IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S

DEFENDANTS' MOTION TO DISMISS

Plaintiffs Brian P. Carr and Rueangrong Carr (husband and wife) together with Mrs. Carr's sister, Buakhao Von Kramer sue Defendants the United States of America and several other federal agencies for allegedly having violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Plaintiffs seek money back from the United States Postal Service (USPS) for an allegedly delayed delivery of a package and a court order mandating that various federal agencies including the U.S. Department of Justice initiate criminal investigations into the circumstances surrounding their various attempts to obtain immigration benefits, including naturalization for Mrs. Carr and a non-immigrant visa for Mrs. Von Kramer. Because Plaintiffs cannot meet their initial burden to identify an applicable waiver of the federal government's sovereign immunity, the Court should dismiss Plaintiffs' entire complaint. Even so, the Court lacks jurisdiction over any claim, and Plaintiffs fail to state a claim. For these reasons and those further explained below, Plaintiffs' entire complaint should be dismissed.

I. Background

Plaintiff Brian Carr is a U.S. Citizen who married Plaintiff Rueangrong Carr in Thailand and petitioned, as her spouse, for her to receive lawful-permanent-resident status in the United States (commonly known as a green card), which was expedited an approved within four months' time. Compl. ¶¶ 60, 74, ECF No. 1.

Plaintiff Von Kramer is Mrs. Carr's sister, and in 2019, she desired to travel to the United States. *Id.* ¶ 90. But her request for a non-immigrant tourist visa was initially denied; however, her fourth application for a visa was granted in 2022 (about three years later). *Id.* Plaintiffs allege they complained to the State Department's Office of Inspector General (OIG) about the challenges Von Kramer encountered in attempting to obtain a visa, but the OIG refused to investigate (what Plaintiffs allege constituted) various federal crimes. *See id.* ¶¶ 125–39.

In 2022, Plaintiff Rueangrong Carr applied for naturalization. *Id.* ¶ 204. At her scheduled naturalization interview, she initially was unable to write a sentence in English and failed the government and history (civics) portions of the naturalization test. *Id.* She was then scheduled for another interview to retake those portions of the naturalization test, but she did not show up—resulting in the denial of her naturalization application. *Id.* It appears that Mr. and Mrs. Carr had a previously scheduled international vacation that conflicted with the scheduled interview, *id.* ¶ 194, but their request to reschedule the interview was denied, *id.* ¶ 197.

In addition, Mr. Carr in 2021 purchased overnight shipping from the USPS to deliver his passport from the Thai Embassy in Washington, D.C. to his home in Irving, Texas. *See id.* ¶ 27. The package allegedly arrived a day late, and now Mr. Carr wants his money back. *See id.* Mr. Carr complained to his Congressman, who allegedly had been informed that a refund had been paid. *Id.* ¶¶ 37–38. Plaintiffs now complain that

the USPS official who reported to refund to Mr. Carr's Congressmen had been misled by "numerous falsified documents." *Id.* ¶ 39.

Plaintiffs allegedly notified various government agencies including the U.S. Department of Justice about the circumstances of their challenges in obtaining a visa for Plaintiff Von Kramer, naturalization for Mrs. Carr, and timely delivery (or a refund) of a package for Mr. Carr. *See, e.g.*, *id.* ¶¶ 248–53. But to date, the federal government has not taken (in Plaintiffs' view) appropriate or timely action to correct allegedly inaccurate records and fix supposedly broken systems (such as USCIS's automated phone system). *See, e.g.*, *id.* at 49–53, ¶¶ 27–47 ("USCIS must immediately disable hang ups by the automated phone system and instead fail over to a human representative.").

II. Legal Standards

A. Rule 12(b)(1)

Defendant moves to dismiss under Rule 12(b)(1) because Plaintiffs have not identified a waiver of sovereign immunity and because the federal government is not liable for the conduct of federal actors under 42 U.S.C. § 1983 or the Fourteenth Amendment. As the party asserting federal subject-matter jurisdiction, the plaintiff must bear "the burden of showing Congress's unequivocal waiver of sovereign immunity." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). "At the pleading stage, [the] plaintiff[ ] must invoke the court's jurisdiction by alleging a claim that is facially outside of the discretionary function exception." *Id.* The Court may dismiss claims under Rule 12(b)(1) based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Willoughby v. United States ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013).

B. Rule 12(b)(6) pleading standard

The Court should grant a motion to dismiss under Rule 12(b)(6) if the complaint fails to allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010). "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Sullivan*, 600 F.3d at 546. The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In assessing the complaint, the Court accepts only "well-pleaded facts as true" and disregards "conclusory allegations, unwarranted factual inferences, [and] legal conclusions." *Singh v. RadioShack Corp.*, 882 F.3d 137, 144 (5th Cir. 2018).

III. Argument & Authorities

The Court should dismiss Plaintiffs' entire complaint because Plaintiffs fail to identify any waiver of the federal government's sovereign immunity for the Fifth Amendment due process claims concerning which they seek mandatory injunctive relief. In addition, the Court lacks jurisdiction to consider any of their various grievances. Lastly, the complaint should be dismissed because the "allegations within the complaint 'are so attenuated and unsubstantial as to be absolutely devoid of merit, . . . wholly insubstantial, . . . obviously frivolous, . . . plainly unsubstantial, . . . or no longer open to discussion.'" *Starrett v. Lockheed Martin Corp. et al.*, 735 F. App'x 169, 170 (5th Cir. 2018) (quoting *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974)).

A. Plaintiffs have not shown that the federal government has waived sovereign immunity for claims seeking non-monetary relief ordering federal law enforcement to investigate alleged crimes.

As the party invoking federal subject-matter jurisdiction, Plaintiff must bear "the burden of showing Congress's unequivocal waiver of sovereign immunity." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). Plaintiffs have identified no such waiver for their claims for non-monetary relief—meaning Defendants retain sovereign immunity from all of Plaintiffs' claims.

B. The Court lacks jurisdiction over the late-delivery claim against the USPS.

Although Congress through the Postal Reorganization Act waives sovereign immunity for certain categories of claims, "the statute also provides that the [Federal Tort Claims Act or the] FTCA 'shall apply to tort claims arising out of activities of the Postal Service.'" *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 484 (2006). The FTCA in turn limits the federal government's waiver of sovereign immunity with certain exceptions, 28 U.S.C. § 2680, including (pertinent here) that the federal government retains sovereign immunity from "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." *Id.* at 485. Here, because Plaintiffs' claim concerns an allegedly late-delivered package, that claim arises out of the allegedly "negligent transmission of letters or postal matter" such that the federal government retains sovereign immunity. *See id.* Therefore, Plaintiffs' claims concerning the alleged one-day delayed delivery of Mr. Carr's package should be dismissed for lack of jurisdiction.

C. The naturalization statute provides an adequate remedy of which Plaintiffs have not availed themselves, requiring dismissal of Plaintiffs' naturalization-related claims.

Jurisdiction would be unavailable under any other federal statute or doctrine for Plaintiffs' naturalization-related claims because the naturalization statute provides an

adequate remedy already. Under 8 U.S.C. § 1421(c), "[a] person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this title, may seek review of such denial before the United States district court for the district." Moreover, judicial review under section 1421(c) "shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application." Moreover, as for timing, if USCIS fails to "make a determination" within 120 days "after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. § 1447(b). In other words, the naturalization statute prescribes a hearing de novo before a federal district court and that a petition for naturalization may be filed in federal court within 120 days of the application having been denied. In addition to this establishing robust procedural protections for naturalization applicants more than sufficient for constitutional Due Process, the naturalization statute, therefore, provides "an adequate remedy to challenge any alleged delay in the adjudication of his naturalization application," which precludes judicial review under any other federal statute that could possibly provide jurisdiction. *See, e.g.*, *Tankian v. U.S. Citizenship & Immigr. Servs.*, 652 F. Supp. 3d 812, 818 (S.D. Tex. 2023).

D. Plaintiffs' visa-related claims also fail to state a claim.

As for Mrs. Von Kramer's alleged delays in obtaining a non-immigrant visa to travel from Thailand to the United States, these allegations fail to state a claim under the Fifth Amendment. To state such a claim, a plaintiff must first identify a protected liberty or property interest and then show that the government deprived him of that interest

without due process. *See Mendias-Mendoza v. Sessions*, 877 F.3d 223, 228 (5th Cir. 2017). Plaintiffs appear to claim a right to fair "administrative procedures" such that constitutional Due Process "is not an arcane right, but rather a central pillar of how the U.S. government must act when dealing with individuals." *See* Compl. ¶ 2. Courts have rejected similar claims brought by other plaintiffs, however. *See Smith v. U.S. Dep't of Homeland Sec.*, No. 3:21-cv-02694-E, Doc. 21 (N.D. Tex. Apr. 13, 2022) (citing *Nyika v. Holder*, 571 F. App'x 351, 352 (5th Cir 2014) & *Ohiri v. Gonzales*, 233 F. App'x 354, 356 (5th Cir. 2007)) (holding that "[b]ecause [the plaintiff] has no liberty interest in an adjustment of status, he has failed to state a claim for a due process violation"); *Bemba v. Holder*, 930 F. Supp. 2d 1022, 1029 (E.D. Mo. 2013) (dismissing the plaintiff's Fifth Amendment due process claim based on the government's delayed adjudication of a Form I-485 application, because there is no constitutionally protected liberty interest in adjustment of status). "[T]he failure to receive discretionary relief," such as a non-immigrant tourist visa, "amount to a constitutionally protected deprivation of a property or liberty interest." *Aguilera v. Holder*, 354 F. App'x 882, 884 (5th Cir. 2009) (per curiam). Plaintiffs' constitutional claim cannot prevail.

No other claim could succeed either because it would be barred by the doctrine of consular nonreviewability. "The doctrine of consular nonreviewability has its basis in Congress's plenary power 'to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country.'" Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Accordingly, "the denial of visas to aliens is not subject to review by the federal courts." Centeno v. Shultz, 817 F.2d 1212, 1213 (5th Cir. 1987). As such the Court lacks jurisdiction to review any decisions by the

consular officer in Thailand denying Mrs. Von Kramer's applications for a visa, whether constitutional or statutory.

E. The allegations in the complaint appear frivolous.

Lastly, the "allegations within the complaint 'are so attenuated and unsubstantial as to be absolutely devoid of merit, . . . wholly insubstantial, . . . obviously frivolous, . . . plainly unsubstantial, . . . or no longer open to discussion.'" *Starrett v. Lockheed Martin Corp. et al.*, 735 F. App'x 169, 170 (5th Cir. 2018) (quoting *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974)). Put another way, the Fifth Circuit has affirmed that claims against the federal government and its agencies are subject to dismissal under Rule 12(b)(1) when the claims are "patently frivolous," and also under Rule 12(b)(6) when such claims are "fanciful, fantastic, or delusional." *Starrett*, 735 F. App'x at 170. Such is the case here. Plaintiffs' lengthy complaint appears to infer conspiracy and false documents from administrative delays without identifying a legal basis for the requested relief. And the broad scope of the requested relief is striking: ordering various federal agencies to open investigations into administrative issues—such as a delay in delivery of a package, the rescheduling of a naturalization interview to accommodate Plaintiffs' international vacation, and the challenges a resident of Thailand experienced in obtaining a non-immigrant tourist visa from the State Department to travel to the United States—or to reorganize their systems and processes, all of which constitutes the "patently frivolous," "fantastic, or delusional." *See Starrett*, 735 F. App'x at 170.

IV. Conclusion

Because Plaintiffs fail to identify a waiver of sovereign immunity that could possibly justify the sweeping non-monetary relief they seek for the alleged constitutional violations, the Court should dismiss Plaintiffs' entire complaint without prejudice. Even

so, the Court lacks jurisdiction over each claim because the USPS retains sovereign immunity from tort claims arising from late-delivered packages, the naturalization statute provides adequate remedies for the naturalization-related claims, and the consular nonreviewability doctrine precludes jurisdiction for the visa-related claims. Plaintiffs also fail to state a claim for violation of constitutional due process. In any event, the complaint may be dismissed as frivolous. For all of these reasons, Plaintiffs' entire complaint should be dismissed.

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

/s/ George M. Padis
George M. Padis
Assistant United States Attorney
Texas Bar No. 24088173
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214-659-8600
Fax: 214-695-8807
george.padis@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

On March 8, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date, the foregoing document was served via U.S. mail to the Plaintiff, pro se, listed below:

/s/ George M. Padis
George M. Padis