

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division**

CPT CHEYNE PARHAM, individually)	
and as next friend of)	
M E PARHAM)	
E J PARHAM,)	
MARY JOY PINGCA PARHAM ¹)	
)	
Plaintiffs,)	
v.)	Civil Action No. 4:09-cv-01105
)	
HILLARY RODHAM CLINTON,)	
United States Secretary of State)	
EDWARD A. BETANCOURT)	
In his official capacity)	
LISA MOOTY)	
in her official and individual capacities,)	
)	
Defendants.)	

DEFENDANTS’ MOTION TO DISMISS THE COMPLAINT

¹ Mary Joy Pingca Parham is not set forth as a “parent” or “next friend” who has filed suit on behalf of the minor plaintiffs (*see* Complaint at 1), but is only a litigant in the context of the defamation claim (*see* Complaint at 1 and 17).

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COME NOW Hillary Clinton, United States Secretary of State, Edward A. Betancourt, Director, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, Bureau of Consular Affairs, United States Department of State, in his official capacity, and Lisa Mooty, Vice Counsel, Embassy Manila, United States Department of State, in both her official and individual capacities (“Defendants”),² by counsel, and timely respond to the Petition for Declaratory Relief and Original Complaint (“Complaint”) filed by Cheyne Parham, Mary Joy Pingha Parham, M.E. Parham and E.J. Parham (“Plaintiffs”) with this Motion to Dismiss (“Motion”) in accordance with Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and in support thereof state as follows:

I. THE NATURE AND STAGE OF THE PROCEEDING

This case arises from the United States Department of State’s request that children conceived out of wedlock and born abroad to an alien mother submit to a Deoxyribonucleic acid (DNA) test to establish biological parentage. Plaintiffs, however, have steadfastly refused to submit to a DNA test and have instead chosen to litigate the issue of whether the Department of State may request proof of a biological relationship. Plaintiffs allege a declaratory judgment, civil rights violation and defamation.

² A declaratory judgment action, pursuant to 8 U.S.C. § 1503(a), may be brought against “the head of such department or independent agency for a judgment declaring him to be a national of the United States . . .” Accordingly, only Hillary Clinton, in her official capacity, is the proper defendant in this case. The Court should dismiss all remaining Defendants from this action in the context of any declaratory judgment claim. *See Reyes v. Neelly*, 264 F.2d 673, 681-82 (5th Cir. 1959).

II. STATEMENT OF THE ISSUES

The Complaint alleges three causes of action. However, the Court lacks jurisdiction over all of these claims, which also fail to state a claim upon which relief may be granted. First, Plaintiffs have failed to exhaust their administrative remedies which are a prerequisite to filing a declaratory judgment action. Second, the civil rights claim, under 42 U.S.C. § 1983, only applies to a person acting under color of state law. However, no state law is applicable; this case deals only with the ability of the Department of State to reasonably examine claims of United States citizenship by those born abroad. Finally, and for at least six different reasons, there is no jurisdiction over the defamation claim. Significantly, defamation is specifically exempt from the Federal Tort Claims Act, Plaintiffs failed to administratively present a claim prior to suit, and claims against the Government does not extend to claims arising in a foreign country.

III. LEGAL STANDARD OF REVIEW

The party asserting jurisdiction bears the burden of proof for a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A motion to dismiss under Rule 12(b)(1) is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6); *see Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 359 (5th Cir. 2006). A motion under Rule 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction. *See Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). A district court may consider outside matters which are attached to a

motion to dismiss without first converting it into a motion for summary judgment "if the material is pertinent to the question of the District Court's jurisdiction since it is always the obligation of a federal court to determine if it has jurisdiction." *Green v. Forney Engineering Co.*, 589 F.2d 243, 246 (5th Cir. 1979). Moreover, Federal Rule of Civil Procedure 12(b)(1) arguments may not be converted to a motion for summary judgment. Disputed issues of material fact will not prevent a trial court from deciding for itself merits of jurisdictional claims. *Id.*

To survive dismissal under Federal Rule of Civil Procedure 12(b)(6), "the non-moving party must plead 'enough facts to state a claim to relief that is plausible on its face.'" *S. Scrap Material Co., LLC v. ABC Ins. Co. (In re S. Scrap Material Co., LLC)*, 541 F.3d 584, 587 (5th Cir. 2008) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). The allegations must be sufficient "to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. If the plaintiff fails to allege facts sufficient to "nudge [the] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id.* at 570.

Although the district court must accept the *well-pleaded* factual allegations of the complaint as true, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). Moreover, a court should not strain to find inferences favorable to the plaintiff and should not accept conclusory allegations,

unwarranted deductions or legal conclusions. *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

IV. SUMMARY OF THE ARGUMENT

This case arose from the Plaintiffs refusal to submit to a DNA test as requested by the Department of State. Plaintiffs allege three causes of action. First, Plaintiffs seek a declaratory judgment that Mary Elise Pingha Parham and Erica Joy Pingha Parham (“Twins”) are United States citizens at birth abroad. However, Plaintiffs have failed to exhaust their administrative remedies because the Department of State has not denied the Twins’ citizenship claim. In addition, Plaintiffs allege a violation of civil rights under 42 U.S.C. § 1983. However, this claim fails on its face because Plaintiffs do not allege that Defendants acted under color of any state law. Finally, Plaintiffs allege that the parents of the Twins were defamed. This claimed is barred for several reasons. The Complaint fails to allege that the Government has waived its sovereign immunity under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680. In addition, Plaintiffs have not exhausted the administrative predicates under 28 U.S.C. § 2675(a) prior to bringing suit. Moreover, defamation is specifically excluded from those claims for which the Government consents to be sued. Furthermore, the alleged tort occurred in a foreign country and is thus exempted from the waiver of sovereign immunity.

V. FACTS

Cheyne Parham and Mary Jo Parham met in September 2007 in South Korea. Complaint at ¶ 12-13. In November 2007, the couple were engaged to be married.

Complaint at ¶ 14. The marriage ceremony was performed in Davao City, Davao, Philippines on April 12, 2008 and recorded on April 18, 2008. Complaint at ¶ 20-21. In August 2008, the Twins were born in Davao City. Complaint at ¶ 30.

Three months later, on or about December 1, 2008, Cheyne Parham filed the Form DS 2029, Application for Consular Report of Birth Abroad of a Citizen of the United States of America with the United States Department of State (“CRBA”), of the Twins. *See* Declaration of Edward A. Betancourt (“Betancourt Decl.”) at ¶ 2. On or about March 5, 2009, Mary Joy Parham filed the Form DS-11-02, Application For United States Passport, on behalf of each of the Twins. *See* Betancourt Decl. at ¶ 3.

On March 5, 2009, the Embassy of the United States, Manila, Philippines sent a letter to Cheyne Parham requesting that Mr. Parham “submit additional evidence to establish your child’s claim to United States citizenship.” *See* Betancourt Decl. at ¶ 4. The letter also suggested that a DNA test be performed to confirm the Twins’ relationship with Mr. Parham. *Id.*

On March 6, 2009, Amanda E. Hicks, then a Citizen Services Specialist for East Asia and the Pacific Region, American Citizen Services, Overseas Services in the Department of State’s Bureau of Consular Services, sent an e-mail to Cheyne Parham explaining that “the consular officer is required by law to note evidence of transmission, legitimation, and filiation.” *See* Betancourt Decl. at ¶ 5. Ms. Hicks further noted that a DNA test of children “is standard practice worldwide in a case where the children were conceived before the date of marriage.” *Id.* The correspondence included excerpts from

the United States Department of State Foreign Affairs Manual (“FAM”) where it explained that the “Department [of State] applies the general standard of a preponderance of the evidence” with regard to establishing a blood relationship. *Id.* On March 18, 2009, the United States Department of State sent a letter to counsel for Plaintiffs noting that “the sole issue in this case is the establishment of a biological relationship” between the parents of the Twins. Such a relationship, which must be proved “by a preponderance of the evidence . . . may be accomplished most expeditiously through DNA testing. . . [P]ursuant to 22 CFR § 51.45 . . . the Department may require an applicant to provide any evidence that it deems necessary to establish United States citizenship.” *See Betancourt Decl.* at ¶ 6.

On March 18, 2009, counsel for Plaintiffs responded in writing, stating that “genetic testing is impracticable” and that there is “NO evidence . . . that the children born of the marriage are not issues of Cpt. Parham.” *See Betancourt Decl.* at ¶ 7 (emphasis in the original). On March 19, 2009, the United States Department of State responded to Plaintiffs’ counsel in writing, stating that pursuant to 22 C.F.R. § 50.45, the Department of State “may require an applicant to provide *any* evidence that it deems necessary to establish United States citizenship.” *See Betancourt Decl.* at ¶ 8 (emphasis in the original). In addition, it was explained to counsel for Plaintiffs that, in accordance with the United States Department of State Foreign Affairs Manual, 7 FAM 1131.4-1a, “[i]t is not enough that the child is presumed to be the issue of the parents’ marriage” Finally, the letter inquired whether DNA testing will be undertaken. *Id.*

On April 10, 2009, Plaintiffs' counsel sent a letter to Mr. Betancourt stating that “[o]ur position that it is fiscally and temporally irresponsible to proceed to the ‘last resort proof’ at this time has changed only as to the length of time that mailing overseas will take and confirmation that the test would not be handled with diligence.” The letter also alleged that “DNA testing is unconscionable.” *See* Betancourt Decl. at ¶ 9.

Nevertheless, Plaintiffs incorrectly allege that May Jo Parham and the minor children remain in the Philippines “as a result of the actions of the State Department.”³ Complaint at ¶ 6.

To date, Plaintiffs have not submitted any DNA evidence to the United States Department of State regarding the Twins. *See* Betancourt Decl. at ¶ 11. However,

³ Plaintiffs allege that the Department of State has kept the family apart. *See, e.g.*, Complaint at ¶ 87. However, Plaintiffs have effective means to reside in the United States as a family unit rather than filing the Complaint over which this Court lacks subject matter jurisdiction. For example, the Legal Immigration and Family Equity Act of 2000 (“LIFE Act”), Pub. Law No. 106-553, section 1102-03 (codified at 8 U.S.C. § 1101(a)(15)(K) and 214(p)) expanded the already existing K-visa nonimmigrant category to include spouses of United States citizens and unmarried children under twenty-one years of age. Specifically, it created the K-3 (spouse) and K-4 (unmarried children under twenty-one) visa and allows the spouse or child of a United States citizen to be admitted to the United States in a nonimmigrant category. The admission allows the spouse or child to complete processing for permanent residence while in the United States. In order to qualify for a K-3 visa, a Form I-130 (“Immigrant Vias Petition for Alien Relative”) must be filed with United States Citizenship and Immigration Services (“USCIS”) on behalf of the alien spouse to accord him or her immigrant status. *See* 8 C.F.R. § 214.2(k)(7). While the I-130 petition is pending, the United States citizen spouse files the Form I-129F with USCIS on behalf of the alien spouse to request an appointment for K-3 and K-4 visas with the United States Consulate where the alien spouse and children are residing. *Id.* After the petition has been approved, the alien spouse and children enter the United States on K-3 and K-4 visas respectively.

neither Plaintiffs nor their counsel have stated their absolute refusal to undergo a DNA test. *Id.* Moreover, the United States Department of State has neither approved nor rejected either the CRBA Application or the Application For United States Passport. *See* Betancourt Decl. at ¶ 12. There has not been any final agency action. *Id.* Furthermore, in accordance with the information provided by Jennifer Toole, Attorney-Adviser for the United States Department of State's Office of the Legal Adviser, Office of International Claims and Investment Disputes, Plaintiffs have not filed any administrative claim under the Federal Tort Claims Act. *See* Betancourt Decl. at ¶ 13; *see also* Declaration of Jennifer Toole at 3-4.

VI. LEGAL ARGUMENT

A. Introduction to the Law Of Citizenship At Birth By Those Born Abroad

The "Congress shall have the Power . . . to establish a uniform Rule of Naturalization throughout the United States." U.S. Const. art. I, § 8, cl.4. A person born abroad of parents, one of whom is a United States citizen and the other is an alien, may, if certain qualifications are met, be a national and citizen of the United States at birth. 8 U.S.C. § 1401(g). The "Secretary of State shall be charged with the administration and enforcement of the provisions of this Act and all other immigration and nationality laws relating to . . . the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a). The Department of State shall determine claims to United States nationality of persons abroad

when made through a passport application or for a CRBA.⁴ 22 C.F.R. § 50.2. The CRBA “*may* only be issued by a consular officer . . . *if* satisfied that the claim to nationality has been established.” *Id.* (emphasis added).

The applicant shall be required to submit proof of the child’s birth, identity and citizenship meeting the evidence requirements as set forth in subpart C of 22 C.F.R. Part 51 (Passports). 22 C.F.R. § 50.5. “The applicant has the burden of proving that he or she is a national of the United States.” 22 C.F.R. § 51.40. Documentary evidence is required when presenting a citizenship claim. 22 C.F.R. § 51.41. When investigating a nationality claim from a person born abroad, the Department of State “*may* require an applicant to provide *any* evidence that *it deems necessary* to establish that he or she is a United States citizen . . . ” 22 C.F.R. § 51.45 (emphasis added). Only “[u]pon application and the submission of

⁴ Plaintiffs allege that a Texas state court determination of parentage is binding upon the United States Department of State in this case. Complaint at ¶ 54. The Fifth Circuit Court of Appeals has recently explained that although a minor’s custody status under state law might provide evidence of his such status for federal naturalization purposes, the Federal courts are not bound by a state’s determination of his legal relationship with his mother. *See Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006). The Court succinctly explained as follows:

[W]e [are] not bound to follow the [state law] decree in determining Petitioner’s custody statue for purposes of the subject section of the Immigration and Nationality Act. *Federal naturalization laws exist independent of state family law.* Here, we do not question the amended decree’s validity - a question that, in other circumstances, the Full Faith and Credit Act might prohibit our asking. *But the Full Faith and Credit Act does not require us to accord that state decree conclusive effect in U.S. [immigration] proceedings.*

Bustamante-Barrera, 447 F.3d at 400 (emphasis added).

satisfactory proof of birth, identity and nationality . . . the consular officer *may* issue to the parent . . . a Consular Report of Birth Abroad of a Citizen of the United States of America.” 22 C.F.R. § 50.7(a) (emphasis added).

Finally, the United States Department of State Foreign Affairs Manual contains guidance when someone born abroad seeks a declaration that he or she is a United States citizen:

The laws on acquisition of United States citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is *not enough* that the child is presumed to be the issue of the parents’ marriage by the laws of the jurisdiction where the child was born. *Absent a blood relationship* between the child and parent on whose citizenship the child’s own claim is based, United States citizenship is *not* acquired. The burden of proving a claim to United States citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.

7 FAM 1131.4-1(a) (emphasis added). Although children born in wedlock “are generally presumed to be the issue of that marriage,” the presumption is not determinative in citizenship cases; “an actual blood relationship to a United States citizen is required.” 7 FAM 1131.4-1(c). In making a determination of blood relationship under 8 U.S.C. § 1401, the Department “applies the general standard of preponderance of the evidence.” This means that the “evidence of blood relationship is of greater weight than the evidence to the contrary.” 7 FAM 1131.4-1(b)(1). The test is not dependent on the volume of the evidence presented by the applicant. *Id.* In order to thoroughly investigate any case where any doubt of a blood relationship exists, “the consular officer *may* wish to . . . [a]dvice blood testing . . .” 7 FAM 1131.5-3(b) (emphasis added). In short, the Consulate has complete discretion

when determining the evidence required to establish citizenship.

B. Plaintiffs Have Failed To Exhaust Their Administrative Remedies and Any Declaratory Judgment Action is Not Ripe

Plaintiffs seek relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et.seq.*, which provides that federal courts may grant declaratory relief in "a case of actual controversy." *See* Complaint at ¶ 3. The Declaratory Judgment Act, however, is a procedural statute that enlarges the range of available remedies in a federal court; it does not actually confer an independent basis for jurisdiction. *Skelly Oil v. Phillips Petro. Co.*, 339 U.S. 667, 671-72 (1950); *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997).⁵ Indeed, because the Complaint fails to allege any independent basis for jurisdiction over a declaratory judgment claim, it is fatally deficient.⁶ Although there is a basis for an individual to bring

⁵ The Complaint also makes a singular reference to 28 U.S.C. § 1361 as a basis for jurisdiction. Complaint at ¶ 3. District courts have "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. In order to prevail under the Mandamus Statute, a plaintiff must establish: (1) that he has a clear right to have a CBRA and/or U.S. passport issued; (2) that defendant has a nondiscretionary duty to issue the CBRA and/or U.S. passport ; and (3) that he has no other adequate remedy. *See Allied Chem. Corp. v. Daifon, Inc.*, 449 U.S. 33, 35 (1980) (party seeking mandamus relief must show "clear and indisputable" right and have no other adequate remedy). However, the "remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976). Moreover, the Mandamus Statute does not afford an independent basis for federal court jurisdiction; absent other federal jurisdiction, an action cannot lie. *In re Stone*, 118 F.3d 1032, 1033 (5th Cir. 1997). Consular officers also have discretion in whether to issue a CRBA upon the evidence presented or to request genetic testing. 22 C.F.R. § 50.7(a); 22 C.F.R. § 51.45.

⁶ The district court also lacks jurisdiction in a suit against the federal government unless Congress has consented to be sued. *United States v. Testan*, 424 U.S. 392, 399

a claim of United States citizenship in the context of 8 U.S.C. § 1503, Plaintiffs do not allege that this section is even applicable. Such an omission is fatal and is, by itself, a sufficient ground for dismissal of the Complaint. *See Wurzer v. University of Houston*, 487 F.2d 612, 613 (5th Cir. 1973) (*citing Weaver v. Kelton*, 357 F. Supp. 1106, 1108 (E.D. Tex. 1973)) (“Thus, having failed to allege the jurisdictional statutes necessary to invoke limited, federal jurisdiction, the instant complaint is fatally defective and must be dismissed.”).

However, even if Plaintiffs had properly stated the cause of action, Plaintiffs’ claim is not ripe because they have not exhausted their administrative remedies; the Department of State has not denied the Twins’ nationality claim. *See* Complaint at ¶ 41 (“To date no written notice of deficiency has been provided.”); ¶ 85 (“no decision has been rendered by the Department.”); Betancourt Decl. at 12.⁷ The plain language of the statute clearly states

(1976). Although 28 U.S.C. § 1331 grants district courts original jurisdiction over “all civil actions arising under the Constitution, laws or treaties of the United States” it does not waive sovereign immunity. *See Koehler v. United States, Internal Revenue Service*, 153 F.3d 263, 266 n.2 (5th Cir. 1998) (“It is well settled, however, that sovereign immunity is not waived by a general jurisdictional statute such as 28 U.S.C. § 1331.”) The sovereign immunity of the federal government is a complete bar to suit unless Congress has “unequivocally expressed in statutory text” its consent to be sued. *Lane v. Pena*, 518 U.S. 187, 192 (1996). “Moreover, a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” *Id.* A waiver of sovereign immunity must be express, not implied.” *Id.*

⁷ The Complaint does not allege a cause of action against Lisa Mooty, in her individual capacity, in the context of the “declaratory judgment” action. Nevertheless, even if the Complaint did intend to so proceed, the relief is barred. The exhaustion requirement also applies to *Bivens* actions. *See Porter v. Nussle*, 534 U.S. 516, 525 (2002) (holding that Prison Litigation Reform Act requires prisoners to exhaust administrative remedies).

that a declaratory action can only be brought after the claimant is denied a right or privilege. 8 U.S.C. § 1503(a) (“An action under this subsection may be instituted only within five years *after the final administrative denial* of such right or privilege. . . .”) (emphasis added). If there is no exhaustion of the administrative remedy, a nationality claim is not ripe. *See Marcello v. Bowen*, 803 F.2d 851, 857 (5th Cir. 1986) (noting that it could address the petitioner's action because he had first exhausted his administrative remedies); *see also Rubio v. Chertoff*, 2008 U.S. Dist. LEXIS 73988 (S.D. Tex. Sept. 25, 2008) (“under section 1503, a federal court will lack jurisdiction over that claim until administrative remedies are exhausted. A prerequisite to prosecuting such a declaratory judgment action is a "final administrative denial" of the claimed right or privilege.”). Because the denial of a right or privilege of United States nationality is a prerequisite to any § 1503(a) suit, this Court lacks subject matter jurisdiction even if Plaintiffs had alleged a claim under that statute.

C. There is No Claim Under 42 U.S.C. § 1983

This Court lacks subject matter jurisdiction over the alleged civil rights violations under 42 U.S.C. § 1983 and the Complaint fails to state a cause of action.⁸ First, § 1983 does not confer subject matter jurisdiction because none of the claims Plaintiffs make fall within

⁸ Plaintiffs also briefly allege that Defendants have violated their civil rights under 18 U.S.C. § 242. Complaint at ¶ 84. This provision makes it a *crime* for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or the laws of the United States. However, this criminal statute does not provide a basis for any civil liability. *See Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960) (“The sections of Title 18 may be disregarded in this suit. They are criminal in nature and *provide no civil remedies.*”) (emphasis added). Obviously, there is no such claim in the context of this civil Complaint.

its purview.⁹ *Boyd v. United States*, 861 F.2d 106, 108 (5th Cir. 1988). In order to state a claim pursuant to § 1983, a plaintiff must allege a violation of a right secured by the Constitution and “must show that the alleged deprivation was committed by a *person* acting under color of *state law*.” *West v. Atkins*, 487 U.S. 42, 48 (1988) (emphasis added); *Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997). The Complaint fails to make any such allegations.

In addition, the Complaint alleges that the “State Department” has violated 42 U.S.C. § 1983. Complaint at ¶¶ 83-84. However, it is well established that Congress intended § 1983 to apply only to natural persons and local state government municipalities. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691-94 (1978); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1994) (“Congress intended § 1983 to apply to local government entities as well as to persons.”). Accordingly, “[t]his Court has long recognized that suits against the United States brought under the civil rights statutes are barred by sovereign immunity.” *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164

⁹ Plaintiffs also allege that jurisdiction is proper under 28 U.S.C. § 1343. Complaint at ¶ 4. However, sections 1343(a)(1) and (2) provide a jurisdictional basis only in the context of 42 U.S.C. § 1985 claims. The Complaint makes no § 1985 claim. In addition, 28 U.S.C. § 1343(a)(3) is only a jurisdictional statute and does not create any substantive rights. *Jewell v Covington*, 425 F.2d 459 (5th Cir.), *cert den.*, 400 U.S. 929 (1970). Moreover, 28 U.S.C. § 1343(a)(3) may be used as a jurisdictional basis in a 42 U.S.C. § 1983 action when only property rights are involved. *Bunkley v Watkins*, 567 F.2d 304, 306 (5th Cir. 1978). Finally, under 28 U.S.C. § 1343(4), a district court has jurisdiction to hear any civil action to recover damages under any “act of Congress providing for the protection of civil rights.” *Harding v American Stock Exchange, Inc.*, 527 F.2d 1366 (5th Cir. 1976). No Act of Congress is at issue in this case.

F.3d 282, 286 (5th Cir. 1999). In addition, § 1983 does not apply to federal officials. *Izen v. Catalina*, 398 F.3d 363, 367 n.3 (5th Cir. 2005). Any claim against defendants Betancourt and Mooty, in all capacities, must thus also be dismissed.

There is also no allegation in the Complaint that any of the Defendants acted under color of *state* law. Complaint at ¶¶ 83-85. Indeed, there can be no such allegation in the context of a claim of United States citizenship against the Department of State. If a defendant acts under color of federal, and not state law, there is no § 1983 claim and the action must be dismissed for lack of subject matter jurisdiction. *Boyd*, 861 F.2d at 107. Finally, for the numerous reasons already stated, there is no viable section 1983 claim against Lisa Mooty in her individual capacity. Although she is a “person,” there is no allegation that she acted under color of state law.

D. There Is No Cause of Action For Defamation Under the Federal Tort Claims Act Against Any of the Defendants

There are at least six different reasons why this Court lacks subject matter jurisdiction over the defamation claim against Defendants in their official or individual capacity, each of which provides an independent basis for dismissal of the defamation claim.

The claim also fails to state a claim upon which relief may be granted.

1. This Court Lacks Jurisdiction Over the FTCA Claim Against Defendants

The Complaint fails to allege any jurisdictional basis for the FTCA whatsoever. The Complaint also fails to allege that the Government has waived its sovereign immunity and that it has consented to be sued in this instance. Indeed, the FTCA is nowhere mentioned in

the Complaint. A failure to allege a waiver of sovereign immunity within a Complaint is fatal and can be the basis of a motion to dismiss. *See Taylor v. Administrator of Small Business Admin.*, 722 F.2d 105, 108-09 (5th Cir. 1983).

However, even if Plaintiffs properly alleged jurisdiction, the claim would still fail. The FTCA is one limited way the United States waives sovereign immunity. *Williamson v. United States Dep't of Agric.*, 815 F.2d 368, 373-74 (5th Cir. 1987). It provides federal district courts with jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). As a limited waiver of immunity, the FTCA and its exceptions should be "narrowly construed in favor of the United States." *Leleux v. United States*, 178 F.3d 750, 754 (5th Cir. 1999) (*citing Lane*, 518 U.S. at 192). Sovereign immunity is also jurisdictional. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). Plaintiffs bear the burden of showing that the United States has waived its immunity in this case. Plaintiffs have not alleged, and cannot allege, a cause of action under the FTCA.

2. There is No Available Individual Claim Against Ms. Mooty

Although the Complaint alleges that it is suing Lisa Mooty in her "individual capacity," it fails to set forth a jurisdictional or legal predicate for such cause of action. The claim must thus fail. However, even if the jurisdictional predicate were properly alleged, the claim against Ms. Mooty fails. In *Bivens v. Six Unknown Named Agents of the Federal*

Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized "that victims of a *constitutional* violation by a federal agent have an implied right of action to recover damages against the official absent any statute conferring such a right." *Hessbrook v. Lennon*, 777 F.2d 999, 1001 (5th Cir.1985) (emphasis added). The Complaint makes no allegation that the defamation claim against Ms. Mooty has a constitutional dimension. It is well established that "defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." Thus, injury to reputation cannot form the basis of a *Bivens* action, even if a *Bivens* claim was alleged. *See Siegert v. Gilley*, 500 U.S.226, 233 (1991); *see also Paul v. Davis*, 424 U.S. 693, 701-02 (1976) (libel does not violate the due process clause of the Constitution).

3. The Court Lacks Subject Matter Jurisdiction Against the Government Because Plaintiffs Failed to Exhaust Administrative Prerequisites

Pursuant to 28 U.S.C. § 2675(a), an action shall not be filed against the United States for money damages caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, "*unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.*" In this case, the Complaint does not allege that any claim for money damages or equitable relief was first presented to the Department of State which then issued a final denial of any claim in writing. Indeed, there was no such presentment. *See Jennifer Toole Declaration.*

“Presentment of a claim to the appropriate agency and denial of that claim by the agency in writing, sent by registered or certified mail, are prerequisites to a tort suit brought against the United States.” *Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998). Without such presentment “the district court [is] without subject matter jurisdiction . . . because [Plaintiffs] failed to comply with the administrative exhaustion requirements of the Federal Tort Claims Act.” *Price v. United States*, 81 F.3d 520 (5th Cir. 1996); *see also McNeil v. United States*, 508 U.S.106, 113 (1993); *see also Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (“The timely filing of an administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA and, as such, should be affirmatively alleged in the complaint. A district court may dismiss a complaint for failure to allege this jurisdictional prerequisite.”).

4. This Court Also Lacks Subject Matter Jurisdiction Against the Government Because A FTCA Claim Does Not Extend to Claims Arising In A Foreign Country

The Complaint alleges that Lisa Mooty is stationed at the United States Embassy in Manila, the Philippines. Complaint at ¶ 2. The Complaint also contends that Lisa Mooty and the Consulate in the Philippines “published” supposedly defamatory material about Mary Parham. Complaint at ¶ 86. The Complaint thus alleges that the defamatory statements were made in the Philippines.

However, section 2680(k) of the FTCA specifically exempts from the section 1346(b) waiver of sovereign immunity "any claim arising in a foreign country." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (“28 U.S.C. § 2680(k) thus codified Congress's

"unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power" and rejecting the "headquarters doctrine"). Accordingly, "the district court does not have jurisdiction under 28 U.S.C. § 2680(k) if a claim arises in a foreign country." *Price v. United States*, 69 F.3d 46, 50 (5th Cir. 1995).

5. In any event, Defamation Claims Against the Government Are Specifically Exempted from the FTCA's waiver of Sovereign Immunity

The defamation claim must also be dismissed because Congress has not waived the government's sovereign immunity for defamation. The tort of libel and slander are a part of the general "defamation" tort. *See Hardy v. Hartford Ins. Co.*, 236 F.3d 287, 291 (5th Cir. 2001). The FTCA is absolutely clear that the waiver of sovereign immunity does not apply to "any claim arising out of . . . libel, slander, misrepresentation, deceit, or interference with contract rights." See 28 U.S.C. § 2680(h) (emphasis added); *see also Siegert*, 500 U.S. at 234 (suit cannot be brought against the United States for defamation); *see also Chafin v. Pratt*, 358 F.2d 349, 356 n.19 (5th Cir. 1966); *see also Johnson v. Sawyer*, 980 F.2d 1490, 1508 (5th Cir. 1992) ("libel and slander are specifically excluded from the FTCA, 28 U.S.C. § 2680(h), and so presumably is defamation, which is essentially the same thing.").

6. The Complaint Fails to Name the Proper Parties

This Court also lacks jurisdiction because the Complaint fails to name the proper parties. "It is beyond dispute that the United States, and not the responsible agency or employee, is the proper party defendant in a Federal Tort Claims Act suit." *Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988). "The courts have

consistently held that an agency or government employee cannot be sued *eo nomine* under the Federal Tort Claims Act.” *Id.* All suits brought under the FTCA must be brought against the United States. *Vernell v. United States Postal Service*, 819 F.2d 108, 109 (5th Cir. 1987).

An FTCA claim against a federal agency or employee as opposed to the United States itself must thus be dismissed for want of jurisdiction. *Carr v. Veterans Administration*, 522 F.2d 1355, 1356 (5th Cir.1975) All Defendants must thus be dismissed for lack of subject matter jurisdiction. *Atorie Air, Inc. v. Federal Aviation Admin.*, 942 F.2d 954, 957 (5th Cir. 1991).¹⁰

¹⁰ In addition, and assuming arguendo that this Court has any subject matter jurisdiction whatsoever to review the defamation claim, the Complaint remains fatally defective. With regard to any defamation claim against the Government, the FTCA authorizes suits against the United States for damages arising from “injury or loss of property, or personal injury . . . *in accordance with the law of the place where the act or omission occurred.*” 28 U.S.C. § 1346(b)(1); *see also Freeman v. United States*, 556 F.3d 326, 325 (5th Cir. 2009). However, the Complaint fails to allege any elements of defamation under Filipino law. Even if, for some reason, this Court applies Texas law concerning defamation, the Complaint still fails to state a cause of action. To prove a cause of action for defamation in Texas, a plaintiff must allege that (1) the defendant published a statement of fact, (2) the statement was defamatory; (3) the statement was false, (4) the defendant acted negligently in publishing the false and defamatory statement; and (5) the plaintiff suffered damages as a result. *Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 382 (Tex. 2005). However, the Complaint does not allege that any statement was defamatory or false; Plaintiffs merely allege that statements were made “without any evidence that any of it is true.” Complaint at ¶ 86. Moreover, the Complaint fails to allege that any Defendant acted negligently in publishing any supposedly defamatory statement. In addition, the only allegation of publication to a third party is a contention that a statement was made by “Ms. Hicks.” *Id.* Amanda Hicks is not a defendant in this case. Finally, there is no allegation that Plaintiffs have suffered any damages as a result of any purported defamatory statement. *See* Complaint at ¶¶ 86-92.

E. The Complaint Fails To State A Claim For Injunctive Relief

As already stated above, this Court lacks subject matter jurisdiction over all of Plaintiffs' claims with regard to all Defendants. This Court has no jurisdiction over any possible injunctive claim. But any potential injunctive claim also fails to state a cause of action. The Complaint makes a perfunctory request for "injunctive relief, following the declaratory relief, that the State Department issue a Report of Birth Abroad" Complaint at ¶ 81. The Complaint also seeks "injunctive relief, following the issuance of citizenship documents, that the State Department issue . . . passports." Complaint at ¶ 82. The injunction Plaintiff seeks is mandatory; it does not require that Defendants cease an action, but rather affirmatively requires a specific action, *i.e.*, to issue a passport. *Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001). The party seeking a mandatory injunction has the burden of showing a clear entitlement to relief under the facts and the law. *Justin Industries, Inc. v. Choctaw Secur., L.P.*, 920 F.2d 262, 268 n.7 (5th Cir. 1990). Courts are reluctant to grant mandatory injunctions. *United States v. Campbell*, 897 F.2d 1317, 1323 (5th Cir. 1990).

To obtain permanent injunctive relief, a plaintiff must allege and demonstrate that: "(1) it has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *ITT Educ. Servs. v. Arce*, 533 F.3d 342, 347 (5th Cir. 2008), *citing eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Since Plaintiffs

have not alleged any elements for injunctive relief in the Complaint, the Court should in no manner consider the request for an injunction. *See Medlin v. Palmer*, 874 F.2d 1085, 1091 (5th Cir. 1989) (failure to satisfy the first component of the injunction elements is ground to deny a request for an injunction).

VII. CONCLUSION

WHEREFORE, for the reasons set forth herein, Defendants respectfully move to dismiss the Complaint, and for such other and further relief as this Court deems necessary, just and proper.

Dated: June 19, 2009

Respectfully submitted,

TONY WEST

Assistant Attorney General

DAVID J. KLINE

Director

JOSHUA E. BRAUNSTEIN

Assistant Director

/s/ **Erik R. Quick**

ERIK R. QUICK

Trial Attorney; "Attorney-in-Charge"

Virginia Bar number: 37380

United States Department of Justice

Civil Division

Office of Immigration Litigation

District Court Section

P.O. Box 868, Ben Franklin Station

Washington, D.C. 20044

Telephone: (202) 353-9162

Facsimile: (202) 305-7000

Email: erik.quick@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE:

I HEREBY CERTIFY that on this **19th day of June, 2009**, true copies of Defendants' Motion to Dismiss and the proposed Order were filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing via e-mail to the following:

Ruby Jeanette Parham
916 Wilkins Street
Hempstead, TX 77445
email: rjpatham@sbcglobal.net

/s/ Erik R. Quick

ERIK R. QUICK
Trial Attorney;
United States Department of Justice