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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
PHOENIX, ARIZONA

In the matter of:)	Case No.: A#-----
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)	
<u>Non-detained</u> Respondent,)	Hearing Type: INDIVIDUAL/MERITS
In Removal Proceedings)	Date: April --, 20--
)	Time: 9:00 AM
)	IJ: Hon. John W. Richardson

**Respondent's Motion to Terminate
under 8 USC §1229(a)(1),
Matter of Rosales Vargas, 27 I&N Dec.745(BIA 2020)
and
*Aguilar Fermin v. Barr, No. 18-70855 (9th Cir. 2020)***

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1 I. INTRODUCTION

2 In light of the more recent precedents, *Karingithi v. Whitaker*, 913 F.3d 1158
3 (9th Cir. 2019) is no longer a good law with respect of the federal regulations 8
4 CFR §1003 being jurisdictional, as the BIA and the Ninth Circuit held the
5 regulations to be non-jurisdictional. *Matter of Rosales Vargas*, 27 I&N Dec. 745
6 (BIA 2020), *Aguilar Fermin v. Barr*, No. 18-70855 (9th Cir. 2020)

7 In reliance on *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020), *Aguilar*
8 *Fermin v. Barr*, No. 18-70855 (9th Cir. 2020), Respondent, through Counsel,
9 respectfully moves to terminate these removal proceedings for the reasons set forth
10 *infra*, including

11 (1) Lack of initiation of the removal proceedings pursuant to 8 USC
12 §1229(a)(1),

13 (2) Lack of subject-matter jurisdiction as the agency regulations, which are
14 under the current BIA precedent and the fresh 9th Circuit precedent are non-
15 jurisdictional claim-processing rules otherwise known as regulations (*Matter*
16 *of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020), *Aguilar Fermin v. Barr*,
17 No. 18-70855 (9th Cir. 2020) have not conferred the subject-matter
18 jurisdiction upon the Immigration Judge.

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

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24 II. STATEMENT OF THE FACTS

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

8 It is an “age-old rule that a court may not in any case, even in the interest of
9 justice, extend its jurisdiction where none exists.” *Christianson v. Colt Indus.
10 Operating Corp.*, 486 U.S. 800, 818 (1988). Therefore, the matter commenced
11 without the subject-matter jurisdiction must be terminated at once

12 The commencement of a matter without the subject-matter jurisdiction is
13 incurable, because where the subject-matter was not conferred on a court it cannot
14 be cured by amendment. *Cf. Mustafa v. Thompson*, 2013 WL 776217 (D.N.J. Feb.
15 28, 2013) (a pleading that fails to invoke jurisdiction cannot be cured by
16 amendment). There is no justification for acting outside of jurisdiction and it is an
17 “age-old rule that a court may not in any case, even in the interest of justice, extend
18 its jurisdiction where none exists.” *Christianson v. Colt Indus. Operating Corp.*,
19 486 U.S. 800, 818 (1988). The administrative order that is a fruit of the unlawfully
20 conducted proceedings is void, as under the Supreme Court precedent when a court
21 is "without authority, its judgments and orders are regarded as nullities. They are
22 not voidable, but simply void; and form no bar to a recovery sought, even prior to a
23 reversal in opposition to them. They constitute no justification; and all persons
24 concerned in executing such judgments or sentences, are considered, in law, as
25 trespassers." *Elliot v. Piersol*, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828).

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3 IV. LEGAL STANDARD FOR TERMINATION OF PROCEEDINGS

4 It is fundamental that a court must not entertain a matter over which the court
5 lacks subject-matter jurisdiction. Knowingly entertaining a matter without subject
6 matter-jurisdiction constitutes usurping jurisdiction, which is a treason of the
7 Constitution. *Cohen v. Virginia*, 19 U.S. 6 Wheat 264 (1821). When a court
8 realizes that it has a matter without subject-matter jurisdiction, the matter must be
9 dismissed at once on the general principal of not engaging in or not perpetuating
10 the act of usurping jurisdiction, trespass, and treason.

11 Only the Immigration Judge may terminate removal proceedings upon request by
12 either party. *See Matter of G-N-C*, 22 I&N Dec. 281 (BIA 1988).

13 The Immigration Judge may terminate when the DHS failed to prove
14 removability by clear and convincing evidence (*Matter of Sanchez-Herbert*, 26
15 I&N Dec. 43, 45 (BIA 2012), *Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204
16 (1990), *United States Department of Justice Immigration Judge Benchbook*, 4th
17 Ed., V.2, p.605), because it is the DHS's burden to prove removability. *Woodby v*
18 *INS*, 385 U.S. 276, 8 CFR §240.8(a). "A respondent charged with deportability
19 shall be found to be removable if the Service proves by clear and convincing
20 evidence that the respondent is deportable as charged." 8 CFR §240.8(a).

21 While the DHS motion to terminate is limited to the same grounds as set forth in
22 the regulation 8 CFR §239.2(c) for dismissal of the Notice to Appeal (*Matter of W-*
23 *C-B-*, 24 I&B Dec. 118, 122 (BIA 2007)), no such limitations apply to aliens in
24 proceedings.
25

1 The BIA has jurisdiction to terminate removal proceedings. *Matter of M-D-*, 24
2 I&N Dec. 138, 139 (BIA 2007), *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990,
3 1991), *Matter of Dobre*, 20 188 (BIA 1990)). The BIA does terminate removal
4 proceedings on interlocutory appeal where the IJ improperly denied to terminate.
5 *Matter of Mei Jiang*, A#089-173-687, December 21, 2017 (BIA unpublished).

6 (Attachment B)

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10 V. ARGUMENT

11 **A. This case must be terminated because the removal proceedings never**
12 **initiated under 8 USC §1229(a)(1).**

13 The initiation of the removal proceedings is governed by Section 239(a) of the
14 Immigration and Nationality Act codified as 8 USC §1229(a)(1).

15 Respondent respectfully argues that removal proceedings against him have never
16 been initiated pursuant to 8 USC §1229(a)(1), were conducted without any
17 statutory authority and contrary to 8 USC §1229(a)(1). The Immigration Judge
18 assumed jurisdiction vested in him solely by the agency regulations 8 CFR
19 §1003.14 notwithstanding the fact that the removal proceedings against Petitioner
20 did not initiate pursuant to 8 USC §1229(a)(1). The Immigration Court conducted
21 the proceedings commenced before it solely under the agency regulations 8 CFR
22 §1003.14 notwithstanding the fact that the removal proceedings against Petitioner
23 did not initiate pursuant to 8 USC §1229(a)(1).

1 Initiation of removal proceedings is governed by the federal statute 8 USC
2 §1229(a) entitled “Initiation of Removal Proceedings.” The title unequivocally
3 indicates that the statute is on point of initiation of removal proceedings. It is
4 obvious that when the statute describes initiation of removal proceedings it implies
5 that the removal proceedings must be initiated before they proceed.

6 The statute 8 USC §1229(a) defines¹ the legal term “Notice to appear.” *See* 8
7 USC 1229(a)(1). The first subsection of the statute is titled “Notice to appear.” *See*
8 8 USC §1229(a). The definition of the legal term “Notice to appear” in the first
9 subsection and in the first sentence of that subsection clearly indicates that the term
10 is important and meant to be used in context of initiation of removal proceedings.
11 It is easy to calculate that the definition of the term “Notice to appear” given in 8
12 USC §1229(a)(1) expressly specifies eleven (11) pieces of information (set forth in
13 the A through G subsections) that must be included in the written notice to the
14 alien to initiate the removal proceedings. *See* 8 USC §1229(a)(1). The definition
15 specifically addresses practicability of its own implementation providing as
16 follows: “In removal proceedings under [section 1229a of this title](#), written notice
17 <...> shall be given in person to the [alien](#) (or, if personal [service](#) is not
18 **practicable**, through [service](#) by mail to the [alien](#) or to the [alien](#)’s counsel of record,
19 if any) ...” 8 USC §1229(a)(1) (Emphasis added in bold.) It is impossible not to
20

21
22 ¹ Supreme Court rejected the view that 8 USC §1229(a) is not definitive and
23 observed that “Section 1229(a) <...> does speak in definitional terms, at least with
24 respect to the “time and place at which the proceedings will be held.”” *Pereira v.*
25 *Sessions*, 138 S. Ct. 2105 (2018) at 2117.

1 notice that Congress expressly addressed practicability of the legislation it passed.
2 The statutory definition of the term “Notice to appear” is large (contains 265
3 words), detailed (specifies eleven (11) required pieces of information that must be
4 contained in the notice), and provides for the single exception with practicability in
5 mind. Importantly, the definition does not provide any exceptions to inclusion of
6 the enumerated eleven (11) pieces of information in the notice. Congress clearly
7 intended that the eleven (11) pieces of information be included in the notice to the
8 alien without any exceptions under any circumstances whatsoever. When Congress
9 intended to create an exception to address practicability, it did so. Congress did not
10 intent to permit under any circumstances that any of the eleven (11) pieces of
11 information to be omitted in the notice to the alien, even if such a rigid provision is
12 impracticable. The intent of Congress is crystal clear from the direct statutory
13 language.

14 It is settled in law that a statutory provision must be read in context of other
15 provisions of the same statute. Immediately after defining the term “Notice to
16 appear” the statute 8 USC §1229(a) addresses changes in time or place of
17 proceedings in the subsection titled “Notice of change in time or place of
18 proceedings.” *See* 8 USC §1229(a)(2). The word “change” in the title implies that
19 time and place of proceedings were already set, and subsequently changed.
20 Importantly, the statute 8 USC §1229(a)(2) does not provide an option of omitting
21 time or place of proceedings in the “Notice to appear” even if the missing
22 information is supplements through a subsequent “Notice of change in time or
23 place of proceedings.”

1 The statute of the same title codified as 8 USC §1229a and entitled
2 “Removal Proceedings” provides that “[a]ny [alien](#) who, after written notice
3 required under paragraph (1) or (2) of [section 1229\(a\) of this title](#) has been
4 provided to the [alien](#) or the [alien](#)’s counsel of record, does not attend **a proceeding**
5 **under this section**, shall be ordered removed in absentia if the [Service](#) establishes
6 by clear, unequivocal, and convincing evidence that **the written notice was so**
7 **provided ...**” 8 USC §1229a. (Emphasis added in bold.) It is clear from the direct
8 statutory language that specifically the removal proceedings, as opposed to
9 unspecified proceedings, are being addressed in the statute. The words “the notice
10 was so provided” is a clear reference to the following language of the neighboring
11 section of the same title,

12 “In removal proceedings under [section 1229a of this title](#), written notice (in
13 this section referred to as a [“notice to appear”](#)) shall be given in person to
14 the [alien](#) (or, if personal [service](#) is not practicable, through [service](#) by
15 mail to the [alien](#) or to the [alien](#)’s counsel of record, if any) specifying the
16 following:

17 (A)The nature of the proceedings against the [alien](#).

18 (B)The legal authority under which the proceedings are conducted.

19 (C)The acts or conduct alleged to be in violation of law.

20 (D)The charges against the [alien](#) and the statutory provisions alleged to
21 have been violated.

22 (E)The [alien](#) may be represented by counsel and the [alien](#) will be
23 provided (i) a period of time to secure counsel under subsection (b)(1) and
24 (ii) a current list of counsel prepared under subsection (b)(2).

25 (F)

1 (i)The requirement that the [alien](#) must immediately provide (or have
2 provided) the [Attorney General](#) with a written record of an address and
3 telephone number (if any) at which the [alien](#) may be contacted respecting
4 proceedings under [section 1229a of this title](#).

5 (ii)The requirement that the [alien](#) must provide the [Attorney](#)
6 [General](#) immediately with a written record of any change of the [alien's](#)
7 address or telephone number.

8 (iii)The consequences under [section 1229a\(b\)\(5\) of this title](#) of failure to
9 provide address and telephone information pursuant to this subparagraph.

10 **(G)**

11 (i)The time and place at which the proceedings will be held.

12 (ii)The consequences under [section 1229a\(b\)\(5\) of this title](#) of the failure,
13 except under exceptional circumstances, to appear at such proceedings.”

14 *See* 8 USC §1229(a)(1). It is abundantly clear that the words “so provided” include
15 provision mandating that “the time and place at which the proceedings will be
16 held” be in the “Notice to appear.” *See* 8 USC §1229(a)(1)(G)(i).

17
18 The direct statutory language of 8 USC §1229(a) and §1229a is devoid of
19 use the terms “jurisdiction” or “commencement.” The statute describes initiation of
20 removal proceedings (as opposed to vesting of jurisdiction or commencement of a
21 proceeding) and defines the notice (referred to as a “Notice to appear”) by service
22 of which on the alien the removal proceedings are being initiated. The statute does
23 not provide any alternative to service of a “Notice to appear” on the alien as a legal
24 vehicle for initiation of the removal proceedings. Importantly, Congress did not
25 make initiation of the removal proceedings subject to Attorney General’s

1 regulation. 8 USC §1229(a). In contrast with initiation of the removal proceedings,
2 Congress made some parts of conduct of the removal proceedings subject to
3 Attorney General’s regulation. §1229a.

4
5 Nothing in the statutory language of 8 USC §1229(a) or §1229a states or
6 implies that the removal proceedings may start without being initiated as described
7 in 8 USC §1229(a)(1). Nothing in the statutory language of 8 USC §1229(a) or
8 §1229a states or implies that vesting of jurisdiction or commencement of
9 proceedings before an Immigration Judge is an alternative way of initiation of the
10 removal proceedings.

11 The statute 8 USC §1229(a)(1) is clear² and free from any ambiguity³.

12
13 It is abundantly clear, that this case did not initiate under 8 USC 1229(a)(1),
14 therefore the statute 8 USC §1229(a)(1) did not confer the subject-matter
15 jurisdiction from Congress to the Immigration Court.
16
17
18

19 ² Supreme Court observed that 8 USC §1229(a) is clear and notes as follows, “[a]t
20 the end of the day, given the clarity of the plain language, we apply the statute as
21 it is written.” *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) at 2119-20 (Internal
22 quotations omitted.)

23 ³ Supreme Court observed that “Straining to inject ambiguity into the statute, the
24 Government and the dissent advance several overlapping arguments. None is
25 persuasive.” *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) at 2117.

1 **B. The instant proceedings before the IJ commenced solely under the non-**
2 **jurisdictional regulations and jurisdiction (but not the subject-matter**
3 **jurisdiction) vested solely under the non-jurisdictional regulations. Non-**
4 **jurisdictional regulations do not vest the subject-matter jurisdiction.**

5
6 Attorney General promulgated regulations governing vesting of jurisdiction
7 and commencement of proceedings before an Immigration Judge. It is settled in the
8 BIA and Ninth Circuit precedents that vesting of jurisdiction and commencement
9 of proceedings before an Immigration Judge are governed by the agency
10 regulations **alone**, not by the statute 8 USC §1229. *Matter of Rosales Vargas*, 27
11 I&N Dec. 745 (BIA 2020); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019);
12 *Aguilar Fermin v Barr*, No. 18-70855 (9th Cir. 2020).

13
14 *What is the relationship between the statutory initiation of the removal*
15 *proceedings on one side and the regulatory vesting of jurisdiction and*
16 *commencement of proceedings before an Immigration Judge on the other side?*

17 The regulation titled “Jurisdiction and commencement of proceedings”
18 provides as follows: “Jurisdiction vests, and proceedings before an [Immigration](#)
19 [Judge](#) commence, when a [charging document](#) is filed with the Immigration Court
20 by the [Service](#).” 8 C.F.R. § 1003.14(a). Notably, this regulation does not specify
21 the type of proceedings that commence by filing of a charging document.

22
23 The term “charging document” is defined in the neighboring section of the
24 regulations as follows: “*Charging document* means the written instrument which
25 initiates a proceeding before an Immigration Judge. For proceedings initiated prior

1 to April 1, 1997, these documents include an Order to Show Cause, a Notice
2 to Applicant for Admission Detained for Hearing before Immigration Judge, and a
3 Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings
4 initiated after April 1, 1997, these documents include a Notice to Appear, a Notice
5 of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request
6 for Hearing by Alien.” 8 C.F.R. § 1003.13. The term “charging document” is
7 defined as “the written instrument which initiates a proceeding before
8 an Immigration Judge.”

9 The regulation 8 CFR §1003.13 expressly identifies “a Notice to Appear” as
10 one of several possible charging documents “[f]or proceedings initiated after April
11 1, 1997.” Under the Ninth Circuit precedent, the words “ a Notice to Appear” –
12 under the Ninth Circuit precedent is not the same as the term “Notice to appear”
13 defined in 8 USC §1229(a)(1). *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir.
14 2019) at 1161. The Ninth Circuit held in the precedential opinion that “[T]he
15 regulations, not § 1229(a), define when jurisdiction vests. Section 1229 says
16 nothing about the Immigration Court's jurisdiction. And for their part, the
17 regulations make no reference to § 1229(a)'s definition of a "notice to appear." *See*
18 *generally* 8 C.F.R. §§ 1003.13-1003.14.” *Karingithi v. Whitaker*, 913 F.3d 1158
19 (9th Cir. 2019) at 1161.

20
21 The word “initiates” trice used in 8 CFR §1003.13 may be – depending on
22 interpretation - a link between the regulations on “Jurisdiction and commencement
23 of proceedings” and the statute 8 USC §1229 on “Initiation of Removal
24 Proceedings.” The regulations do not link the word “initiate” to 8 USC
25 §1229(a)(1). Utilizing the same logic as used by the Ninth Circuit to find that the

1 words “Notice to Appear” in the regulations is not the same as the words “Notice
2 to appear” in the statute, one arrives to the conclusion that the word “initiate” in
3 the regulations is not the same as the word “initiate” in the statute. The regulations,
4 therefore, do not govern initiation of the removal proceedings. (If one attempts to
5 reads the word “initiate” in the regulations as meaning the same as in the statute, t
6 would compel the result that the regulations 8 CFR §1003.13 directly override the
7 statute 8 USC §1229(a)(1), which is nonsensical. Notably, at this time, there is no
8 authority holding that the term “initiated” in the 8 CFR §1003.13 is the same as the
9 term “initiated” in 8 USC §1229(a)(1).)

10 The regulations 8 CFR §1003.13, 14 govern commencement of unspecified
11 proceedings before an Immigration Judge.” The regulation 8 CFR §1003.14 on
12 “Jurisdiction and commencement of proceedings” does not purport to relate
13 specifically to *removal* proceedings, and neither does the regulation 8 CFR
14 §1003.13. In other words, the regulations 8 CFR §1003.13, 14 – it appears - do not
15 regulate implementation of the statute 8 USC §1229(a)(1), because they address
16 different matters then addressed in 8 USC §1229(a)(1). It is, however, settled in
17 law that a section of regulations must be read in context of adjacent sections in the
18 same regulations. The regulation 8 C.F.R. § 1003.18(b) governs specifically
19 *removal* proceedings under 8 USC §1229 and provides as follows: “In removal
20 proceedings pursuant to section 240 of the Act⁴, the Service shall provide in the
21 Notice to Appear, the time, place and date of the initial removal hearing, where
22 practicable. If that information is not contained in the Notice to Appear, the
23 Immigration Court shall be responsible for scheduling the initial removal hearing
24

25 _____
⁴ Codified as 8 USC §1229.

1 and providing notice to the government and the alien of the time, place, and date of
2 hearing.” 8 C.F.R. § 1003.18(b).

3 When the statute 8 USC §1229 and the regulations 8 CFR §1003.13, 14 and
4 18(b) are read together, the first observation is that the regulations 8 CFR
5 §1003.18(b) in their direct language expressly refer to the removal proceedings
6 under the statute codified as 8 USC §1229. The second observation is that, the
7 Ninth Circuit precedent holds that the Notice to Appear in the regulations 8 CFR
8 §1003.13, 14 adjacent to 8 CFR §1003.18(b) is not the term defined by 8 USC
9 §1229(a)(1). *See Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019) at 1161.
10 These observations necessarily compel conclusion that Notice to Appear in 8 CFR
11 §1003.18(b) is *not* the “Notice to appear” defined in 8 USC §1229(a)(1). Thus,
12 both 8 USC §1229 and 8 CFR §1003.18(b) govern the removal proceedings under
13 8 USC §1229, both use the term “Notice to Appear,” but – anomalously - define
14 this key legal term differently.

15
16 Respondent respectfully argues that reconciliation of the statutory and
17 regulatory governance of the removal proceedings under 8 USC §1229 is only
18 possible, if the clear distinction is made between initiation of the removal
19 proceedings on one side and vesting of jurisdiction and commencement of
20 proceedings before an Immigration Judge on the other side. The statute 8 USC
21 §1229 governs initiation of the removal proceedings. The regulations **alone** – as
22 held in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019) at 1161 - govern
23 vesting of jurisdiction and commencement of proceedings before an Immigration
24 Judge. Initiation is different from vesting of jurisdiction, and it is different from
25 commencement of proceedings before an Immigration Judge. The mere fact that

1 the BIA and Ninth Circuit found that the “Notice to appear” defined in 8 USC
2 §1229(a)(1) is not the “Notice to Appear” vesting jurisdiction with an Immigration
3 Court (*Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020); *Karingithi v.*
4 *Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Aguilar Fermin v Barr*, No. 18-70855 (9th
5 Cir. 2020)), is an indication that vesting of jurisdiction and commencement of
6 proceeding before an Immigration Judge are different from the statutory initiation
7 of the removal proceedings.

8
9 In the instant case the Notice to Appear in the record does not match the
10 statutory definition of the term “Notice to appear” given in 8 USC §1229(a)(1),
11 therefore, the removal proceedings against Petitioner did not initiate. The Notice to
12 Appear in the record, even though not a match to the regulatory definition, under
13 the BIA and Ninth Circuit precedents, vested jurisdiction (but not necessarily
14 subject-matter jurisdiction) and commenced proceedings before the Immigration
15 Judge (*see Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020); *Karingithi v.*
16 *Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Aguilar Fermin v Barr*, No. 18-70855 (9th
17 Cir. 2020)), but did so without initiating removal proceedings under 8 USC
18 §1229(a)(1).

19 Respondent was processed in the Immigration Court, because the Attorney
20 General, through regulations 8 CFR §1003.18(b), created the way of conducting
21 the removal proceedings without initiating them according to 8 USC §1229(a)(1).
22 But regulatory commencement of proceedings without statutory initiation of the
23 removal proceedings does not necessarily confer the subject-matter jurisdiction to
24 conduct the removal proceedings.
25

1 Under the previous Ninth Circuit precedent, *Karingithi v. Whitaker*, 913
2 F.3d 1158 (9th Cir. 2019), the regulations were jurisdictional. It was arguably the
3 case, that the jurisdictional regulations conferred the subject-matter jurisdiction of
4 the Immigration Court, even when the statute did not.

5 In January of 2020, the Board of Immigration Appeals interpreted the
6 regulations in the way that the word “jurisdiction” in the regulations does not mean
7 the subject-matter jurisdiction. *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA
8 2020). In May of 2020, the Ninth Circuit agreed with the Board’s interpretation of
9 its regulations. *Aguilar Fermin v Barr*, No. 18-70855 (9th Cir. 2020). That means
10 that vesting of jurisdiction and commencement of the removal proceedings before
11 the Immigration Judge solely under the agency regulations does not mean that the
12 Immigration Court assumed the subject-matter jurisdiction.

13 Respondent argues that an Immigration Judge may not assume subject
14 matter-jurisdiction in the removal proceedings, unless empowered to do so under
15 the statute 8 USC §1229(a)(1) through initiation of the removal proceedings. The
16 previous Ninth Circuit precedent *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir.
17 2019) interpreted the agency regulations as jurisdictional, which *arguably* created
18 the way to confer the subject-matter jurisdiction from the AG to the Immigration
19 Court. Respondent does not need to dispute the *Karingithi* interpretation of the
20 regulations, because the Ninth Circuit recently in *Fermin* agreed with the BIA’s
21 interpretation (*Aguilar Fermin v Barr*, No. 18-70855 (9th Cir. 2020)) given in
22 *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020) that the regulations are
23 not jurisdictional.
24
25

1 Under *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020) and *Aguilar*
2 *Fermin v Barr*, No. 18-70855 (9th Cir. 2020) is abundantly clear that non-
3 jurisdictional regulations certainly did not confer the subject-matter jurisdiction on
4 the Immigration Court. It is argued *supra*, that the subject-matter jurisdiction did
5 not confer on the Immigration Court under the statute, as the statute 8 USC
6 §1229(a)(1) on initiation of the removal proceedings was not used to commence
7 the proceedings solely under the regulations. With no statute and no jurisdictional
8 regulations conferring the subject-matter on the Immigration Court, the
9 Immigration Court is without the subject-matter.

10
11
12 Application of *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020) and
13 *Aguilar Fermin v Barr*, No. 18-70855 (9th Cir. 2020) to the instant case compels
14 conclusion that the Immigration Judge usurped subject-matter jurisdiction. Such
15 situation developed through *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA
16 2020) and *Aguilar Fermin v Barr*, No. 18-70855 (9th Cir. 2020) abrogating the
17 prior Ninth Circuit precedent holding the regulations jurisdictional.

18 *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020) and *Aguilar Fermin*
19 *v Barr*, No. 18-70855 (9th Cir. 2020) are good laws, therefore, the removal
20 proceedings must be swiftly terminated as this Honorable Court is without the
21 subject-matter jurisdiction. The IJ may not ignore the valid precedent of the BIA,
22 because Supreme Court held that, “[w]here the rights of individuals are affected, it
23 is incumbent upon agencies to follow their own procedures.” *Morton v. Ruiz*, 415
24 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). The IJ may not ignore the
25

1 Ninth Circuit precedent, as departure from precedent is a reversible error under
2 *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002).

3
4 The Immigration Judge should terminate when the DHS failed to prove
5 removability by clear and convincing evidence. *Matter of Sanchez-Herbert*, 26
6 I&N Dec. 43, 45 (BIA 2012), *Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204
7 (1990), *United States Department of Justice Immigration Judge Benchbook*, 4th
8 Ed., V.2, p.605. In the instant case, the DHS is precluded from proving
9 removability as the removal proceedings did not initiate under the one and only
10 legal authority, specifically the statute 8 USC §1229(a)(1), governing initiation of
11 the removal proceedings.

12 13 VI. CONCLUSION

14 Respondent presented legal arguments in support of terminating these removal
15 proceedings for

16 (1) lack of the initiation of the removal proceedings under the sole authority on
17 such initiation, which is the statute 8 USC §1229(a)(1), and

18 (2) lack of the subject-matter jurisdiction, which had no source from which it
19 could have possibly conferred on the Immigration Court, since the previously
20 jurisdictional regulations *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019)
21 have been held no-jurisdictional in the recent precedents of both the BIA and the
22 Ninth Circuit, *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020), *Aguilar*
23 *Fermin v Barr*, No. 18-70855 (9th Cir. 2020).

24 WHEREFORE, the removal proceedings against this Respondent should be
25 terminated.

1 Respectfully submitted on _____, 2020

2 _____
3 Marina Alexandrovich, Esq.
4 ATTORNEY FOR RESPONDENT

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VII. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing

1 **Respondent’s Motion to Terminate**
2 **under 8 USC §1229(a)(1),**
3 ***Matter of Rosales Vargas, 27 I&N Dec.745(BIA 2020)***
4 **and**
5 ***Aguilar Fermin v. Barr, No. 18-70855 (9th Cir. 2020)***

6 was served onto the DHS via the e-mail to

7 OPLA-PHO-eService@ice.dhs.gov

8 And

9 by USPS first class mail onto:

10 DHS/ICE Office of Chief Counsel
11 U.S. Immigration and Customs Enforcement
12 2035 N Central Avenue, 2nd floor
13 Phoenix, AZ 85012

14 on _____, 2020.

15 By: _____

16 Marina Alexandrovich, Esq.

17 ATTORNEY FOR RESPONDENT

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VIII. ATTACHMENTS

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Attorney for Respondent
EOIR # UK832232

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
PHOENIX, ARIZONA**

1 In the Matter of:) In Removal Proceedings
)
 2 -----)
)
 3 A-----) Hearing: INDIVIDUAL
) Hearing Date: April --, 20--
 4 Respondent) Time: 9:00 AM
) Judge: Hon. John W. Richardson
)

5 ORDER OF THE IMMIGRATION JUDGE

6 Upon consideration of the following motion

7
 8 **RESPONDENT'S POST-BERMUDEZ-COTA**
MOTION TO TERMINATE UNDER INA §239(a), PEREIRA AND MACLEOD

9 it is HEREBY ORDERED that the said motion be

10 GRANTED / DENIED / DEFERRED .

11
 12 Date: _____

13 By: _____
 14 IMMIGRATION JUDGE

15 Certificate of Service

16 This document was served by [] mail [] personal service
 17 To [] Alien [] Alien c/o Custodial Officer [] Alien's Atty/Rep [] DHS
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