2 ¶ 17; Ex. 7 ¶ 9.

Duran-Ortega remained in a Memphis jail for two days. Ex. 18. On the evening of his arrest on April 3, his girlfriend posted bond but he was still not released. Ex. 2 ¶ 18; Ex. 7 ¶ 10. The Shelby County court dismissed all charges against Duran-Ortega on April 5, but within a few hours, Memphis authorities transferred him to ICE custody. Ex. 2 ¶¶ 19-20. He is currently detained at LaSalle ICE Processing Center and faces imminent removal.

PROCEDURAL BACKGROUND

On April 9, 2018, Duran-Ortega filed a Motion to Reopen his 2007 removal order in the Atlanta Immigration Court, raising three main arguments. Ex. 19. First, he argued that increased persecution of journalists in El Salvador constitutes a material change in conditions since 2007, and that he is *prima facie* eligible for asylum and withholding of removal. *Id*. at 3-9. Second, Duran-Ortega asserted that he had not received notice of his 2007 hearing. *Id.* at 9-11. Third, Duran-Ortega asked the court to *sua sponte* reopen his case given the extraordinary circumstances and constitutional violations involved in his apprehension by ICE. *Id.* at 12-13.[3]

[3] On April 13, 2018, Duran-Ortega filed a petition for a writ of habeas corpus in

On April 24, 2018, an immigration judge ("IJ") denied Duran-Ortega's motion to reopen, concluding that (1) Duran-Ortega was properly served with notice; (2) the time limit for filing motions to reopen was not subject to equitable tolling; (3) Duran-Ortega had not sufficiently demonstrated changed country conditions; and (4) his situation was not exceptional, nor could the immigration court consider the constitutional issues raised. *See* Ex. 20. Duran-Ortega filed a timely notice of appeal with the BIA on April, 30, 2018, followed by a Motion for a Stay with supporting exhibits on May 1, and supplemental supporting exhibits on May 8 and May 24. Exs. 21-24. The BIA entered an order staying Duran-Ortega's removal on May 29, 2018. Ex. 25. Duran-Ortega submitted his BIA appeal brief on June 21, 2018. Ex. 26. Multiple press organizations submitted an *amici curiae* brief in support of Duran-Ortega on June 20, 2018. Ex. 27. On October 17, 2018, the BIA issued a decision affirming the IJ's denial of the Motion to Reopen, dismissing Duran-Ortega's appeal, and dissolving the stay. Ex. 1. The BIA upheld the IJ's findings that: (1) Duran-Ortega was properly served with notice of the 2007 hearing and the Court had jurisdiction to order removal *in absentia*, (2) circumstances related to the safety of journalists in El Salvador had not materially

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the U.S. District Court for the Western District of Louisiana challenging his detention (but not his removal order). The District Court dismissed the petition on September 4, 2018.

changed; and (3) *sua sponte* reopening was unwarranted. *Id*. On October 30, 2018, Duran-Ortega filed a petition in this Court seeking review of his removal order and the BIA decision affirming the denial of his motion to reopen.

ARGUMENT

Duran-Ortega requests that this Court stay his removal during the period required to litigate his petition for review and any resultant proceedings. To win a stay of removal, a petitioner must show that (1) he is likely to succeed on the merits; (2) he will be irreparably injured absent a stay; (3) the stay will not substantially injure the other parties interested in the proceeding; and (4) a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the most important, and the third and fourth factors "merge when the Government is the opposing party." *Id.* at 434-35. A stay motion "can still be 'granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay.'" *LabMD, Inc. v. Fed. Trade Comm'n*, 678 F. App'x 816, 819 (11th Cir. 2016) (quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)). Here, all factors favor a stay.

I. DURAN-ORTEGA IS LIKELY TO SUCCEED ON THE MERITS OF HIS MOTION TO REOPEN.

A. Duran-Ortega Is Eligible for Asylum Based on Changed Circumstances.

The 90-day time limit for filing a motion to reopen immigration proceedings is inapplicable if the movant can demonstrate "changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii). Duran-Ortega must also demonstrate *prima facie* eligibility for relief from removal. *See Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996).

Duran-Ortega is likely to succeed on the merits of his appeal because of materially changed circumstances in El Salvador since 2007, and because he is *prima facie* eligible for asylum.

1. Circumstances have materially changed.

Circumstances for journalists in El Salvador have materially and significantly changed since 2007. Duran-Ortega has presented weighty evidence concerning increased persecution of journalists over the eleven years between his *in absentia* removal order and his motion to reopen. In failing to recognize this, the BIA erred in several ways.

First, the BIA erroneously upheld the IJ's determination that "it is most significant to compare" the State Department's 2017 El Salvador Human Rights Report ("2017 Report") with the 2007 Report, treating the 2017 Report as dispositive at the expense of a full review of the record. Ex. 1 at 4. Limiting analysis of country conditions to a comparison of State Department reports, while excluding extensive evidence in the record of a materially more dangerous climate for journalists in El Salvador since 2007, contravenes relevant caselaw. *See Mazvrishvili v. U.S. Att'y Gen.*, 467 F.3d 1292, 1295 (11th Cir. 2006) (BIA must give "reasoned consideration" to the evidence on record). Even if the BIA cursorily noted Duran-Ortega's evidence, it failed to actually consider it. *See* Ex. 1 at 4-5; *Imelda v. U.S. Atty. 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)); *Jiang v. U.S. Atty. Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009) (vacating BIA decision where it "overlooked or inexplicably discounted" affidavits supporting change in country conditions and "wrongly focused" on a broad policy rather than the specific changes identified by the petitioner).

For example, one article Duran-Ortega submitted described *increasing* violence and threats against journalists in El Salvador. Ex. 28. Another cited the

current Salvadoran president's *recent* hostility towards the media and refusal to protect journalists from violence. Ex. 29. A 2017 article characterized the government's "open hostility" towards journalists as having reached "extremes." Ex. 30. This evidence contrasts sharply with the 2007 Report's finding that media expressed a variety of views without restriction, and demonstrates that anti-media antipathy has grown significantly in El Salvador since 2007. *See* Ex. 31. By reducing the substance of Duran-Ortega's claims to only a comparison of State Department Country Reports, the BIA departed from precedent requiring full consideration of the record.

Second, the BIA erred in upholding the IJ's finding of "no material difference" between the 2007 and 2017 Country Reports. Ex. 1 at 5. Even on direct comparison, the Reports differ greatly on the material issue of risk to journalists. The 2017 Report detailed severe governmental intimidation of journalists, including death threats by individuals purporting to be police officers. *See* Ex. 32 at 17; Ex 1 at 4-5. The threat was sufficiently severe that the Inter-American Commission on Human Rights ordered protective measures for the journalists. Ex. 33 at 1. The 2007 report, on the other hand, contains no evidence of this magnitude. *See* Ex. 31. The IJ failed to consider, and the BIA similarly overlooked, passages in the 2017 Report—absent from the 2007 Report—explaining that

"journalists reporting on gangs and narcotics trafficking were subject to threats and intimidation" and that "[t]here continued to be allegations that the government retaliated against members of the press for criticizing its policies." Ex. 32 at 17; *see* Ex. 1 at 5.

Third, the BIA erroneously found that even if Duran-Ortega established the "current level of violence against journalists and other anti-corruption advocates in El Salvador," he needed to provide additional evidence other than the 2007 Report to establish a lower level of violence against journalists in that year. Ex. 1 at 5. The BIA misapplied 8 C.F.R. § 1003.23(b)(4)(i),which requires only that a movant establish "changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." 8 C.F.R. § 1003.23(b)(4)(i); *see Joseph v. Holder*, 579 F.3d 827, 833 (7th Cir. 2009) (a movant need not establish a "dramatic change" in country conditions).

The BIA's failure to consider the entirety of the record that Duran-Ortega submitted was arbitrary and capricious.

2. Duran-Ortega is *Prima Facie* Eligible for Asylum and Withholding of Removal.

An asylum applicant bears the burden of proving he is unwilling or unable to return to the country of his nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006). Duran-Ortega need not conclusively demonstrate his eligibility for asylum and withholding of removal; only that he has presented enough new facts to make a *prima facie* case. *See Matter of L-O-G-*, 21 I&N Dec. at 419 ("In considering a motion to reopen, the Board should not prejudge the merits of a case before the alien has had an opportunity to prove the case.").

The BIA upheld the IJ's determination that because Duran-Ortega had failed to demonstrate changed country conditions, it was not necessary to consider whether he had established *prima facie* eligibility for asylum or withholding of removal. Ex. 1 at 6. Nevertheless, Duran-Ortega has affirmatively demonstrated eligibility on the basis of his political opinion and his particular social group.

Opposition to corruption can be the basis of a political opinion asylum claim. *Matter of N-M-*, 25 I& N Dec. 526, 528 (BIA 2011). Duran-Ortega's anti-corruption political opinion, demonstrated by his widely-circulated past

journalistic work, is identical to that of the Salvadoran journalists and other government opponents who have been targeted, threatened, and killed. *See* Ex. 2 ¶¶ 3, 5-13, 23; Ex. 3 ¶¶ 6-12, 15-19. If removed to El Salvador, Duran-Ortega would likely be targeted for his anti-corruption political opinions by government officials or transnational criminal organizations that the government cannot and will not control, and who rely on corruption to achieve their aims. Ex. 2 ¶ 23; Ex. 2 ¶¶ 16-19; *see generally* Exs. 28-30, 33-39.

The same is true for Duran-Ortega's claim based on his membership in the "particular social group" of Salvadoran journalists. A "particular social group" must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 404 (11th Cir. 2016). The proposed social group "Salvadoran journalists" is immutable because the characteristic that binds this group—their investigative and expressive written speech—is a "fundamental" characteristic that members of the group "should not be required to change." *Id.* at 405 (citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)).

The group is defined with particularity, because "journalists" are recognized and defined as a discrete class of persons. The group is socially distinct; journalists

have their own trade organization and are an oft-persecuted group in Salvadoran society. *See* Ex. 30. Duran-Ortega's fear of persecution on account of his membership in this particular social group is well-founded. The Salvadoran government has sent the message that journalists may be harmed with impunity. Duran-Ortega is at acute risk of harm because his work and arrest in the United States have also been well-documented by the Salvadoran press, and government officials and gangs have threatened and/or killed journalists whose work strongly resembles Duran-Ortega's. *See* Ex. 2 ¶ 23; Ex. 3 ¶ 16; Exs. 28-30, 33-39.

B. Duran-Ortega Did Not Receive Required Notice of His Hearing.

Duran-Ortega is also likely to succeed on his claim that because he did not receive notice of his immigration court hearing as required by statute, the *in absentia* removal order must be rescinded. The Department of Homeland Security ("DHS") failed to meet its statutory burden of showing by "clear, unequivocal, and convincing evidence" that it provided statutorily-required notice to Duran-Ortega—namely, of the date and time of his hearing—in a valid NTA. 8 U.S.C. § 1229a(b)(5)(A); *see also* 8 U.S.C. § 1229a(b)(5)(C)(ii) (*in absentia* order "may be rescinded only . . . (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with [8 U.S.C. § 1229(a)(1) or (2)]").

A statutorily adequate NTA must include "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-2120 (2018) ("A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a)'"). An NTA that does not comply with these requirements is statutorily deficient. *See Pereira*, 138 S. Ct. at 2115 ("Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings"); *United States v. Virgen-Ponce*, 320 F.Supp. 3d 1164, 1166 (E.D. Wash. 2018) ("Lack of a statutorily compliant [NTA] . . . means that the immigration court did not have jurisdiction.").

DHS records indicate that Duran-Ortega was presented with a document styled an NTA in June 2006. Ex. 4. Like the putative NTA found deficient in *Pereira*, it failed to specify a date and time for a hearing; rather, it ordered appearance at "a date to be set" and "a time to be set." *Id.* Under *Pereira*, this NTA was legally ineffective because it failed to comply with the requirements of 8 U.S.C. § 1229(a)(1), which mandates written notice of the date and time of the hearing. 8 U.S.C. § 1229(a)(1)(G)(i); *Pereira*, 138 S. Ct. 2105 at 2115-16. Duran-Ortega's case is therefore subject to reopening because he "did not receive notice

in accordance" with section 1229(a)(1). *See* 8 U.S.C. § 1229a(b)(5)(C) (*in absentia* order may be rescinded if noncitizen demonstrates that he "did not receive notice in accordance with" § 1229(a)(1)). In the alternative, the faulty NTA failed to vest the immigration court with jurisdiction to hear his case and the removal order is invalid on that basis as well. *See Virgen-Ponce*, 320 F. Supp. 3d at 1166.[4]

The BIA attempts to escape the clear import of *Pereira* by citing its decision in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), *appeal filed*, No. 18-72-573 (9th Cir. Sept. 20, 2018).[5] *Bermudez-Cota* held that a defective NTA vests jurisdiction for the purposes of 8 U.S.C. § 1229(a), as long as it is followed by a properly served Notice of Hearing ("NOH"). That decision is readily distinguishable from the instant case. First, unlike the noncitizen in *Bermudez-Cota*, Duran-Ortega never received notice of his hearing. Like the NOH sent to the noncitizen in *Pereira*, the NOH sent to Duran-Ortega was returned as undeliverable. *See Pereira*, 138 S. Ct. at 2107; Ex. 5.

[4] This Court need not reach the jurisdictional issue here, because the lack of a statutorily-compliant NTA is sufficient to warrant reopening under Section 1229a(B)(5)(C).

[5] The law in this area has been rapidly developing during the course of Duran-Ortega's appeal. The *Pereira* decision came down after the IJ's April 24 order, and the *Bermudez-Cota* decision was issued while the appeal was pending at the BIA.

Second, the BIA in *Bermudez-Cota* improperly attempted to limit the holding in *Pereira* to the "stop-time" rule for purposes of the remedy of cancellation of removal. While it is true that *Pereira* arose in the cancellation context, the Supreme Court made clear that § 1229(a) "speak[s] in definitional terms." *Pereira*, 138 S. Ct. at 2116. Where a statute is definitional for one subsection (*i.e.*, for the purposes of the stop-time rule in 8 U.S.C. § 1229b), it is definitional for purposes of other subsections (*i.e.*, for the entry of an *in absentia* order under 8 U.S.C. § 1229a(b)(5)).[6]

Third, applying *Bermudez-Cota* to Duran-Ortega's facts would fly in the face of the plain statutory language under which he is seeking to reopen his case. *See* 8 U.S.C. § 1229a(b)(5)(C) (if noncitizen demonstrates that he "did not receive notice in accordance with" § 1229(a)(1); *i.e*, a notice containing the date and time of a hearing, *in absentia* order may be rescinded). Because the putative NTA

[6] Several district courts have rejected the narrow interpretation of *Pereira* that the BIA embraced in *Bermudez-Cota*. *See Virgen- Ponce* 320 F.Supp. 3d at 1166; *United States v. Zapata-Cortinas,* No. SA-18-CR-00343-OLG, 2018 WL 4770868, at *3 (W.D. Tex. Oct. 2, 2018) (rejecting government's argument that a properly-served NOH can "cure" a deficient NTA, because an NTA lacking a hearing date and time "is not merely an 'incomplete' NTA, but is instead not a NTA at all."); *United States v. Pedroza-Rocha*, No. 3:18-cr-01286, slip op. at 5-6 (W.D. Tex. Sept. 21, 2018) (noting that the Supreme Court in *Pereira* considered and rejected the proposition that an NTA "met the statutory requirements because the immigration court complied with immigration regulations by providing a later [NOH] with the date and time specified.") (attached as Ex. 40).

served on Duran-Ortega lacked a date and time of hearing, he never received notice complying with section 1229(a)(1). Therefore, his motion to reopen should be granted and the *in absentia* removal order rescinded. The BIA's suggestion that *Bermudez-Cota* could override this plain statutory language is precisely the type of administrative overreach that the Supreme Court rejected in *Pereira*. *See Pereira*, 138 S. Ct. at 2113 (finding the statute unambiguous and refusing to apply *Chevron* deference to BIA interpretation).[7]

Even assuming *arguendo* that later proper service of a supplemental NOH would cure the deficient putative NTA in this case—which Duran-Ortega disputes—such supplemental notice was not provided to Duran-Ortega. "Due process is satisfied so long as the method of notice is conducted in a manner reasonably calculated to ensure that notice reaches the alien." *Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258, 1259 (11th Cir. 2002) (internal quotations omitted). DHS did not meet its statutory burden to show compliance with this standard.

[7] The BIA in *Bermudez-Cota* relied exclusively on cases decided prior to *Pereira* to hold that a later-served NOH cures a defective NTA. *See Bermudez-Cota*, 27 I&N Dec. at 445-47 (citing, *e.g.*, *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009); *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009); *Dababneh v. Gonzales*, 471 F.3d 806, 809–10 (7th Cir. 2006); *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006)). *Pereira* abrogated this line of cases to the extent they hold that NTAs lacking hearing dates and times trigger consequences that can only flow from an NTA that complies with Section 1229(a). *See Pereira*, 138 S. Ct. at 2114.

Duran-Ortega's NOH was returned with the notation of "insufficient address," clearly indicating that he had not received the notice. Ex. 5. *Cf. Carrera v. U.S. Att'y Gen.*, 422 Fed. App'x. 755, 756 & n.3 (11th Cir. 2011) (notice was sufficient where "the record lacks any evidence that the notice was returned as undelivered" and "neither the Court nor INS had any indication that [the petitioner] had not received the notice of hearing.").

Because DHS neither complied with statutory requirements in serving the initial NTA, nor did it demonstrate proper service, it failed to meet its burden to show by "clear, unequivocal, and convincing evidence" that it complied with statutory notice requirements before Duran-Ortega was removed *in absentia*. Thus, the usual 90 day deadline for a motion to reopen does not bar Duran-Ortega from relief, and his *in absentia* removal order should be rescinded. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii); *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008).

II. REMOVAL WILL CAUSE IRREPARABLE HARM.

A. Duran-Ortega Will Suffer Persecution Upon Removal With No Guarantee of Return to the United States

Duran-Ortega's removal pending his appeal would cause irreparable harm because it could strip him of any ability to present his asylum claims and force him to return to a country where he has a well-founded fear of persecution. Duran-Ortega has a *prima facie* case for asylum and withholding of removal based on

changed circumstances in El Salvador. The INA requires that Duran-Ortega be "physically present" in the United States to claim asylum. *See* 8 U.S.C. § 1158(a)(1). If he is removed before he is able to pursue these claims, he may be barred from effective relief. *See Sadhvani v. Holder*, 596 F.3d 180, 183 (4th Cir. 2009) (where asylum applicant was removed before the BIA could rule on his motion to reopen, "the BIA did not abuse its discretion in denying relief based on the statutory requirement that one must be present in the United States to be eligible for asylum."). This Court has not directly spoken on the physical presence issue, and Duran-Ortega does not concede that removal would bar him from eligibility for asylum. But the risk of his return to a country where he fears persecution, without any guarantee that DHS would return him to the United States for full consideration of his appeal, would cause irreparable harm.

If removed, Duran-Ortega faces probable threats to his physical welfare given his reputation as a journalist in the United States and his expressed intent to continue working as an investigative, anti-corruption journalist. These considerations weigh strongly in favor of a stay. *See, e.g.*, *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) ("[T]he likelihood of [physical danger], determined apart from merits issues . . . should be part of the irreparable harm inquiry.").

B. Duran-Ortega's Removal Would Violate the Constitution and Chill First Amendment Rights.

Pursuant to 8 U.S.C. § 1252(a)(2)(D), this Court has jurisdiction to review Duran-Ortega's claims that his removal would violate the Constitution. *Bing Quan Lin v. U.S. Att'y Gen.*, 881 F.3d 860, 871 (11th Cir. 2018). His removal would result in irreparable harm as his rights would be further violated and protected speech further chilled.

Speech that addresses matters of government policy, including criticism of law enforcement, is entitled to vigorous First Amendment protection. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (1987). The First Amendment also specifically protects the right to gather and report news, including filming the actions of public officials. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). The Supreme Court has also recognized the public's First Amendment interest in hearing the opinions and ideas of noncitizens. *Kleindienst v. Mandel*, 408 U.S. 753, 762–65 (1972).

All persons in the United States, including noncitizens, enjoy the right to peaceful expression and publication of opinions. *See* U.S. Const. amdt.1. The First

Amendment precludes law enforcement officials from taking adverse action against an individual in response to their speech where such action would chill a person of ordinary firmness from engaging in such speech. *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005).

Duran-Ortega's speech and newsgathering are core speech and press activities protected by the First Amendment. His journalism has exposed and criticized the impact of MPD and ICE law enforcement activities on Memphis's Latino communities. This speech is entitled to the highest level of protection under the First Amendment. Duran-Ortega's arrest while exercising his First Amendment right undoubtedly would lead a reasonable noncitizen to pause in fearful consideration of whether to speak and expose herself to arrest, detention, and deportation, or to stay silent in the hopes of remaining safe.

An ongoing violation of the First Amendment constitutes an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (plurality op.). Duran-Ortega's removal would further violate his First Amendment rights as a member of the press and the coextensive right of his audience to hear his ideas and reporting.

III. A STAY SERVES THE PUBLIC INTEREST.

A stay would serve the public interest because the public has an "interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436.

But Duran-Ortega's case also presents additional, broader public interest considerations weighing in favor of a stay. His retaliatory arrest and attempted removal, especially when considered with other recent examples of noncitizens retaliated against because of their speech, chill the exercise of basic First Amendment freedoms. *See, e.g., Gutierrez-Soto v. Sessions*, 317 F. Supp.3d 917, 933-35 (W.D. Tex. 2018); *Ragbir v. Sessions*, No. 18-CV-236 (KBF), 2018 WL 623557, at *1 n.1 (S.D.N.Y. Jan. 29, 2018); *Vargas v. U.S. Dep't of Homeland Sec.*, No. 1:17-CV-00356, 2017 WL 962420, at *3 (W.D. La. Mar. 10, 2017); *see also* Exs. 41-42 (articles detailing retaliatory immigration enforcement and attempts to remove asylum-eligible journalists); Ex. 43 (Complaint filed in *NWDC v. ICE*, No. 18-cv-01558 (W.D. Wash. Oct. 23, 2018), alleging unconstitutional targeting of immigration activists). The chilling effect of Duran-Ortega's arrest and imminent removal will be magnified if he is removed before this Court can even consider his claims for relief. *See Elrod*, 427 U.S. at 373.

Staying Duran-Ortega's removal pending his appeal will not injure the government. This is Duran-Ortega's first motion to reopen. The government has never alleged that he poses any danger to the United States. It will not harm the government to stay his removal for the short time required to litigate the serious statutory grounds for relief and constitutional issues involved in Duran-Ortega's petition for review.

CONCLUSION

For these reasons, Duran Ortega requests that this Court stay his removal pending resolution of his petition for review and any resultant proceedings.

Respectfully Submitted,

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DATED: October 30, 2018

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 30, 2018, I caused Petitioner's MOTION TO STAY REMOVAL and accompanying exhibits to be served on all parties or their counsel of record by serving a true and correct copy by Federal Express at the addresses listed below:

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