[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13372

Non-Argument Calendar

CLAUDIO MARCELO ROJAS,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A089-232-994

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges

PER CURIAM:

Claudio Marcelo Rojas, a citizen of Argentina, petitions for review of the Board of Immigration Appeals' ("BIA") denial of his third motion to reopen and terminate his removal proceedings. He first argues that the agency lacked jurisdiction over him due to a defective Notice to Appear ("NTA") in light of the Supreme Court's decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Alternatively, he argues that even if the agency had jurisdiction over him, the removal proceedings were nonetheless invalid due to the defective NTA.

After careful review of the parties' arguments, we deny Rojas's petition.[1]

I

We have jurisdiction to determine our own jurisdiction, including whether the agency had jurisdiction over an alien's removal proceedings such that it could issue a final order of removal. *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1153 (11th Cir. 2019) (explaining that our jurisdiction is trigged by the existence of a final order of removal, so jurisdictional arguments that, if accepted,

[1] We review the BIA's denial of a motion to reopen for an abuse of discretion, although we "review any underlying legal conclusions de novo." *Dacostagomez-Aguilar v. U.S. Att'y Gen.*, 40 F.4th 1312, 1315 (11th Cir. 2022). We decline to consider arguments that parties abandoned. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).

would invalidate the final order of removal can be reviewed even if unexhausted).

Under our prior precedent rule, we must follow a prior panel precedent "unless and until it is overruled by this [C]ourt en banc or by the Supreme Court." *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

We lack jurisdiction to review a decision of the BIA that is purely discretionary, including a decision not to reopen a case sua sponte. *Lin v. U.S. Att'y Gen.*, 881 F.3d 860, 871 (11th Cir. 2018). But, where the BIA's denial of a motion to reopen is based on non-discretionary grounds—such as a finding that it is number-barred—we have the power to review the basis for the denial, even where the BIA also declines to reopen proceedings sua sponte. *Id.* at 870–71.

Removal proceedings before an Immigration Judge are the exclusive means of determining an alien's removability. Immigration and Nationality Act § 240(a)(1), (3), 8 U.S.C. § 1229a(a)(1), (3). The INA states that an NTA "shall be given" to an alien in removal proceedings. INA § 239(a)(1), 8 U.S.C. § 1229(a)(1). Regulations provide that an IJ's jurisdiction vests, and removal proceedings commence, when an NTA is filed with the Immigration Court. 8 C.F.R. § 1003.14; *see* 8 C.F.R. § 239.1. Section 239(a) of the INA specifies the information that must be included in an NTA, which includes the nature of the removal proceedings, the charges against the alien, the "*time and place at which the proceedings will be held*," and

the consequences of failing to appear. INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (emphasis added).

In 2018, the Supreme Court determined that a document labeled as an NTA that did not specify the time or place of the removal proceedings, as required by § 1229(a)(1), "is not a 'notice to appear under [§] 1229(a).'" *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018). The Supreme Court concluded that a putative NTA that did not specify either the time or place of the removal proceedings did not trigger the "stop-time" rule for cancellation of removal and thus did not end the alien's continuous physical presence in the United States for purposes of cancellation of removal eligibility. *Id.* at 2110. The Court reasoned that 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),' and so does not trigger the stop-time rule." *Id.* at 2113–14 (quoting INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1)). It explained that a "[f]ail[ure] to specify integral information like the time and place of removal proceedings unquestionably would deprive the notice to appear of its essential character." *Id.* at 2116−17 (quotation omitted).

In 2019, we rejected an alien's claim that the government's failure to include the date of the hearing in his NTA deprived an IJ and the BIA of jurisdiction over his removal proceedings. *Perez-Sanchez,* 935 F.3d at 1150, 1152−57. We acknowledged that the Justice Department's regulations provided that "[j]urisdiction vests, and proceedings before an [IJ] commence, when a charging

document is filed with the Immigration Court." *Id.* at 1152 (quoting 8 C.F.R. § 1003.14(a)). But we nonetheless determined that the regulation providing that jurisdiction vests upon the filing of an NTA, and the statutory requirements for an NTA, were claim-processing rules rather than jurisdictional ones. *Id.* at 1150, 1153–57.

In 2021, the Supreme Court held, in the context of reviewing a cancellation of removal, that the stop-time rule could be triggered only by a single document that contained all the information required to be in an NTA. *Niz-Chavez*, 141 S. Ct. at 1480–86. The Supreme Court expressly rejected the government's position that a deficient NTA could be cured by a later Notice of Hearing, such that the NOH "complete[s]" the NTA "and the stop-time rule kicks in whenever [the government] finishes delivering all the statutorily prescribed information." *Id.* at 1479. The Supreme Court noted that application of the stop-time rule required "a" notice, which meant a "single document containing the required information." *Id.* at 1480. Importantly for this case, the Supreme Court did not overrule *Perez-Sanchez*'s holding about the NTA requirements being non-jurisdictional claim-processing rules. *Id.* at 1479.

After *Niz-Chavez*, we reiterated that the NTA requirements in 8 U.S.C. § 1229(a) were not jurisdictional and, instead, "set[] forth only a claim-processing rule." *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312, 1322 (11th Cir. 2021) (quoting *Perez-Sanchez*, 935 F.3d at 1154–55).

Here, we conclude that the BIA did not abuse its discretion in denying Rojas's third motion to reopen, to the extent he raised

a jurisdictional challenge based on *Niz-Chavez*. Specifically, the BIA correctly concluded that his 2010 NTA did not deprive the IJ of jurisdiction. Even if Rojas is correct that his NTA was defective because it did not specify "[t]he time and place at which the proceedings will be held," *see* INA § 239(a)(1), 8 U.S.C. § 1229(a)(1), *Perez-Sanchez* forecloses his argument that the NTA requirements are jurisdictional, such that the government's failure to follow them invalidated his removal proceedings. *Perez-Sanchez*, 935 F.3d at 1150, 1154. His argument that *Perez-Sanchez* is inconsistent with, or was abrogated by, *Niz Chavez* is meritless, as *Niz-Chavez* merely held that a defective NTA cannot be cured by a later NOH for stop-time-rule purposes. 141 S. Ct. at 1479. *Perez-Sanchez* had earlier reached the same conclusion as to the parties' jurisdiction arguments. 935 F.3d at 1153–54.

In light of the foregoing, it is not necessary for us to review whether Rojas's motion to reopen was both time-barred and number-barred, particularly since he does not challenge the BIA's determinations in those respects. *See Access Now, Inc.*, 385 F.3d at 1330. In any event, the record shows that the BIA correctly concluded that his motion was time-barred and number-barred, because his motion was his third one seeking that form of relief, and he filed it far more than 90 days after an order of removal was issued. 8 C.F.R. § 1003.2(c)(2).[2]

---

[2] That provision states, in relevant part, "Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings . . .

II

We will not consider issues raised for the first time in a reply brief. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (deeming "issues . . . raised for the first time in a . . . litigant's reply brief" abandoned).

The Supreme Court has confirmed that claim-processing rules, unlike jurisdictional ones, are subject to waiver and forfeiture by an opposing party. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019). Moreover, even those claim-processing rules that are categorized as "mandatory," which are not subject to harmless-error analysis, must be "properly raised by an opposing party" to be enforced. *Id.*; *see also Kontrick v. Ryan*, 540 U.S. 443, 460 (2004) (holding that "[n]o reasonable construction of [claim]-processing rules . . . would allow a litigant" to prevail if he objected to the claim-processing violation "after [he] has litigated and lost the case on the merits").

The Fifth Circuit has noted that "an objection based on a mandatory claim-processing rule may be forfeited if the party asserting the rule waits too long to raise the point." *Pierre-Paul v. Barr*, 930 F.3d 684, 692 (5th Cir. 2019) (quotation omitted), *abrogated in part on other grounds by Niz-Chavez*, 141 S. Ct. at 1479–80. Accordingly, the Fifth Circuit has concluded that in removal proceedings, "any alleged defect with the charging document must be

---

and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

raised properly and can be forfeited if the [respondent] waits too long to raise it." *Id*. at 693.

Additionally, in *Matter of Nchifor*, the BIA held that a respondent may not object for the first time in a motion to reopen that the NTA did not contain the removal hearing's time and date. 28 I. & N. Dec. 585, 589 (B.I.A. 2022).

Here, we conclude that Rojas's non-jurisdictional challenge based on the defective NTA fails. Although the BIA, citing *Nchifor,* determined that Rojas forfeited this argument by not raising it previously during his proceedings before the agency, he does not substantively challenge that ruling in his initial brief. Rojas does make a conclusory assertion that the BIA's decision is meritless, in that it applied a categorical rule to deny his claim simply because it was raised in a motion to reopen. *See* Appellant's Brief at 16. However, Rojas never substantively engages with the law relating to such forfeitures or the facts of his case relevant to his failure to raise the issue until his third motion to reopen. Although Rojas' reply brief suggests that he may have had an "explanation of his diligence and why he raised his objection when he did," Reply Brief at 5–6, he does not set out his explanation. At no point does Rojas substantively engage with *Nchifor* and the BIA's reliance on that matter. We therefore deem abandoned any challenge in this respect. *See Access Now, Inc.*, 385 F.3d at 1330; *Timson*, 518 F.3d at 874.

Accordingly, we hold that the BIA did not abuse its discretion in denying Rojas's third motion to reopen, and we deny his petition for review.

PETITION DENIED.