

Introduction.

Respondent moves this Court to terminate removal proceedings under the *legal presumption of lack of subject-matter jurisdiction*, because government is precluded from meeting its burden of overcoming this presumption in light of *Niz-Chavez v Garland*, 593 U.S. ____ (2021), alternatively, Respondent moves this Court to determine whether the Court has subject-matter jurisdiction to hold removal proceedings against Respondent.

The Federal Rules of Civil Procedure provide that “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Def. R. Civ. P. 12(h)(3).

This Court’s obligation to determine whether it has *subject-matter jurisdiction to hold removal proceedings against Respondent.*

Any court has an “independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)).

According to the Supreme Court,

“Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue*, 409 U. S. 109 (1972), principles of estoppel do not apply, *Am. Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.”

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) at 702.

Legal presumption of lack of subject-matter jurisdiction.

An Immigration Court is a *federal* administrative court, therefore, all and any rules relating to federal subject-matter jurisdiction apply to an Immigration Court. In short, subject-matter jurisdiction of an Immigration Court is limited, and there is a legal presumption that subject-matter does not exist.

All federal courts have limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)) (“Federal courts are courts of limited jurisdiction . . .”), *see also Lowdermilk v. United States Bank Nat’l Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007) (“[A]s federal courts, we are courts of limited jurisdiction and we will strictly construe our jurisdiction.”).

“It is to be presumed that a cause lies outside [of federal courts’] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

In summary, subject-matter jurisdiction of an Immigration Court is limited to what Congress conferred upon it by a statute, and there is a legal presumption that subject-matter does not exist. If government fails to prove that a particular statute conferred subject-matter jurisdiction onto this Court to hold removal proceedings against Respondent, under presumption this Court lacks subject-matter jurisdiction. This Court would steer away from usurping jurisdiction if in absence of government pointing to the statute vesting subject-matter jurisdiction to hold removal proceedings against Respondent relies on the legal presumption that the Court has no subject-matter jurisdiction to do so.

**Source of subject-matter jurisdiction of an Immigration Court to hold
removal proceedings against Respondent.**

Only one federal court gets its subject-matter jurisdiction directly from the U.S. Constitution, that is the Supreme Court. *See* Const., Art. 3. All other federal courts get their subject-matter jurisdictions from Congress via a statute. The Constitution “authorizes Congress . . . to determine the scope of federal courts’ jurisdiction within constitutional limits.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010).

An Immigration Court gets a subject-matter jurisdiction to hold removal proceedings against a foreign national from the statute 8 USC §1229(a)(1), when government serves on the targeted foreign national a Notice to Appear. In the recent precedent, the Supreme Court determined that a Notice to Appear is a single document compliant with a statutory definition given in 8 USC §1229(a)(1). *Niz-Chavez v Garland*, 593 U.S. ____ (2021).

Prior to *Niz-Chavez v Garland*, 593 U.S. ____ (2021) the government has settled in its preferred practice of serving a notice of proceedings in more than one document. The fresh Supreme Court precedent *Niz-Chavez v Garland*, 593 U.S.

___ (2021) abrogated the government’s preferred practice of the so-called two-step service of a notice of removal proceedings on a foreign national. (The government preferred practice is “to provide notice of removal proceedings to an alien using a two-step process: (1) sending a Notice to Appear in which the government states that the date and time of the hearing will be provided at a later time and (2) later sending notice of the hearing with the date and time of the hearing.” *See Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009).) The *Niz-Chavez* precedent resolved the legal issue which Supreme Court described as follows,

“The question for us is whether the law Congress adopted tolerates the government’s preferred practice.”

Niz-Chavez v Garland, 593 U.S. ___ (2021) at 1. The *Niz-Chavez* precedent construed the statute to *not* tolerate the government’s preferred practice.

“Our only job today is to give the law’s terms their ordinary meaning and, in that small way, ensure the federal government does not exceed its statutory license. Interpreting the phrase “a notice to appear” to require a single notice—rather than 2 or 20 documents—does just that.”

Niz-Chavez v Garland, 593 U.S. ___ (2021) at 16. *Niz-Chavez* forbids the two-step process and abrogates any regulation or precedent in favor of the two-step process as contrary to the statute.

“... [O]ur point is that each case-initiating document must contain the catalogue of information Congress has said the defendant or respondent is entitled to receive in that document—and no one thinks this information may be provided by installment.” *Niz-Chavez v Garland*, 593 U.S. ____ (2021), FN 2 at 8.

In light of *Niz-Chavez* it is beyond contestation that one and only way to initiate removal proceedings is to serve on a foreign national the single document comporting with the definition of a Notice to Appear given in 8 USC §1229(a)(1). Such initiation of removal proceedings is an act of vesting of subject-matter jurisdiction to hold removal proceedings against a foreign national that was served a Notice to Appear compliant with 8 USC §1229(a)(1). There is no other statute other than 8 USC §1229(a)(1) that relates to initiation of removal proceedings, hence, either this statute confers subject-matter jurisdiction to conduct removal proceedings, or none at all.

The Ninth Circuit’s position on non-subject-matter jurisdiction of an Immigration Court vesting solely upon non-jurisdictional regulations does not explain how an Immigration Court is vested with subject-matter jurisdiction to hold removal proceedings against Respondent.

The freshest Ninth Circuit precedent on jurisdiction of an Immigration Court summarizes the prior precedents on vesting of non-subject-matter jurisdiction as follows,

“In *Bastide-Hernandez*, the majority held that *Karingithi* and *Aguilar Fermin* compel the conclusion that “the jurisdiction of the immigration court vests upon the filing of an NTA, even one that does not at that time inform the alien of the time, date, and location of the hearing.” *Bastide- Hernandez*, 2021 WL 345581, at *2.”

U.S. v. Gonzalez-Valencia, No. 19-30222, Feb. 12, 2021 (9th Cir. 2021) at 5.

Importantly, this precedent does not deal with subject-matter jurisdiction.

The second to last precedent on jurisdiction of an Immigration Court has the following language,

“Under *Karingithi* and *Aguilar Fermin*, a defective NTA does not divest the immigration court of jurisdiction. *Karingithi* held that regulations promulgated by the Attorney General define when the jurisdiction of immigration courts vests, rather than the statute authorizing those regulations. Failure to include the date and time of a removal hearing in an NTA does not deprive the immigration court of **subject-matter** jurisdiction

so long as the information is provided in a subsequent NOH. *Karingithi*, 913 F.3d at 1161–62. Similarly, *Aguilar Fermin* held that failure to include the address of the immigration court in an NTA does not deprive the immigration court of jurisdiction, so long as a subsequent NOH provides that information. *Aguilar Fermin*, 958 F.3d at 893–95. The regulations provide that “[j]urisdiction vests . . . when a charging document is filed with the Immigration Court,” 8 C.F.R. § 1003.14(a), and requires the NTA include “the time, place and date of the initial removal hearing, where practicable.” 8 C.F.R. § 1003.18(b).”

U.S. v. Batiste-Hernandez, No 19-30006, Feb. 2, 2021 (9th Cir. 2021) at 5-6. The term “subject-matter jurisdiction” is used in reliance on *Karingithi*, which does NOT use the term “subject-matter jurisdiction. Use of the term “subject-matter jurisdiction” in *Batiste-Hernandez* is dubious by reason of incorrect citing to precedent. More to the point, *Batiste-Hernandez* finds subject-matter jurisdiction “so long as the information is provided in a subsequent NOH”. *U.S. v. Batiste-Hernandez*, No 19-30006, Feb. 2, 2021 (9th Cir. 2021) at 5. *Niz-Chavez v Garland*, 593 U.S. ____ (2021) abrogated the practice of providing information that statute requires to be provided in the NTA via a subsequent Notice of Hearing (NOH), therefore, directly overruled *U.S. v. Batiste-Hernandez*, No 19-30006, Feb. 2, 2021 (9th Cir. 2021). *Niz-Chavez v Garland*, 593 U.S. ____ (2021) also overruled *U.S. v.*

Batiste-Hernandez, No 19-30006, Feb. 2, 2021 (9th Cir. 2021) indirectly, as it overruled the precedents, on which *Batiste* relied in its finding of jurisdiction. *Niz-Chavez v Garland*, 593 U.S. ____ (2021) overruled *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), as *Karingithi* relied on the “two-step process” and relied on *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009), which *Niz-Chavez* also overruled.

“The BIA recently issued a precedential opinion in which it rejected an argument identical to the one advanced by *Karingithi*. *Bermudez-Cota*, [27 I. & N. Dec. at 442–44](#). The BIA’s interpretations of its regulations are due “substantial deference,” and should be upheld “so long as the interpretation sensibly conforms to the purpose and wording of the regulations.” *Lezama-Garcia v. Holder*, [666 F.3d 518, 525](#) (9th Cir. 2011) (internal quotation marks omitted). We therefore defer to the Board’s interpretations of ambiguous regulations unless they are “plainly erroneous,” “inconsistent with the regulation,” or do “not reflect the agency’s fair and considered judgment.” *Id.* (internal quotation marks omitted). *Bermudez-Cota* easily meets this standard and is consistent with our analysis.”

Karingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019). *Bermudez-Cota*, 27 I&N Dec. rests only on *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009), which is the

precedent that blessed the existing practice of “two-step process.” The issue in *Popa* was as follows,

“The sole issue in this appeal is whether the government is permitted to provide notice of removal proceedings to an alien using a two-step process: (1) sending a Notice to Appear in which the government states that the date and time of the hearing will be provided at a later time and (2) later sending notice of the hearing with the date and time of the hearing.”

Popa v. Holder, 571 F.3d 890 (9th Cir. 2009). This issue was resolved in the following way,

“Although § 1229(a)(1)(G)(i) requires a notice to appear to “specify[]” the time and place at which the proceedings will be held, this court has never held that the NTA cannot state that the time and place of the proceedings will be set at a future time by the Immigration Court. This court silently has adopted the rule that the time and date of a removal proceeding can be sent after the first notice to appear.”

Popa v. Holder, 571 F.3d 890 (9th Cir. 2009). It is the “two-step process” practice blessed in *Popa* that got overruled by *Niz-Chavez v Garland*, 593 U.S. ____ (2021).

As a peripheral issue, *Karingithi* deemed regulations to be jurisdictional.

“There is no "glue" to bind § 1229(a) and the jurisdictional regulations: the regulations do not reference § 1229(a), which itself makes no mention of the IJ’s jurisdiction.”

Karingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019). What is a jurisdictional regulation? Does it mean that it confers subject-matter jurisdiction? The answer to this questions do not matter, because the Ninth Circuit changed its position on regulations, and more recently ruled that regulations are non-jurisdictional claim processing rules and that jurisdiction they confer onto an Immigration Court is not-subject-matter jurisdiction. *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020).

The approach of vesting jurisdiction (not necessarily subject-matter) solely under regulations is condemned in *Niz-Chavez v Garland*, 593 U.S. ____ (2021) as follows,

“Ultimately, the government is forced to abandon any pretense of interpreting the statute’s terms and retreat to policy arguments and pleas for deference. The government admits that producing compliant notices has proved taxing over time. It may not know the availability of hearing officers’ schedules at the time it would prefer to initiate proceedings against aliens. Nor, the government contends, does it make sense to include time and place

information in a notice to appear when the statute allows it to amend the time and place by serving a supplemental notice. Beyond all that, the government stresses, its own (current) regulations authorize its practice. The dissent expands on all these points at length. *Post*, at 17–21. But as this Court has long made plain, pleas of administrative inconvenience and self-serving regulations never “justify departing from the statute’s clear text.” *Pereira*, 585 U. S., at ___ (slip op., at 18).”

Niz-Chavez v Garland, 593 U.S. ___ (2021) at 13.

In *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020) the Ninth Circuit reasoned in favor of a post-filing cure of an incomplete NTA by the second notice as follows,

“[t]he panel observed that *Rosales Vargas* and *Karingithi* are consistent, as under both decisions, an omission of some of the information required by § 1003.14(a) and § 1003.15(b)(6) can be cured and is not fatal.”

Aguilar Fermin v. Barr, 958 F.3d 887 (9th Cir. 2020) at 4. In light of *Niz-Chavez v Garland*, 593 U.S. ___ (2021) the omission of some information may not be cured by any subsequent notice, because the statute requires the notice to be a single document. The *Niz-Chavez* precedent resolved the legal issue which Supreme Court described as follows,

“The question for us is whether the law Congress adopted tolerates the

government’s preferred practice.”

Niz-Chavez v Garland, 593 U.S. ____ (2021) at 1. The *Niz-Chavez* precedent construed the statute to *not* tolerate the government’s preferred practice.

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Legal authorities predating *Niz-Chavez v Garland*, 593 U.S. ____ (2021) either do not deal with subject-matter jurisdiction of an Immigration Court to hold removal proceedings against a foreign national, or have been overruled.

Notably, regulations do not address removal proceedings, but proceedings. Regulations do not govern subject-matter jurisdiction, but jurisdiction. Proceedings are not necessarily removal proceedings. Jurisdiction is not necessarily subject-matter jurisdictions. In light of federal presumption of lack of subject-matter jurisdiction, regulations do not help to establish subject-matter jurisdiction of an Immigration Court to hold removal proceedings.

Conclusion

This Court may find lack of subject-matter jurisdiction to hold removal proceedings against Respondent solely upon the legal presumption that subject-matter does not exist. Government has not overcome this presumption. In light of *Niz-Chavez v Garland*, 593 U.S. ____ (2021), the prior precedents of lower courts in support of the “two-step process” are abrogated, and government is precluded from overcoming the presumption of non-existence of subject matter jurisdiction absent a statutorily compliant NTA served on Respondent.