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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Executive Branch officials contend that they can further one of the most egregious and catastrophic violations of law – a genocide – while the judicial branch is powerless to review it, so long as the Executive's violations occur within its own boundless conception of "foreign policy." Defendants' startling arrogation of unreviewable power would make binding law – including criminal law prohibiting genocide – a merely discretionary option, leaving the Executive with "the power to switch the Constitution on and off at will," *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), including the Constitution's system of separation of powers and the judiciary's corresponding role in ensuring adherence to the rule of law. The Supreme Court has long emphasized – in landmark decisions Defendants ignore – that our Constitution does not give the Executive such a "blank check" to carry out foreign policy in defiance of law. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Defendants chant the refrain of "foreign policy," but proceed without once addressing the fundamental flaw in their political question argument: as the Supreme Court has made clear, *see generally* Appellants' Opening Brief ("Pls.' Br."), Dkt. #22.1 (discussing Duty-Discretion Distinction from *Marbury* to *Zivotofsky*), the question presented here is not *political* because it does not seek to challenge the wisdom of discretionary foreign policy judgments or choices; it is a purely *legal*

question invoking well-settled, indisputably judicially manageable legal norms regarding the prohibition of genocide.

Remarkably, amidst Defendants' platitudes relating to their discretionary foreign policy interests, *not once* do Defendants mention the binding legal obligations enshrined in the U.S.-ratified Genocide Convention, customary international law, and domestic criminal law to prevent and not further genocide. Defendants repeatedly reference their support for "Israel's war against Hamas" as a reason to foreclose judicial review of Plaintiffs' claims arising out of the genocide against the Palestinian people in Gaza. This argument is ultimately based on a nihilistic premise that the intentional killing, mass displacement and starvation of a people could ever be justified. It is an argument that power knows no law.

Contrary to Defendants' mischaracterization, Plaintiffs' action does not seek to end all U.S. military and diplomatic aid to Israel; it seeks to enforce legal constraints to limit U.S. support for a genocide, the occurrence of which is manifested through the clear intention in both word and deed of Israeli officials – and the subject of repeated warnings, including by the United Nations – of the destruction of the Palestinian people of Gaza.

Defendants' position so willfully ignores the law constraining the narrow political question doctrine that it operates ultimately as an exercise in executive fiat. Defendants mention the *Baker v. Carr* factors, but do not even attempt to

demonstrate where the Constitution confers a "textual commitment" to some undifferentiated "foreign policy." The Constitution's text, Founding-era cases, and modern Supreme Court jurisprudence prove otherwise. *See* Pls.' Br. 34–44. Defendants give the Court's critical analysis in *Zivotofsky ex rel. Zivotofsky v. Clinton* ("*Zivotofsky I*"), 566 U.S. 189 (2012), a one-paragraph back-of-the-hand, while ignoring the careful delineations of executive power set forth in *Zivotofsky ex rel. Zivotofsky v. Kerry* ("*Zivotofsky II*"), 576 U.S. 1, 19–20 (2015). Defendants ignore the four Supreme Court pronouncements in the "Enemy Combatant" cases, which is unsurprising given that their totalistic position replicates the search for unbounded executive power that the Court conclusively rejected.

Meanwhile, Defendants' arguments that Plaintiffs fail to demonstrate causation ignore Defendants' own conduct, namely, their direct supply to Israel of weapons it has used to further the genocide in Gaza. Defendants have ensured the provision of billions of dollars of devastating munitions being deployed directly against Palestinians in Gaza, even after being put on notice by two different courts that there is a serious risk, and even a "plausible" case, of genocide. *See* Pls.' Br. 10, 20–21. Defendants' own boastful pronouncements about their influence over Israel, expert testimony and Israeli official statements all demonstrate the centrality of U.S. munitions for destruction inflicted on Gaza, which plausibly meets the requirement of "traceability."

Finally, Defendants focus on what they incorrectly characterize as overbroad injunctive relief, but ignore Plaintiffs' claim that a declaratory judgment ordering Defendants to comply with their legal duty to prevent and not to aid and abet genocide would not interfere with executive prerogatives while fulfilling the judiciary's obligation to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

ARGUMENT

I. DEFENDANTS FAIL TO REFUTE THAT PLAINTIFFS' CLAIMS ARE BASED ON BINDING LAW, NOT ON A CHALLENGE TO DISCRETIONARY POLICY DECISIONS, AND THUS ARE SUBJECT TO JUDICIAL REVIEW.

In their Opening Brief, Plaintiffs set out a detailed history of the origins, scope, and necessary limitations of the political question doctrine in light of the constitutionally-mandated separation of powers, from the doctrine's first invocation in *Marbury v. Madison*, through *Baker v. Carr*, 369 U.S. 186 (1962), and up to recent Supreme Court cases addressing legal constraints on foreign policy and national security decisions – namely the four "Enemy Combatant" cases and *Zivotofsky I*. *See also* Scholars of Constitutional Law et al. Amici Br. 12–21, Dkt. #34.1. In contrast, Defendants offer a rote recitation of maximalist executive power that avoids engaging with the text of the Constitution, its foundational separation-of-powers structure, and the principles underpinning more than two centuries of Supreme Court jurisprudence. Instead, Defendants reflexively demand that the judiciary's

presumptive role in our constitutional system be displaced based on the Executive's undifferentiated invocation of "foreign policy."

Defendants fail to identify any textually-demonstrable constitutional commitment (*Baker* factor one) of all matters touching on "foreign policy" or "diplomacy" to the Executive because no such categorical authority exists. Notably, Defendants concede there are judicially manageable standards (*Baker* factor two) for adjudicating claims of genocide. Brief for Appellees, Dkt. #59.1 ("Defs.' Br.") 28, ("genocide claims are justiciable"). Indeed, such claims are clearly defined, including at 18 U.S.C. § 1091, and readily justiciable. *See, e.g., Al-Tamimi v. Adelson*, 916 F.3d 1, 11–12 (D.C. Cir. 2019) (genocide claims brought under Alien Tort Statute ("ATS") are judicially manageable); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011).[1]

Defendants also ignore the central constitutional principle underlying the proper understanding of the political question doctrine in a system of democratic governance: the Duty-Discretion Distinction. The Distinction explains that courts remain obligated to review executive actions that violate a legal duty while generally

[1] Neither ground that Defendants identify for a political question – challenging the President's conduct of foreign affairs involving policy questions not suitable for judicial resolution or "judicial interference" undermining U.S. diplomatic relationships with Israel and in the wider region, Defs.' Br. 13 – aligns directly with the six *Baker* factors; Defendants do not suggest otherwise, let alone argue that they implicate *Baker* factors one or two.

excluding from judicial review pure discretionary policy choices and value determinations not subject to legal constraint. *See, e.g., Zivotofsky I,* 566 U.S. at 196 (case is justiciable if it does not question wisdom of foreign policy but instead "requests that the courts enforce a specific statutory right"); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc).

The required "discriminating analysis" of the "specific case," *Baker*, 369 U.S. at 211; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) (courts must "examine each of the claims with particularity") – and numerous foundational cases Defendants ignore – makes clear that Plaintiffs are entitled to review of the *legality* of Defendants' actions furthering genocide, which do not question the *wisdom* of *bona fide* discretionary *policy* choices. Ultimately, Defendants do not take seriously constitutional text, structure, or history, all of which demonstrate the political question doctrine does not bar adjudication of Plaintiffs' law-based claims.

A. The Executive Cannot Evade Judicial Review of Alleged Violations of Law.

While paying lip service to the *Baker* Court's warning that not all cases "touching foreign relations" implicate political questions, 369 U.S. at 211, Defendants urge such a categorical exemption from judicial review, even as they provide no authority to support this sweeping claim. Ultimately, in Defendants' view, the legal constraints on the Executive against furthering genocide – manifested

in customary international law, the Genocide Convention's codification of that law, and a domestic criminal statute, *see* International Law Scholars Amici Br., Dkt. #38.1 – represent little more than a choice; they can be made subservient, at the Executive's will, to its exercise of an asserted "foreign policy" judgment. This betrays the foundational principle that "ours is a government of laws, not of men." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

The narrow political question doctrine, while carving out a limited space for executive discretion, was never intended to offer blanket immunity for illegal actions. Defendants do not identify, as they must under the critical *Baker* factor one, any textually-demonstrable commitment to the Executive Branch to conduct "foreign policy" free from any judicial review of the legality of their conduct. Plaintiffs conclusively demonstrate that the text and structure of the Constitution, Pls.' Br. 32–33 – as well as Founding-era jurisprudence, *id.* at 33–37 – reject such a maximalist interpretation of executive power. *See also Zivotofsky II*, 576 U.S. at 19–20 (rejecting Secretary of State's claim that "the President has exclusive authority to conduct diplomatic relations, along with the bulk of foreign-affairs powers") (internal quotations omitted).[2] Defendants fail to address the Constitutional

[2] Regardless, this case is not about general questions regarding the Executive's power to engage in bilateral diplomacy or military operations; it is about Defendants'

provisions Plaintiffs cite that *empower* federal courts to adjudicate matters touching on foreign affairs, U.S. Const. arts. III & VI, and the scholarly authorities which affirm that there are "no jurisdictional carve-outs for foreign affairs or war." *See* Pls.' Br. 32–34. Indeed, this case seeks the judicial enforcement of a norm already negotiated, codified and *agreed to by the political branches* in ratifying the Genocide Convention, making it the "supreme Law of the Land," U.S. Const., art. VI, cl.2, and codifying the prohibition of genocide. *See Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 161 (4th Cir. 2016) (emphasizing significance of international agreements "to which the United States government has obligated itself" in finding international law violations justiciable).

Defendants rely on factually-distinct cases like *Dep't of Navy v. Egan,* 484 U.S. 518, 529 (1988) (citing *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)), and *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), for their outdated view of the Executive's sole-control over "foreign policy," while ignoring subsequent cases discrediting those pronouncements, including in the area of national security, such as *Baker, Youngstown Steel*, the Enemy Combatant cases and *Zivotofsky II* (rejecting scope of executive power proffered in *Curtiss-Wright*). *See* Pls.' Br. 30–31, 37–43.

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overwhelming military support in furtherance of an ongoing genocide against the Palestinian people of Gaza.

First, Defendants ignore the multitude of Founding-era cases that confirm the judiciary's role in enforcing Executive Branch compliance with binding international law. *See id.* at 34–37. The only case Defendants cite, *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), for the uncontested fact that the President is commander-in-chief, Defs.' Br. 13–14, supports Plaintiffs' position because the President's role did not prevent the Court from adjudicating the legality of a military blockade or the seizure of vessels and cargo, some belonging to foreign neutrals.[3] *See also* Constitutional Scholars Amici Br. 20.

Next, Defendants wholly ignore the water-shed *Youngstown Steel* decision and the four "Enemy Combatant" cases which rejected Defendants' nearly identical arguments as inconsistent with a proper understanding of separation-of-powers and affirmed the necessity of judicial review of unlawful executive determinations even during war. Pls.' Br. 38–41. *See Rasul v. Bush,* 542 U.S. 466 (2004); *Hamdi v.*

[3] Defendants' reliance on *Johnson v. Eisentrager,* 339 U.S. 763 (1950), and *Munaf v. Geren*, 553 U.S. 674 (2008), is misplaced. Defs.' Br. 13–15. Whatever force *Eisentrager* may have had in limiting a foreign national's access to the "privilege of litigation" in U.S. courts, 339 U.S. at 777, was undermined by *Rasul*, 542 U.S. at 483–85, which expressly *rejected* the Executive's invocation of the political question doctrine and held that habeas claims during wartime were judicially cognizable, and by *Boumediene*, 553 U.S. at 754–55, 762–71, which rejected the Executive's claim to exclusively determine Guantanamo detainees' status in favor of a constitutional entitlement to judicial review of the legality of detention. In *Munaf,* the Court rejected a similar claim of non-justiciability and held that federal courts had jurisdiction over habeas petitions filed by American citizens detained by a multinational coalition in Iraq.

Rumsfeld, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). The collective force of these decisions discredits Defendants' position and reaffirms that the Duty-Discretion Distinction mandates judicial review of executive actions contrary to binding law, including international law, *see Hamdan*, 548 U.S. at 625–34, and the Constitution. *See* Pls.' Br. 37–41. Defendants' unwillingness to grapple with these cases is unsurprising insofar as Defendants, like the predecessor administrations admonished by the Court, defy constitutional guardrails to transform matters involving military assistance into a "blank check for the President," *Hamdi*, 542 U.S. at 536, to further a genocide.

Defendants also ignore critical cases emphasizing that the political question doctrine applies only to cases involving discretionary judgments rather than to binding legal obligations. *Japan Whaling* delineated between cases involving "purely legal question[s] of statutory interpretation," which must be subject to judicial review, and those nonjusticiable questions that "revolve around policy choices and value determinations." 478 U.S. at 230. The en banc *El-Shifa* court likewise recognized a constitutional distinction between "claims requiring us to decide whether taking military action was 'wise' [or] a 'policy choice'" (nonjusticiable) from claims "'[p]resenting purely legal issues' such as whether the

government had legal authority to act" (justiciable). 607 F.3d at 842 (internal quotations omitted).

Defendants loosely address, without acknowledging, the dispositive force of, *Al-Tamimi*, which found genocide claims justiciable. Undertaking the "discriminating analysis" Defendants discard, 916 F.3d at 8–9 (internal quotations omitted), the D.C. Circuit found that the distinct questions arising out of U.S. actors' support for Israeli settlement practices in "disputed territories" should be considered separately. Because war crimes and trespass claims might require resolution of who "has sovereignty over the disputed territory," they could present a political question since, per *Zivotofsky II*, sovereignty-related questions are among the narrow set constitutionally committed to the Executive Branch. *Id.* at 10–11. By contrast, the plaintiffs' genocide claim asked the question, "are Israeli settlers committing genocide?" *Id* at 11. That question presented a "purely legal issue" and was justiciable under the ATS. *Id.* at 11–12. Here, too, Plaintiffs ask the same "purely legal" question subject to the Court's review: are "Defendants' actions contributing to a genocide?"

Defendants also misunderstand *Al Shimari's* central conclusion. *See* Defs.' Br. 25–26. *Al Shimari* carefully applies the Duty-Discretion Distinction in distinguishing a claim relating to negligence of the military from those implicating international legal duties; it recognizes that judicial review of "actual, sensitive

judgments made by the military" – discretionary decisions – may run afoul of the political question doctrine, but violations of "settled international law" or "criminal law" – the very conduct at issue in this case – are justiciable. 840 F.3d at 158 (internal quotations omitted) ("commission of unlawful acts [torture and war crimes] is not based on 'military expertise and judgment,' and is not a function committed to a coordinate branch of government.").

Defendants make a futile effort to blunt the force of the Court's most recent separation-of-powers pronouncement in *Zivotofsky I*. After implicitly acknowledging that the Court reaffirmed the judiciary's role in reviewing whether binding law or the Constitution regulates executive conduct, Defs.' Br. 21, Defendants seek to limit the Court's broad-reaching pronouncement to facts of that case. Defs.' Br. 22 (unlike in *Zivotofsky I*, "plaintiffs do not seek to 'vindicate [a] statutory right'"). That is, lacking any other way to meet the force of *Zivotofsky I*'s Duty-Discretion principle, Defendants imagine there is some arbitrary distinction in types of law that constrain executive action – *i.e.*, between statutory rights and rights otherwise firmly established in customary international and treaty-based law, even when implemented in a criminal statute, such as the prohibition on genocide.

Notably, because Defendants never acknowledge the clear legal duties reflected in customary international law, the Genocide Convention and the U.S.

criminal statute,[4] they do not – and ultimately could not – sustain a distinction between statutory duties and customary international law; the duties are equally binding. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as *questions of right* depending upon it are duly presented for their determination") (emphasis added); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–15 (9th Cir. 1992) (genocide *jus cogens* norm binding and non-derogable); *Al Shimari*, 840 F.3d at 161 ("'torture' and 'war crimes' are defined at length in the United States Code and in international agreements to which the United States has obligated itself" and are thus judicially enforceable).[5] *See also* International Law Scholars Amici Br. 22-31.

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[4] Defendants have recognized these obligations before the International Court of Justice ("I.C.J.") in *Ukraine v. Russia*. *See* Pls.' Br. 9–10.

[5] *Zivotofsky I* rejected the relevance of potential embarrassment to the State Department in judging the legality of its actions, and otherwise makes clear that the first two *Baker* factors are the most important considerations under the political question doctrine. 566 U.S. at 204–05.

In any event, Plaintiffs reject Defendants' suggestion that international embarrassment can come only from questioning conduct of an ally, Israel, Defs.' Br. 24–25, and not instead from the U.S.' open breach of its international law obligations to prevent, and not further, a genocide, an obligation reaffirmed by the I.C.J. Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (*Nicar. v. Ger.*), Order, ¶24 (Apr. 30, 2024), https://www.icj-cij.org/sites/default/files/case-related/193/193-20240430-ord-01-00-en.pdf (considering it "particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict…that such arms might be used to violate the [Genocide and Geneva] Conventions"); *id.*, Declaration of Judge Cleveland, ¶8, https://www.icj-cij.org/sites/default/files/case-

Also revealing the depth of their misapprehension, Defendants rest heavily on this curious proffer: Plaintiffs' claims "implicate policy judgments, *not just law*." Defs.' Br. 22 (emphasis added). But so what? Arguably all executive decisions that may be illegal – *i.e.* seizing U.S. steel mills, *Youngstown Steel*; detaining so-called "enemy combatants," *Rasul, et al.* – and indeed, the State Department's decision to foreclose listing Jerusalem on passports at issue in *Zivotofsky I and II* – also "implicate *policy*." What *Marbury* and 200 years of case law make clear, however, is that when asserted Executive policy choices veer into a legal prohibition, the "choices" cannot be considered discretionary and must be reviewed by the courts. This is precisely the "familiar judicial exercise" that *Zivotofsky I*, 566 U.S. at 196, confirmed Article III courts have under the Constitution, whether the binding legal duty comes from statute, the Constitution or customary international law. *See* Pls.' Br. 41–43; Constitutional Scholars Amici Br. 23–25.

B. Plaintiffs' Claims Squarely Involve Legal Questions, Not Discretionary Choices, and Are Thus Reviewable.

Defendants consistently mischaracterize this case as a challenge to general U.S. policy choices around military and foreign assistance. But Plaintiffs do not ask

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related/193/193-20240430-ord-01-03-en.pdf ("In the context of military assistance, the obligations to prevent under Article 1 of … the Genocide Convention necessarily impose a duty on States parties to be proactive in ascertaining and avoiding 'the risk that such arms might be used to violate the . . . Conventions'). *See also* Former Diplomats et al. Amici Br. 27–34, Dkt. #33.1.

the court "to directly question the *judgment* of the Executive Branch in how it has responded to the conflict in Gaza," Defs.' Br. 22 (emphasis added), or ponder whether Defendants "have done enough to stop an alleged genocide." Defs.' Br. 28. Plaintiffs instead seek review of Defendants' *actions* to *further genocide* as against binding law, predominantly by directly supplying the weapons being used to kill tens of thousands of civilians in Gaza. Pls.' Br. 15–18.

Understood this way, *none* of the cases cited by Defendants support the proposition that actions that violate the law are beyond judicial review simply because conduct might also implicate foreign relations. Plaintiffs here, in contrast to the plaintiffs in *Corrie v. Caterpillar*, are not asking the court to "indirectly indict Israel for violating international law with military equipment the United States government provided" to Israel well-ahead of the alleged violations pursuant to a generic grant of discretionary foreign military assistance. 503 F.3d 974, 982, 984 (9th Cir. 2007). Likewise, this case does not ask the courts to compel "when, where, whether and how" the United States should engage in good-faith treaty negotiations related to nuclear disarmament, *Republic of Marshall Islands v. United States,* 865 F.3d 1187, 1200 (9th Cir. 2017), or negotiate other treaties, *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). Rather, Plaintiffs directly charge *these Defendants* with violating international and domestic criminal law by *knowingly*

aiding and abetting an ongoing and – according to the I.C.J. and the district court – plausibly pled genocide in real-time.

This case also does not question the President's authority to establish or recognize state boundaries. *See United States v. Louisiana*, 363 U.S. 1 (1960). Nor does it involve claims of *negligence* in carrying out a discretionary function, whether during naval training exercises, *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997), or by *negligently* installing wiring that injured a servicemember. *Taylor v. Kellogg Brown & Root Servs., Inc.,* 658 F.3d 402 (4th Cir. 2011).[6] It is also unlike *Jaber v. United States*, which was dismissed under the *El-Shifa* framework because it challenged the wisdom of a drone strike as "mistaken and not justified." 861 F.3d 241, 247 (D.C. Cir 2017) (quotation omitted). This case is on the other side of the Duty-Discretion line because it involves a firm legal prohibition against aiding and abetting, and failing to prevent, genocide and because the Executive has no discretion to violate the law. *See Al Shimari*, 840 F.3d at 155–59 (distinguishing *Taylor*'s nonjusticiable negligence claims which might question discretionary military judgments from judicially enforceable customary international law duties that constrain military actions).

[6] *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), which questions Executive authority over applications to engage in foreign air transportation, is likewise inapposite, as it raises only a discretionary policy decision and not an alleged breach of a well-established legal norm.

Defendants' heavy reliance on *Corrie v. Caterpillar* is misplaced. Defs.' Br. 16–18. First, *Corrie* did not implicate a legal-duty of U.S. officials, as it challenged sales undertaken pursuant to "executive discretion" to advance U.S. policy interests. 503 F.3d at 982. Here, unlike in *Corrie*, Plaintiffs challenge executive conduct that violates clear binding domestic and international legal norms – precisely the genocide claims *Al-Tamimi* found justiciable. As in *Al-Tamimi*, the possibility that adjudication may entail an indirect assessment of another country's conduct can be of no moment when federal courts are empowered and obligated to review allegations of illegality by U.S. officials. Second, unlike *Corrie* or *Saldana v. Occidental Petroleum Corp*., 774 F.3d 544 (9th Cir. 2014), Defs.' Br. 17–18, this case does not challenge routine or discretionary foreign assistance programs of the kind this Court found critical to its political question analysis. *See Corrie,* 503 F.3d at 983 (policy determination Israel "*should*" purchase Caterpillar bulldozers) (emphasis added). Notably, those generic and discretionary funding "policy determination[s]," *id.*, were taken as part of a larger financing program *prior* to the alleged violations, meaning that the plaintiffs did not allege that U.S. decisions knowingly assisted war crimes;[7] here, U.S. officials are knowingly advancing a genocide, which constitutes a breach of international law.

[7] Likewise in *Saldana*, while the Executive Branch approved a military training program in Colombia, that financing was not alleged to have knowingly or substantially assisted the unauthorized, later-in-time criminal conduct indirectly

Defendants' reliance on *Alperin* is equally misplaced. Defs.' Br. 18–20, 27–28. There, this Court permitted Holocaust survivors' claims against Vatican Bank related to WWII property-theft because they were judicially manageable and implicated no discretionary policy judgments, but foreclosed vague "war objectives" claims related to the bank's actions helping war criminals flee or profiteering from slave labor, which involved reviewing historical "policy judgment[s]" and "value determinations," 410 F.3d at 560–62 (quoting *Japan Whaling*, 478 U.S. at 230), unlike the genocide claims *Alperin* noted were properly recognized in *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).[8] Here, the obligation to prevent, not further, genocide is not a mere policy choice, as *Kadić* and *Al-Tamimi* confirm. Any reading of *Corrie* or *Alperin* suggesting the violation of an actual legal duty – rather than a challenge to discretionary decisions – is beyond judicial review is incompatible with the Supreme Court's subsequent *Zivotofsky I* decision.

C. The Court Indisputably has Jurisdiction Over Plaintiffs' Request for Declaratory Relief.

Defendants focus on the purportedly intrusive nature of the injunctive relief Plaintiffs seek (which Plaintiffs strongly dispute), but say almost nothing about

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associated with the brigade to which the U.S. provided funding. 774 F.3d at 549, 553.

[8] This Court's unpublished opinion, *Hmong 2 v. United States*, 799 F. App'x 508, 509 (Mem.) (9th Cir. 2020), is inapposite, as that class-action required "judgment on United States policy in Southeast Asia for a period spanning several decades," and even the plaintiffs conceded it raised political questions.

Plaintiffs' independent entitlement to declaratory relief. Such a judicial declaration that Defendants are violating the law could not conceivably implicate a political question, as Defendants would themselves have to ascertain how to conform their behavior to the law. *See* Pls.' Br. 56–59.

II. PLAINTIFFS' INJURIES ARE TRACEABLE TO DEFENDANTS AND REDRESSABLE.

Defendants do not and cannot dispute that Plaintiffs have suffered a cognizable injury-in-fact, but argue only, wrongly, that Plaintiffs fail to satisfy the traceability and redressability requirements necessary for Article III standing.

A. Plaintiffs' Injuries are Traceable to Defendants' Direct Supply of Weapons that Israel is Using in Gaza, and Their Conduct Has Otherwise Had a Determinative Effect on Israel.

First, mischaracterizing Plaintiffs' claims, Defendants suggest Plaintiffs' Complaint challenges nothing more than "a foreign state's independent actions" and that it "[a]t best [alleges] that the United States exerts some influence over Israeli policy." Defs.' Br. 30–31. Instead, Plaintiffs actually allege that Defendants *directly supply* Israel with the means (weapons) to carry out a genocide in Gaza, and that Israel has used these very means for this unlawful purpose. Accordingly, Plaintiffs' injuries are not caused by a third-party's "independent" actions, but by Defendants themselves. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (the law holds vicariously liable those who aid and abet the tortious conduct of another). This is sufficient to plausibly show traceability for all Plaintiffs' claims because it

satisfies the causal link for aiding and abetting liability. *See Doe I v. Cisco Sys., Inc.*, 73 F.4th 700, 726 (9th Cir. 2023) (knowingly furnishing Chinese government "weapons and ammunition . . . or other resources relied on in the commission of the crimes" demonstrates sufficient "substantial effect" to support aiding-and-abetting liability) (internal quotations omitted).

Defendants have supplied the majority of weapons that Israel has used in Gaza since October 7, which plausibly enables or facilitates the commission of genocide. 3-ER-427–75 ¶¶15, 182–209; 2-ER-235 ¶w (forensic analysis makes experts "confident that the vast majority of bombs dropped on [Gaza] are U.S.-made."); 2-ER-275–78 ("In the first month and a half, Israel dropped more than 22,000 guided and unguided bombs on Gaza that were supplied by Washington" and U.S. has transferred at least 15,000 bombs, including 2,000-pound bunker busters, and "more than 50,000 155mm artillery shells"). Defendants have shipped munitions to Israel since early October. 3-ER-469–75 ¶¶182–209; 2-ER-233 ¶n (on December 8, Defendant Blinken bypasses Congressional oversight,approving sale of 120mm tank munitions to Israel); 2-ER-216 ¶10 (expert testimony that since October 7 the U.S. has provided "extensive weapons, munitions, and equipment to Israel").[9] Defendants

[9] *See also* John Hudson, *U.S. floods arms into Israel despite mounting alarm over war's conduct*, Wash. Post (Mar. 6, 2024), https://www.washingtonpost.com/national-security/2024/03/06/us-weapons-israel-gaza/ (between October 2023 and March 2024, Biden Administration approved 100 weapons transfers to Israel).

committed to continuing this heavy supply. *See* 2-ER-232 ¶k (White House N.S.C. Coordinator Kirby on December 6: the U.S. has "done everything we can – and we'll continue to do it" including "in terms of weapons and capabilities"). Even six months into this genocide, Defendants admit they have an ongoing policy of maintaining the "qualitative military advantage," Defs.' Br. 3, of a state which the district court and I.C.J. found is plausibly committing a genocide. 1-ER-6. This is sufficient to establish traceability.

Second, that Israel is the final actor in effectuating the genocide does not break the chain of causation. Plaintiffs are not required to demonstrate proximate cause, *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (2014), or that "defendant[s'] actions are the very last step in the chain of causation," as fair traceability "does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also Ning Xianhua v. Oath Holdings, Inc.*, 536 F. Supp. 3d 535, 550 (N.D. Cal. 2021) (arbitrary torture and arrest by Chinese authorities traceable to Yahoo's disclosure of plaintiff's communications). Where a "complaint relies on words directly from the mouths of the relevant third parties explaining" the effect of a defendant's actions on their conduct, a plaintiff will have satisfied this requirement. *Mendia v. Garcia*, 768 F.3d 1009, 1014 (9th Cir. 2014).

Israeli officials and Defendants have acknowledged that Defendants' *own actions* – their provision of weapons and other assistance – have enabled Israel's assaults on Palestinians in Gaza. *See* 3-ER-476 ¶211 (Israeli Defense Minister Gallant: "[t]he Americans insisted and we are not in a place where we can refuse them. We rely on them for planes and military equipment."); 2-ER-232 ¶i (Israeli Prime Minister Netanyahu: "We need three things from the US: munitions, munitions, and munitions"). Defendants or their spokespeople have admitted to guiding Israel's military decisions. 3-ER-478–79 ¶¶225–26 ("conversations [including at DoD] all the way up to the president have certainly informed and at least guided some of what the Israelis are doing on the ground"), ¶232. Finally, expert testimony by a former high-level State Department official responsible for U.S. arms transfers concluded on December 22 that "it would be impossible for Israel to have conducted the past two months of military operations as it has without utilizing a vast amount of U.S.-origin weaponry." 2-ER-217 ¶10. Indeed, the U.S. has had a longstanding determinative effect over Israel's military decisions. *See, e.g.*, 2-ER-236 ¶6(a) (1982 New York Times report that Israel agreed to cease bombing Lebanon within 30 minutes after President Reagan called to demand it). These allegations are sufficient to satisfy traceability.[10]

[10] Defendants on the one hand describe the close and influential relationship between the U.S. and Israel, Defs.' Br. 4–7, and on the other attempt to dispute the extent of U.S. influence over Israel. Defs.' Br. 30–31. Courts can "consider[] the

Defendants cite cases involving highly speculative forms of causation that are entirely distinguishable. In *Salmon Spawning & Recovery Alliance v. Gutierrez*, plaintiffs sought to compel the U.S. to withdraw from a treaty with Canada that allegedly allowed overfishing by Canada, and to request Canada implement additional conservation measures. 545 F.3d 1220, 1228 (9th Cir. 2008). Because there were no plausible allegations that U.S. withdrawal would reduce overfishing, nor that Canada would respond to requests to alter its conduct, this Court found no traceability. *Id*.

Similarly, in *Talenti v. Clinton*, the plaintiff sought to compel the Secretary of State to withhold aid to Italy after Italy expropriated his property. 102 F.3d 573 (D.C. Cir. 1996). The plaintiff failed to show redressability because the enforcement of the relevant statute would not require withholding of aid and because it was not plausible that Italy would respond to any withholding of aid by resolving his expropriation claim. *Id*. at 577–78. The court distinguished *Japan Whaling* where, like this case, there was "a track record suggesting that the threat of sanctions would compel compliance with the whaling agreements." *Id*. at 578.

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question of [their] jurisdiction on the basis of undisputed facts alone," *Ruan v. United States*, 831 F. App'x 797, 799 (9th Cir. 2020), and the undisputed facts about the scale of Defendants' weapons transfers to Israel, and Israel's reliance on those weapons, as well as the influential relationship Defendants describe, Defs.' Br. 4–7, are sufficient to establish traceability.

Here, like *Japan Whaling* but unlike *Salmon Spawning* and *Talenti*, the plausible inference of traceability turns on Defendants' own admissions that they are influencing Israel's military decisions, and Israeli government admissions and expert testimony that the scale of Israel's attacks on Palestinians in Gaza could not occur absent U.S. munitions supplies.[11]

B. Plaintiffs' Injuries Are Redressable by this Court.

A plaintiff's burden to show redressability is "relatively modest[,]" *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012), requiring only that the "change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury. . . ." *Id.* (quotations omitted). Plaintiffs "need not show that a favorable decision will relieve [their] every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

[11] Defendants' reliance on other cases is similarly misplaced. Defs.' Br. 30–31. In *Cierco v. Mnuchin*, 857 F.3d 407 (D.C. Cir. 2017), plaintiff-shareholders could not establish redressability in a challenge to transfers of a foreign bank's assets because, by the time of the court's ruling, the bank's assets were already transferred and plaintiffs made no showing that their requested relief would cause reversal of the transfer. *Id*. at 418. In *Greater Tampa Chamber of Commerce v. Goldschmidt*, plaintiffs sought to invalidate an agreement that limited American airline flights to the U.K., and to enjoin the agreement until Senate ratification. 627 F.2d 258, 263 (D.C. Cir. 1980). The claims were nonredressable because, unlike here, there was no evidence that the U.K. had an incentive to alter their behavior and plaintiffs conceded that the U.K. was "not willing to agree to any modification." *Id*.

1. Ceasing Defendants' Direct Assistance to Israel's Genocide Would Redress Plaintiffs' Injuries.

Because Plaintiffs' injuries are traceable to Defendants' provision of weapons essential to Israel's genocide, they are necessarily redressable. An injunction ceasing provision of this weaponry would redress Plaintiffs' injuries. A declaratory judgment that Defendants are aiding and abetting and failing to prevent genocide, in violation of the law, would likewise cause Defendants to cease their illegal acts to comply with the Court's declaratory order.

Moreover, redressability is established where judicial relief produces even incremental reductions in plaintiffs' injuries. In *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007), the Court concluded that injuries to the Massachusetts coastline were redressable by an order requiring regulation of U.S. automobile emissions, although those emissions accounted for only 6% of worldwide share, and even where the order only would reduce the risk of harm "to some extent." Here, Plaintiffs have plausibly shown that a reduction in the flow of U.S. weapons – which constitutes the *vast majority* of weapons used in Israel's genocide in Gaza, *see* 3-ER-427–69 ¶¶15, 182; 2-ER-235 ¶¶u, w – would at least partially redress Plaintiffs' injuries by reducing Israel's capability to continue the genocide.

2. The Political Question Doctrine Does Not Bar Relief.

Defendants repackage their unfounded political question defense to argue that the Court lacks power to redress Plaintiffs' injuries because a court order would

implicate complex, discretionary policy decisions. Defs.' Br. 34. Defendants have not ever argued – nor could they, given the law, Pls.' Opening Br. 54–56; *Al-Tamimi*, 916 F.3d at 11–12 – that there are no "judicially manageable standards" to resolve their claims, foreclosing this argument.

The sole case Defendants cite, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), Defs.' Br. 34, is far afield because the *Juliana* plaintiffs' own experts effectively conceded at summary judgment that there was a gaping mismatch between the relief plaintiffs requested and the "comprehensive," systemic, and fundamental transformations of U.S. energy policy necessary to actually redress plaintiffs' injuries. 947 F.3d at 1170–71. Here, redressability is sound because Plaintiffs plausibly show that U.S. military support is necessary to Israel's ongoing genocide. Remedying Plaintiffs' injuries would not require a "comprehensive plan"; instead, halting one set of affirmative acts by Defendants – the supply of weapons for Israel's use in Gaza – would at least partially remedy their injuries, if not halt the genocide altogether.

3. Defendants Do Not Enjoy Immunity Over Claims of Aiding and Abetting and Failing to Prevent Genocide.

Defendants' assertion of Presidential immunity for Defendant Biden from Plaintiffs' equitable claims is unfounded. Defs.' Br. 33.[12] For assessing equitable

[12] Defendants cite *Mississippi v. Johnson* for the proposition that a court cannot "enjoin the President in the performance of his official duties," 71 U.S. 475, 501

claims against the President, the *Larson* framework applies. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 695 (1949); *E.V. v. Robinson*, 906 F.3d 1082, 1092 (9th Cir. 2018). This waives the President's immunity over *ultra vires* and unconstitutional actions. *Murphy Co. v. Biden*, 65 F.4th 1122, 1128–30 (9th Cir. 2023). *See also Sierra Club v. Trump*, 929 F.3d 670, 696–97 (9th Cir. 2019).[13]

The President has no discretion to avoid federal common law mandates, particularly those deemed *jus cogens* norms and *erga omnes* obligations like the prohibition on aiding and abetting genocide and the requirement to prevent genocide, which lie beyond the scope of his legal authority. *See Yousef v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) ("under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."); *Al Shimari*, 840 F.3d at 162 (Floyd, J., concurring) ("it is beyond the power of even the President to declare [*jus cogens* violations] lawful," since determinations of legality are "constitutionally committed to the courts"). *See also* Pls.' Br. 54–56.

(1866), while failing to acknowledge the critical distinction the case draws between presidential actions that are "political" or "discretionary" from actions that are "ministerial" – i.e., "directed by law." *Id*. at 478, 490. As demonstrated above, the President enjoys no discretion to violate the laws prohibiting genocide.

[13] *Franklin v. Massachusetts*, 505 U.S. 788 (1992) also does not support a claim to absolute Presidential immunity, only immunity for APA claims. The *Larson* framework (which *Franklin* did not address) makes clear, however, that for *non*-APA claims, the President has no immunity for *ultra vires* equitable claims. *See Murphy Co.*, 65 F.4th at 1128.

Moreover, any theoretical immunity for Defendant Biden would not apply to Defendants Austin and Blinken. Section 702 of the APA waives "whatever sovereign immunity the United States enjoyed from prospective relief with respect to any action for injunctive relief." *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017) (internal quotations omitted); *see also Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524 (9th Cir. 1989).[14]

Realizing this, Defendants focus solely on one action that they argue Defendant Biden directed and therefore is not remediable—the decision to veto UN ceasefire resolutions. Defs.' Br. 34. But the Court is required to "address each requested remedy in turn." *M.S. v. Brown*, 902 F.3d 1076, 1084–86 (9th Cir. 2018). There are independent remedies that, if ordered against Defendants Austin or Blinken alone, would suffice, including a declaratory judgment that their role in the provision of munitions is aiding and abetting and failing to prevent genocide, and an injunction prohibiting the provision of such munitions. *See* 3-ER-470 ¶186, 2-ER-233 ¶n (transfers of weapons to Israel approved or shipped by DoD or DoS).

[14] This waiver applies to federal common law claims, *Navajo Nation*, 876 F.3d at 1171 (applying APA waiver to federal breach of trust claim), and ATS claims, *see, e.g., Rosner v. United States*, 231 F. Supp. 2d 1202, 1212 (S.D. Fla. 2002); *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1308 (S.D. Cal. 2018).

4. Even if Injunctive Relief is Not Available, Declaratory Relief is.

Defendants erroneously argue that if injunctive relief is foreclosed, declaratory relief is automatically also foreclosed. Defendants rely on one scholar's characterization of *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950).[15] But *Skelly Oil* simply requires any party bringing a declaratory action to have some basis for federal (as opposed to state) court jurisdiction – either federal question or diversity jurisdiction. 339 U.S. 667, 671–72 (1950).[16] This Court indisputably has federal question jurisdiction over this case and *Skelly Oil* in no way undermines the requirement, *see* Pls.' Br. 56, that courts examine claims for injunctive and declaratory relief separately, including for political question, *Center for Biological Diversity v. Mattis*, 868 F.3d 803, 815 (9th Cir. 2017), and the Supreme Court's instruction that courts may grant declaratory relief even if injunctive relief is unavailable. *Powell v. McCormack*, 395 U.S. 486, 517–18 (1969).

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[15] Defs.' Br. 35–36 (quoting Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 841 (7th ed. 2015)).

[16] *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC* simply reiterates this requirement. 571 U.S. 191, 196-197 (2014). *California v. Texas* similarly stands for the uncontroversial proposition that Article III standing is required for seeking declaratory relief. 593 U.S. 659, 672 (2021).

CONCLUSION

For the foregoing reasons, the district court judgment should be reversed, and the case remanded for further proceedings.

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Respectfully submitted,

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FOR THE NINTH CIRCUIT

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