

United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE ALBERTO REYES BACAPICIO,  
Plaintiff,  
v.  
KIRSTJEN NIELSON, et al.,  
Defendants.

Case No. [19-cv-00236-CRB](#)

**ORDER DENYING MOTION FOR A  
PRELIMINARY INJUNCTION**

Petitioner Jose Alberto Reyes Bacapicio has filed a Petition for Writ of Habeas Corpus (Dkt. 1), and now seeks a preliminary injunction to prevent the Department of Homeland Security from deporting him while he pursues an appeal before the Board of Immigration Appeals of his removal order. Mot. (Dkt. 2). Because the Court concludes that Petitioner is unlikely to succeed on the merits of his claim, his Motion for a Preliminary Injunction is DENIED.

**I. BACKGROUND**

Petitioner, a Mexican citizen, was placed in removal proceedings in 2011 pursuant to a Notice to Appear (“NTA”) that he now argues is invalid because it failed to specify the time, date, and place of his removal hearing. Habeas Pet. ¶¶ 12, 16; Gagelonia Dec’1 (Dkt. 15-1) ¶ 7; Pet. Supp. Br. at 5 (Dkt. 24). He thereafter conceded removability based on his criminal record and requested relief from removal. Gagelonia Dec’1 ¶ 8. The Immigration Judge (“IJ”) reset his merits hearing date multiple times. *Id.* at ¶ 10. Eventually, in April 2017, his hearing was set for October 11, 2018.

In September 2018, Petitioner’s counsel moved to withdraw because he had been

1 unable to reach Petitioner. Resp. Opp. Exh. H (Dkt. 15-9). On October 11, 2018,  
2 Petitioner’s counsel appeared at the hearing before the IJ, but Petitioner himself did not  
3 appear. Gagelonia Dec’1 ¶ 18; Resp. Opp. Exh. G (Dkt. 15-8). The IJ then ordered  
4 Petitioner removed in absentia. Gagelonia Dec’1 ¶ 18; Resp. Opp. Exh. G

5 On November 20, 2018, Petitioner filed a Motion to Reopen and Reconsider his  
6 removal order. Gagelonia Dec’1 ¶ 20. The next day, he was arrested because he had a final  
7 administrative order of removal, although that order was stayed pending the adjudication  
8 of the Motion to Reopen. Id. ¶ 21. On December 13, 2018, the IJ denied the Motion to  
9 Reopen. Id. ¶ 22. Petitioner then filed a Motion to Reconsider before the IJ. Id. ¶ 23. While  
10 that Motion to Reconsider was pending, Immigration and Customs Enforcement advised  
11 Petitioner’s attorney that Petitioner was scheduled for removal to Mexico on January 14,  
12 2019.

13 On January 13, 2019, Petitioner filed his habeas petition before this Court. Habeas  
14 Pet. He seeks to stay his deportation. Id. ¶ 32. He simultaneously filed a Motion for a  
15 Temporary Restraining Order, Mot. (Dkt. 2), asking this Court to stay his removal  
16 “because his removal would preclude him from reserving his right to appeal the IJ’s  
17 decision to the Board of Immigration Appeals (BIA) with regard to the motion to  
18 reconsider that is currently pending before the Immigration Court, and would therefore  
19 violate his right to due process.” Id. at 3. On January 22, 2019, he filed an appeal of the  
20 IJ’s motion to reconsider and an emergency motion to stay removal. Dkt. 17-1; cf.  
21 Gagelonia Dec’1 ¶ 24.

22 The Court initially granted Petitioner’s ex parte motion for a Temporary Restraining  
23 Order and enjoined Petitioner’s removal until January 27, 2019. Order Granting Ex Parte  
24 Mot. for Temp. Rest. Order (Dkt. 5). This Court then issued an order construing his motion  
25 as a Motion for a Preliminary Injunction and setting an expedited briefing schedule and  
26 hearing. Order Setting Schedule for Prelim. Inj. Hearing (Dkt. 13). Following the hearing  
27 on that Motion, see Dkt. 18, the Court extended the temporary restraining order for good  
28 cause until February 10, 2019. Order (Dkt. 20).

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**II. DISCUSSION**

The core of Petitioner’s Motion for a Preliminary Injunction is his claim that his deportation before he litigates his appeal before the BIA would violate the Due Process Clause of the Fifth Amendment. Mot. at 3-4. Respondent focuses its argument on a threshold issue: whether this Court has jurisdiction over such a claim at all. Resp. Opp. at 6 (Dkt. 15).

Because the Court finds that Petitioner has not met his burden to show that he has a likelihood of success on the merits, see Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008), and thus the Court can readily resolve the merits of Petitioner’s Motion for a Preliminary Injunction, the Court assumes without deciding for the purposes of the motion that it has hypothetical jurisdiction, and denies Petitioner’s Motion for a Preliminary Injunction.

**A. Jurisdiction**

Respondent devotes a substantial portion of its briefing to arguing that this Court must deny Petitioner’s motion for a preliminary injunction because it lacks jurisdiction over this matter. Resp. Opp. at 6-12. Respondent points to the jurisdiction-stripping provisions of 8 U.S.C. § 1252, which include a section that provides:

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28 [habeas corpus], or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Id. § 1252(g); see Resp. Opp. at 6-9. Respondent contends that under § 1252, this Court is “preclude[d] . . . from exercising jurisdiction over Petitioner’s motion and petition.” Resp. Opp. at 9.

Petitioner responds that his Motion for a Preliminary Injunction is not foreclosed under § 1252 because he only seeks to stay his removal pending the BIA’s decision is

1 necessary to ensure him an opportunity to pursue that appeal—and thus to preserve his  
2 “day in court.” Pet. Reply at 3-4 (Dkt. 17); see Singh v. Gonzales, 499 F.3d 969, 979 (9th  
3 Cir. 2007) (district court had jurisdiction over a habeas petition that sought to ensure  
4 noncitizen no more than a “day in court”).

5 The Court need not resolve the parties’ jurisdictional dispute. And that is so because  
6 under the doctrine of “hypothetical jurisdiction,” in cases in which “jurisdiction is  
7 disputed,” a Court may sometimes “assume, without deciding, the existence of subject  
8 matter jurisdiction.” In re Grand Jury Subpoena Issued to Bailin, 51 F.3d 203, 206 (9th Cir.  
9 1995). This “doctrine has several required elements: (1) the jurisdictional question must be  
10 difficult; (2) the merits . . . must be insubstantial; (3) the [merits] must be resolved against  
11 the party asserting jurisdiction; and (4) undertaking a resolution on the merits as opposed  
12 to dismissing for lack of jurisdiction must not affect the outcome.” Id.; see also Steel Co. v.  
13 Citizens for a Better Env’t, 523 U.S. 83, 97 & n.2 (1998) (explaining that unlike Article III  
14 jurisdiction, courts may presume statutory jurisdiction when the merits are more easily  
15 resolved).

16 The question whether Petitioner’s claim falls within the jurisdictional exception  
17 recognized by Singh is a complex one. On the other hand, the merits of the Motion for a  
18 Preliminary Injunction are “insubstantial” and “must be resolved against the party  
19 asserting jurisdiction.” See Bailin, 51 F.3d at 206. Thus, because the outcome of this  
20 Motion would be the same as if the Court concluded that the Court lacked jurisdiction over  
21 the Motion, assuming without deciding jurisdiction has no effect on the outcome—in  
22 either case, the Court will deny the Petitioner’s Motion. In consequence, it is appropriate  
23 for the Court assumes without deciding that it has jurisdiction. On that assumption, the  
24 Court now proceeds to the preliminary injunction standard.

25

26 **B. Preliminary Injunction**

27 To obtain a preliminary injunction, a party must make four showings: that he (1) “is  
28 ‘likely to succeed on the merits,’ (2) [he] is ‘to suffer irreparable harm in the absence of

1 preliminary relief,’ (3) ‘the balance of equities tips in [his] its favor,’ and (4) ‘an injunction  
2 is in the public interest.’ Disney Enterprises, Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th  
3 Cir. 2017) (quoting Winter, 555 U.S. at 20); see also Stuhlbarg Int’l Sales Co. v. John D.  
4 Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001) (standard for preliminary injunction  
5 and temporary restraining order are “substantially identical”). The “[l]ikelihood of success  
6 on the merits ‘is the most important’ Winter factor; if a movant fails to meet this ‘threshold  
7 inquiry,’ the court need not consider the other factors.” Disney Enterprises, 869 F.3d at  
8 856 (quoting Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015)).

9 In support of his Motion, Petitioner’s sole argument that he meets the first prong of  
10 the Winter test is that he is “likely to success on the merits of his case given that statutory  
11 and case law support that he will ultimately be successful in challenging his removal order  
12 in the appropriate channel.” Pet. Reply at 16; see also Pet. Mot. at 3 (“Petitioners are likely  
13 to succeed in showing that their removal prior to the adjudication of their Motion to  
14 Reopen violates controlling statutory and case law.”); Pet. Supp. Br. at 3 (“Regarding a  
15 likelihood of success with regard to whether the Petitioner merits a preliminary injunction,  
16 the Petitioner argues that his NTA is still invalid.”); see also Winter, 555 U.S. at 20. In  
17 support of that claim, he argues that “Due Process prohibits the removal of a person when  
18 there is no removal order. Statutory and case law is clear that when [an NTA] does not  
19 include the time and place of the removal proceedings, that jurisdiction does not vest with  
20 the immigration court” and so “any removal order from such a proceeding is invalid.” Mot.  
21 at 3-4.

22 Petitioner’s argument is based on the Supreme Court’s recent decision, Pereira v.  
23 Sessions, 138 S. Ct. 2105 (2018), which addressed the statutory requirements of an NTA in  
24 the context of the “stop-time rule.”<sup>1</sup> Id. at 2109-10. Pereira held that, for purposes of the  
25 “stop-time” rule, an NTA must include time and date information because the statutory

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27 <sup>1</sup> Under the Immigration and Nationality Act, “[n]onpermanent residents . . . who are subject to  
28 removal proceedings and have accrued 10 years of continuous physical presence in the United  
States, may be eligible for a form of discretionary relief known as cancellation of removal.”  
Pereira, 138 S. Ct. at 2109 (citing 8 U.S.C. § 1229b(b)(1)). The “stop-time” rule defines when the  
period of “continuous physical presence in the United States” ends. Id. at 2110.

1 provision that establishes the “stop-time” rule defines the scope of a “period of continuous  
2 physical presence” such that it is “deemed to end . . . when the alien is served a notice to  
3 appear under section 1229(a).” 8 U.S.C. § 1229b(d)(1)(A); see also Pereira, 138 S. Ct. at  
4 2109. “Section 1229(a), in turn, provides that the Government shall serve noncitizens in  
5 removal proceedings with ‘written notice (in this section referred to as a ‘notice to appear’)  
6 . . . specifying’ several required pieces of information, including ‘[t]he time and place at  
7 which the [removal] proceedings will be held.’” Pereira, 138 S. Ct. at 2019-2110 (quoting  
8 8 U.S.C. § 1229(a)(1)(G)(i) (alterations in original)).

9         Petitioner argues that his NTA lacked time and date information, and thus, under  
10 Pereira, his removal would be pursuant to an invalid NTA. Mot. at 3-4; Pet. Supp. Br. at 3.  
11 He further urges, his removal while his BIA appeal is pending might prevent him from  
12 pursuing that appeal, and thus violate the Due Process Clause. Pet. Reply at 6-10.

13         When Petitioner first filed his Habeas Petition and Motion, the Ninth Circuit had yet  
14 to determine Pereira’s impact on the question when jurisdiction vests with an Immigration  
15 Court—that is, under Pereira, whether jurisdiction vests in an Immigration Court upon  
16 issuance of an NTA that lacks time and date information. However, the Ninth Circuit has  
17 recently resolved that question and held that an NTA vests an Immigration Court with  
18 jurisdiction over a noncitizen’s removal proceedings when that NTA satisfies the  
19 regulatory requirements—which do not include a requirement that an NTA include time  
20 and date information. Karingithi v. Whitaker, 2019 WL 333335 at \*3 (9th Cir. Jan. 28,  
21 2019) (citing 8 C.F.R. §§ 1003.13-14, 1003.18).

22         In Karingithi, the Petitioner “argue[d] that if a notice to appear does not state the  
23 time for her initial removal hearing, it is not only defective under § 1229(a), but also does  
24 not vest jurisdiction with the IJ.” Karingithi, 2019 WL 333335 at \*3. The Ninth Circuit  
25 rejected this reasoning because:

26                 [T]he regulations, not § 1229(a), define when jurisdiction vests.  
27                 Section 1229 says nothing about the Immigration Court’s  
28                 jurisdiction. And for their part, the regulations make no  
                    reference to § 1229(a)’s definition of a “notice to appear.” If the  
                    regulations did not clearly enumerate requirements for the

1 contents of a notice to appear for jurisdictional purposes, we  
2 might presume they sub silentio incorporated § 1229(a)'s  
3 definition. But the plain, exhaustive list of requirements in the  
4 jurisdictional regulations renders that presumption inapplicable  
5 here. Not only does that list not include the time of the hearing,  
6 reading such a requirement into the regulations would render  
7 meaningless their command that such information need only be  
8 included "where practicable." The regulatory definition, not the  
9 one set forth in § 1229(a), governs the Immigration Court's  
10 jurisdiction. A notice to appear need not include time and date  
11 information to satisfy this standard. Karingithi's notice to appear  
12 met the regulatory requirements and therefore vested  
13 jurisdiction in the IJ.

14 Id. (internal citations omitted).

15  
16 Petitioner argues that the IJ nevertheless lacked jurisdiction over his case, and thus  
17 his removal was invalid, because "[u]nder Karingithi, the Petitioner's NTA is still  
18 deficient—and thus jurisdiction never vested—given that the 'place' was not listed." Pet.  
19 Supp. Br. at 5. Petitioner argues that the regulation specifying the requirements of an NTA  
20 for jurisdictional purposes require that the NTA include the place. Id. (citing 8 C.F.R. §  
21 1003.15(b)). But the regulation includes no such requirement. The regulation on which  
22 Petitioner relies, 8 C.F.R. § 1003.15 states, in full, that a notice to appear must include:

- 23 (1) The nature of the proceedings against the alien;
- 24 (2) The legal authority under which the proceedings are  
25 conducted;
- 26 (3) The acts or conduct alleged to be in violation of law;
- 27 (4) The charges against the alien and the statutory provisions  
28 alleged to have been violated;
- (5) Notice that the alien may be represented, at no cost to the  
government, by counsel or other representative authorized to  
appear pursuant to 8 C.F.R. § 1292.1;
- (6) The address of the Immigration Court where the Service will  
file the Order to Show Cause and Notice to Appear; and
- (7) A statement that the alien must advise the Immigration Court  
having administrative control over the Record of Proceeding of  
his or her current address and telephone number and a statement  
that failure to provide such information may result in an in  
absentia hearing in accordance with § 1003.26.

8 C.F.R. § 1003.15(b). Nothing in § 1003.15(b) requires that the NTA must include the  
place the hearing will occur. Id. And so Petitioner has failed to identify why his NTA  
could be construed as deficient under Karingithi.<sup>2</sup>

<sup>2</sup> Petitioner also contends that "[c]ourts within the Ninth Circuit have expressly rejected  
Karingithi's holding that the regulation's definition of an NTA . . . is controlling to vest  
jurisdiction." Pet. Supp. Br. at 6. Not so. The cases Petitioner cites are district court

1 In consequence, Petitioner has not shown that there is a “likelihood of success on  
2 the merits,” because his argument on this Winter prong is predicated solely on the  
3 argument that it violates Due Process to deport a person who lacks a valid removal order.<sup>3</sup>  
4 Mot. at 3; Pet. Reply at 16; Pet. Supp. Br. at 3-4; see also Winter, 555 U.S. at 20. And that  
5 claim, in turn, is based solely on his argument that his underlying removal order is invalid  
6 is that the NTA he received could not have vested the Immigration Court with jurisdiction  
7 because it lacked necessary time, date, and place information. Mot. at 3-5; Pet. Reply at  
8 16; Pet. Supp. Br. at 3-4. But, as discussed, in light of Karingithi, that argument is  
9 foreclosed by clear and on-point Ninth Circuit precedent. Karingithi, 2019 WL 333335 at  
10 \*3. And so Petitioner has not met his burden to show that he is likely to succeed on the  
11 merits of his habeas petition. See Disney Enterprises, Inc., 869 F.3d at 856. Further,  
12 because the “[l]ikelihood of success on the merits ‘is the most important’ Winter factor,”  
13 and Petitioner has “fail[ed] to meet this ‘threshold inquiry,’ the court need not consider the  
14 other factors.” Id. (quoting Garcia, 786 F.3d at 740). Thus, the Court concludes that a  
15 preliminary injunction is not warranted in this case.

16  
17 **III. CONCLUSION**

18 For the foregoing reasons, the Motion for a Preliminary Injunction is DENIED.

19 **IT IS SO ORDERED.**

20 Dated: February 5, 2019



21 CHARLES R. BREYER  
22 United States District Judge

23 \_\_\_\_\_  
24 opinions decided before Karingithi. See United States v. Arteaga-Centeno, 2019 WL  
25 134571 (N.D. Cal. Jan. 8, 2019); United States v. Rojas Osorio, 2019 WL 235042 (N.D.  
26 Cal. Jan. 16, 2019). Not only do these district court cases lack the authority to “expressly  
27 reject” a holding of the Ninth Circuit, but they could not have done so, because Karingithi  
28 had not been published. See Karingithi, 2019 WL 333335 (9th Cir. Jan. 28, 2019).

<sup>3</sup> Petitioner’s final argument is that the Ninth Circuit may decide to address the issue of  
whether jurisdiction may vest with an IJ upon the issuance of an NTA that lacks time and  
date information en banc and reverse the holding of Karingithi. Pet. Supp. Br. at 8. But  
Petitioner fails to identify any support for the rather remarkable proposition that the remote  
possibility that a Court of Appeals will overrule a controlling precedent is sufficient to  
demonstrate a likelihood of success on the merits. See id.