No. 24-704

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE; AL-HAQ; AHMED ABU ARTEMA; MOHAMMED AHMED ABU ROKBEH; MOHAMMAD HERZALLAH; AYMAN NIJIM; LAILA ELHADDAD; WAEIL ELBHASSI; BASIM ELKARRA; and DR. OMAR EL-NAJJAR,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., *President of the United States*; ANTONY J. BLINKEN, *Secretary of State*; and LLOYD JAMES AUSTIN III, *Secretary of Defense,* in their official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California, Case No. 4:23-cv-05829-JSW

BRIEF OF *AMICI CURIAE* FORMER DIPLOMATS, SERVICE-MEMBERS AND INTELLIGENCE OFFICERS IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

FILED WITH CONSENT OF ALL PARTIES

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF THEIR AUTHORITY TO FILE

Amici curiae are former U.S. diplomats, service-members, and intelligence officers. They present their views and experience regarding whether courts may consider the legality of executive action and the harms that would result to U.S. foreign policy if the Court declines to do so in this case. Throughout their careers, *amici* have always understood the legality of their actions to be subject to judicial review, and have acted accordingly. The United States' commitment to the rule of law only serves to strengthen U.S. foreign policy.

Amici are:

William Bache, Colonel (ret.), served as an Infantry, Special Forces and General Staff officer in the US Army from 1966-1992. In the 1980s, he served on the Army Central Command staff involved with preparation of war plans, operations and deployment exercises involving Western Asia.

Wes J. Bryant is a retired master sergeant and senior special operations joint terminal attack controller (JTAC) in the elite special warfare branch of the U.S. Air Force. He was a key member of the special operations response force sent to Baghdad to combat ISIS in

2014 and led the establishment of the first strike cells to take down the ISIS Caliphate. He is coauthor of the book *Hunting the Caliphate: America's War on ISIS and the Dawn of the Strike Cell*.

Mike Ferner served as a Navy corpsman at Great Lakes Naval Hospital during the Vietnam War, providing care to G.I.s who arrived on frequent medevac flights. He is National Director for Veterans for Peace.

Chas W. Freeman, Jr., served as a diplomat in the Departments of State and Defense for 30 years, including as U.S. Ambassador to Saudi Arabia during the Persian Gulf War.

Dennis Fritz retired from the Air Force as a Command Chief Master Sergeant (E9). While on active duty, he served as the principal senior advisor to four-star Commanders at Pacific Air Forces and Air Force Space Command and as Senior Enlisted Advisor to the Commander of NORAD. After active-duty service, from July 2005-November 2008, he served in the Office of the Under Secretary of Defense for Policy as a contracted staff member and later as a contracted Program Manager of the Department of Defense's Wounded Warrior Recovery Coordination Program.

Josephine Guilbeau served in the military for 17 years, first as a combat medic and then as an officer from 2013-2023. She is a former U.S. Army Captain and Military Intelligence Officer, with several assignments that relate to the ongoing wars in the Middle East.

Matthew Hoh served as a Marine Corps officer from 1998-2008. He is a disabled combat veteran of the Iraq War, serving from 2004-2005 with a State Department reconstruction and governance team and then from 2006-2007 as a Marine Corps company commander. When not deployed, he worked on Afghanistan and Iraq war policy at the Pentagon and State Department from 2002-2008. He later served as a political officer with the State Department in Afghanistan.

John Brady Kiesling was a State Department Foreign Service Officer from 1983-2003. He is the author of *Diplomacy Lessons: Realism for an Unloved Superpower*.

Karen Kwiatkowski, Ph.D., served in the U.S. Air Force, retiring as a Lieutenant Colonel. She served at the National Security Agency and at the Pentagon as an analyst on Africa policy and in the Pentagon's Near East and South Asia directorate (NESA).

Jack F. Matlock, Jr. was a career Foreign Service Officer and

served as U.S. Ambassador to the U.S.S.R. from 1987-1991.

Alberto Mora served from 2001-2006 as General Counsel of the Department of the Navy.

Elizabeth Murray is the former Deputy National Intelligence Officer for the Near East, National Intelligence Council (ret.) and a former political/media intelligence analyst, CIA (ret.).

Josh Paul was a Director in the Bureau of Political-Military Affairs, the U.S. Government entity responsible for the approval of most arms transfers, from 2012-2023.

Todd E. Pierce, MAJ, JA, U.S. Army (ret.), served as a Marine Corps Rifleman, U.S. Army Sr. PsyOps NCO, and Army JAG Officer, including as Operational Law Attorney Advisor to Commander on Law of War and Rule of Law issues, and a Military Commissions Defense Attorney defending International and Constitutional Law standards.

Coleen Rowley, FBI Special Agent (ret.), served as FBI Special Agent from 1981-2004 and as Minneapolis Division Legal Counsel for 13 years.

Lawrence B. Wilkerson, Colonel, U.S. Army (ret.), served as former Special Assistant to the Chairman of the U.S. Joint Chiefs of

Staff (1989-1993), General Colin Powell, and as former Chief of Staff to Secretary of State Powell (2001-2005).

Ann Wright served 29 years in the U.S. Army, including as a member of the U.S. Army International Claims Commission-Grenada 1984, and retired as a Colonel. She also was a U.S. diplomat for 16 years, serving at U.S. Embassies in Nicaragua, Grenada, Somalia, Uzbekistan, Kyrgyzstan, Sierra Leone, Micronesia, Afghanistan, and Mongolia, the last four as Deputy Chief of Mission (Deputy Ambassador). She was Chief of the Justice Division, United Nations Operation Somalia UNOSOM 1993-1994. In 2023, she was an Expert Witness at the U.N. Security Council committee hearing on Weapons Transfers.

Amici condemn Hamas' October 7, 2023, attacks on Israel in the strongest possible terms.

All parties have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* certify that no party or party's counsel authored this brief in whole or in part and that no person – other than the *amici curiae* or their counsel – contributed

money to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

Amici address a single, straightforward and purely *legal* issue:

> Does the political question doctrine bar claims alleging the Executive acted illegally in the foreign policy sphere, or may courts apply the law?

Amici show that courts may decide whether an act violates the law, and that a finding that they cannot would harm U.S. foreign policy.

This Court need not decide, and *amici* take no position here on, whether the Israeli military is or is not engaging in genocide. Instead, we accept for present purposes that the district court's factual finding, that the Israeli military's conduct may plausibly constitute genocide, accurately reflects the record and controls at this juncture.

Similarly, this Court need not decide, and *amici* take no position here on, the ultimate question in this case: whether Defendants' conduct constitutes illegal support for or complicity in genocide. Instead, *amici* demonstrate that the district court can and must answer that question. The district court's conclusion that the political question doctrine bars it from doing so was error.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs claim Defendants are violating the law. The district court held that the political question doctrine rendered it powerless to hear this case simply because it implicates foreign policy. In other words, it concluded that when the executive branch acts in the foreign policy realm, *no* judicially enforceable law applies. That was error.

The political question doctrine distinguishes between two types of cases. Those that question the *wisdom* of foreign policy are non-justiciable because making foreign policy is the political branches' responsibility. But courts may hear cases that question the *legality* of foreign policy, because applying the law to determine the legality of government action is the judiciary's responsibility.

The political question doctrine does not bar cases that challenge executive action as violating specific, applicable law merely because the case may affect foreign policy. To the contrary, a 220-year-old line of Supreme Court precedent, dating from our nation's early years to the Court's last word on the subject, makes clear that cases that challenge the legality of foreign policy decisions are justiciable, even if they might affect foreign policy.

Nothing in this case prevents it from being heard, because it challenges the legality rather than the wisdom of Defendants' acts. There is no more important prohibition in international or U.S. law than the prohibition against genocide, mankind's worst crime. And this prohibition indisputably extends to assisting genocide.

Plaintiffs claim that Defendants are violating this law by providing diplomatic, financial, and military support to the Israeli military's alleged ongoing genocide. The district court found that the "undisputed" record evidence – including uncontroverted testimony, expert opinion, and statements by Israeli government officials – "indicate[s] that the ongoing military siege in Gaza is intended to eradicate a whole people and therefore plausibly falls within the international prohibition against genocide." *Def. for Child. Int'l-Palestine v. Biden*, No. 23-cv-05829, 2024 U.S. Dist. LEXIS 17219, at *8 (N.D. Cal. Jan. 31, 2024). Determining whether the Defendants are violating international or U.S. law involves no more than applying clear, well-established law to these facts. That is not a policy judgment or a political question; it is the role the Constitution textually commits to the judiciary.

The district court's application of the political question doctrine turned on a fundamental error: misconstruing Plaintiffs' claim that Defendants are violating the law regarding genocide as a challenge to Defendants' policy judgment on the broader issue of U.S. support of Israel. Plaintiffs allege that Defendants have violated a non-discretionary legal duty to prevent, and not further, genocide. Furthering genocide can never be a discretionary policy choice for the political branches.

Allowing Defendants to evade judicial scrutiny over whether their actions violate laws prohibiting support for genocide will undermine U.S. legitimacy on the world stage and erode the international rules-based order. The prohibition on genocide is universally recognized and is one of the most important norms of international law – it imposes non-derogable legal duties on all nations, including the United States, that demand compliance. Further, both Congress and the Executive have recognized the United States' implementation of the prohibition on genocide as critical to U.S. foreign policy and international peace and security.

A finding that this case poses non-justiciable political questions

because it implicates foreign military aid cannot be squared with the long history of legislative and judicial checks on the Executive's foreign affairs powers. Moreover, such a holding would suggest to the world that the United States takes neither the prohibition against genocide nor the rule of law seriously, and would thereby undermine our official policy that the United States act to prevent, and indeed take a leadership role in preventing, genocide. It is both the purview and the duty of courts to decide issues concerning violations of law, and this Court should not shirk that responsibility here.

ARGUMENT

I. The political question doctrine does not bar courts from determining whether Defendants' actions violate laws prohibiting support for genocide.

Plaintiffs allege that Defendants are violating laws prohibiting complicity in genocide. Appellants' Opening Br. at 15-18. The district court held that these claims are nonjusticiable because "our government's decision to grant military assistance to Israel" is a "foreign policy decision [] committed under the Constitution to the legislative and executive branches." *Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *14 (cleaned up). But while foreign *policy*

decisions are committed to the political branches, the Supreme Court has repeatedly made clear that assessing the *legality* of foreign policy is a task the Constitution assigns to the courts. And because this case questions the legality, not the wisdom, of Defendants' actions, it is the type of case that courts can, and indeed must, decide.

A. The political question doctrine bars cases that question the wisdom of government action but permits cases that challenge its legality.

The political question doctrine is "a narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (citations omitted). Over 200 years of Supreme Court precedent makes two things clear. First, the doctrine does not forbid adjudication merely because a case might involve or impact foreign policy. Second, the doctrine instead permits claims that merely ask courts to apply the law; that is the judiciary's job. It bars claims that challenge the government's policy judgment, *i.e.*, that essentially ask courts to *make* foreign policy; it does not impede courts' authority to ensure that the political branches' conduct of foreign affairs conforms to the law. The district court lost sight of this distinction.

The Supreme Court has "long held" that when even the President himself "takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (discussing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952)). This is simply an "an application of the principle established in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

Accordingly, since the beginning of our Republic, the Supreme Court has heard cases challenging the legality of government action, even when it involves foreign affairs. Appellants' Opening Br. at 34-37. For example, consider *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). There, the Supreme Court adjudicated whether the President's order to seize American ships traveling from French ports – issued during hostilities between the United States and France – violated a statute. *Id.* at 177-79. On the merits, the Court concluded that the Executive's order *did* violate the law. *Id.* at 179.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Court established the

modern political question doctrine test, including the principle the district court applied here: a case is nonjusticiable if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. *Baker* made clear that the doctrine "is one of 'political questions,' not one of 'political cases,'" *id.*, and "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211.

The Supreme Court has firmly established that courts may *apply the law* to executive decisions, even those involving foreign policy. It noted that courts cannot "shirk" their responsibility to apply established law "merely because [a] decision may have significant political overtones" or affect "the conduct of this Nation's foreign relations," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Thus, the Court rejected the claim that a federal court lacks the power to command the Secretary of Commerce to repudiate an international agreement. *Id.*

In so doing, the Court distinguished between cases addressing law and those addressing policy. The doctrine precludes controversies about "policy choices and value determinations constitutionally committed" to

Congress or the Executive. *Id.* But courts "have the authority to construe treaties . . . and . . . legislation" and to address other "legal question[s] of statutory interpretation" in the foreign-policy realm. *Id.*

The Supreme Court reiterated this distinction in *Zivotofsky*, 566 U.S. 189, its most recent application of the political question doctrine in the foreign affairs field, which the district court overlooked. There, as here, the plaintiff claimed that the Executive's action, pursuant to its foreign policy, violated established law. *Id.* at 193. And there, as this Court should here, the Court held that the political question doctrine did not prevent the Court from determining whether the Executive's action was illegal. *Id.* at 201.

In *Zivotofsky*, a statute allowed Americans born in Jerusalem to list "Israel" as their birthplace on their passports. *Id.* at 191. The State Department declined to follow the law, given its policy of taking no position on Jerusalem's political status. *Id.* When a Jerusalem-born American sued, the Department argued that the case was barred by the political question doctrine. *Id.* But the Court rejected that argument even though the Department's foreign policy toward Israel was at issue. *Id.* at 191.

The case was justiciable because the claim did not challenge the wisdom of government policy but instead challenged its legality. *Id.* at 196-97. Cases asking courts "to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be" are not justiciable. *Id.* But cases asking courts to enforce a specific statute – "a familiar judicial exercise" – are justiciable. *Id.* at 196.

Given these principles, courts regularly decide legal questions in cases that have foreign policy implications, and often do so in the face of executive branch resistance. Indeed, they do so in cases involving U.S. national security, even when the United States is at war. Appellants' Opening Br. at 38-41; *see, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 754-55 (2008) (holding, regarding alien detainees at Guantanamo Bay, that the question of whether *de facto* or *de jure* sovereignty is the touchstone of *habeas corpus* jurisdiction is a legal, not a political, question); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-37 (2004) (plurality opinion) (noting deference given to executive determinations of military strategy but making a legal determination regarding the adequacy of due process afforded to citizens being held as enemy combatants, and "reject[ing]

the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 623-25 (2006) (holding that military commission convened to try Guantanamo Bay detainee violated the Uniform Code of Military Justice and Geneva Conventions and that President's practicability determination was insufficient to justify variances from the procedures governing courts-martial); *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 157-58 (4th Cir. 2016) (holding in context of torture at Abu Ghraib that since the military cannot lawfully direct contractor to commit unlawful acts and the commission of unlawful acts is not a function committed to the political branches, contractor's unlawful conduct, even if committed under the military's control, is justiciable under the political question doctrine).

Courts also decide legal questions that have foreign policy implications in cases involving foreign aid. *See, e.g.*, *Planned Parenthood Federation, Inc. v. Agency for International Development*, 838 F.2d 649 (2d Cir. 1988) (holding challenge to legality of restriction of speech on abortion for recipients of federal funds was justiciable

challenge to unlawful implementation, not a challenge to the wisdom of the foreign aid policy); *DKT Memorial Fund, Ltd. v. Agency for International Development*, 810 F.2d 1236 (D.C. Cir. 1987) (holding challenges to the legality, as opposed to the wisdom, of the implementation of foreign policy not to contribute funds to foreign NGOs that perform abortions are justiciable).

As the D.C. Circuit summarized in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), there is no *per se* rule that a claim is nonjusticiable solely because it "implicates foreign relations." *Id.* at 841. That a case may involve the conduct of foreign affairs does not prevent courts from determining whether the Executive has "failed to obey the prohibition of a statute or treaty." *Id.* at 842 (citing *Japan Whaling Ass'n*, 478 U.S. at 230). Whether a case is justiciable turns not on the nature of the government conduct but on the type of challenge the plaintiff raises. *Id.* Challenges that seek "reconsider[ation of] the wisdom of discretionary decisions made by the political branches in the realm of foreign policy" are not justiciable. *Id.* But courts can hear claims presenting "purely legal issues such as whether the government had legal authority to act."

Id. (quotation marks omitted). The political branches' responsibility to undertake foreign policy does not vitiate the judiciary's constitutional obligation to determine legal questions.

B. The Constitution commits the issue in this case to the judiciary, not a coordinate political department.

Because the political question doctrine *permits* courts to determine the legality of executive action even in the realm of foreign policy, the question here is straightforward: are Plaintiffs alleging that Defendants' acts are bad policy or that they are illegal? Obviously, the latter. Plaintiffs do not challenge the wisdom of U.S. policy regarding military sales or other support to Israel. Instead, they assert that providing arms and other support to Israel that is allegedly aiding the commission of genocide is illegal. Appellants' Opening Br. at 53. Thus, Plaintiffs' request that the district court apply clear law to the executive branch's conduct is justiciable.

The district court found based on the record before it that the Israeli military's current treatment of civilians in Gaza may plausibly constitute genocide in violation of international law. *Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *8, *16. The prohibition on genocide is a universally recognized norm of international law from

which nations may not deviate, and is part of U.S. law by statute.

Shocked and appalled by the Holocaust, the community of nations codified genocide as "a crime under international law . . . condemned by the civilized world." Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Dec. 9, 1948, 78 U.N.T.S. 277. The prohibition on genocide, which includes a prohibition on complicity in genocide, *id.* art. III(e), and a legal duty to prevent genocide, *id.* art. I, is a peremptory, or *jus cogens*, norm of international law from which no derogation is allowed. Such norms "prohibit acts repugnant to all civilized peoples," *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 262 (2018), and make their perpetrators "enem[ies] of all mankind." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

The prohibition on genocide is enshrined in U.S. law through the 1987 Genocide Convention Implementation Act, 18 U.S.C. § 1091, and the Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441, 132 Stat. 5586 (2019). Thus, the prohibition on genocide occupies a distinctive place under both international and domestic law as a peremptory norm and non-derogable legal duty.

Defendants have a specific legal mandate to prevent, and not

further, genocide. Violating clear legal duties arising from a *jus cogens* norm and established in U.S. law by Congress can never be a discretionary policy choice for the Executive.

Courts have repeatedly recognized that claims that a party committed genocide are justiciable. *E.g.*, *Al-Tamimi v. Adelson*, 916 F.3d 1, 11-12 (D.C. Cir. 2019) (finding court could hear claim that Israeli settlers were committing genocide); *Kadic v. Karadzic*, 70 F.3d 232, 249-50 (2d Cir. 1995) (holding genocide claims were justiciable: "Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions."). Indeed, as these cases found, the ability of U.S. courts to hear and decide claims alleging violations of *jus cogens* norms like genocide dates back to the First Congress and is codified in the Alien Tort Statute – one of the bases of Plaintiffs' claims here. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789); 28 U.S.C. § 1350; *Al-Tamimi*, 916 F.3d at 11-12; *Kadic*, 70 F.3d at 249-50.

Since Plaintiffs allege that Defendants' support for Israeli military actions in Gaza violates binding international and U.S. law, they raise a

legal challenge, not a policy argument. Deciding that legal challenge does not contravene separation of powers concerns; federal courts have the power and the responsibility to apply the law.

C. The district court's holding that the legality of the Executive's conduct in carrying out policy objectives is immune from judicial scrutiny was error.

The district court incorrectly thought that every foreign policy decision is insulated from judicial review of its legality. That is, it suggested that any case that impacts or involves foreign policy is nonjusticiable. Indeed, it quoted a century-old case for the proposition that foreign relations is "traditionally deemed to involve political questions" because "'the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" *Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *12 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)). But *Baker* held that prior "sweeping statements to the effect that all questions touching foreign relations are political questions" – specifically including that very statement from *Oetjen* – were "error." 369 U.S. at 211 & n.31 (citing 246 U.S. at 302).

The district court also based its decision on statements that, while

true as far as they go, merely beg the central question of whether these Plaintiffs ask the court to make policy or apply law. For example, the district court noted that the political question doctrine, "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed'" to the political branches. *Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *10 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). And it cited now-Justice Jackson's quotation of *El-Shifa* that courts cannot reconsider "'the wisdom of discretionary [foreign policy or national security] decisions made by the political branches.'" *Id.* at *13 (quoting *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 92 (D.D.C. 2016)). But the district court ignored the corollary rule; where, as here, a case is *not* a dispute over "policy choices and value determinations," and Plaintiffs do *not* challenge the "'wisdom'" of any discretionary policy decision, but instead ask the court to apply the law, the case *is* justiciable. *Supra* Section I.A.; *Mobarez*, 187 F. Supp. 3d at 91-92.

The district court committed the same fundamental errors in its heavy reliance on *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007). *See Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *13-16.

Corrie held that the political question doctrine prevented adjudication of claims against Caterpillar for selling bulldozers to the Israeli military, which were "financed by the executive branch pursuant to a congressionally enacted program calling for *executive discretion* as to what lies in the foreign policy and national security interests of the United States." *Corrie*, 503 F.3d at 982 (emphasis added).

The district court read *Corrie* to mean that foreign aid decisions are always insulated from review, even as to their legality. *See Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *7-8. But as noted above, that conflicts with the Supreme Court's post-*Corrie* holding in *Zivotofsky* that courts may assess the legality of executive action. *See* Appellants' Opening Br. at 53 n.13 ("Any reading that *Corrie* would still be nonjusticiable if there were a firm legal duty constraining the executive could not be reconciled with *Zivotofsky I*, decided 12 years later."). By relying on an overly broad reading of *Corrie*, the district court ignored the key distinction courts make between nonjusticiable cases challenging the prudence of discretionary foreign policy judgments and justiciable challenges to policies that violate the law. *Supra* Section I.A. Indeed, courts have explicitly drawn this distinction

in cases involving war, national security, and foreign aid. *Supra* Section I.A. The district court overlooked the fact that this case involves a purely legal question of whether Defendants are violating the law of genocide. *Corrie* involved no genocide allegations, and no one would seriously suggest that the Executive has foreign policy discretion to violate the legal prohibition on genocide.

The district court also failed to recognize a factual distinction from *Corrie*: the political branches' differing support for the conduct at issue. The district court held that where both Congress and the President have determined that foreign assistance is necessary, the question of whether that aid is needed is inappropriate for judicial resolution. *See Def. for Child. Int'l-Palestine*, 2024 U.S. Dist. LEXIS 17219, at *14 (citing *Corrie*, 503 F.3d at 983). The decision below cited only a case from 1975 for the proposition that "[b]oth Congress and the President have determined that military and economic assistance to Israel is necessary at this time." *Id.* at *13-14 (citing *Dickson v. Ford*, 521 F.2d 234, 235-36 (5th Cir. 1975)).

This not only misconstrues the narrow legal issue in this case – whether Defendants' support for the Israeli military while it was

allegedly committing genocide violates the *law* regarding genocide – it also ignores the facts. Congress has *not* approved any military sales to Israel since October 7, 2023.[1] Moreover, the Executive invoked emergency authority to circumvent Congressional scrutiny for two of these sales that would have ordinarily been subject to Congressional notice and potential veto under the Arms Export Control Act.[2] Congressional action could change the governing law on the merits, but it would not affect this Court's jurisdiction to hear a challenge to the legality of Defendants' acts. In any event, the district court erred in suggesting that Congress has approved executive action in this case, because the relevant congressional pronouncements here are Congress' ratification of the Genocide Convention and its codification into U.S. law.

Rather than rely on *Corrie*, the district court should instead have looked to the many post-*Zivotofsky* cases that properly distinguish

[1] John Hudson, *U.S. floods arms into Israel despite mounting alarm over war's conduct*, WASH. POST (Mar. 6, 2024).
[2] Indeed, if the Court were to try to draw inferences from Congressional inaction – which it should not – it would be bizarre to infer from Congress's refusal to somehow approve additional funding to Israel that it approves of additional aid.

policy judgments from legal questions, including cases in this Court involving fraught political contexts. *See* Appellants' Opening Br. at 47-54; *see, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) (challenge to President Trump's decision to reallocate funds to build border wall raised no political question). For example, while the question of who has sovereignty over the West Bank, Gaza, and East Jerusalem is reserved to the political branches, the question of whether Israeli settlers were committing genocide was justiciable because it "is a purely legal issue." *Al-Tamimi*, 916 F.3d at 11-12. The district court should have followed this analytical approach and reached the same conclusion, rather than making a blanket determination that executive action in the foreign policy realm is beyond review.

In short, there is no basis for the district court's assumption that, whenever the Executive acts in the foreign policy realm, courts lack the power to issue even a declaratory judgment finding that the Executive has violated the law. *See* Appellants' Opening Br. at 56-59. While the judiciary must not overstep its constitutionally prescribed role, it also may not shirk its constitutional obligation to ensure that the conduct of foreign affairs conforms to the law.

II. A holding that no court may consider whether Defendants are violating the *jus cogens* prohibition on genocide will undermine U.S. foreign policy and erode the international rules-based order.

As described above, the question of whether the Defendants' acts violate the law is a legal question, not a political one, and is therefore justiciable. A holding that courts cannot decide whether Defendants' actions are legal would not only expand the political question doctrine beyond its recognized bounds; it would undermine official U.S. policy to prevent genocide, the credibility of our commitment to that goal, and thus our ability to continue to exercise leadership on this key national security issue.

A. The United States plays an important role in preventing genocide, in part to protect our national security.

The United States has been crucial to the recognition and punishment of genocide as an international crime, both because it is the right thing to do, and because it is in our national interests.

In the wake of World War II and the Holocaust, the United States helped establish the International Military Tribunal at Nuremberg and prosecuted Nazi leaders for crimes against humanity. This served as a catalyst for the nations of the world to negotiate and accede to the

Genocide Convention. The United States formally ratified the Convention in 1988. As the United States recognized in its 2022 intervention in Ukraine's case against Russia before the International Court of Justice, the United States "helped shape the final text of the Genocide Convention" and "is one of the only parties to the Genocide Convention to have publicly invoked Article VIII in calling on the United Nations to address genocide in the territory of another Contracting Party." Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Russ.*), Declaration of Intervention of the United States of America ¶ 10 (Sept. 7, 2022).

The United States continues to have a critical role in the prevention and punishment of genocide all over the world. Since ratifying the Genocide Convention, the United States has formally recognized and condemned eight genocides in countries as varied as Sudan, Myanmar (Burma), and China.[3] The United States' recent statements on numerous international criminal tribunals confirm our

[3] Antony J. Blinken, Secretary of State, Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma (Mar. 21, 2022).

commitment to punishing mass atrocities and genocide. *See, e.g.*, Uzra Zeya, Under Secretary for Civilian Security, Democracy, and Human Rights, Remarks to the Assembly of States Parties to the Rome Statute (Dec. 7, 2021) ("The United States' enduring commitment to justice and accountability for atrocity crimes is deeply embedded in our history, our values, and our policy."); Press Statement, U.S. Department of State, Opening of Trial of Former Janjaweed Commander for Atrocities in Darfur (Apr. 5, 2022) ("The United States is committed to the principle that those who commit atrocities must be held accountable."); Press Statement, Antony J. Blinken, Secretary of State, Opening of the Trial of Former Séléka Commander for Atrocity Crimes in the Central African Republic (Sept. 27, 2022) ("The United States is committed to promoting accountability for war crimes and human rights violations and the end of impunity").

The Executive and Congress have made clear that enforcement of the prohibition on genocide is a national security priority. For example, in 2011, then-President Obama issued a directive stating that "[p]reventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States."

Presidential Study Directive on Mass Atrocities, PSD-10 (Aug. 4, 2011); *see also* Executive Order No. 13729, 81 Fed. Reg. 99, 32611 (May 18, 2016); Press Statement, U.S. Department of State, First Trial Judgment by the Special Criminal Court in the Central African Republic (CAR) (Nov. 8, 2022) ("[E]nding impunity is a necessary foundation for peace, prosperity, and rule of law.").

This policy was codified into law in the 2018 Elie Wiesel Genocide and Atrocities Prevention Act: "It shall be the policy of the United States to [] regard the prevention of atrocities as in its national interest," and to pursue a "[g]overnment-wide strategy" to prevent and respond to the risk of atrocities through diplomacy, foreign assistance and U.S. leadership. Pub. L. No. 115-441, 132 Stat. 5586 (2019). Consistent with our commitment to preventing genocide and our obligations under the Genocide Convention, U.S. law criminalizes genocide. Genocide Convention Implementation Act in 1987, 18 U.S.C. § 1091.

While the Constitution commits certain foreign affairs decisions to the Executive, Congress may and does impose restrictions on the Executive's exercise of its foreign affairs functions. Of particular note

here, as part of the United States' commitment to preventing mass atrocity, Congress has imposed numerous human rights restrictions on the Executive's assistance to foreign militaries. For example, Section 502B of the Foreign Assistance Act prohibits security assistance to countries whose governments engage in a "consistent pattern of gross violations of internationally recognized human rights." 22 U.S.C. § 2304(a)(2). Congress has also prohibited both the Department of State and Department of Defense from providing security assistance to a unit of a foreign security force where there is "credible information that the unit has committed a gross violation of human rights" or violations of international humanitarian law. 10 U.S.C. § 362; 22 U.S.C. § 2378d.[4]

In short, United States law and policy for the last eighty years has consistently sought to prevent and punish genocide and mass atrocity.

[4] And in 2020, Congress closed a loophole that limited the enforceability of these laws regarding certain recipients of U.S. military aid, including Israel, and required the United States to enter into an agreement with Israel under which the State Department must provide a list of units ineligible to receive U.S. military aid. *See* Pub. L. No. 117-103, div. K, title VII, § 7035(b)(6), 136 Stat. 629 (2022); Agreement between the Government of the United States of America and the Government of the State of Israel Concerning Assistance to Security Forces, Dec. 30, 2021, T.I.A.S. 21-1230.1.

B. Insulating the legality of Defendants' alleged support for genocide from judicial review would undermine the United States' long-standing policy and national security commitment to preventing genocide.

Congress has spoken through its ratification of the Genocide Convention, passage of the Genocide Implementation Act and the Alien Tort Statute, and prohibition on foreign aid to countries committing grave human rights abuses. Defendants have allegedly disregarded such legislative restrictions and the international legal obligations they enforce. Failure by the courts to fulfill their Constitutional duty to decide whether Defendants' conduct is legal would damage our credibility, effectiveness, and leadership role in our fight against genocide, and thus harm our national interests.

A refusal by this Court to even consider whether Defendants' acts violate the law prohibiting support for genocide would show that, in the United States, government support for genocide is beyond the law's reach. That might lead other nations to question the United States' commitment to preventing and punishing genocide. Or perhaps worse, it might suggest that our commitment to preventing genocide depends on who is committing it. Needless to say, a refusal by this Court to apply the law would seriously erode the United States' moral authority

and influence on the international stage, and will have lasting impacts on the effectiveness of U.S. foreign policy, as well as on international peace and security.

Moreover, as the then-U.S. Department of State Legal Adviser in the George W. Bush Administration stated, "When we assume international obligations, we take them seriously and seek to meet them, even when doing so is painful. And where international law applies, all branches of the U.S. government, including the judiciary, will enforce it." John B. Bellinger, III, Legal Adviser, U.S. Department of State, Remarks at The Hague: The United States and International Law (Jun. 6, 2007). These were not merely aspirational pronouncements on the United States' ability to abide by its obligations under international law. As described above, U.S. courts can and do assess the legality of many actions the political branches take in the realm of foreign policy, including in politically fraught contexts such as the post-9/11 "War on Terror."

Determining whether defendants have violated the *jus cogens* legal prohibition on genocide and U.S. law is the role and the duty of U.S. courts. In refusing to submit to the jurisdiction of international

tribunals, the United States has long argued that such jurisdiction is unnecessary, because U.S. courts are mandated and capable of holding U.S. citizens accountable for violations of international law. *E.g.*, *id.* (reassuring international community that, despite its unwillingness to submit to International Criminal Court jurisdiction, the United States "share[s] with the parties to the Statute a commitment to ensuring accountability for genocide" and that the U.S. government, "including the judiciary," will enforce international law). A refusal by our courts to hear a case alleging violations of one of the most long-standing and widely accepted norms of international law will signal to the international community that we are not in fact capable of ensuring our own compliance with our international legal obligations and that any assurances to the contrary cannot be trusted.

CONCLUSION

For the foregoing reasons and those stated in Appellants' Opening Brief, the political question doctrine does not bar courts from determining whether Defendants' actions violate the prohibition on supporting genocide. The district court's order should be reversed.

March 14, 2024

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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