No. 22A345

In The Supreme Court of the United States

NAOMI W. KINUTHIA,

Petitioner,

v.

DONNA CARR, Chief Clerk,
Board of Immigration Appeals (BIA);
MERRICK B. GARLAND, U.S. Attorney General;
TODD M. LYONS, U.S. ICE – Immigration
and Customs Enforcement Field Office,
Acting Director, Boston Field Office,

Respondents.

EMERGENCY APPLICATION FOR A STAY OF REMOVAL PENDING TWO CONCURRENT WRIT OF CERTIORARI RESOLUTIONS FOR CASE # 22-313 AND CASE # 22-344

To the Honorable Ketanji Brown Jackson, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit

On Application For Stay Of Removal, Pending on Petition For Writ Of Certiorari (cases 22-313 & 22-344) To The United States Court Of Appeals For The First Circuit

For the Petitioner-Pro-se
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QUESTIONS PRESENTED

Question 1: whether 8 U.S.C. § 1252(b)(9) was an unconstitutional suspension of the right to the writ of habeas corpus protected in Article I, Section 9 of the U.S. Constitution, or if 8 U.S.C. § 1252(b)(9) explicitly suspends this right, or if the lower courts below have erred in their interpretation 8 U.S.C. § 1252(b)(9) forecloses 28 U.S.C. § 2241 writ of habeas corpus, hence the petitioner's +$120,000 in asylum Attorneys' Fees and expenses are reimbursable under the Equal Access to Justice Act (the EAJA) 28 U.S.C. § 2412(b). (see App. 2 & App. 11 to 14)

Question 2: whether 8 U.S.C. § 1252(b)(9) suspends the writ of habeas corpus protected in Article I, Section 9 of the U.S. Constitution, for just the 22 C.F.R. § 40.1(q) principal asylum applicant, and not for the 8 C.F.R. § 208.21 derivative spouse or both; and whether a 8 C.F.R. § 208.21 derivative spouse can petition the 28 U.S.C. § 2241 writ of habeas corpus, to raise an independent issue of 241(b)(3) ineffective assistance of counsel, or to preemptively seek to restrain the Immigration and Customs Enforcement from taking her into custody using the allegedly final unconstitutional (see App. 11 undelivered) BIA 3-8-2013 order of deportation; because the other lower court's decision (subject of a concurrent writ of certiorari), have foreclosed as 8 U.S.C. § 1229a(c)(7) and 8 C.F.R. § 1003.2(c)(2) numeric and time barred, that only other available 8 C.F.R. § 1003.2 MTR substitute avenue.

PARTIES TO THE PROCEEDING

Petitioner Mrs. Naomi W. Kinuthia was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings.

Respondents DONNA CARR, Chief Clerk, Board of Immigration Appeals (BIA); MERRICK B. GARLAND, U.S. Attorney General; TODD M. LYONS, U.S. ICE – Immigration and Customs Enforcement Field office, Acting Director, Boston Field Office were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

RELATED CASES

- *Kinuthia v. Carr*, 1:18-cv-12325 U.S. District Court for the District of Massachusetts. Judgment entered February 08, 2019.
- *Kinuthia v. Carr et al.*, 1:18-cv-12255 U.S. District Court for the District of Massachusetts. Judgment entered Monday, July 08, 2019.
- *Kinuthia v. Barr et al.*, 1:19-cv-11450 U.S. District Court for the District of Massachusetts. Judgment entered August 08, 2019.
- *Naomi Wahu Kinuthia v. Merrick B. Garland*, 19-1248, 19-1858, 19-1886, U.S. Court of Appeals for the First Circuit. Judgment entered April 19, 2022.
- *Naomi Wahu Kinuthia v. Merrick B. Garland*, 19-1248, 19-1858, 19-1886, U.S. Court of Appeals for the First Circuit. En Banc Judgment entered August 9, 2022.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit entered April 19, 2022, is unpublished and is reproduced in App. 1. The First Circuit's denial of petitioner's motion for rehearing and rehearing en banc is reproduced at App. 17-22. The opinion and judgment of the United States District Court for the District of Massachusetts entered 2/8/2019, is unpublished and is reproduced in App. 8; Two other opinions and judgments of the United States District Court for the District of Massachusetts entered 7/8/2019 and 8/8/2019, are unpublished and are reproduced in App. 6 and 3 respectively.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1); 28 U.S.C. § 2101; 28 U.S.C. § 1651; also has jurisdiction under 28 U.S.C. § 1257(a). See, e.g., *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (providing interim protection under First Amendment to Nazi group); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975) (reversal of finally decided federal issue would be preclusive of any further litigation); id., at 481 (later review of the federal issue cannot be had); *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 63, 68 (1948) (collecting cases where losing party would be irreparably injured without review).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The Suspension Clause (Clause 2), located in Article I, Section 9. This states that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

8 U.S.C. § 1252(b)(9), provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

8 U.S.C. § 1229a(c)(7), 8 C.F.R. § 1003.2(c)(2) – Motion to reopen is numeric and time barred regulations.

STATEMENT OF THE CASE

The district court Factual Background offers a summary of the case, please see App. 10-App. 13; parts recited below: "In May 2003, Kinuthia arrived in the United States on a visitor's visa. Her husband, Samuel Kinuthia Gicharu filed for asylum and withholding of removal with USCIS on September 30, 2003, and

included Kinuthia as a derivative beneficiary. On March 8, 2013, the BIA dismissed the Gicharu appeal. Kinuthia alleges that neither she nor counsel received actual or constructive notice of the 2013 BIA decision. According to Kinuthia, Meyers and Gicharu learned of the BIA decision on May 2, 2013, after Meyers called an immigration hotline. Because thirty days had already expired from the date of the BIA order, Kinuthia was unable to file a timely petition for review with the First Circuit. . . . Kinuthia alleges that the BIA's failure to notify Meyers, Gicharu and Kinuthia of the 2013 decision violated her due process rights under the Fifth Amendment. She also seeks relief on the grounds that the BIA erred by denying her claim for ineffective assistance of counsel by Meyers. Kinuthia alleges Meyers provided ineffective assistance of counsel by 1) failing to give Kinuthia the 2013 BIA decision, 2) failing to interview Kinuthia and 3) failing to advise Kinuthia to file a standalone application for withholding of removal. . . . Kinuthia requests relief in the form of a writ of habeas corpus, pursuant to 28 U.S.C. 2241."

EMERGENCY APPLICATION FOR A STAY OF REMOVAL PENDING TWO CONCURRENT WRIT OF CERTIORARI RESOLUTIONS FOR CASE# 22-313 AND CASE# 22-344

To the entire court, or to the Honorable Ketanji Brown Jackson, Associate Justice, of the United States Supreme Court and Circuit Justice for the First Circuit. The district court denied Stay. of removal, see decision in App. 15 (a copy. also separately. enclosed). The first circuit denied Stay, see decision App. 2 (copy. also separately. enclosed).

The Stay of removal issued for case 22–313 expired with the 1st circuit court August,2022 Mandate –see enclosed expired stay. Stay is justified per below:

Now comes pro se applicant Naomi Wahu Kinuthia, asking this court to right a wrong. Specifically, at the immediate, the applicant seeks an emergency stay of removal order, pending appeals/two writ of certioraris of a permanent removal order. A deeply flawed unconstitutional 3-8-2013 Board of Immigration (BIA) removal order is used to remove the applicant. To avoid the irreparable harm that would come to the applicant from the government-enforced removal, the Applicant, Naomi, respectfully requests an immediate stay of removal pending appeal/adjudication of the applicants two separate writ of certiorari, concurrently filed with this court case# 22-313 and case# 22-344.

This extraordinary situation arises from what the BIA, District Court and First Circuit lower courts – acknowledges was an unfair procedural asylum process, but under the ruse of following the law, the lower courts indicates that the law prevents these lower courts from acting, or to act to review a non-delivered 3-8-2013 Board of Immigration (BIA) removal order. In essence, the decisions indicate, that the law prevent the judges from providing justice or doing the right thing – is in reverse, as the law was created not to prevent justice, but to provide justice. Reminiscence of Jesus, that the Law has a greater purpose than to be followed with blind, careless literalism – the Law's Sabbath-day restrictions, Bible Mark 3:4, NIV; "Which is lawful on the Sabbath: to do good or to do evil, to save life or to kill?" The Applicant/Petitioner, Naomi, sought relief in the form of a Motion to reopen (MTR) proceeding before the BIA, and also sought relief in the

form of a writ of Habeas Corpus with the district court. Both avenues were denied, and are subject/before this court concurrently, requesting for or petitions for a writ of certiorari.

The facts of the case are laid out in the habeas corpus petition for a writ of certiorari, see District court decision (App. 10-14). These facts show that the applicant Naomi, despite being the subject to an order of removal, has not been given a due process asylum interview. Petitioner Naomi was never interviewed by the asylum officer, and no reasons were offered why by the government/asylum officer, violated her due process and constitution rights under INA § 235(b)(1)(B)(ii): "An alien who indicates either an intention to apply for asylum under § 208 or a fear of persecution shall be referred for an interview by an asylum officer. INA § 235(b)(1)(B)(ii)." The applicant Naomi was also not interviewed by her husband's attorney and was also not interviewed by the immigration judge. To compound the matters worse, the applicant-female petitioner Naomi has established non receipt of the March 8, 2013 BIA order of removal, hence the fact that this removal order is unconstitutional; and as documented via MTR probative evidence documentary evidence from the Postal Service, and text messages between her and her prior counsel, evidence demonstrating that there was improper delivery – the Attorney of record was not served the 3-8-2013 BIA decision in accordance with 8 C.F.R. § 1292.5(a), and that nondelivered was not due to applicant Naomi [alien's] failure to provide an address where she could receive mail. This

whole asylum procedure/process is in violation of both *Pereira v. Sessions* (06/21/2018) – Supreme Court and *Niz-Chavez v. Garland* (04/29/2021) – Supreme Court.

The BIA and the lower Courts below, have taken an active one sided actions to squash relevant facts germane to proving applicants Naomi FGM/C asylum claim, under the ruse of 8 U.S.C. § 1229a(c)(7), 8 C.F.R. § 1003.2(c)(2) – numeric and time barred regulations, and also under the ruse of the unconstitutional law of the case doctrine, *Enwonwu v. Gonzales,* 232 F. Appx. 11, 14 (1st Cir. 2007), and have applied in reverse, the similar unfair procedural mistreatment of Associate justice of the Supreme Court Brett Kavanaugh, endured during the 2018 Supreme court confirmation hearing, to now deny the female petitioner Naomi an FGM asylum, or a 241(b)(3) withholding of removal hearing.

The 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2) applied by the lower courts, violates female petitioner constitution rights failure to acknowledge the Persecution on account of gender FGM, as a permanent and continuing act, *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005), which constitutes a new asylum application based on previously unraised basis for relief and is predicated on a new and substantially different factual basis. Also, there is no time limit on the filing of a MTR if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) withholding of removal.

The [8 C.F.R. § 1003.23(b)(4)(iii)(A)(2)] MTR to request an absentia order in deportation proceedings – which can be filed at any time, is counted by BIA as

towards 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2) time and numeric barred limitation.

The 8 U.S.C. § 1252(b)(9) is interpreted by the lower courts as an unconstitutional suspension of the right to the writ of habeas corpus protected in Article I, Section 9 of the U.S. Constitution, or as 8 U.S.C. § 1252(b)(9) explicitly suspends this right, or if the lower courts below have erred in their interpretation 8 U.S.C. § 1252(b)(9) forecloses 28 U.S.C. § 2241 writ of habeas corpus, hence the applicant/petitioner's +$120,000 in asylum Attorneys' Fees and expenses are reimbursable under the Equal Access to Justice Act (the EAJA) 28 U.S.C. § 2412(b).

Under 28 U.S.C. § 2101, "a justice of the Supreme Court" may stay the enforcement of "the final judgment or decree of any court" that is "subject to review by the Supreme Court on writ of certiorari." 28 U.S.C. § 2101(f). A stay is appropriate under Section 2101 where there is (1) "a reasonable probability that certiorari will be granted"; (2) "a significant possibility that the judgment below will be reversed"; and (3) "a likelihood of irreparable harm * * * if the judgment is not stayed." *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991).

Also, under 28 U.S.C. § 1651, a Justice may issue "all writs necessary or appropriate in aid of" the Court's "jurisdiction[]." 28 U.S.C. § 1651(a); see also Rule 23.1. To obtain relief under Section 1651, an applicant must carry the burden of making a "strong showing" that it is "likely to succeed on the merits,"

that it will be "irreparably injured absent a stay," that the balance of the equities favors it, and that a stay is consistent with the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). See also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

The issues presented in the applicants Naomi's, both separate petitions for a writ of certiorari cases, filed concurrently are worthy of certiorari. The first petition for a writ of certiorari case 22-344 addresses the Writ of Ha-beas corpus, while the second petition for a writ of certiorari case 22-313 addresses the MTR. To review the MTR and the 3-8-2013 BIA order of removal, please see the con-currently filed MTR writ of certiorari Appendix 8, case# 22-313.

REASONS FOR GRANTING THE WRIT OF CERTIORARI PETITION

Question 1 arguments: whether 8 U.S.C. § 1252(b)(9) was an unconstitutional suspension of the right to the writ of habeas corpus protected in Article I, Section 9 of the U.S. Constitution, or if 8 U.S.C. § 1252(b)(9) explicitly suspends this right, or if the lower courts below have erred in their interpretation 8 U.S.C. § 1252(b)(9) forecloses 28 U.S.C. § 2241 writ of habeas corpus, hence the petitioner's +$120,000 in asylum Attorneys' Fees and expenses are reimbursable under the Equal Access to Justice Act (the EAJA) 28 U.S.C. § 2412(b).

The implication by the lower courts' decisions, that 8 U.S.C. § 1252(b)(9) statutory text is sufficient to repeal Article I, § 9, cl. 2 the writ of habeas corpus jurisdiction, (and or) to look at the merits claims of constitutional violation, of a *Kucana v. Holder*, No. 08-911, 558 U.S. ___ (Jan. 20, 2010) petition, when no other substitute avenue is available; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. *Ex parte Yerger*, 8 Wall., at 105 ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act").

In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), the Supreme court made a unanimous opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void. In following the same logic, the lower courts' opinions have affirmed that 8 U.S.C. § 1252(b)(9) commits the important right to safeguard the female petitioner Naomi's constitutional right, to a withholding of removal pursuant to section 241(b)(3)(A) hearing, to her husband alone, because of a marriage contract. The deprivation of spousal constitutional right/punishment of a spouse/wife for the sin of a spouse/husband is now just and acceptable in the USA Judaea/judicial legal system.

The lower court's erroneous restrictions/suspension of the writ of habeas corpus (see App. 11-14 the

district court 2-8-2019 order and the App. 2 First Circuit Court 4-19-2022 decision – 8 U.S.C. § 1252(b)(9) restrictions), relies on three provisions of IIRIRA, now codified at 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9) (1994 ed., Supp. V). As amended by § 306 of IIRIRA, 8 U.S.C. § 1252(a)(1) (1994 ed., Supp. V) now provides that, with certain exceptions, including those set out in subsection (b) of the same statutory provision, "[j]udicial review of a final order of removal . . . is governed only by" the Hobbs Act's procedures for review of agency orders in the courts of appeals.

The lower courts are in error to hold the position that AEDPA and IIRIRA contain four provisions that express a clear and unambiguous statement of Congress' intent to bar petitions brought under § 2241, despite the fact that none of them mention that section. Moreover, a number of the courts that considered the interplay between the general habeas provision and INA § 106(a)(10) after the 1961 Act and before the enactment of AEDPA did not read the 1961 Act's specific habeas provision as supplanting jurisdiction under § 2241. *Orozco v. INS*, 911 F.2d 539, 541 (CA11 1990); *United States ex rel. Marcello v. INS*, 634 F.2d 964, 967 (CA5 1981); *Sotelo Mondragon v. Ichert*, 653 F.2d 1254, 1255 (CA9 1980).

The most obvious objection made to 8 U.S.C. § 1252(b)(9) suspending the right to the writ of habeas corpus, is that it did not itself suspend the writ of habeas corpus, but instead, as misinterpreted by the lower courts, inferred that authority upon another statute 8 U.S.C. § 1252(b)(9), and upon the judicial

branch to do so, and thus the Act therefore violated the nondelegation doctrine prohibiting Congress from transferring its legislative authority.

The U.S. Constitution specifically includes the habeas procedure in the Suspension Clause (Clause 2), located in Article One, Section 9. This states that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." 8 U.S.C. § 1252(b)(9) cites no cases of rebellion or invasion the public safety may require it.

8 U.S.C. § 1252(b)(9), addresses the "[c]onsolidation of questions for judicial review," provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

8 U.S.C. § 1252(b)(9) writ of habeas corpus suspension, fails to conform with the constitution writ of habeas corpus suspension requirements, or fails to conform with prior/previous writ of habeas corpus suspension, or the writ of habeas corpus suspension precedent, including failing to specify the time deadline the habeas suspension expires; for example, the Habeas Corpus Suspension Act, 12 Stat. 755 (1863), entitled An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases. This 1863 Habeas

Corpus Suspension Act authorized the president of the United States to suspend the writ of habeas corpus. Six months after the act, on September 15, 1863, President Lincoln suspended habeas corpus throughout the Union for any cases relating to prisoners of war, spies, traitors, or Union soldiers. It allows for extended detainment of prisoners without jury trials. At the end of the war, President Andrew Johnson used the act to overturn a writ of habeas corpus issued in the case of Mary Surratt, who was implicated in the assassination of Lincoln and later executed despite the continuing legal questions over her arrest and conviction. After the war, the suspension gradually resides in the North and South, as various provisions expire or are repealed or replaced.

The lower court's arguments, that the four sections of the 1996 statutes – specifically, § 401(e) of AEDPA and three sections of IIRIRA (8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9) (1994 ed., Supp. V)) – stripped the lower courts of jurisdiction to decide the Habeas Corpus questions of law presented by the female petitioner/my-Naomi habeas corpus application is misinterpretation overreach. In reviewing whether § 106(a)(10) served as an independent grant of habeas jurisdiction or simply as an acknowledgment of continued jurisdiction pursuant to § 2241, its repeal cannot be sufficient to eliminate what it did not originally grant namely, habeas jurisdiction pursuant to 28 U.S.C. § 2241. See *Ex parte Yerger*, 8 Wall., at 105-106 (concluding that the repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction

there to fore allowed"); *Ex parte McCardle*, 7 Wall. 506, 515 (1869) (concluding that the repeal of portions of the 1867 statute conferring appellate jurisdiction on the Supreme Court in habeas proceedings did "not affect the jurisdiction which was previously exercised").

For the lower courts position to prevail, it must overcome both the strong presumption in favor of judicial review of an alleged broken administrative asylum process, explain away the female petitioner's medical FGM and medical PTSD facts defense for late asylum application district court evidence, and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. *Ex parte Yerger*, 8 Wall. 85, 102 (1869) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law"); *Felker v. Turpin*, 518 U.S. 651, 660-661 (1996) (noting that "[n]o provision of Title I mentions our authority to entertain original habeas petitions," and the statute "makes no mention of our authority to hear habeas petitions filed as original matters in this Court").

Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. *Ex parte Yerger*, 8 Wall., at 105 ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act").

A construction of the amendments at issue that would entirely preclude review of questions of law and facts by any court would give rise to substantial constitutional questions. Article I, § 9, cl. 2, of the Constitution provides that some "judicial intervention in deportation cases" is unquestionably "required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 235 (1953).

The lower courts erred in reliance on 8 U.S.C. § 1252(b)(9) (1994 ed., Supp. V). § 1252(b)(9) is a "zipper clause." *Reno v. AADC*, 525 U.S. 471, 483 (1999). Its purpose is to consolidate "judicial review" of immigration proceedings into one action in the court of appeals, but it applies only "[w]ith respect to review of an order of removal under subsection (a)(1)." 8 U.S.C. § 1252(b) (1994 ed., Supp. V). Accordingly, this provision, by its own terms, does not bar writ of habeas corpus jurisdiction over removal orders review delayed (time and numerical barred), or not subject to judicial review under § 1252(a)(1).

There is a "longstanding distinction between 'judicial review' and 'habeas.'" *Heikkila v. Barber*, 345 U.S. 229 (1953). There, this supreme court differentiated "habeas corpus" from "judicial review as that term is used in the Administrative Procedure Act. This asserts that habeas corpus review is different from ordinary APA review, which no one doubts. It conclusively asserts that habeas corpus review is not judicial review at all. In sum, there is authority for the proposition that, at the time the Suspension Clause was ratified – or, for that matter, even for a century and a half

thereafter – habeas corpus relief was available to compel the Executive's allegedly wrongful refusal to preserve constitutional rights of individuals/women.

The Due Process Clause requires judicial determination of the female pensioner/my-Naomi's claim of being medically ill to stand trial/hearing (per 8 U.S.C. § 1252(b)(9) as "an alien"), or being prevented from testifying, when that issue cannot be brought before the BIA because of purported the lower courts assertion of 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2) numeric and time barred regulation motion to reopen (MTR) = a separate writ of certiorari filed co-current with this court. The 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2) as presented in that case are not the female petitioners my-Naomi's fault.

The BIA 2013 final order of removal is still reviewable for compliance with law or reviewable for any Habeas statute provisions violations; BIA cannot review its own order for compliance as the lower courts' wants to assert that in their decision. BIA could issue arbitrary orders that would never be reviewed if we accept the lower courts' 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2) construction of an untimely and numerical barred MTR. There is statutory entitlement to suspension of deportation, or at least a review of the asylum process that resulted with the female petitioner/my-Naomi's final order of removal, for any alleged medical mistrial, trial misconduct allegation, I-Naomi raised in the face of compelling FGM, PTSD medical facts, under Article I, Section 9, Clause 2. The Due Process Clause conferred jurisdiction, with Article

I, Section 9, Clause 2 providing the benefit of statutory authorization.

Question 2 arguments: whether 8 U.S.C. § 1252(b)(9) suspends the writ of habeas corpus protected in Article I, Section 9 of the U.S. Constitution, for just the 22 C.F.R. § 40.1(q) principal asylum applicant, and not for the 8 C.F.R. § 208.21 derivative spouse or both; and whether a 8 C.F.R. § 208.21 derivative spouse can petition the 28 U.S.C. § 2241 writ of habeas corpus, to raise an independent issue of 241(b)(3) ineffective assistance of counsel, or to preemptively seek to restraint the Immigration and Customs Enforcement from taking her into custody using the allegedly final unconstitutional BIA 3-8-2013 order of deportation; because the other lower court's decision (subject of a concurrent writ of certiorari), have foreclosed as 8 U.S.C. § 1229a(c)(7) and 8 C.F.R. § 1003.2(c)(2) numeric and time barred, that only other available 8 C.F.R. § 1003.2 MTR substitute avenue.

The lower courts did not contend the female petitioner/I didn't file a § 2241 writ of habeas Corpus petition, nor did the lower courts reason the female petitioner/I § 2241 Habeas application is only meant for in custody inmates; but even if that was the case, then, the lower court should have issued a preemptive proactive order today, barring ICE from taking into custody the female petitioner Naomi; because the BIA 3/8/2013 removal order will eventually, inadvertently or intentionally result in the female petitioner my-Naomi being taken into custody (even for a few hours) when ICE has to implement it. The exercise of the

District Court's habeas corpus jurisdiction to answer such a pure question of law and facts omitted anywhere in the judicial removal process, in this case is entirely consistent with the exercise of such jurisdiction in Accardi. See also *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 77 (1957).

Though a writ of right, it is not a writ of course. It is technically only a procedural remedy; it is a guarantee against any detention or executive branch deportation order that is forbidden by law, but it does not necessarily protect other rights, such as the entitlement to a fair trial. So, if an imposition such as internment or deportation without trial is permitted by the law, then habeas corpus may not be a useful remedy.

The right to petition for a writ of habeas corpus has nonetheless long been celebrated as the most efficient safeguard of the liberty of the subject. Here, the subject – the female petitioner Naomi is being ordered deported merely for being a wife – a derivative beneficially, no trial, no hearing before an asylum office or before an immigration judge, and no constitutionally protected hearing, provided to every immigrant – entitled 241(b)(3) withholding of removal hearing is provided, even when that regulation was meant to protect a derivative beneficially – like ner.

The writ of habeas corpus is a civil, not criminal, ex parte proceeding in which a court inquires as to the legitimacy of a prisoner's custody, in this case the inquiry, is into the legitimacy of the subject – the female petitioner Naomi BIA 3-8-2013 deportation order

issued by the executive branch. Typically, habeas corpus proceedings are to determine whether the court (in this case the BIA) that imposed sentence (the deportation order) on the defendant had jurisdiction and authority to do so, or whether the defendant's sentence has constitutional errors.

The lower courts purported 8 U.S.C. § 1252(b)(9) restrictions (see App. 2 First Circuit Court 4-19-2022 decision and App. 11-14 district court 2-8-2019 decision) on habeas corpus placed in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provide an occasion for further analysis of the scope of the Suspension Clause. Neither AEDPA § 401(e) nor three IIRIRA provisions, 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9), express a clear and unambiguous statement of Congress' intent to bar 28 U.S.C. § 2241 petitions. None of these sections even mentions § 2241. Section 401(e)'s repeal of a subsection of the 1961 Act, which provided, inter alia, habeas relief for an alien in custody pursuant to a deportation order, is not sufficient to eliminate what the repealed section did not grant – namely, habeas jurisdiction pursuant to § 2241.

Habeas corpus is also used as a legal avenue to challenge other types of custody such as pretrial detention or detention by the United States Bureau of Immigration and Customs Enforcement pursuant to a deportation proceeding. Here, the subject – the female petitioner Naomi preemptively seeks to prevent any Immigration and Customs Enforcement custody, that is based on the unconstitutional BIA 3-8-2013 deportation order, that she was a derivative, and never a

participant. The female petitioner Naomi has established non receipt (App. 11) of March 8th 2013 BIA order, hence the fact that the removal order is unconstitutional, and also as documented via district Court exhibit probative evidence documentary evidence from the Postal Service, and text messages with prior counsel evidence demonstrating that there was improper delivery – the Attorney of record was not served 3-8-2013 BIA decision per 8 C.F.R. § 1292.5(a), and that no delivery was not due to her [alien's] failure to provide an address where she could receive mail. The courts below fail to address the constitutionality of the 3-8-2013 BIA decision deportation order.

The term "an alien" in the 8 U.S.C. § 1252(b)(9) statute doesn't mean a derivative beneficially/wife/spouse/the female petitioner Naomi – it means singular = individual aliens. The statutes do not explicitly bar a spouse/wife/Naomi/derivative asylum beneficially/seekers from seeking habeas hearing to determine if foreclosed from an asylum hearing of the principal asylum applicant/husband-Gicharu, either because of by medical issues or ineffective assistance of counsel as evidence was presented at the district lower court. This is similar to the women voting rights struggles. In *Minor v. Happersett*, the Supreme court made a unanimous opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void.

The female petitioners (Naomi) request for a withholding of removal pursuant to section 241(b)(3)(A) hearing, as a derivative beneficially, is erroneously denied following the same logic, that the regulations commit that trust of determining her eligibility for withholding of removal to the principal (husband). The/my husband never suffered FGM, yet this court decision hold that I'm ineligible for withholding of removal, because my husband failed to qualify for asylum. *In Re Fauziy Kasinga*, 21 I&N 357 (BIA 1996) (noting that FGM is extremely painful, temporarily incapacitating, and exposes the girl or woman to the risk of serious, potentially life-threatening complications). *Abay v. Ashcroft*, 368 F.3d 634, 641-641 (6th Cir. 2004) (mother and daughter share a well-founded fear of persecution when the daughter is under the threat of female genital mutilation).

The conclusion of the lower courts that I — the female petitioner Naomi, a derivative asylum beneficially should be denied 241(b)(3)(A) withholding of removal hearing, retroactively when the principal applicant/Asylee (my husband Gicharu) is denied asylum is unconstitutional. A derivative asylee can apply for adjustment under INA § 209(b) independently of the principal asylee. A derivative asylee cannot be subject to any mandatory bars to adjustment under INA § 209, such as those found inadmissible for drug trafficking, terrorism, or espionage. The punishment of a spouse/wife for the sin of a spouse/husband or her children has no room in our Judaea/judicial legal system.

Also, § 1252(a)(2)(C), which concerns "[m]atters not subject to judicial review," states: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated criminal offenses. Here again, the statute is careful to use "an alien," meaning individual/principal asylum applicant, and not derivative asylum applicant/wife/Naomi. A wife is not punished/deported for the sins of husband. The lower courts want to set a new precedent to punish/deport others for other crimes – it will start with spouses and then go to neighbors?

Hamilton in The Federalist No. 84, p. 444 (G. Carey & J. McClellan eds. 2001) understood due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned – found expression in the Constitution's Due Process and Suspension Clauses. See Amdt. 5; Art. I, § 9, cl. 2. The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. See, e.g., 2 & 3 Phil. & M., c. 10 (1555); 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833) (hereinafter Story) (equating "due process of law" with "due presentment or indictment and

being brought in to answer thereto by due process of the common law"). The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." See also T. Cooley, General Principles of Constitutional Law 224 (1880) ("When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted" (internal quotation marks omitted)). These due process rights (see App. 11 undelivered BIA decision) have historically been vindicated by the writ of habeas corpus. When the female petitioner a woman (I-Naomi) produces FGM cutting medical evidence – it is life and death evidence that demands judicial proceedings in this court or district court or a Remand order to BIA to probe the evidence.

The writ of habeas corpus was preserved in the Constitution – the only common-law writ to be explicitly mentioned. See Art. I, § 9, cl. 2. Hamilton lauded "the establishment of the writ of habeas corpus" in his Federalist defense as a means to protect against "the practice of arbitrary imprisonments . . . in all ages, [one of] the favorite and most formidable instruments of tyranny." The Federalist No. 84, supra, at 444. Indeed, availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases, see Art. III, § 2, cl. 3) was his basis for arguing that additional, explicit procedural protections were unnecessary. See The Federalist No. 83, at

433. It thus follows that A statute can't suspend habeas corpus unless as specified in the constitution – in times of rebellion.

The common law by the time of Magna Carta, which says in Article 39: "No freeman shall be taken or imprisoned or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgment of his peers or the law of the land." Exile (equals =) deportation, so historic reference support that Habeas was meant to stop any deportation without lawful judgment – the female petitioner – my claim is that the deportation BIA March 8th, 2013, order/decision against me, just for being a derivative asylum beneficially, is unlawful as mentioned above, and habeas court has a duty to ascertain it is lawful. Simply the lower courts can't claim a statute deprived them of the Habeas corpus rights to examine my claim.

Unlike Roe v Wade, a bad decision, finding abortion in the constitution, where the court failed to exercise restraint. Article I, Section 9, Clause 2, prescribes that the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. It thus follows that the Habeas corpus demands restraint by the lower court, and the right cause was a Remand, with instruction that the BIA decision be clear with evidentially support. The BIA wrongly psychological evaluations of my-Naomi FGM (quoting the BIA March 8th 2013): "We are not persuaded that the correspondent had relevant evidence buried inside her that was not triggered by traditional conversation and interviews,"

has no part in our justice system – BIA can't attack late submitted evidence in its 2013 decision by simply stating " We are not persuaded" Naomi could not have remember and shared FGM in the removal proceedings. Also, FGM medical harm should not have a statute of limitations because the harm is permanent and can be examined anytime.

Moreover, to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention. See *Felker*, 518 U.S., at 663; *Swain v. Pressley*, 430 U.S., at 380, n. 13 (1977); id., at 385-386 (Burger, C.J., concurring); *Brown v. Allen*, 344 U.S., at 533 (1953) (Jackson, J., concurring in result). Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789, and § 2241 of the Judicial Code provides that federal judges may grant the writ of habeas corpus on the application of a prisoner held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241.

Also, assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that questions of law or facts in removal proceeding not presented to any other forum, like the female petitioner medical FGM cutting and PTSD medical evidence prevented Naomi, mentally and emotionally from testifying in removal hearing, raised by my-Naomi habeas application in this case, could have been answered in

1789 by a common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if the lower courts were to accept the submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1395-1397 (1953). The necessity of resolving such a serious and difficult constitutional issue – and the desirability of avoiding that necessity – simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent.

Also, the term "judicial review" or "jurisdiction to review " are the focus of each of these three provisions or in 8 U.S.C. § 1252(b)(9). In the immigration context, "judicial review" and "habeas corpus" have historically distinct meanings. See *Heikkila v. Barber*, 345 U.S. 229 (1953). In *Heikkila*, the Court concluded that the finality provisions at issue "preclud[ed] judicial review" to the maximum extent possible under the Constitution, and thus concluded that the APA was inapplicable. Nevertheless, the Court reaffirmed the right to habeas corpus. Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that "it is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review." Id., at 236; see also, e.g., *Terlinden v. Ames*, 184 U.S. 270, 278 (1902) (noting that under the extradition statute then in effect there was "no right of

review to be exercised by any court or judicial officer," but that limited review on habeas was nevertheless available); *Nishirmura Ekiu v. United States*, 142 U.S. 663 (1892) (observing that while a decision to exclude an alien was subject to inquiry on habeas, it could not be "impeached or reviewed").

Both §§ 1252(a)(1) and (a)(2)(C) speak of "judicial review" – that is, full, non habeas review. Neither explicitly mentions habeas, or 28 U.S.C. § 2241. Accordingly, neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute. the female petitioner's/My Claim that I'm being deported just because I'm a wife/derivative beneficially, who was prevented from participating, and had medical issues, should be reviewed by a habeas court, or at least the habeas court has a duty to demand there be a 241(b)(3)(A) withholding of removal hearing, apart from a husband derivative asylum denial or evidence produced to the contrary, that the hearing that determined my fatal fate was fair to me – a wife/Naomi.

Subsection (b)(9) simply provides for the consolidation of issues to be brought in petitions for "[j]udicial review," which, as this Supreme court noted, is a term historically distinct from habeas. See *Mahadeo v. Reno*, 226 F.3d 3, 12 (CA1 2000); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1140 (CA9 2000). It follows that § 1252(b)(9) does not clearly apply to actions brought pursuant to the general habeas statute, (or by a "an alien" = derivative asylum beneficially) and thus cannot repeal that statute either in part or in whole. If it were clear that the question of law could be answered in another judicial forum, it might be permissible to

accept this reading of § 1252. But the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration (or preclude by a "an alien" per 8 U.S.C. § 1252(b)(9) = derivative asylum beneficially) on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.

Accordingly, the conclusion is that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA (or at least not repealed for a singular "an alien" per 8 U.S.C. § 1252(b)(9) = derivative asylum beneficially). My-Naomi claim is consistent with Habeas statute, and the lower courts' decision has not noted otherwise or made a determination my claim is not consistent with Habeas statute.

CONCLUSION

Petitioner respectfully requests that the Court grant this Emergency Application for a Stay of Removal pending the resolutions of case# 22-313 and case# 22-344 writs of certiorari.

Respectfully filed by Petitioner (Plaintiff-me),

NAOMI W. KINUTHIA
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United States Court of Appeals
For the First Circuit

No. 19-1248
19-1858
19-1886

NAOMI WAHU KINUTHIA,

Petitioner - Appellant,

v.

DONNA CARR, Chief Clerk, Board of Immigration Appeals (BIA); MERRICK B. GARLAND, US. Attorney General; TODD M. LYONS, ICE Field Office Acting Director Boston Field Office,

Respondents - Appellees.

Before

Barron, Chief Judge,
Howard and Thompson, Circuit Judges.

JUDGMENT

Entered: April 19, 2022

Petitioner-appellant has filed these three appeals from the dismissal of three duplicative immigration habeas cases that she initiated in an effort to challenge a removal order. After careful review of the record and the parties' filings in each case, we affirm for the

reasons set forth in this court's opinion in Gicharu v. Carr, 983 F.3d 13, 20 (1st Cir. 2020) (district court jurisdiction barred by 8 U.S.C. § 1292(b)(9), as the "claims of insufficient service and ineffective assistance of counsel plainly 'arise from' the removal process"). This court, accordingly, need not reach any of the other issues addressed by the district court.

AFFIRMED.

By the Court:

Maria R. Hamilton, Clerk

Sady, Michael (USAMA)

From: ECFnotice@mad.uscourts.gov

Sent: Thursday, August 8, 2019 11:24 AM

To: CourtCopy@mad.uscourts.gov

Subject: Activity in Case 1:19-cv-11450-RGS Kinuthia v. Barr et al Order on Motion to Dismiss

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App. 4

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 8/8/2019 at 11:24 AM EDT and filed on 8/8/2019

Case Name:	Kinuthia v. Barr et al
Case Number:	1:19-cv-11450-RGS
Filer:	
Document Number:	12(No document attached)

Docket Text:
Judge Richard G. Stearns: ELECTRONIC ORDER entered granting [8] Motion to Dismiss. In her habeas corpus petition, petitioner Naomi Kinuthia alleges procedural defects in the asylum/ witholding proceedings involving her husband and herself, in particular, that she was not afforded an opportunity to testify in her husband's asylum proceeding, nor on behalf of her own withholding petition. Petitioner seeks a stay of removal and a remand to the BIA for a hearing. Having previously challenged other alleged procedural defects in the same immigration proceedings and litigated the case to a final judgment on the merits, *see Kinuthia v. Carr*, No. 18-12325-DJC, Dkt. # 18 (D.Mass. Fed. 8, 2019) (*Kinuthia I*), this matter is barred by the principle of *res judicata*. The law disfavors the splitting of claims and bars "litigation of claims that arose from the

same set of operative facts and *could have been raised* in the prior proceeding." *Wolf v. Gruntal & Co.*, 45 F.3d 524, 527 (1st Cir. 1995) (emphasis in original). Further, as Judge Casper noted in *Kinuthia*, as petitioner is not being held in custody, a habeas petition is not the appropriate vehicle through which to seek the relief petitioner requested. Accordingly, the government's motion to dismiss is ALLOWED.(DT)

1:19-cv-11450-RGS Notice has been electronically mailed to:

Michael P. Sady michael.sady@usdoj.gov, ellen.souris@usdoj.gov, keara.martin@usdoj.gov,

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NAOMI WAHU KINUTHIA, Petitioner, v. DONNA CARR, JEFF SESSIONS, and TODD M. LYONS, Respondents.	No. 18-cv-12255-DLC

ORDER SUA SPONTE DISMISSING ACTION

(Filed Jul. 8, 2019)

Cabell, U.S.M.J.

On October 29, 2018, Kinuthia filed the present petition for writ of habeas corpus under 28 U.S.C. § 2241, contending that the immigration court violated her civil rights by failing to give her timely notice of a decision and refusing to entertain her claim of ineffective assistance of counsel.

However, a thorough review of the Court's records reveals that just a week after she commenced this action, Kinuthia filed a virtually identical second petition against the same defendants. *See Kinuthia v. Carr*, No. 18-cv-12325-DJC (D. Mass. filed Nov. 5, 2018) (*Kinuthia II*). The November 5 action raises exactly the same claims as the present matter and incorporates the same 21-page document attached to the petition in the present matter. *Compare* D. 1-1 *and*

Kinuthia II D. 1-1. The only difference between these petitions is that Kinuthia used the Pro Se Complaint for a Civil Case form in this matter but switched to the more appropriate Petition for Writ of Habeas Corpus form in the second matter.

A district court has the inherent power to manage its own proceedings and control the conduct of the litigants who appear before it. *See Chambers v. Basco*, 501 U.S. 32, 46-50 (1991); *United States v. Kouri-Perez*, 187 F.3d 1, 6-8 (1st Cir. 1999); *Bradeen v. Bank of NY Mellon Trust Co.*, No. 18-cv-11753, 2018 WL 5792319, at *2 (D. Mass. Nov. 2, 2018). Given that the Court has already dismissed *Kinuthia II* and that Kinuthia had appealed that dismissal, it would be a waste of judicial resources to proceed with this identical action. As a matter of judicial economy and the Court's inherent authority to manage its docket, the Court finds no reason for permitting this duplicative action to proceed.

Therefore, this action is **DISMISSED** as duplicate, and all pending motions are hereby **DISMISSED** as moot. The Clerk shall enter a separate order of dismissal and terminate this action.

SO ORDERED. /s/ Donald L. Cabell
DONALD L. CABELL, U.S.M.J.

DATED: July 8, 2019

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/8/2019 at 4:45 PM EST and filed on 2/8/2019

Case Name:	Kinuthia v. Carr
Case Number:	1:18-cv-12325-DJC
Filer:	
Document Number:	18 (No document attached)

Docket Text:

Judge Denise J. Casper: ELECTRONIC ORDER entered. D. [2],[11],[14],[16]: Plaintiff Naomi Wahu Kinuthia ("Kinuthia") has filed this lawsuit *pro se* against Defendants Chief Clerk of the Board of Immigration Appeals ("BIA"), (former) United States Attorney General, and Immigration and Customs Enforcement Field Office Acting Director, Boston Field Office, all in their official capacities (collectively "Defendants") seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241. D. 1. Kinuthia has also moved for a temporary restraining order and/or stay of removal, D. 2, and a motion for default judgment as to all Defendants, D. 14. Defendants have moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. D. 11. For the following reasons, the Court ALLOWS Defendants' motion to dismiss,

D. 11, and DENIES Kinuthia's motions, D. 2, 14, 16.

As a preliminary matter, the Court DENIES Kinuthia's motion for default judgment, D. 14. Contrary to Kinuthia's assertions, Defendants filed a motion to dismiss within the deadline set by the Court. See D. 9 (ordering Defendants to file a response within twenty-one days of November 7, 2018); D. 11 (filing by Defendants entered on November 28, 2018).

Standard of Review. **On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must determine if the facts alleged "plausibly narrate a claim for relief." Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (citation omitted). Reading the complaint "as a whole," the Court must conduct a two-step, context-specific inquiry. Garca-Cataln v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must perform a close reading of the claim to distinguish the factual allegations from the conclusory legal allegations contained therein. Id. Factual allegations must be accepted as true, while conclusory legal conclusions are not entitled credit. Id. Second, the Court must determine whether the factual allegations present a "reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011). In sum, the complaint must provide**

sufficient factual allegations for the Court to find the claim "plausible on its face." Garca-Cataln, 734 F.3d at 103. The Court notes that "the fact that [a] plaintiff filed the complaint pro se militates in favor of a liberal reading" of his allegations, and that "[o]ur task is not to decide whether the plaintiff ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim." Rodi v. S. New England Sch. of Law, 389 F.3d 5, 13 (1st Cir. 2004).

"When considering a motion to dismiss under subsection 12(b)(1) of the Federal Rules of Civil Procedure, the Court should apply a standard of review 'similar to that accorded a dismissal for failure to state a claim' under subsection 12(b)(6)." Menge v. N. Am. Specialty Ins. Co., 905 F. Supp. 2d 414, 416 (D.R.I. 2012) (quoting Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)); see P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R., 189 F.3d 1, 13 n.10 (1st Cir. 1999) (noting that "the standard of review . . . is the same for failure to state a claim and for lack of jurisdiction").

Factual Background. The following summary is undisputed unless otherwise noted. In May 2003, Kinuthia arrived in the United States on a visitor's visa. D. 1-1 ¶ 2. Her husband, Samuel Kinuthia Gicharu ("Gicharu") filed for asylum and withholding of removal with USCIS on September 30, 2003 and included Kinuthia as a

derivative beneficiary. Id. ¶ 3; D. 12 at 3. On May 1, 2006, the Department of Homeland Security initiated removal proceedings against Gicharu and Kinuthia by filing a Notice to Appear with the Boston Immigration Court. D. 12 at 3. Attorney Ron Meyers represented Gicharu and Kinuthia throughout the removal proceedings. Id. On May 16, 2011, an Immigration Judge denied Gicharu's asylum application. Id. Gicharu filed an appeal of the Immigration Judge's decision with the BIA on June 15, 2011. Id. at 3-4. On March 8, 2013, the BIA dismissed the Gicharu appeal. D. 1 ¶ 4; D. 1-3; D. 12 at 1-2. Kinuthia alleges that neither she nor counsel received actual or constructive notice of the 2013 BIA decision. D. 1-1 ¶¶ 5-11. According to Kinuthia, Meyers and Gicharu learned of the BIA decision on May 2, 2013 after Meyers called an immigration hotline. D. 1 ¶¶ 9, 55; D. 1-5 at 8. Because thirty days had already expired from the date of the BIA order, Kinuthia was unable to file a timely petition for review with the First Circuit. D. 1-1 ¶ 8.

Gicharu and Kinuthia filed two motions to reopen with the BIA—one in 2015 and one in 2017—and at least four emergency motions to stay removal. D. 1-2 ¶¶ 12-23; D. 1-6; D. 12 at 8. The 2015 petition was based on changed circumstances in their home country of Kenya and new evidence. D. 1-2 ¶ 12. In 2016, Gicharu and Kinuthia filed additional briefing in support of the 2015 motion, in which they explained that they had not

received the 2013 BIA order and that Attorney Meyers had not provided them with the order. D. 1-7 at 4. Neither of the motions to reopen or the supplemental briefing, however, included a request for the BIA to reissue its 2013 order. D. 1-2 ¶ 25. The BIA denied both motions to reopen. D. 1-2 ¶¶ 19; 23. Gicharu and Kinuthia sought judicial review in the First Circuit Court of Appeals of the BIA's 2016 decision denying the motion to reopen and the BIA's 2017 decision denying their motion to reconsider. D. 1-10. The First Circuit affirmed the BIA decisions. Id. According to the sworn declaration of the Deputy Chief Clerk of the BIA, upon which both parties rely, Gicharu has never filed a motion requesting that the BIA reissue its 2013 decision. D. 1-2 ¶ 25; D. 12 at 7.

Kinuthia alleges that the BIA's failure to notify Meyers, Gicharu and Kinuthia of the 2013 decision violated her due process rights under the Fifth Amendment. She also seeks relief on the grounds that the BIA erred by denying her claim for ineffective assistance of counsel by Meyers. D. 1-1 ¶¶ 52, 53, 54. Kinuthia alleges Meyers provided ineffective assistance of counsel by 1) failing to give Kinuthia the 2013 BIA decision, 2) failing to interview Kinuthia and 3) failing to advise Kinuthia to file a standalone application for withholding of removal. D. 1-1 ¶ 52.

2241 Habeas Is Not the Correct Vehicle for Claims Here. Kinuthia requests relief in the form of a writ of habeas corpus, pursuant to 28 U.S.C.

§ 2241. D. 1 at 1. The writ of habeas corpus is "at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." Munaf v. Geren, 553 U.S. 674, 693 (2008); see INS v. St. Cyr, 533 U.S. 289, 301 (2001). Accordingly, "[section] 2241 is not available to [the petitioner] in this case because [s]he is not contesting the conditions of [her] confinement." United States v. Palmer-Contreras, 187 F.3d 624, 1998 WL 1085786, at *1 (1st Cir. 2008) (citing Miller v. United States, 564 F.2d 103, 105 (1st Cir. 1977)); see Francis v. Maloney, 798 F.3d 33, 36 (1st Cir. 2015).

Even if a habeas petition were the proper vehicle for relief, Kinuthia has failed to exhaust her administrative remedies, which is a prerequisite to obtaining the writ. See Boumediene v. Bush, 553 U.S. 723, 793 (2008) (noting that "in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief"); Bencosme de Rodriquez v. Gonzales, 433 F.3d 163, 164-65 (1st Cir. 2005) (per curiam) (quoting Olujoke v. Gonzales, 411 F.3d 16, 22-23 (1st Cir. 2005)) (explaining that the "doctrine of exhaustion of administrative remedies bars effort[s] to raise claim[s] in petition for review where petitioner 'failed to make any developed argumentation in support of that claim before the BIA'"). Here, the undisputed record reflects that Gicharu and Kinuthia never filed any motions with the

BIA seeking reissuance of the 2013 order based on lack of notice. See D. 12 at 6-7.

Lack of Subject Matter Jurisdiction. Even assuming habeas were proper here and that Kinuthia had exhausted her administrative remedies, the Court would still lack jurisdiction to review the execution of Kinuthia's removal order under 2241. The Immigration and Nationality Act ("INA"), as amended by the REAL ID Act of 2005, specifies that "a petition filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal," with few exceptions. 8 U.S.C. 1252(a)(5). Those exceptions are not relevant here. See id. 1252(e). The INA also specifically states that the term "judicial review" includes habeas corpus review pursuant to 2241; see Tejada v. Cabral, 424 F. Supp. 2d 296, 298 (D. Mass. 2006) (citing 8 U.S.C. 1252(a)(2)(D), 1252(a)(5)) (noting that "Congress made it quite clear that all court orders regarding alien removal – be they stays or permanent injunctions – were to be issued by the appropriate court of appeals").

Kinuthia also asserts jurisdiction under the Administrative Procedures Act ("APA"). D. 1-1 ¶ 54. The APA, however, does not bestow jurisdiction on the Court for this case. "[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." Califano v. Sanders, 430 U.S. 99, 107 (1977); see Conservation Law Found. v. Busey, 79 F.3d 1250, 1261 (1st Cir. 1996) (explaining that "[w]hile the APA does not provide an independent source of subject matter jurisdiction, it does provide a

federal right of action where subject matter jurisdiction exists under 28 U.S.C. ◆ 1331"); see also Okpoko v. Heinauer, 796 F. Supp. 2d 305, 315 (D.R.I. 2011) (declining to exercise subject-matter jurisdiction based on the APA over plaintiff's appeal of a United States Citizenship and Immigration Services denial of relative petition for plaintiff's wife).

Because the Court lacks subject matter jurisdiction in this matter, the Court ALLOWS Defendants' motion to dismiss, D. 11. Accordingly, the Court also DENIES Kinuthia's motion for a temporary restraining order, D. 2, and Kinuthia's motion to appoint counsel, D. 16, as moot.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Naomi Wahu Kinuthia

V. **CIVIL ACTION NO. 18-12325-DJC**

Donna Carr et al

ORDER OF DISMISSAL

CASPER, D.J.

In accordance with the ECF Order dated February 08, 2019, the Court Orders that the above-entitled action be and hereby is DISMISSED.

February 08, 2019 /s/ Matthew M. McKillop
Deputy Clerk

United States Court of Appeals
For the First Circuit

No. 19-1248

NAOMI WAHU KINUTHIA,

Petitioner - Appellant,

v.

DONNA CARR, Chief Clerk, Board of Immigration Appeals (BIA) MERRICK B. GARLAND, US. Attorney General; TODD M. LYONS, ICE Field Office Acting Director Boston Field Office,

Respondents - Appellees.

Before

Barron, Chief Judge,
Lynch, Howard, Thompson,
Kayatta and Gelpi, Circuit Judges.

ORDER OF COURT

Entered: August 9, 2022

Pro se petitioner Naomi Kinuthia has filed a petition for panel rehearing and rehearing en banc, as well as a motion to consolidate Appeal Nos. 19-1248, 19-1858, 19-1886, and 21-1343 for purposes of rehearing. The consolidation motion is resolved as follows: the court has considered the rehearing petition as to each

case and has coordinated resolution of the rehearing requests.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

United States Court of Appeals
For the First Circuit

No. 19-1858

NAOMI WAHU KINUTHIA,

Petitioner - Appellant,

v.

DONNA CARR, Chief Clerk, Board of Immigration Appeals (BIA) MERRICK B. GARLAND, US. Attorney General; TODD M. LYONS, ICE Field Office Acting Director Boston Field Office,

Respondents - Appellees.

Before

Barron, Chief Judge,
Lynch, Howard, Thompson,
Kayatta and Gelpi, Circuit Judges.

ORDER OF COURT

Entered: August 9, 2022

Pro se petitioner Naomi Kinuthia has filed a petition for panel rehearing and rehearing en banc, as well as a motion to consolidate Appeal Nos. 19-1248, 19-1858, 19-1886, and 21-1343 for purposes of rehearing. The consolidation motion is resolved as follows: the court has considered the rehearing petition as to each

case and has coordinated resolution of the rehearing requests.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

United States Court of Appeals
For the First Circuit

No. 19-1886

NAOMI WAHU KINUTHIA,

Petitioner - Appellant,

v.

DONNA CARR, Chief Clerk, Board of Immigration Appeals (BIA) MERRICK B. GARLAND, US. Attorney General; TODD M. LYONS, ICE Field Office Acting Director Boston Field Office,

Respondents - Appellees.

Before

Barron, Chief Judge,
Lynch, Howard, Thompson,
Kayatta and Gelpi, Circuit Judges.

ORDER OF COURT

Entered: August 9, 2022

Pro se petitioner Naomi Kinuthia has filed a petition for panel rehearing and rehearing en banc, as well as a motion to consolidate Appeal Nos. 19-1248, 19-1858, 19-1886, and 21-1343 for purposes of rehearing. The consolidation motion is resolved as follows: the court has considered the rehearing petition as to each

case and has coordinated resolution of the rehearing requests.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Naomi Wahu Kinuthia
Donald Campbell Lockhart
Mark Sauter

United States Court of Appeals
For the First Circuit

No. 21-1343

NAOMI WAHU KINUTHIA; SAMUEL KINUTHIA GICHARU,

Petitioners,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

ORDER OF COURT

Entered: April 29, 2021
Pursuant to 1st Cir. R. 27.0(d)

In view of respondent's non-opposition to petitioners' motion for a stay of removal, removal is stayed. If the petition for review is denied -- and absent further order of court prescribing a different result -- the stay of removal will expire when mandate issues.

By the Court:

Maria R. Hamilton, Clerk

cc:
Naomi Wahu Kinuthia
Samuel Kinuthia Gicharu
Janice Kay Redfern
OIL OIL

United States Court of Appeals
For the First Circuit

No. 19-1248
19-1858
19-1886

NAOMI WAHU KINUTHIA,

Petitioner - Appellant,

v.

DONNA CARR, Chief Clerk, Board of Immigration Appeals (BIA); MERRICK B. GARLAND, US. Attorney General; TODD M. LYONS, ICE Field Office Acting Director Boston Field Office,

Respondents - Appellees.

Before

Barron, Chief Judge,
Howard and Thompson, Circuit Judges.

JUDGMENT

Entered: April 19, 2022

Petitioner-appellant has filed these three appeals from the dismissal of three duplicative immigration habeas cases that she initiated in an effort to challenge a removal order. After careful review of the record and the parties' filings in each case, we affirm for the reasons set forth in this court's opinion in Gicharu v. Carr, 983 F.3d 13, 20 (1st Cir. 2020) (district court jurisdiction barred by 8 U.S.C. § 1292(b)(9), as the "claims of insufficient service and ineffective assistance of counsel plainly 'arise from' the removal process"). This court, accordingly, need not reach any of the other issues addressed by the district court.

AFFIRMED.

By the Court:

Maria R. Hamilton, Clerk

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/8/2019 at 4:45 PM EST and filed on 2/8/2019

Case Name: Kinuthia v. Carr
Case Number: 1:18-cv-12325-DJC
Filer:
Document Number: 18 (No document attached)

Docket Text:

Judge Denise J. Casper: ELECTRONIC ORDER entered. D. [2],[11],[14],[16]: Plaintiff Naomi Wahu Kinuthia ("Kinuthia") has filed this lawsuit *pro se* against Defendants Chief Clerk of the Board of Immigration Appeals ("BIA"), (former) United States Attorney General, and Immigration and Customs Enforcement Field Office Acting Director, Boston Field Office, all in their official capacities (collectively "Defendants") seeking a writ of habeas corpus pursuant to 28 U.S.C. ◆ 2241. D. 1. Kinuthia has also moved for a temporary restraining order and/or stay of removal, D. 2, and a motion for default judgment as to all Defendants, D. 14. Defendants have moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. D. 11. For the following reasons, the Court ALLOWS Defendants' motion to dismiss, D. 11, and DENIES Kinuthia's motions, D. 2, 14, 16.

As a preliminary matter, the Court DENIES Kinuthia's motion for default judgment, D. 14. Contrary to Kinuthia's assertions, Defendants filed a motion to dismiss within the deadline set by the Court. See D. 9 (ordering Defendants to file a response within twenty-one days of November 7, 2018); D. 11 (filing by Defendants entered on November 28, 2018).

***Standard of Review.* On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must determine if the facts alleged "plausibly narrate a claim for relief." Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (citation omitted). Reading the complaint "as a whole," the Court must conduct a two-step, context-specific inquiry. Garca-Catalin v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must perform a close reading of the claim to distinguish the factual allegations from the conclusory legal allegations contained therein. Id. Factual allegations must be accepted as true, while conclusory legal conclusions are not entitled credit. Id. Second, the Court must determine whether the factual allegations present a "reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011). In sum, the complaint must provide sufficient factual allegations for the Court to find the claim "plausible on its face." Garca-Catalin, 734 F.3d at 103. The Court notes that "the fact that [a] plaintiff filed the complaint pro se militates in favor of a liberal reading" of his allegations, and that "[o]ur task is not to decide whether the plaintiff ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim." Rodi v. S. New England Sch. of Law, 389 F.3d 5, 13 (1st Cir. 2004).**

"When considering a motion to dismiss under subsection 12(b)(1) of the Federal Rules of Civil Procedure, the Court should apply a standard of review 'similar to that accorded a dismissal for failure to state a claim' under subsection 12(b)(6)." Menge v. N. Am. Specialty Ins. Co., 905 F. Supp. 2d 414, 416 (D.R.I. 2012) (quoting Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)); see P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R., 189 F.3d 1, 13 n.10 (1st Cir. 1999) (noting that "the standard of review... is the same for failure to state a claim and for lack of jurisdiction").

Factual Background. The following summary is undisputed unless otherwise noted. In May 2003, Kinuthia arrived in the United States on a visitor's visa. D. 1-1 ¶ 2. Her husband, Samuel Kinuthia Gicharu ("Gicharu") filed for asylum and withholding of removal with USCIS on September 30, 2003 and included Kinuthia as a derivative beneficiary. Id. ¶ 3; D. 12 at 3. On May 1, 2006, the Department of Homeland Security initiated removal proceedings against Gicharu and Kinuthia by filing a Notice to Appear with the Boston Immigration Court. D. 12 at 3. Attorney Ron Meyers represented Gicharu and Kinuthia throughout the removal proceedings. Id. On May 16, 2011, an Immigration Judge denied Gicharu's asylum application. Id. Gicharu filed an appeal of the Immigration Judge's decision with the BIA on June 15, 2011. Id. at 3-4. On March 8, 2013, the BIA dismissed the Gicharu appeal. D. 1 ¶ 4; D. 1-3; D. 12 at 1-2. Kinuthia alleges that neither she nor counsel received actual or constructive notice of the 2013 BIA decision. D. 1-1 ¶¶ 5-11. According to Kinuthia, Meyers and Gicharu learned of the BIA decision on May 2, 2013 after Meyers called an immigration hotline. D. 1 ¶¶ 9, 55; D. 1-5 at 8. Because thirty days had already expired from the date of the BIA order, Kinuthia was unable to file a timely petition for review with the First Circuit. D. 1-1 ¶ 8.

Gicharu and Kinuthia filed two motions to reopen with the BIA—one in 2015 and one in 2017—and at least four emergency motions to stay removal. D. 1-2 ¶¶ 12-23; D. 1-6; D. 12 at 8. The 2015 petition was based on changed circumstances in their home country of Kenya and new evidence. D. 1-2 ¶ 12. In 2016, Gicharu and Kinuthia filed additional briefing in support of the 2015 motion, in which they explained that they had not received the 2013 BIA order and that Attorney Meyers had not provided them with the order. D. 1-7 at 4. Neither of the motions to reopen or the supplemental briefing, however, included a request for the BIA to reissue its 2013 order. D. 1-2 ¶ 25. The BIA denied both motions to reopen. D. 1-2 ¶¶ 19; 23. Gicharu and Kinuthia sought judicial review in the First Circuit Court of Appeals of the BIA's 2016 decision denying the motion to reopen and the BIA's 2017 decision denying their motion to reconsider. D. 1-10. The First Circuit affirmed the BIA decisions. Id. According to the sworn declaration of the Deputy Chief Clerk of the BIA, upon which both parties rely, Gicharu has never filed a motion requesting that the BIA reissue its 2013 decision. D. 1-2 ¶ 25; D. 12 at 7.

Kinuthia alleges that the BIA's failure to notify Meyers, Gicharu and Kinuthia of the 2013 decision violated her due process rights under the Fifth Amendment. She also seeks relief on the grounds that the BIA erred by denying her claim for ineffective assistance of counsel by Meyers. D. 1-1 ¶¶ 52, 53, 54. Kinuthia alleges Meyers provided ineffective assistance of counsel by 1) failing to give Kinuthia the 2013 BIA decision, 2) failing to interview Kinuthia and 3) failing to advise Kinuthia to file a standalone application for withholding of removal. D. 1-1 ¶ 52.

◆ 2241 Habeas Is Not the Correct Vehicle for Claims Here. Kinuthia requests relief in

the form of a writ of habeas corpus, pursuant to 28 U.S.C. ◆ 2241. D. 1 at 1. The writ of habeas corpus is "at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." Munaf v. Geren, 553 U.S. 674, 693 (2008); see INS v. St. Cyr, 533 U.S. 289, 301 (2001). Accordingly, "[section] 2241 is not available to [the petitioner] in this case because [s]he is not contesting the conditions of [her] confinement." United States v. Palmer-Contreras, 187 F.3d 624, 1998 WL 1085786, at *1 (1st Cir. 2008) (citing Miller v. United States, 564 F.2d 103, 105 (1st Cir. 1977)); see Francis v. Maloney, 798 F.3d 33, 36 (1st Cir. 2015).

Even if a habeas petition were the proper vehicle for relief, Kinuthia has failed to exhaust her administrative remedies, which is a prerequisite to obtaining the writ. See Boumediene v. Bush, 553 U.S. 723, 793 (2008) (noting that "in other contexts and for prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief"); Bencosme de Rodriguez v. Gonzales, 433 F.3d 163, 164-65 (1st Cir. 2005) (per curiam) (quoting Olujoke v. Gonzales, 411 F.3d 16, 22-23 (1st Cir. 2005)) (explaining that the "doctrine of exhaustion of administrative remedies bars effort[s] to raise claim[s] in petition for review where petitioner 'failed to make any developed argumentation in support of that claim before the BIA'"). Here, the undisputed record reflects that Gicharu and Kinuthia never filed any motions with the BIA seeking reissuance of the 2013 order based on lack of notice. See D. 12 at 6-7.

Lack of Subject Matter Jurisdiction. Even assuming habeas were proper here and that Kinuthia had exhausted her administrative remedies, the Court would still lack jurisdiction to review the execution of Kinuthia's removal order under ◆ 2241. The Immigration and Nationality Act ("INA"), as amended by the REAL ID Act of 2005, specifies that "a petition filed with an appropriate court of appeals... shall be the sole and exclusive means for judicial review of an order of removal," with few exceptions. 8 U.S.C. ◆ 1252(a)(5). Those exceptions are not relevant here. See id. ◆ 1252(e). The INA also specifically states that the term "judicial review" includes habeas corpus review pursuant to ◆ 2241; see Tejada v. Cabral, 424 F. Supp. 2d 296, 298 (D. Mass. 2006) (citing 8 U.S.C. ◆◆ 1252(a)(2)(D), 1252(a)(5)) (noting that "Congress made it quite clear that all court orders regarding alien removal—be they stays or permanent injunctions—were to be issued by the appropriate court of appeals").

Kinuthia also asserts jurisdiction under the Administrative Procedures Act ("APA"). D. 1-1 ¶ 54. The APA, however, does not bestow jurisdiction on the Court for this case. "[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." Califano v. Sanders, 430 U.S. 99, 107 (1977); see Conservation Law Found. V. Busey, 79 F.3d 1250, 1261 (1st Cir. 1996) (explaining that "[w]hile the APA does not provide an independent source of subject matter jurisdiction, it does provide a federal right of action where subject matter jurisdiction exists under 28 U.S.C. ◆ 1331"); see also Okpoko v. Heinauer, 796 F. Supp. 2d 305, 315 (D.R.I. 2011) (declining to exercise subject-matter jurisdiction based on the APA over plaintiff's appeal of a United States Citizenship and Immigration Services denial of relative petition for plaintiff's wife).

Because the Court lacks subject matter jurisdiction in this matter, the Court ALLOWS Defendants' motion to dismiss, D. 11. Accordingly, the Court also DENIES Kinuthia's motion for a temporary restraining order, D. 2, and Kinuthia's motion to appoint counsel, D. 16, as moot.

federal right of action where subject matter jurisdiction exists under 28 U.S.C. § 1331"); see also Okpoko v. Heinauer, 796 F. Supp. 2d 305, 315 (D.R.I. 2011) (declining to exercise subject-matter jurisdiction based on the APA over plaintiff's appeal of a United States Citizenship and Immigration Services denial of relative petition for plaintiff's wife).

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reasons set forth in this court's opinion in Gicharu v. Carr, 983 F.3d 13, 20 (1st Cir. 2020) (district court jurisdiction barred by 8 U.S.C. § 1292(b)(9), as the "claims of insufficient service and ineffective assistance of counsel plainly 'arise from' the removal process"). This court, accordingly, need not reach any of the other issues addressed by the district court.

AFFIRMED.

By the Court:

Maria R. Hamilton, Clerk
