

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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DR. ROGER C.S. LIN))	
No. 100-1, Yuanlinkeng Rd.,))	
Guishan Dist.,))	
Taoyuan City 333, Taiwan;))	
))	
JULIAN T.A. LIN))	
No. 100-1, Yuanlinkeng Rd.,))	
Guishan Dist.,))	
Taoyuan City 333, Taiwan; and))	
))	
TAIWAN CIVIL GOVERNMENT))	Civil Action No. 1:15-CV-295-CKK
No. 100-1, Yuanlinkeng Rd.,))	
Guishan Dist.,))	
Taoyuan City 333, Taiwan,))	
))	
Plaintiffs,))	
))	
v.))	
))	
UNITED STATES OF AMERICA; <i>et al.</i> ,))	
))	
Defendants.))	
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**DEFENDANT UNITED STATES OF AMERICA’S
REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFFS’ AMENDED COMPLAINT**

INTRODUCTION

Plaintiffs ask this Court to declare that the “Republic of China’s” nationality decrees of 1946 are legally invalid under various international instruments, and that the United States did not authorize the “Republic of China” to issue these decrees.¹ The United States explained in its opening memorandum (ECF No. 23) that this Court does not have jurisdiction to issue such declarations for numerous independent reasons. Nothing in Plaintiffs’ opposition memorandum (ECF No. 25) undermines that conclusion.

First, this case should be dismissed under binding D.C. Circuit precedent because any request, like Plaintiffs’ request, to issue declarations concerning the nationality status of residents on Taiwan presents a quintessential non-justiciable political question. *See Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009).

Second, this case should be dismissed because Plaintiffs cannot establish any of the constitutional elements of standing: (1) Plaintiffs cannot establish injury-in-fact because their alleged injury—their lack of an internationally accepted nationality, which Plaintiffs claim renders them effectively “stateless”—is not a personal and particular injury for these Plaintiffs; (2) the fact that Plaintiffs are without an internationally accepted nationality is not an injury fairly traceable to any conduct of the United States; and (3) they cannot establish redressability because their requested judicial declarations would not redress their alleged injury of lacking of an internationally accepted nationality.

Third, this case should be dismissed because Plaintiffs do not identify an applicable waiver of sovereign immunity. In response to the United States’ first motion to dismiss (ECF No. 12), Plaintiffs amended their Complaint by adding a claim for arbitrary denationalization

¹ Since the United States’ recognition of the People’s Republic of China as the government of China, it does not refer to the authorities on Taiwan as the “Republic of China.”

under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350. But the ATS does not waive the sovereign immunity of the United States. Further, the waiver of immunity in the Administrative Procedure Act does not apply here because Plaintiffs have not sued an official government agency or any federal officers in their official capacity. In addition, even if the APA’s waiver of sovereign immunity were arguably available, providing declaratory relief in this case involving sensitive foreign policy matters would exceed the Court’s equitable discretion under D.C. Circuit precedent.

Finally, this case is barred by the statute of limitations. Plaintiffs’ central claim is that the “Republic of China,” while acting as an agent of the United States, issued decrees in 1946 that unlawfully denied Taiwan residents of their Japanese nationality in violation of international law. This claim has no legal basis, but in any event would have accrued upon the issuance of the decrees in 1946, and is well outside the six-year limitations period applicable to claims against the United States. Plaintiffs argue that their claim is timely because the nationality decrees issued in the 1940s continue to have present effects—namely, that residents on Taiwan remain, in Plaintiffs’ terms, “stateless”—and thus these present effects constitute new actionable violations. But the D.C. Circuit has rejected this application of the continuing violations doctrine, repeatedly holding that the lingering effects of a prior unlawful act are not new actionable violations for purposes of the statute of limitations.

ARGUMENT

I. THE POLITICAL QUESTION DOCTRINE BARS ADJUDICATION OF PLAINTIFFS’ CLAIMS.

Under binding D.C. Circuit precedent, this case should be dismissed because it presents a non-justiciable political question regarding the nationality of residents on Taiwan. *See* Def. United States’ Mem. Supp. Mot. Dismiss Am. Compl. 21-27 (“Def.’s Mem.”) (ECF No. 23). In

Lin v. United States, 561 F.3d 502 (D.C. Cir. 2009), Plaintiff Roger C.S. Lin (who is again a plaintiff in this action) and a group of Taiwan residents sought a judicial declaration that they are nationals of the United States with all related rights and privileges, including the right to obtain U.S. passports. 561 F.3d at 503; *see also Lin v. United States*, 539 F. Supp. 2d 173, 176-77 (D.D.C. 2008). The D.C. Circuit, affirming a decision from this Court, held that the political question doctrine barred plaintiffs' claims because "[d]etermining [plaintiffs'] nationality would require us to trespass into a controversial area of U.S. foreign policy in order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan." 561 F.3d at 503-04. Similar to the declarations sought in *Lin*, Plaintiffs ask this Court to interpret foreign decrees so that Plaintiffs may secure "answers regarding their nationality and end their statelessness." *See* Pls.' Mem. Opp'n Def. United States' Mot. Dismiss Am. Compl. 41, 1 (ECF No. 25) (Pls.' Mem.'). Under *Lin*, the political question doctrine bars consideration of Plaintiffs' claims, and thus this case should be dismissed for lack of subject matter jurisdiction.

Plaintiffs argue in their opposition that this case is materially distinguishable from the first *Lin* case. This contention is meritless. Plaintiffs argue that in *Lin*:

This Court did not apply the political question doctrine to any question of nationality, but rather to the reading of international treaties and any question that would require identification of Taiwan's sovereign. It was the question of sovereignty, not any question of nationality . . . , that the Court in the 2006 *Lin* case cited as a reason for dismissal pursuant to the political question doctrine.

Pls.' Mem. 42-43 (internal citation omitted). Plaintiffs' reading of *Lin* is wrong. First, it is simply not correct to say that the nationality of Taiwan residents was not at issue in the first *Lin* case. The very declarations sought in *Lin* asked the Court to declare plaintiffs to be nationals of

the United States. *Lin*, 561 F.3d at 503; *Lin*, 539 F. Supp. 2d at 176-78. The Circuit, moreover, specifically held that “[d]etermining [Plaintiffs’] *nationality* would require us to trespass into a controversial area of U.S. foreign policy” and was therefore barred by the political question doctrine. *Lin*, 561 F.3d at 503-04 (emphasis added). In addition, the Circuit explained that resolving Plaintiffs’ claims regarding their nationality status would first require answering the “antecedent question” of identifying Taiwan’s sovereign, an issue that cannot be answered under the political question doctrine. *Id.* at 506. Similar to *Lin*, adjudicating Plaintiffs’ claims here, which are premised on the theory that the United States and the “Republic of China” share a principal-agent relationship spanning decades, would require the Court to address sensitive issues of foreign policy, including addressing the issue of sovereignty over Taiwan. The political question doctrine does not permit review of such claims. Under a straightforward application of *Lin*, this case should be dismissed as non-justiciable under the political question doctrine.

II. PLAINTIFFS LACK STANDING TO BRING THIS ACTION.

A. Plaintiffs Cannot Demonstrate A Cognizable Injury-In-Fact.

To constitute injury-in-fact under Article III, the injury must be “particularized,” which means that “the injury must affect the plaintiff in a personal and individual way.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992); *see also Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) (“injury must be particularized—which the [Supreme] Court has also described as personal, individual, distinct, and differentiated—not generalized or undifferentiated”) (collecting cases). Here, Plaintiffs cannot establish injury-in-fact because their alleged injury—the lack of an internationally recognized nationality of those individuals residing on Taiwan—is not a personal and particular injury for the Plaintiffs in this case. Instead, Plaintiffs’ alleged injury is one “suffer[ed] in some indefinite

way in common with people generally,” which does not meet Article III’s requirements.

Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); *see also Lance v.*

Coffman, 549 U.S. 437, 439 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

In their opposition, Plaintiffs argue that there is not an “‘upper limit on the number of people that may be injured by a defendant’s actions beyond which there is no standing,’” Pls.’ Mem. 34 (citing *Karim v. AWB Ltd.*, No. 06-cv-15400, 2008 WL 4450265, at *3 n.1 (S.D.N.Y. Sept. 30, 2008)), and thus “[t]he great number of individuals suffering from statelessness in any one region does not lessen or generalize the harm done to any one individual.” Pls.’ Mem. 35. But the problem here is not just that the alleged harm at issue is widely shared, but that it is too abstract and indefinite in nature to satisfy the concrete and particularized requirement for standing. *See, e.g., Pub. Citizen, Inc.*, 489 F.3d at 457 n.1 (citing *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998)); *Ass’n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 46 (D.D.C. 2012); *Little v. Fenty*, 689 F. Supp. 2d 163, 168 (D.D.C. 2010). Plaintiffs’ allegation that they, along with the millions of others who reside on Taiwan, are without an internationally accepted nationality presents the type of “abstract question of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches.” *Valley Forge Christian Coll. v. Ames. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (internal alterations, quotation marks, and citation omitted); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (*quoting Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (stating that courts should not be “‘called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though

judicial intervention may be unnecessary to protect individual rights.”). Thus, because Plaintiffs cannot establish a personal and particular injury, they cannot establish standing.

B. Plaintiffs’ Alleged Injury Is Not Fairly Traceable To The United States.

Plaintiffs also lack standing because they cannot show that their alleged injury—the lack of an internationally recognized nationality that Plaintiffs attribute to the nationality decrees issued by the “Republic of China” in 1946—is fairly traceable to the United States. *See* Def.’s Mem. 18-20.

Plaintiffs’ opposition memorandum is largely unresponsive to the causation arguments the United States articulated in its opening memorandum. Plaintiffs repeat their theory that the “United States is liable for the challenged acts of its agent, the ROC,” *see* Pls.’ Mem. 36, but they do not explain how their alleged injury—the lack of an internationally recognized nationality—is fairly traceable to a particular challenged action of the United States. For the reasons discussed in our opening memorandum, including the fact that almost seventy years have passed since the 1946 nationality decrees were issued and numerous intervening events involving a number of nonparty sovereign nations have occurred, Plaintiffs cannot establish that their alleged statelessness was caused by a particular act of the United States.

C. This Court Cannot Redress Plaintiffs’ Alleged Injuries.

Plaintiffs also cannot establish that their alleged injury—*i.e.*, lacking an internationally recognized nationality—is redressable by a favorable decision from this Court. *See* Def.’s Mem. 20-21. Redressability focuses on whether Plaintiffs’ injury would likely be cured if they secured the relief sought. *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (“Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff.”) (footnote omitted); *see*

also *Urban Health Care Coal. v. Sebelius*, 853 F. Supp. 2d 101, 107 (D.D.C. 2012). For relief in this case, Plaintiffs seek declarations stating that the “Republic of China’s” nationality decrees of 1946 are legally invalid under various international instruments, and that the United States did not authorize the “Republic of China” to issue these decrees. *See* Am. Compl., Relief Requested.

Plaintiffs’ requested declarations would not redress their alleged injury of lacking an internationally recognized nationality. Plaintiffs do not argue that these declarations, interpreting international decrees issued over seventy years ago, would provide them with an internationally recognized nationality or directly affect their nationality status. *See* Pls.’ Mem. 38-39, 42. Instead, Plaintiffs argue that their “sought remedy, a declaration by an American court that the National Decrees violated international law and were ineffective would significantly support the Plaintiffs’ efforts in Taiwan and around the world, and within international bodies such as the United Nations, to end their statelessness.” Pls.’ Mem. 39. However, redressability cannot rest on speculation concerning the discretionary actions that non-parties may take in the future. *See Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 442 (D.C. Cir.1999) (stating that even if the plaintiff prevailed, “it has never explained how, or under what legal theory, it would be entitled to recover” against non-parties). “When redress depends on the cooperation of a third party, it becomes the burden of the [plaintiff] to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.” *U.S. Ecology, Inc. v. U.S. Dep’t of Interior*, 231 F.3d 20, 24–25 (D.C. Cir.2000) (internal quotation marks omitted). Here, Plaintiffs allege no facts plausibly demonstrating that their requested declarations will be used “within international bodies such as the United Nations [] to end their statelessness.” Pls.’ Mem. 39. Thus, because resolving Plaintiffs’ alleged injury of lacking an internationally recognized nationality clearly involves “independent actors not before the court

and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” *Lujan*, 504 U.S. at 562 (citation omitted), Plaintiffs cannot establish redressability.

III. PLAINTIFFS’ CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY AND, ALTERNATIVELY, DECLARATORY RELIEF IS NOT APPROPRIATE IN THIS CASE INVOLVING SENSITIVE FOREIGN AFFAIRS MATTERS.

“It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction.” *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 40 (D.D.C. 2010) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Plaintiffs argue that their alleged cause of action against the United States is “the federal common law tort of Arbitrary Denationalization” under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350. Pls.’ Mem. 3; *see also id.* 18-26. This Court lacks subject matter jurisdiction over Plaintiffs’ ATS claim, however, because it is barred by sovereign immunity.²

As an initial matter, the Alien Tort Statute itself does not waive the sovereign immunity of the United States. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Escarria-Montano v. U.S.*, 797 F. Supp. 2d 21, 24-25 (D.D.C. 2011); *see also El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836, 858 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (stating that the ATS has never been “held to cover suits against the United States or United States Government officials”).

Recognizing that the ATS does not waive the sovereign immunity of the United States, Plaintiffs contend that the waiver of immunity in the Administrative Procedure Act (“APA”)

² This memorandum does not address the extent to which the Taiwan authorities (referred to by Plaintiffs as the “Republic of China”) are immune. However, the United States notes that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (“FSIA”), applies to “foreign states[.]” While the United States does not recognize the “Republic of China” as a government of a foreign state, the FSIA applies to the Plaintiffs’ claims against the “Republic of China” pursuant to 22 U.S.C. § 3303(b)(1), which provides that U.S. laws applicable to “foreign . . . states . . . apply with respect to Taiwan.”

applies to their claims for declaratory relief. Plaintiffs are mistaken. The APA's waiver of sovereign immunity "applies only to suits for specific relief against an agency or officer acting or failing to act in an official capacity." *Schonberg v. Fed. Election Comm'n*, 792 F. Supp. 2d 20, 27 (D.D.C 2001); *see also* 5 U.S.C. § 702 (stating that an action "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States."). The APA's waiver of immunity does not apply in this case because Plaintiffs have not sued an official government agency or any federal officers in their official capacity. Instead, Plaintiffs have sued the "United States." *See* Am. Compl., ¶ 17. In addition, nowhere in the Amended Complaint does Plaintiff identify a federal agency that, or an officer of the United States who, acted or failed to act in a manner that violates a particular legal duty. Therefore, the APA's waiver of sovereign immunity does not apply here, and Plaintiffs have not established that the United States has waived sovereign immunity in the context of this action.³

In addition, even if the APA's waiver of sovereign immunity were arguably available in this case, providing declaratory relief in this case would constitute an abuse of discretion under D.C. Circuit precedent. As the Circuit has explained, "all the bases for nonmonetary relief – including injunction, mandamus and declaratory judgment – are discretionary." *Sanchez-*

³ In their opposition, Plaintiffs suggest that they need not identify a waiver of sovereign immunity because *jus cogens* norms of international law are binding without the consent of a sovereign. *See* Pls.' Mem. 29. However, a state's consent to be bound by international law and a state's consent to be subject to the jurisdiction of a court or tribunal to adjudicate whether the state has violated international law are two very distinct questions. The United States does not waive sovereign immunity by allegedly committing violations of *jus cogens* norms of international law. *See, e.g., Smith v. Scalia*, 44 F. Supp. 3d 28, 39 (D.D.C. 2014). In any case, Plaintiffs provide no basis for concluding that such norms of international law are at issue in this case.

Espinoza, 770 F.2d at 207-08; *see also Al-Aulaqi*, 727 F. Supp. 2d at 42. The APA “specifically provides that its judicial review provision does not affect ‘the power or duty of the court to dismiss any action or deny relief on any . . . appropriate legal or equitable ground.’” *Sanchez-Espinoza*, 770 F.2d at 208 (citing 5 U.S.C. § 702). The Circuit, moreover, has held that in areas of “sensitive” foreign affairs matters, providing declaratory relief would actually be an abuse of the court’s discretion. *Sanchez-Espinoza*, 770 F.2d at 208 (holding that providing discretionary relief into “so sensitive a foreign affairs matter . . . would be an abuse” of the court’s power); *see also Al-Aulaqi*, 727 F. Supp. 2d at 42 (declining to grant discretionary relief that would require the Court to interject itself into a “sensitive” foreign affairs matter). Plaintiffs ask the Court to interfere in the Executive Branch’s conduct of foreign relations and complex foreign affairs matters. As the Circuit has cautioned, providing discretionary relief under these circumstances would constitute an abuse of discretion.

IV. PLAINTIFFS’ CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Even if Plaintiffs could establish a cause of action for which the United States has waived sovereign immunity, such a claim would be time barred. *See* Def.’s Mem. 14-16. Under 28 U.S.C. § 2401(a), “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” Here, Plaintiffs’ central claim is that “[w]hile acting as an agent of the United States, the ROC promulgated nationality decrees in 1946 that acted to illegally strip Japanese nationals living on Taiwan, as well as their descendants, of their Japanese nationality in violation of international law.” Am. Compl. ¶ 6 (emphasis added); *see also id.* ¶¶ 11-13, 35, 37, 39-42, 87, 88. This alleged claim is well outside the six-year limitation period in section 2401(a) because it would have accrued in 1946 upon the issuance of the nationality decrees, almost seventy years ago. In addition, even if

the claims raised in this case could be said to have arisen at some point after 1946, the basis for them would at least have been known to the Plaintiffs more than six years ago. Indeed, Plaintiffs filed their first lawsuit raising claims based on the same underlying circumstances in 2006. *See Lin*, 539 F. Supp. 2d at 173.

Plaintiffs nonetheless argue that their claims are not time-barred because their claim against the United States constitutes “a continuing violation of international law over which no statute of limitations has begun to run.” Pls.’ Mem. 32; *see id.* at 30-32. Plaintiffs contend that their “nationality rights were revoked in the 1940s” and “the creation and perpetuation of the Plaintiffs’ statelessness[] continues to the present time.” *Id.* at 31. In other words, Plaintiffs’ argument is that the nationality decrees issued in the 1940s continue to have present effects—namely, what they refer to as “statelessness”—and these present effects constitute new actionable violations for purposes of the statute of limitations.

The D.C. Circuit has repeatedly rejected this application of the continuing violations doctrine. As the Circuit has explained, “[a] lingering effect of an unlawful act is not itself an unlawful act” for purposes of the continuing violations doctrine, *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (citing *Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999)), and the “mere failure to right a wrong . . . cannot be a continuing wrong which tolls the statute of limitations,” for if it were, “the exception would obliterate the rule,” *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977). *See also AKM LLC dba Volks Constructors v. Sec’y of Labor*, 675 F.3d 752, 757 (D.C. Cir. 2012); *Earle v. District of Columbia*, 707 F.3d 299, 306-07 (D.C. Cir. 2012). Here, Plaintiffs allege that they are suffering from the lingering effects of the nationality decrees issued in the 1940s, but these lingering effects are not new, actionable violations under the continuing violations doctrine. In addition, Plaintiffs’ Amended Complaint

alleges no unlawful actions committed by the United States within the limitations period.

Plaintiffs' claims, therefore, are barred by the statute of limitations.

CONCLUSION

For the reasons stated above and those set forth in Defendant's opening memorandum, Defendant United States respectfully requests that the Court grant its motion to dismiss the Amended Complaint.

Dated: August 28, 2015

Respectfully submitted,

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