

**THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**CASE NO. 18-14563**

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**MANUEL LEONIDAS DURAN ORTEGA,  
Petitioner,**

**v.**

**UNITED STATES ATTORNEY GENERAL,  
Respondent.**

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

File No. 

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### I. **Duran-Ortega Did Not Receive Statutorily Adequate Notice and His In Absentia Order Should Be Rescinded.**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





*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.

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.<sup>2</sup>

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.

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<sup>2</sup> 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.*

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.

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

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## **CONCLUSION**





**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