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-BT

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

A. Plaintiffs have failed to show an unequivocal waiver of sovereign immunity.

In response to Defendants' assertion of sovereign immunity over all claims for nonmonetary relief, Plaintiffs call Defendants' argument "unfounded" and point to their response to Defendants' first motion to dismiss. (Doc. 34, at 3). In that earlier response, Plaintiffs provide a narrative history of sovereign immunity, with no citations or support, and claim the APA provides a waiver for their claims. In citing the APA, Plaintiffs appear to argue it provides a sweeping waiver for sovereign immunity in all circumstances where a plaintiff takes issue with agency action and seeks relief other than money damages. (Doc. 18 at 4). But in reality, the limited waiver applies only to "actions against federal government agencies, seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 488 (5th Cir. 2014). This limited waiver is subject to

significant exceptions. These include, but are not limited to, actions committed to agency discretion or where there is another adequate remedy available to the complaining party. 5 U.S.C. §§ 701(a)(2), 704. And it is a plaintiff's burden to adequately identify an "unequivocal waiver of sovereign immunity." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). Plaintiffs cite to no authority demonstrating the numerous actions taken by various agencies of which they complain were the sort of non-discretionary actions contemplated by the APA. Further, as explained in greater detail below, an adequate statutory remedy regarding the denial of Mrs. Carr's N-400 application exists, depriving the Court of jurisdiction under any other statute. Plaintiffs therefore have not met their burden, and Plaintiffs' claims for nonmonetary relief should be dismissed for lack of jurisdiction.

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

The federal government retains sovereign immunity from "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006). Here, because Plaintiffs' claim regarding USPS concerns an allegedly late-delivered package, it arises out of the allegedly "negligent transmission of letters or postal matter" such that the federal government retains sovereign immunity. *See id.*

Plaintiffs argue the Supreme Court's decision in *Dolan* "clearly indicates that [Plaintiffs] could seek a refund for 'Guaranteed Delivery'." (Doc. 34, at 7). But they fail to explain this assertion. Indeed, *Dolan* involved a personal injury claim filed after a person was injured by tripping over a package that was allegedly negligently placed by a

postal worker. *Dolan*, 546 U.S. at 483. The Supreme Court ultimately determined that a personal injury claim arising out of the placement of packages did not constitute negligent transmission of postal matter, so sovereign immunity was waived. *Id*. at 492. In making this decision, the Court noted Congress intended to retain immunity for "injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id*. at 489. Plaintiffs' claims related to a late-delivered package thus fall squarely within the exception to the FTCA's waiver. And while Plaintiffs attempt to draw a distinction between requesting money damages directly versus indirectly through a "credit for future services," they cite to no authority demonstrating how this distinction reaches any waiver of sovereign immunity. (Doc. 34, at 7). 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."

Plaintiffs claim they have availed themselves of this remedy by adding an alternative request for de novo review under section 1421(c) to their amended complaint. (Doc. 34, at 7). But they have skipped a mandatory procedural step. Section 1421(c) confers jurisdiction "*after* a hearing before an immigration officer under section 1447(a)." 8 U.S.C. § 1421(c) (emphasis added). Section 1447(a) provides that after the denial of a naturalization application, an applicant may request a hearing before an immigration officer. 8 U.S.C. § 1447 (a). Plaintiffs never sought such a hearing. (*See* Doc. 29, 24-30). Because Plaintiffs never sought or attended such a hearing, section 1421(c) does not confer jurisdiction. *See Aparicio v. Blakeway*, 302 F.3d 437, 440 (5th Cir. 2002) ("[a]pplicants may only appeal to the district court however, if they either sought administrative review and the application was again denied, or if they sought administrative review and the review as delayed for more than 120 days."); *and see Huang v. Napolitano*, No. 10-22580-Civ, 2011 WL 772755 at *2-3 (S.D. Fla Feb. 28, 2011).

Because the naturalization statute provides "an adequate remedy to challenge any alleged delay in the adjudication of his naturalization application," it precludes judicial review under any other federal statute that could possibly provide jurisdiction, including the APA. *See, e.g.*, *Tankoano 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.

Plaintiffs argue their claims regarding Mrs. Von Kramer's alleged delays in

obtaining a non-immigrant visa state a Due Process claim because there is "no basis for [an] executive discretion challenge" and because the doctrine of consular nonreviewability is "not applicable". (Doc 34, at 9-10) (cleaned up).

Initially, it is unclear what Plaintiffs are referring to as an "executive discretion challenge." In explaining why Plaintiffs' claims related to non-immigrant tourist visas fail to state a constitutional claim, Defendants noted that 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. (Doc. 31, at 7); *and see Mendias-Mendoza v. Sessions*, 877 F.3d 223, 228 (5th Cir. 2017). Plaintiffs have failed to identify such a protected interest. *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, does not "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) (citing *Assad v.*

Ashcroft, 378 F.3d 471, 475 (5th Cir. 2004).[1]

Pointing to the Ninth Circuit's decision in *Muñoz v. Dep't. of State* (50 F.4th 906 (9th Cir. 2022)), Plaintiffs appear to argue they hold a protected interest in Ms. Von Kramer's non-immigrant tourist visa. However, *Muñoz* involved an immigrant-relative petition and related immigrant visa application. *Muñoz*, 50 F.4th at 910. It is therefore inapplicable to Plaintiffs' claims, and Plaintiffs' constitutional claim cannot prevail.

Plaintiffs also seek to challenge the doctrine of consular nonreviewability based on *Muñoz*. Particularly, they argue it "opens the door to ancillary review of the entire visa process." (Doc. 34, at 10). Initially and as discussed above, *Muñoz's* holdings related to immigrant-relative petition and related immigrant visa application are not applicable to non-immigrant tourist visas. Further, in the Fifth Circuit, "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.

II. 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 amended complaint without

[1] Plaintiffs also suggest Defendants' citing of *Aguilera*, an unpublished opinion, is sanctionable. But the Fifth Circuit specifically allows parties to cite to unpublished opinions. 5th Cir. R. 47.5.4. And although "[a]n unpublished opinion… is not controlling precedent," it "may be persuasive authority." *Butler v. S. Porter*, 999 F.3d 287, 296 n.4 (5th Cir. 2021).

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. For all of these reasons, Plaintiffs' entire amended complaint should be dismissed.

Dated: June 11, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 11, 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 hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Emily H. Owen
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