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

SABRINA DE SOUSA,

Plaintiff,

v.

DEPARTMENT OF STATE, *et al.*,

Defendants.

Case No. 09-cv-896 (RMU)

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

By this action, Plaintiff Sabrina De Sousa seeks to have this Court direct the United States Department of State to assert immunity on her behalf in a foreign judicial proceeding. To do so, however, would require this Court to subject to judicial review the exercise of a discretionary right that has consistently been viewed under U.S. and international law as belonging to the state, and thereby strip the Executive Branch of the discretion that all governments enjoy with respect to the assertion or waiver of immunity consistent with the needs of the state. Doing so would inject the Court into matters of foreign policy, international diplomacy, and treaty practice which are not the province of the judiciary. Such matters, which are "delicate, complex, and involve large elements of prophecy," are "wholly confided by our Constitution to the political departments of the government, Executive and Legislative" and "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Put simply, Plaintiff claims that Defendants¹ have injured her by not exercising the prerogative of the United States to assert diplomatic or consular immunity in an Italian judicial proceeding in which she is being tried *in absentia*. She claims that this inaction violates the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; violates her Fifth Amendment liberty interest in pursuing a career in foreign affairs; and violates her right to travel abroad. None of her claims are actionable. To the contrary, they must fail because, *inter alia*, inquiry into the United States' sovereign discretion regarding assertions of its immunity is barred by the political question doctrine, the assertion of immunity is committed to unreviewable agency discretion, and Plaintiff's allegations fail to state claims for which relief can be granted.

BACKGROUND

Plaintiff alleges that she was serving as a consular officer with the Department of State at the U.S. Consulate in Milan, Italy, in February 2003. Compl. ¶ 35.² On February 17, 2003, an Islamic cleric named Hassan Mustafa Osama Nasr (a.k.a. Abu Omar), was allegedly kidnapped from Milan and flown to Egypt by operatives of the United States and/or Italian governments. *Id.* ¶¶ 37-38. Plaintiff alleges that her tour of duty ended in January 2004, and that she then returned to the United States and continued her employment with the government. *Id.* ¶ 39. After her return, however, De Sousa alleges that Italian authorities issued arrest warrants and indictments for a number of United States government officials, including De Sousa, for kidnapping Abu Omar. *Id.* ¶¶ 40-41. Abu Omar has also brought a separate civil action in Italy against various defendants related to his alleged kidnapping. *Id.* ¶ 41.

¹ Defendants include the U.S. Department of State; Hillary Rodham Clinton, Secretary of the U.S. Department of State; and the United States.

² Pursuant to Fed. R. Civ. P. 12, and solely for purposes of the present motion, Defendants accept the factual allegations appearing in the Complaint as true.

Although Plaintiff “categorically denies any involvement” in the alleged kidnapping,³ and despite a ruling by Italy’s Constitutional Court excluding evidence gathered in violation of Italian state secrecy from use in the Italian proceedings, the proceedings have moved forward and are expected to be concluded soon. *Id.* ¶¶ 42-44.⁴

The Complaint further alleges that, despite the pending proceedings in and outstanding warrant issued from Italy, Plaintiff traveled to India in March 2008, and that in October 2008, she requested permission from the United States government to do so again. *Id.* ¶¶ 58-59. The United States government responded that, in light of the Italian proceedings, travel to India would risk her possible arrest and extradition. *Id.* Though she makes no allegation that she was told as much, Plaintiff alleges that it was her “understanding” that if she did travel to India, she would risk termination of her employment. *Id.* ¶ 60. She was not terminated, but nonetheless resigned from her position in February 2009. *Id.* ¶ 64.

Plaintiff contends that because of her designation as a consular official in Milan when the alleged actions took place, she is entitled to diplomatic and/or consular immunity pursuant to the Vienna Conventions on Diplomatic and Consular Immunity (the “VCDR” and “VCCR,” respectively), and that the Defendants had an obligation to assert her immunity under these treaties in the Italian proceedings, Compl. ¶ 73. She also alleges, *inter alia*, that, as a result of Defendants’ inaction, false accusations and “inaccurate descriptions” regarding her are memorialized in her personnel files and may be passed on, in the future, to potential employers. *Id.* ¶ 86. According to Plaintiff, in light of the still-pending proceedings and arrest warrant, she

³ Plaintiff also contends that if the allegations of involvement were true, “her actions clearly fell within the scope of her official duties.” *Id.* ¶ 42.

⁴ It has been reported that the Italian proceedings are adjourned until September 23, 2009. *See Abu Omar, in autunno requisitoria e sentenza*, Corriere Canadese, July 9, 2009, available at

can neither obtain employment nor travel internationally, and these alleged impediments render the government liable for violations of her rights.

STANDARDS OF REVIEW

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 66 (D.D.C. 2005); *Brady Campaign to Prevent Gun Violence v. Ashcroft*, 339 F. Supp. 2d 68, 72 (D.D.C. 2004).

Although the plaintiff is entitled to reasonable factual inferences that can be drawn in her favor, *see Artis v. Greenspan*, 158 F.3d 1301, 1306 (D.C. Cir. 1998), a Rule 12(b)(1) motion “imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority,” *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). For this reason, “the plaintiff’s factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim.” *Id.* at 13-14 (internal quotation marks and citation omitted).

Rule 12(b)(6) allows dismissal of an action if a plaintiff fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). As clarified in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests[.]’” *Id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). To provide the “grounds” of “entitle[ment] to relief,” a plaintiff must furnish “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. Moreover, something beyond

... mere possibility ... must be alleged[.]” *Id.* at 557-58. That is, the facts alleged in the complaint “must be enough to raise a right to relief above the speculative level,” *id.* at 555, or must be sufficient “to state a claim for relief that is plausible on its face,” *id.* at 570; *see also Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).⁵ While the complaint “is construed liberally in the [plaintiff’s] favor, and [the Court should] grant [the plaintiff] the benefit of all inferences that can be derived from the facts alleged,” *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994), the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint; nor must the Court accept the plaintiff’s legal conclusions, *id.*; *see also Iqbal*, 129 S. Ct. at 1949-50.

ARGUMENT

Plaintiff erroneously claims that the U.S. government’s non-assertion of diplomatic or consular immunity in a foreign criminal proceeding can be subject to judicial review in a civil action against the U.S. government in federal district court. These immunities derive from international treaties entered into by sovereign nations, including the United States. And a treaty is, of course, “primarily a compact between independent nations.” *Medellín v. Texas*, ___ U.S. ___, 128 S. Ct. 1346, 1357 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). By nature, diplomatic and consular immunities are rights held by the state, not the individual, and are accorded for the benefit of the state. Hence, in the face of a foreign state’s exercise of jurisdiction over a United States diplomat or consular officer, the United States may assert, not

⁵ The Court in *Twombly* referred to this newly-clarified standard as “the plausibility standard.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 560 (disavowing *Conley*’s “no set of

assert, or waive such immunities entirely at its discretion. Moreover, decisions regarding the whether or how the United States might raise these immunities abroad are wholly confided in the Executive Branch, not the courts. Accordingly, all of Plaintiff's claims are nonjusticiable under the political question doctrine because they rest upon her contention that the United States should assert immunity on her behalf in foreign proceedings.

Plaintiff's Complaint likewise fails to state a claim for which relief can be granted. Plaintiff's APA claim fails because the United States' assertion, as sovereign, of its immunity abroad is committed to agency discretion and is therefore unreviewable. In addition, Plaintiff fails to state a claim under the APA because the treaty on which she relies does not create an individually enforceable right to require the government to assert immunity in a foreign proceeding. Plaintiff's Fifth Amendment liberty claim fails for a variety of reasons — most centrally because she has failed to allege facts that would bring her complaint within the narrow category of claims for interference with her right to follow her chosen profession. And Plaintiff fails to state a claim for violating her right to international travel because she has not alleged that the United States has in any way regulated or restricted her right to travel.

I. Plaintiff's Claims Are Barred By The Political Question Doctrine And Are Not Subject To Judicial Review.

Plaintiff's Complaint contends that the United States should have asserted immunity on Plaintiff's behalf from Italian judicial proceedings under two treaties: (1) the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, [1972] 23 U.S.T. 3227, T.I.A.S. No. 7502 ("VCDR"); and (2) the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77,

facts" language).

T.I.A.S. No. 6820 (“VCCR”).⁶ However, the immunities provided by these treaties are intended for the benefit of the sovereign, not the individuals on whose behalf immunity may be asserted. *See Breard v. Greene*, 523 U.S. 371, 378 (1998). Moreover, whether the United States should assert treaty-based diplomatic or consular immunity on behalf of an individual in a foreign proceeding is a quintessential foreign policy matter. Accordingly, the political question doctrine precludes judicial review of Plaintiff’s claim that the United States should have acted differently in Plaintiff’s case by asserting these treaty-based immunities on her behalf. And because Plaintiff’s APA, Fifth Amendment liberty-interest claim and international travel claim are all similarly premised on the allegation that the United States has not asserted immunity on Plaintiff’s behalf, none of these claims are justiciable.

Under the political question doctrine, “courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary,” *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (internal quotations and citation omitted), and “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch,” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). The Supreme Court has identified six factors as indicating the presence of a political question:

⁶ Plaintiff’s complaint also references the North Atlantic Treaty Organization Status of Forces Agreement (“NATO-SOFA”), June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846. Compl. ¶¶ 25-28, 50. However, Plaintiff alleges that she was a consular officer at the Consulate; she makes no allegation that she was at any relevant time a member of the military “force” covered by the Agreement. See NATO-SOFA art. I, ¶ 1 (defining “force”). Accordingly, the provisions of that treaty can have no bearing on her claims. *See Twombly*, 550 U.S. at 555, 570.

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). If a claim implicates any one of these factors, the claim must be dismissed as presenting a nonjusticiable political question. *Bancoult*, 445 F.3d at 432. Plaintiff's claim that the United States should have invoked treaty-based immunities on her behalf in the Italian proceedings squarely implicates at least the first three, most critical *Baker* factors.⁷

First, not the VCDR, nor the VCCR, nor any other source provides for any standards for determining when or whether it is proper for a state, in the face of a foreign prosecution, to assert, not assert, or waive diplomatic or consular immunity. This is unsurprising, since whether to assert diplomatic or consular immunity from a foreign court's jurisdiction is a quintessential foreign policy question not cabined by legal standards. As the VCDR and VCCR make clear, the diplomatic and consular immunities provided by those treaties are solely intended to facilitate diplomatic or consular relations between the states concerned and are not to benefit individuals to whom the treaties' immunity provisions apply. The VCDR states expressly that "the purpose of such [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." VCDR pmb.; see Yoram Dinstein, *Defences*, in 1 Substantive and Procedural Aspects of International

⁷ The Supreme Court has observed that the *Baker* factors are "probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

Criminal Law 371, 386-88 (Gabrielle McDonald & Olivia Swaak Goldman eds., 2000) (diplomatic immunity is not personal to the diplomat but belongs to the diplomat's state); Eric C. Surette, Annotation, *Applicability of Diplomatic Immunity Under Vienna Convention and Diplomatic Relations Act*, 1 A.L.R. Fed. 2d. 351 § 2 (2005) ("Diplomatic immunity is not a privilege of the person, but of the state that a diplomatic agent represents."). The VCCR likewise unambiguously explains that "the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." VCCR pmbl. As the Supreme Court noted in *Breard v. Greene*, "[a]ny rights that the Consul General [of Paraguay] might have by virtue of the [VCCR] exist for the benefit of Paraguay, not for him as an individual." 523 U.S. at 378.

Because diplomatic and consular immunity exist for the benefit of the sovereign and not the diplomatic or consular agent, it is well established that a state can waive immunity at its discretion. *See* VCDR art. 32(1) ("The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State."); VCCR art. 45(1) ("The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44."); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988); Restatement (Third) of Foreign Relations Law of the United States (1986) § 464, cmt. j.⁸ *A fortiori*, it is within the sovereign's sole discretion whether or not to formally assert an individual's diplomatic or consular immunity from a foreign state's judicial process.⁹ Precisely because the United States retains broad discretion to assert, not assert, or waive diplomatic or

⁸ Defendants note that Plaintiff alleges only that the United States has thus far failed to assert immunity, not that the United States has *waived* any such immunity. *See* VCCR art. 45(2).

consular immunity, there are no “judicially discoverable and manageable standards for resolving” Plaintiff’s claim that the United States should have asserted immunity on her behalf. *Baker*, 369 U.S. at 217.

Moreover, foreign policy questions related to diplomatic or consular immunity are constitutionally entrusted to the Executive Branch. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (“[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government.”). Accordingly, giving “due respect for the Constitution’s separation of powers, and [recognizing their] own weak tools in this area,” therefore, courts are “require[d] ... to refrain from venturing heedlessly into the realm of foreign affairs.” *Mora v. New York*, 524 F.3d 183, 201 (2d Cir. 2008). Indeed, the Supreme Court has specifically instructed courts to exercise “‘great caution’ when considering private remedies for international law violations because of the risk of ‘impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.’” *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004)). Because “[t]he fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy,” *Bancoult*, 445 F.3d at 433, this Court could not resolve Plaintiff’s claims “without an initial policy determination of a kind clearly for nonjudicial discretion,” *Baker*, 369 U.S. at 217.

In short, this Complaint presents a textbook political-question issue, to wit, matters “vital and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [that] are so exclusively entrusted to the political branches of government as to

⁹ This is so regardless of whether, as a matter of a receiving state’s domestic law, an individual may, of her own accord, raise the question of immunity in a domestic legal proceeding

be largely immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Plaintiff’s APA claim that the United States should have asserted diplomatic or consular immunity on her behalf in the Italian criminal proceedings against her is nonjusticiable. And because Plaintiff’s Fifth Amendment liberty interest and international travel claims are likewise premised on her immunity claim, none of Plaintiff’s claims are justiciable and Plaintiff’s suit must be dismissed for lack of subject-matter jurisdiction.¹⁰

II. Plaintiff’s Three Claims Fail As A Matter Of Law.

Even assuming Plaintiff’s Complaint were justiciable, Plaintiff’s claims that the Government’s failure to assert immunity entitles her to relief under the APA, or that the Defendants have violated her Fifth Amendment right to pursue a career or her Fifth Amendment right to travel, are insufficient as a matter of law and must be dismissed.

A. Plaintiff Fails To State A Claim Under The APA.

Plaintiff’s Complaint relies on the VDCR and the VCCR as the applicable sources of immunity. However, insofar as Plaintiff’s claims rely on the VCDR, they necessarily fail because that treaty does not apply to Plaintiff’s allegations. The VCDR provides for immunity from prosecution in foreign states for ambassadors and embassy (“mission”) staff having

in a receiving state.

¹⁰ Plaintiff’s Complaint relies most directly on the immunity question to assert claims against the United States. To the extent Plaintiff attempts to hold the United States responsible for other alleged harms, such as those flowing from the Italian proceedings, the alleged EUROPOL warrant, and other acts of independent third-party sovereigns, her claims must fail because they are not justiciable and for lack of standing. Such alleged harms are neither caused by Defendants, nor is this Court in any position to redress them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (plaintiff bears burden of demonstrating injury, causation, and redressability); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (“[A] plaintiff must demonstrate standing for each claim he seeks to press.”); *see also Young Am. Corp. v. Affiliated Computer Servs. (ACS), Inc.*, 424 F.3d 840, 845 (8th Cir. 2005) (holding that it was merely speculative that requested relief would redress harm because there was no evidence that

diplomatic rank. VCDR, arts. 1, 31. Plaintiff alleges that in 1998 she became a member of the United States' diplomatic mission to Italy, *i.e.*, a member of the diplomatic staff of the American Embassy in Rome. *See* Compl. ¶ 34. While serving as a member of that mission, Plaintiff would have been covered by the VCDR. Plaintiff further alleges, however, that from May 2001 to January 2004, including the time of the alleged kidnapping of Abu Omar in 2003, she was no longer a member of the diplomatic staff of the Embassy in Rome but was assigned to the U.S. Consulate in Milan. Compl. ¶¶ 35, 39. As a consequence, any immunity that she may have enjoyed during her assignment in Milan could not have been derived from the VCDR, which applies only to the members of diplomatic, not consular, missions.

Insofar as Plaintiff relies on the consular immunity provision of the VCCR, her claims fail for several reasons. First, decisions and actions by the United States regarding consular immunity are “committed to agency discretion” and are therefore unreviewable under the APA. 5 U.S.C. § 701(a)(2). This exception to APA review precludes judicial scrutiny of agency actions where the law at issue “is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Dismissal pursuant to this exception is necessary where, as here, a court is asked to subject foreign affairs determinations left entirely to the Executive Branch’s discretion to judicial review. *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1999). In other words, where “the very act of judicial review risks an impermissible interference with the exercise of a power — say, the foreign affairs power — for which the Constitution makes the Executive Branch of government primarily responsible, the Court has found the agency action ‘committed to agency discretion.’” *Ward v. Skinner*, 943 F.2d

defendant could bind third-party actors).

157, 160 (1st Cir. 1991). Thus, where a treaty provides broad discretion in its implementation, implementation decisions regarding foreign policy are discretionary and unreviewable. *See Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991).

Here, all of these concerns are implicated. The United States' assertion of immunity abroad is a question steeped in foreign affairs judgments that lie squarely within the purview of the Executive, and manifestly outside the competence of the judiciary. Moreover, as explained earlier, the sovereign's actions regarding diplomatic or consular immunity are plainly committed to Executive discretion. *See* 22 U.S.C. § 2656 (vesting delegated authority regarding foreign affairs with the Secretary and Department of State). Nowhere in the VCCR are there any standards for determining when it is proper for a state to assert, not assert, or waive diplomatic or consular immunity. To the contrary, the Executive Branch's retained discretion is very broad indeed: The only "law" to which Plaintiff can point is the VCCR itself, and that treaty fails to require any action on the part of the United States relative to asserting immunity in foreign judicial proceedings. At best, it requires that a *receiving* state honor consular immunity when it is shown to apply in a given case; it fails to speak to any related obligation of the *sending* state. *See* VCCR art. 42, art. 43.¹¹ By preserving the sending state's discretion to waive immunity at will, the VCCR leaves undisturbed the Executive's traditional foreign policy prerogatives — and thereby places them beyond the courts' powers of review. *Bagguley*, 953 F.2d at 662; *see also Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 516 F. Supp. 2d 43, 59 (D.D.C. 2007).

Even if Plaintiff could locate meaningful and justiciable standards for review, her claim would still fail because there is no basis for APA review of a sovereign's treaty obligations at the

behest of private litigants unless the treaty itself affords a privately enforceable right. *See Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 942-43 (D.C. Cir. 1988) (stating that “the APA provision on reviewability is *always* dependant on other law” and “does not grant judicial review” where there is no basis for it in law) (quoting 5 K. Davis, *Administrative Law Treatise* § 28.1, at 256 (2d ed. 1984) (emphasis in original)). While some treaties are properly construed to provide rights that are judicially enforceable by individuals, as a factual matter, “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” Restatement (Third) of Foreign Relations Law of United States § 907, cmt. a (1986); *Medellín*, 128 S. Ct. at 1357 n.3 (quoting the same Restatement provision); *see also Icelandic S.S. Co. v. U.S. Dep’t of the Army*, No. 98-cv-2631, 1999 U.S. Dist. LEXIS 1091, at *12 (Feb. 3, 1999) (“If there is no private right of action, the alleged treaty violations cannot form the basis to support judicial review under the APA.”), *rev’d on other grounds*, 201 F.3d 451 (D.C. Cir. 2000).

Here, Plaintiff cannot demonstrate that either the VCDR or the VCCR creates an individually enforceable right to subject the sovereign’s non-assertion of immunity to judicial review. *United States v. Alvarez-Machain*, 504 U.S. 655, 665 (1992) (“In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.”); *Medellín*, 128 S. Ct. at 1357-58 (“Because a treaty ratified by the United States is ‘an agreement among sovereign powers,’ we have also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as the ‘postratification understanding’ of signatory nations.”) (quoting *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996)). In fact, both treaties confirm that immunity is a discretionary prerogative of the sending state and that the

¹¹ Nor are there any such standards in the VCDR. *See* VCDR pmbl.; art. 32(1).

exercise of that prerogative is reserved to the sovereign. *See* Part I, *supra*. Since the sending state retains full discretion to waive immunity, it would make little sense to construe the treaty to provide for domestic judicial review of whether an individual has a right to have the United States assert immunity in her favor in a given case, let alone to construe the treaty implicitly *to require* that immunity be asserted — precisely the relief sought in this action. *See* Compl. at 22. And numerous courts have concluded that other provisions of the VCCR do not give rise to individually enforceable rights. *See Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008); *Cornejo v. County of San Diego*, 504 F.3d 853, 859-60 (9th Cir. 2007); *United States v. Jimenez-Nava*, 243 F.3d 192, 197 (5th Cir. 2001); *Li*, 206 F.3d 56, 67 (1st Cir. 2000) (en banc) (Selya, J., and Boudin, J., concurring); *but see Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007).

The Supreme Court has, moreover, instructed that federal courts must accord “great weight” to the views of the Executive Branch on issues of treaty interpretation, *Medellín*, 128 S. Ct. at 1361 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 (1982)); *see also Li*, 206 F.3d at 67 (Selya, J., and Boudin, J., concurring) (“[W]hen foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President.”), and the Executive Branch is of the view that neither the VCDR nor the VCCR create an individually enforceable right to subject the sovereign’s actions regarding the assertion

of immunity to judicial review. De Sousa's APA claim must, therefore, be dismissed.¹²

B. De Sousa Fails To State A Fifth Amendment Liberty Claim For Being Prevented From Following Her Chosen Profession.

Plaintiff's claim that Defendants have violated her Fifth Amendment liberty interests by preventing her from pursuing her chosen profession fares no better. According to the Complaint, Defendants have "permitted inaccurate and defamatory information regarding De Sousa to be publicly reported world-wide." Compl. ¶ 82. Although she fails to identify precisely how she would expect Defendants to have curtailed the actions and speech of unrelated third parties (presumably Italian judicial authorities and the world-wide media), Plaintiff alleges that by failing to "correct or otherwise address" allegations regarding her, the government has "seriously damaged her reputation" such that, now that she has resigned from a position with the government, she may no longer pursue her chosen profession in foreign affairs. Id. ¶¶ 84, 98.

While the courts have recognized a limited cause of action under the Due Process clause of the Fifth Amendment for violating a person's right to "follow a chosen profession free from unreasonable government interference," *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003) (identifying this right as emerging from the liberty concept of the Fifth

¹² De Sousa also states that Defendants have failed to provide her with legal representation in the criminal proceedings in Italy. To the extent this allegation could be deemed some sort of claim under the APA, the issue is moot because representation for De Sousa has been authorized by the Department of Justice. See Ex. A (U.S. Dep't of Justice, Memorandum for File, Aug. 26, 2009); see also 28 C.F.R. § 50.15 (Department of Justice regulations governing the provision of legal representation for federal officials); *Stillman v. CIA*, 517 F. Supp. 2d 32 (D.D.C. 2007) ("[T]he mootness doctrine requires a federal court to refrain from deciding [a claim] if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (internal quotations and citations omitted); see also *Am. Council of Blind v. WMATA*, 133 F. Supp. 2d 66, 74 (D.D.C. 2001) ("The potential of declaratory relief alone cannot save an action from mootness if the object of the suit is not some ongoing underlying policy, but ... an isolated agency action.") (quoting *Columbian Rope Co. v. West*, 142 F.3d 1313, 1317 n.3 (D.C. Cir.

Amendment), it applies only in two narrow types of cases: (1) an act of official defamation in conjunction with an adverse employment action (a “reputation-plus” claim); or (2) the combination of an adverse employment action and a “stigma or other disability” that forecloses a plaintiff’s freedom to take advantage of other job opportunities (a “stigma or disability” claim), *Smith v. Harvey*, 541 F. Supp. 2d 8, 16 (D.D.C. 2008). De Sousa appears to pursue her claim under a blend of the two theories, but on its face, her claim fails as a matter of law.

1. Constructive Discharge Claims Are Not Actionable.

First, De Sousa admits that prior to her resignation, she maintained her employment and makes no credible allegation of any threat of termination. *See* Compl. ¶ 64; *cf. Iqbal*, 129 S. Ct. at 1949-50.¹³ Nonetheless, she claims she was circumstantially compelled to resign because, she alleges, of “[t]he dissemination of derogatory information, combined with the ongoing criminal proceedings in Italy,” and that this constructive discharge is actionable. Compl. ¶¶ 64, 84. This Court has squarely held, however, that a constructive discharge is insufficient to state a claim under the Fifth Amendment. *Evans v. District of Columbia*, 391 F. Supp. 2d 160, 167-68 (D.D.C. 2005). Under either the “reputation-plus” or “stigma or disability” theory, the Plaintiff must demonstrate the existence of an adverse action, which must, at a minimum, constitute “a discharge from government employment or at least a demotion in rank and pay,” *O’Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1983), and voluntary resignation is neither of these things.

1998) (internal quotations omitted).

¹³ De Sousa’s only allegation in this regard is that it was her “understanding” that if she traveled abroad, notwithstanding the government’s warnings about the risk of apprehension, she would risk termination. Not only is this precisely the type of unsubstantiated recitation rejected by the Supreme Court (*see Twombly*, 550 U.S. at 555, 557-58; *Iqbal*, 129 S. Ct. at 1949-50), but it is irrelevant: Had she put her “understanding” to the test and traveled to India, despite the risks, she theoretically *may* have been at risk of termination, but she did not do so. Accordingly, prior to her resignation, there was no credible threat of termination by the government.

Evans, 391 F. Supp. 2d at 167-68; *see also Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995) (termination or change in status required). Reliance on a theory of constructive discharge is insufficient because, *inter alia*, “[u]nder either theory, a threshold question is whether an adverse action actually took place,” and such “action” must be both official and adverse. *Evans*, 391 F. Supp. 2d at 167. A resignation, of course, is an action taken by an individual, and cannot be deemed an “official” action taken by governmental authority. In any event, “[b]ecause resignation from one’s position, *even under the threat of termination*, does not carry the same stigma as an official action such as termination, it does not have so negative an effect on future employment opportunities as to raise due process concerns.” *Id.* at 168 (emphasis added).¹⁴ De Sousa’s Complaint not only falls well short of alleging an adverse action, but also underscores the basis for this rule: Prior to her resignation, the government did not impugn De Sousa; on the contrary, it continued to employ her despite the purported allegations against her, thus buttressing, rather than harming, her reputation (not to mention her employability). Compl. ¶ 84.

2. De Sousa’s “Stigma Or Disability” Claim Fails As A Matter Of Law.

Even if an alleged constructive discharge were cognizable as an adverse action, Plaintiff’s claim would still fail. Not only has she failed to identify an adverse action, but, to the extent she alleges a “stigma or disability” claim, she fails to allege plausibly, as she must, that the government has acted so as to either (a) automatically bar plaintiff from a specific set of positions within the government, or (b) generally block her from pursuing employment in her chosen field of interest. *Holman v. Williams*, 436 F. Supp. 2d 68, 79 (D.D.C. 2006).

¹⁴ Additionally, because De Sousa makes no credible allegation of an adverse employment action implicating her procedural due process rights, her allegation that she was not

The basis of the “stigma or disability” theory is “the combination of an adverse employment action and ‘a stigma or other disability that foreclose[s] [the plaintiff’s] freedom to take advantage of other employment opportunities.’” *O’Donnell v. Barry*, 148 F.3d at 1140 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972)). As the D.C. Circuit has explained, such a claim

requires that the government either have formally deprived one of a legal right ... or have so severely impaired one’s ability to take advantage of a legal right, such as a right to be considered for government contracts or employment or a right to seek non-government employment, that the government can be said to have “foreclosed” one’s ability to take advantage of it and thus extinguished the right.

Mosrie v. Barry, 718 F.2d 1151, 1161 (D.C. Cir. 1983) (footnote omitted).

De Sousa’s claim that the *government* has foreclosed her freedom to take advantage of other opportunities is, at best, severely attenuated. De Sousa alleges harm to her employment prospects arising from the existence of charges against her in Italy, from a EUROPOL warrant, and from unspecified “known inaccurate and false information” which the government will, she speculates, inevitably disseminate to potential employers. Compl. ¶ 86. Of course, even if the Italian proceedings or the warrant could be deemed so damaging to De Sousa as to foreclose her ability to obtain employment entirely, they can neither be attributed to the United States nor reviewed by this Court. And De Sousa has no standing to challenge imagined future dissemination of allegedly misleading information to potential employers. Such speculative allegations of future harms have long been held to be nonjusticiable. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983). Accordingly, De Sousa has failed to state a claim, either as a matter of standing or for purposes of Fed. R. Civ. P. 12(b)(6). *See Croddy v. FBI*, No. 00-cv-651, 2006 WL 2844261, at *3-*4 (D.D.C. Sept. 28, 2006) (dismissing stigma-or-disability claim for lack of

given a “name-clearing” hearing is irrelevant.

evidence that defendants disseminated polygraph results, or that plaintiffs were denied jobs because of such dissemination).

Moreover, the burden is on the plaintiff who “seeks to make out a claim of interference with the right to follow a chosen trade or profession that is based exclusively on reputational harm [to] show that the harm occurred in conjunction with, or flowed from, some tangible change in status.” *O’Donnell v. Barry*, 148 F.3d at 1141. That is, it is not sufficient for Plaintiff to allude indiscriminately to unspecified allegations concerning her conduct in Italy or to media attention to her (or even to the speculative possibility that the government might pass on such information in the future). Rather, Plaintiff must show that the harm she alleges “occurred in conjunction with, or flowed from,” an actionable change in status. And the only putative change in status Plaintiff identifies is her resignation. Many employees who resign from the foreign affairs agencies of the government continue to work in foreign affairs. To the extent she is wholly unable to pursue her chosen profession in “foreign affairs,” consulting, or international business (*see* Compl. ¶ 98) — which is highly implausible — it is not because Plaintiff resigned from the government’s employ.

Finally, Plaintiff fails to allege any facts that would demonstrate that, in fact, her employment prospects have been entirely foreclosed — apart from the unsubstantiated allegation that this is so. *See Twombly*, 550 U.S. at 555 (“labels and conclusions” or “a formulaic recitation of the elements of a cause of action” insufficient to state a claim). She fails to allege either that she has been denied employment or even that she has sought any. In short, her claims are entirely speculative and therefore are not cognizable. *Croddy*, 2006 WL 2844261, at *4 & n.5.

3. De Sousa's "Reputation-Plus" Claim Likewise Fails.

To the extent De Sousa seeks relief under the "reputation-plus" theory, such reliance is likewise unavailing. This theory requires, in addition to an adverse action — and there is none here — "official defamation," *i.e.*, "public accusations that will damage [the plaintiff's] standing and associations in the community," *Doe v. Chaney*, 885 F.2d 898, 910 (D.C. Cir. 1989).¹⁵ The Complaint alleges nothing of the sort. Instead, Plaintiff alleges that the government "permitted" defamatory allegations to be disseminated and "failed to correct" these allegations in public and, she alleges, in her "personnel and/or security files." Of course, purportedly defamatory allegations of third parties (and, for that matter, a warrant issued by the Italian government or EUROPOL) are neither the government's responsibility, nor can they be attributed to the government. *Evans*, 391 F. Supp. 2d at 167. Nor, for that matter, does the speculation that such defamatory allegations have become part of De Sousa's personnel or security files, without credible allegations that the government has disseminated such allegations, transform them into "official defamation." *Harvey*, 541 F. Supp. 2d at 16 ("flag" in personnel file does not give rise to cause of action); *M.K. v. Tenet*, 196 F. Supp. 2d 8, 15 (D.D.C. 2001) (absent public accusations by employer, allegations of adverse action do not state a reputation-plus claim). Because there is no allegation of either an adverse action or official defamation, Plaintiff's claim must fail.

¹⁵ Even simple defamation (not present here) does not suffice. "To implicate constitutional interests under the reputation-plus theory, the statements made in conjunction with a termination must call into serious question those personal characteristics that are central or enduring in nature, such as dishonesty, commission of a felony, manifest racism, serious mental illness, or lack of intellectual ability." *Holman*, 436 F. Supp. 2d at 79 (internal quotations and citations omitted).

C. The Complaint Fails To State A Claim That Defendants Have Violated Plaintiff's Limited Right To International Travel.

Plaintiff's international travel claim likewise must fail. The right to travel internationally is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right' ... can be regulated within the bounds of due process." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted). Accordingly, "the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation." *Id.* at 306; *see also Regan v. Wald*, 468 U.S. 222 (1984) (upholding federal regulation banning travel to Cuba); *Zemel v. Rusk*, 381 U.S. 1, 15 (1965) ("[T]he Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.").

In light of these limitations, the courts have routinely upheld international travel restrictions imposed by the government. *See Regan*, 468 U.S. 222; *Haig*, 453 U.S. at 306-10 (upholding revocation of passport in light of national security and foreign policy considerations); *Zemel*, 381 U.S. at 15; *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treasury*, 545 F.3d 4, 13-14 (D.C. Cir. 2008) (upholding travel restrictions to Cuba against right-to-international-travel claims); *Williams v. Wisconsin*, 336 F.3d 576 (7th Cir. 2003) (upholding state prohibition on international travel for parolees); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959) (rejecting challenge to restrictions against Communist countries); *Clancy v. Office of Foreign Asset Control*, No. 05-cv-580, 2007 WL 1051767, at *16 (W.D. Wis. Mar. 31, 2007) (upholding regulations curtailing travel to Iraq in the wake of Iraq's invasion of Kuwait).

Here, De Sousa does not even allege the existence of a governmental restriction or regulation. At best, she alleges an indirect restriction (in fact, a set of known risks, rather than a restriction) created by a foreign government — a hindrance that arises primarily from acts of foreign governments and only indirectly, if at all, from the U.S. government’s alleged inaction. In any event, and in accord with general justiciability principles, even if this attenuated chain of causation could be deemed a direct restriction on travel attributable to the United States government, the Supreme Court has squarely stated that the limited right to travel is “subordinate” to foreign affairs considerations such as those informing the United States’ alleged actions here. *Haig*, 453 U.S. at 306. Given this subordination, Plaintiff’s claim must therefore fail.

CONCLUSION

For all the aforementioned reasons, Defendants request that this action be dismissed with prejudice.

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Respectfully submitted,

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