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; DR. OMAR EL-NAJJAR,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., President of the United States; ANTONY J. BLINKEN, Secretary of State; LLOYD J. 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

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ISMAIL J. RAMSEY
United States Attorney

SHARON SWINGLE
MAXWELL A. BALDI
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-1754

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Rule:

Legislative Materials:

International Document:

Other Authorities:

INTRODUCTION

Since Hamas terrorists attacked Israel on October 7, 2023, the United States has been working to mitigate the humanitarian crisis unfolding in Gaza, to prevent the escalation of the armed conflict between Israel and Hamas into a broader regional conflict, to support Israel's right to self-defense, to secure a just and durable peace, and to defend vital U.S. national-security interests. Under our Constitution, the Executive Branch's balancing of these key foreign- policy concerns is not subject to judicial second-guessing or superintendence.

Plaintiffs—Palestinian advocacy organizations, Palestinian residents of the Gaza Strip, and Palestinian-Americans—seek a declaration that the President, the Secretary of State, and the Secretary of Defense are complicit in an alleged genocide and an injunction to manage national security and foreign policy, including by requiring defendants to take all measures within their power to prevent Israel from committing alleged genocidal acts against Palestinians in Gaza. Although the United States is deeply sympathetic towards the suffering that plaintiffs and others have endured during the conflict in Gaza, this case is not suitable for judicial resolution.

Following binding precedent, the district court correctly recognized that it lacks jurisdiction to entertain plaintiffs' claims because they present quintessential political questions. *See Republic of the Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007). This Court should affirm.

STATEMENT OF JURISDICTION

Plaintiffs asserted jurisdiction under 28 U.S.C. §§ 1331, 1350, and 2201 *et seq.* 3-ER-435. On January 31, 2024, the district court entered final judgment in favor of defendants. 1-ER-2. On February 8, 2024, plaintiffs timely filed their notice of appeal. 3-ER-508; *see* Fed. R. App. P. 4(a)(1)(B).

This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether plaintiffs' claims that the President, the Secretary of State, and the Secretary of Defense failed to prevent and are complicit in alleged genocide in Gaza present nonjusticiable political questions.

II. Whether plaintiffs lack standing.

PERTINENT STATUTES AND REGULATIONS

There are no statutes or regulations pertinent to this case.

STATEMENT OF THE CASE

A. Background

1. "Steadfast support for Israel's security has been a cornerstone of American foreign policy for every U.S. Administration since the presidency of Harry S. Truman." Bureau of Political-Military Affairs, U.S. Dep't of State, *U.S. Security Cooperation with Israel* (Oct. 19, 2023), https://perma.cc/2SRU-7SAW. The United States has committed to supporting Israel's security as well as U.S. interests in the region. Just last summer, Congress reaffirmed that "the United States will always be a

staunch partner and supporter of Israel." H.R. Con. Res. 57, 118th Cong. § 3 (2023) (enacted). Federal law designates Israel as a "major non-NATO all[y]." 22 U.S.C. § 2321k(b). The United States has committed to maintaining Israel's qualitative military advantage against credible threats from states and non-state actors. Bureau of Political-Military Affairs, *supra*; *see also* 22 U.S.C. § 2776(h) (prohibiting arms sales that will adversely affect "Israel's qualitative military edge over military threats to Israel"). And the United States has committed to "bilateral security cooperation" with Israel and to pursuing "a comprehensive and lasting solution to the Palestinian-Israeli conflict." U.S. Dep't of State, *Integrated Country Strategy: Israel* 1 (2022), https://perma.cc/3LR2-K6L7.

To carry out these policies, consistent with a memorandum of understanding between the United States and Israel, Congress has authorized at least $3.3 billon annually in Foreign Military Financing to be made available for Israel on a grant basis for fiscal years 2021–2028. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1273, 134 Stat. 3388, 3979. Congress has appropriated those funds through fiscal year 2024. *See* Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. F, tit. VII, § 7041(d), 138 Stat. 460, 805.[1]

[1] *See also* Consolidated Appropriations Act, 2021, Pub. L. No. 116-20, div. K, tit. IV, 134 Stat. 1182, 1712 (2020); Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. K, tit. VII, § 7041(d), 136 Stat. 49, 637–38; Consolidated

Continued on next page.

2. On October 7, 2023, Hamas terrorists perpetrated simultaneous attacks on Israel civilian and military targets, killing more than 1,200 Israelis and taking hundreds of hostages in Gaza. Since then, Israel has fought a military campaign against Hamas in the Gaza Strip.

The President and other senior administration officials have been engaged in diplomatic discussions with actors throughout the region regarding the conflict. The United States seeks a stable and durable peace that protects civilians, ensures Israeli security, and gives rise ultimately to a Palestinian state.

The President has visited the region to reinforce the United States' support for Israel and the families of victims, including U.S. nationals killed or taken hostage, while making clear that "[t]he United States unequivocally stands for the protection of civilian life," and emphasizing that "[t]he vast majority of Palestinians are not Hamas." 3-ER-290 (alterations in original) (quoting The White House, *Remarks by President Biden on the October 7th Terrorist Attacks and the Resilience of the State of Israel and Its People* (Oct. 18, 2023), https://perma.cc/D7A9-RSBU). The President has appointed a special envoy to lead diplomatic efforts to address the humanitarian crisis in Gaza and to facilitate the provision of life-saving assistance. 3-ER-290–91. The President has sought additional funding from Congress both to provide additional security assistance to Israel and to extend additional humanitarian assistance to civilians on

---

Appropriations Act, 2023, Pub L. No. 117-328, div. K, tit. IV, § 7041(d), 136 Stat. 4459, 5046 (2022).

both sides of the conflict. 3-ER-291. The President has encouraged Israel to "increase the throughput and consistency of humanitarian assistance to innocent Palestinian civilians" and to refrain from further military operations in the southern Gaza city of Rafah "without a credible and executable plan for ensuring the safety of and support for the more than one million people sheltering there." The White House, *Readout of President Biden's Call with Prime Minister Netanyahu of Israel* (Feb. 11, 2024), https://perma.cc/4EZU-WMHJ. The President has repeatedly pushed for a "lasting ceasefire," and on, March 25, the United States enabled UN Security Council Resolution 2728 to be adopted, recognizing the importance of a resolution that demands "an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire," despite concerns with other aspects of the text. Linda Thomas Greenfield, U.S. Ambassador to the United Nations, Explanation of Vote (Mar. 25, 2024), https://perma.cc/9BAE-KDPY; *see* S.C. Res. 2728, U.N. Doc. S/RES/2728 (Mar. 25, 2024). And the President has announced plans to build a temporary pier to facilitate humanitarian aid for Gaza. 170 Cong. Reg. H1031 (daily ed. Mar. 7, 2024) (State of the Union address).

Since October 7, the Secretary of State has traveled to to Israel seven times and to the wider region six times. U.S. Dep't of State, *Secretary Antony J. Blinken at a Press Availability* (Feb. 7, 2024), https://perma.cc/MS5V-JQ3P; Interview by Christiane Baissary with Antony J. Blinken, Sec'y of State, in Jeddah, Saudi Arabia (Mar. 20, 2024), https://perma.cc/6EAL-GMUA. He has emphasized the United States'

"'condemnation of the terrorist attacks in Israel,' 'reaffirm[ed] the United States' solidarity with the government and people of Israel,' and 'engage[d] regional partners on efforts to help prevent the conflict from spreading, secure the immediate and safe release of hostages, and identify mechanisms for the protection of civilians.'" 3-ER-291 (quoting U.S. Dep't of State, *Secretary Blinken's Travel to Israel, Jordan, Qatar, Bahrain, Saudi Arabia, the United Arab Emirates, and Egypt* (Oct. 12, 2023), https://perma.cc/275U-6FSC). He has stressed that Israel must keep "the situation for civilians . . . first and foremost in mind" and ensure that "that the necessary steps are taken to make sure that they're protected[,] and they have the assistance they need." *Secretary Antony J. Blinken at a Press Avaliability*, *supra*.

The Secretary of Defense has deployed U.S. forces to the region to safeguard U.S. interests and "bolster regional deterrence." 3-ER-292 (quoting U.S. Dep't of Def., *Statement from Secretary of Defense Lloyd J. Austin III on Steps to Increase Force Posture* (Oct. 21, 2023), https://perma.cc/S9VA-VMYD); *see also* David Vergun, U.S. Dep't of Def., *DoD Takes Steps to Restore Stability in Red Sea Area* (Feb. 27, 2024), https://perma.cc/23C4-3D2N (detailing efforts of an international task force to protect shipping in the Red Sea). He has also conveyed to Israeli officials "the need to prioritize civilian safety in military operations." 3-ER-292 (quoting U.S. Dep't of Def., *Readout of Secretary of Defense Lloyd J. Austin III's Call with Israeli Minister of Defense Yoav Gallant* (Oct. 31, 2023), https://perma.cc/AW85-ZGPR). And the U.S. military has transported critical humanitarian supplies to civilians in Gaza. Joseph Clark, U.S.

Dep't of Def., *U.S., Jordanian Forces Deliver Humanitarian Aid to Civilians in Gaza*(Mar. 2, 2024), https://perma.cc/RX2B-DUYX (detailing airdrops of food to civilians in Gaza).

Together, the defendants "remain determined . . . to pursue a diplomatic path to a just and lasting peace, and security for all in the region, and notably for Israel." *Secretary Antony J. Blinken at a Press Availability*, *supra*.

B. Prior Proceedings

1. Plaintiffs are two Palestinian nongovernmental organizations, three Palestinian residents of Gaza, and five Palestinian-Americans who have family members living in Gaza. 3-ER-424.

Plaintiffs sued the President, the Secretary of State, and the Secretary of Defense. 3-ER-419, 435. Plaintiffs allege that Israel is engaged in genocide against Palestinians in Gaza.[2] 3-ER-496–500. Asserting a cause of action under federal common law and the Alien Tort Statute, they charge that defendants have violated their duty to prevent that alleged genocide and are in fact complicit in genocide. 3-ER-500–05; *see also* 2-ER-56 (clarifying that plaintiffs' claims sound in federal common law).

[2] Although the resolution of this appeal does not turn on plaintiffs' allegations with respect to Israel, the United States disagrees with their characterization of Israel's actions in Gaza. *See* U.S. Dep't of State, *This Week's International Court of Justice Hearings* (Jan. 10, 2024), https://perma.cc/XHS9-DWA4 ("Allegations that Israel is committing genocide are unfounded.").

Plaintiffs seek a sweeping injunction to:

- Require the Executive Branch "to take all measures within [its] power" to convince Israel to end any bombing operations in Gaza, lift its "siege" of Gaza, and prevent any transfer of Palestinians from Gaza;
- Prevent the Executive Branch from providing "military assistance," "financing," "weapons or arms," and "military equipment or personnel" to Israel; and,
- Forbid the Executive Branch "from obstructing attempts by the international community, including at the United Nations, to implement a ceasefire in Gaza."

3-ER-505–06. Plaintiffs also seek a declaration that the President, the Secretary of State, and the Secretary of Defense have violated their duties under international law to prevent genocide and to refrain from complicity in genocide. 3-ER-505.

Plaintiffs moved for a preliminary injunction to cut off all military, financial, and other forms of support to Israel. 3-ER-314. Defendants moved to dismiss the complaint on the grounds that plaintiffs' claims present political questions, plaintiffs lack standing, and plaintiffs lack a cause of action. 3-ER-288. Over defendants' objections, the district court held an evidentiary hearing and took live testimony from several plaintiffs and an expert witness. 2-ER-72–168. The district court also heard arguments on a series of questions it posed to the parties before the hearing. 2-ER-17–69, 168–79; *see* 2-ER-183–85.

2. Following the hearing, the district court denied plaintiffs' motion for a preliminary injunction and dismissed the case. 1-ER-10. The district court held that "the claims alleged here raise fundamentally non-justiciable political questions." 1-

ER-7. The district court recognized that "[b]oth Congress and the President have determined that military and economic assistance to Israel is necessary at this time," and that it could not "'intrude into our government's decision to grant military assistance to Israel.'" 1-ER-9 (quoting *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007)). Accepting that it could not "'square the primacy of the Executive in the conduct of foreign relations and the Executive Branch's lead role in foreign policy with an injunction that compels the United States to' end support and exert influence over Israel," the district court dismissed the case as nonjusticiable. 1-ER-10 (cleaned up) (quoting *Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017)).

3. Plaintiffs timely appealed. 3-ER-508.

SUMMARY OF ARGUMENT

I. Under Article III of the Constitution, courts may decide only legal disputes; they may not supplant the political branches' foreign-policy judgments. Plaintiffs seek judicial review of Executive Branch foreign-policy decisions, which would cabin the Executive Branch's discretion to conduct foreign affairs and undermine U.S. diplomatic efforts with Israel and in the wider region. As this Court's precedents confirm, plaintiffs' claims lie at the heart of the political question doctrine. *See Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544 (9th Cir. 2014) (per curiam); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

The remedies plaintiffs seek confirm that this Court lacks jurisdiction to hear their claims. They seek an injunction to (1) cut off aid to an ally in the middle of its military response to a devastating terrorist attack, (2) control how the United States negotiates with foreign states, and (3) prohibit the United States from exercising its veto in the United Nations Security Council. They also seek a declaration that the President, Secretary of State, and Secretary of Defense are complicit in a genocide allegedly being carried out by an ally. If a court were to grant any of those forms of relief, it would undermine U.S. foreign policy, disrespect a coordinate branch of government, and usurp powers constitutionally committed to the politically accountable branches of government.

Plaintiffs cannot avoid that conclusion by arguing that the political question doctrine does not apply because defendants' conduct purportedly violates international law. The challenged conduct involves some of the most complicated and nuanced foreign-policy and national-security judgments the President and the Secretaries make: how to balance the needs of an ally, regional stability, protection for civilians, and other U.S. foreign-policy interests—all while pursuing a just and lasting peace. Even if the Executive Branch believed a genocide were occurring—and it does not—how best to respond would involve a host of complex military and foreign-relations judgments that are vested exclusively in the Executive Branch. Because plaintiffs' claims—and the remedies plaintiffs seek—present core political questions, the district court properly recognized that it lacks jurisdiction.

II. The district court also lacks jurisdiction because plaintiffs cannot establish standing. Plaintiffs' alleged injuries may possibly be traced to Israel but not to the President of the United States, the Secretary of State, or the Secretary of Defense. And for many of the same reasons that this case presents political questions, a court cannot grant plaintiffs any effectual relief.

STANDARD OF REVIEW

This Court reviews de novo dismissal of a case for lack of Article III jurisdiction. *WildEarth Guardians v. U.S. Forest Serv.*, 70 F.4th 1212, 1216 (9th Cir. 2023).

ARGUMENT

"Whether examined under the rubric of . . . standing[] or the political question doctrine, the analysis stems from the same separation-of-powers principle—[this case] is not committed to the judicial branch." *Republic of the Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017). The district court correctly recognized that it lacked jurisdiction to consider plaintiffs' claims because they present quintessential political questions. Plaintiffs also lack standing to raise their claims.

I. The political question doctrine bars plaintiffs' claims because a court cannot second-guess core foreign-policy judgments.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When Article III limits federal jurisdiction, it cannot be enlarged, *see TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021), whether

by judicial decree, statute, or customary international law. One such limitation is the political question doctrine.

The political question doctrine flows from the separation of powers. *Baker v. Carr*, 369 U.S. 186, 217 (1962). It recognizes that some issues are "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). The doctrine comes into play when a question displays one or more of the following characteristics:

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

Baker, 369 U.S. at 217. While the first two factors are often treated as the most important, "to find a political question, [the Court] need only conclude that one factor is present, not all." *Republic of the Marshall Islands*, 865 F.3d at 1200 (cleaned up).

A. Plaintiffs' claims and demands for relief lie at the heart of the political question doctrine.

1. Not all cases "touching foreign relations" implicate political questions. *Baker*, 369 U.S. at 211. But generally, "the conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative branches and the propriety of what may be done in the exercise of this political power

is not subject to judicial inquiry or decision." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (cleaned up). As such, "cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary." *Id.* (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005)).

Plaintiffs' claims present political questions because they challenge the President's conduct of foreign affairs involving policy questions not suitable for judicial resolution and because judicial interference in this case could undermine U.S. diplomatic relationships with Israel and in the wider region.

The Supreme Court "has recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'" *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *see, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936); *United States v. Louisiana*, 363 U.S. 1, 35 (1960). The President the has the exclusive power to negotiate treaties and conduct diplomacy with foreign nations. *See* U.S. Const. art. II, § 2, cl. 2. Because of that commitment to the Executive Branch, *see Baker*, 369 U.S. at 217, neither Congress nor the courts may compel the Executive Branch to engage in diplomatic negotiations with a foreign nation. *See Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993) (holding that courts may not enforce a statute purporting to require the Secretary of State to negotiate a treaty). The Constitution also vests the President, as commander-in-chief, with the power to deploy the armed

forces and the duty to defend U.S. national security. U.S. Const. art. II, § 2, cl. 1; *see The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). Because "courts are unschooled in the delicacies of diplomatic negotiation and the inevitable bargaining for the best solution of an international conflict, the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government." *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (cleaned up) (holding that a challenge to the U.S. Navy's conduct of training exercise with NATO forces was barred by the political question doctrine).

To adjudicate plaintiffs' claims would require a court to answer political questions. Under plaintiffs' own theory of the case, they must show that defendants did not do enough to prevent Israel's actions and that defendants made the wrong policy choices when they sent aid and materiel to Israel. When the defendants are the President and the Secretaries of State and Defense, a court cannot answer those questions. And unless plaintiffs can establish their claims, they are entitled to no relief at all.

To grant plaintiffs the remedies they seek would also require a court to answer political questions. Plaintiffs ask for judicial intervention to control how the President carries out his core functions. As Israel's campaign against Hamas continues, the Executive Branch is working to stabilize the region, support its ally, protect innocent civilians on both sides of the conflict, provide humanitarian relief, defend national-security interests, and secure a just and lasting peace. Plaintiffs argue that the United

States has balanced these interests incorrectly. And so, they ask for an injunction that would bar the Executive Branch from providing any military or financial assistance to Israel in its conflict with Hamas and that would compel the Executive Branch to take all diplomatic and political measures to prevent Israel's alleged commission of genocide. Yet, courts lack capacity to decide whether and how the United States engages diplomatically with foreign nations. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Diplomatic negotiations—especially multiparty negotiations like the United States is undertaking here—are dynamic. They involve give and take; they demand continuous rebalancing of interests and priorities. They "are delicate, complex, and involve large elements of prophecy"; they often turn on classified intelligence. *Id.* The judiciary is not well suited to second-guess such decisions because there are no judicially manageable standards to review them. *See Baker*, 369 U.S. at 217.

If courts could intervene in diplomatic relations, they would "undermine the Government's ability to speak with one voice." *Munaf v. Geren*, 553 U.S. 674, 702 (2008). Foreign affairs presents the most critical field for the judiciary to avoid "multifarious pronouncements," *Baker*, 369 U.S. at 217; *see The Federalist No. 42*, at 215 (James Madison) (George W. Carey & James McClellan eds., 2001) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). Judicial second-guessing of the diplomatic and military actions of the President, the Secretary of State, and the Secretary of Defense would hamper the Executive Branch's ability to

negotiate with Israel, regional allies, and our partners around the world. Compelling the defendants to take or refrain from taking certain diplomatic steps would significantly harm U.S. foreign policy and could even render effective diplomacy impossible. A court cannot make such a decision without disrespecting the Executive Branch and undermining the United States on the world stage. *See Baker*, 369 U.S. at 217.

Plaintiffs' claims do not just "touch[] foreign affairs." *Baker*, 369 U.S. at 211. They attempt to regulate how the Executive Branch conducts diplomacy and safeguards national security while a close partner and ally is engaged in an armed conflict. These claims are beyond an Article III court's competence to adjudicate.

2. This Court's precedents confirm that plaintiffs' claims raise nonjusticiable political questions.

This Court held in *Corrie* that a claim turning on the propriety of the political branches' decision to grant extensive military aid to Israel is nonjusticiable. In *Corrie*, individuals sued Caterpillar, Inc., a U.S.-based manufacturer of construction equipment. 503 F.3d at 977. They alleged that Caterpillar sold bulldozers to the Israel Defense Forces, which, they further alleged, used the bulldozers to demolish homes and kill or injure their family members in violation of international law. *Id.* The United States government paid for the bulldozers as part of the Foreign Military Financing program—a federal grant-and-loan program, which enables select friendly foreign countries and international organizations to purchase defense materiel,

services, and training from the United States. *Id.* at 978; *see also* 22 U.S.C. § 2763. Although the complaint claimed that Caterpillar—not the United States—had aided and abetted the Israel Defense Forces' alleged violations of international law, this Court concluded that "[a]llowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel." *Corrie*, 503 F.3d at 982. Because the "sales 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," the Court could not "impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers." *Id.* The political question doctrine, therefore, barred consideration of those claims. *Id.* at 984.

Similarly, in *Saldana v. Occidental Petroleum Corp.*, the plaintiffs sued a private oil company that had provided $6.3 million in funding to a Colombian Army brigade to protect a pipeline. 774 F.3d 544, 545–47, 552 (9th Cir. 2014) (per curiam). The United States had also provided $99 million worth of military equipment and training to the same brigade to protect the same pipeline. *Id.* at 546–48. The survivors of union leaders killed by the brigade sued the oil company, asserting that it supported the brigade despite knowing that it would commit human-rights abuses. *Id.* at 549–50. This Court explained that because there was "no principled way to sever Occidental's funding from that of the United States," the claims were "inextricably

bound to an inherently political question—the propriety of the United States' decision to provide . . . training and equipment to the [brigade]." *Id.* at 552. This Court held that it could not pass on the propriety of that funding question, which would call into question the government's "underlying foreign-policy choices." *Id.* at 553.

The political question doctrine applies even more squarely in this case than in *Corrie* and *Saldana*. As in *Corrie*, the foreign-policy decision to provide military aid to Israel "is committed under the Constitution to the [political] branches." 503 F.3d at 983; *see also Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (same). If a court cannot "implicitly decid[e] the propriety" of supplying military aid to an ally because that decision would interfere with "a political decision inherently entangled with the conduct of foreign relations," "caus[e] international embarrassment," and "indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide," then it certainly cannot do so explicitly. *Corrie*, 503 F.3d at 982–84; *see also Saldana*, 774 F.3d at 552.

These same principles compelled this Court's holding that it could not consider claims that the Vatican Bank profited from "genocidal acts" undertaken by the Ustaša political regime in Croatia during World War II.[3] *See Alperin*, 410 F.3d at 538, 543,

[3] The *Alperin* plaintiffs alleged that the Ustaše "slaughtered" "Serbs, Jews, and the Roma . . . in their villages after unspeakable tortures" and ran a concentration camp known as the "'Auschwitz of the Balkans.'" *Alperin*, 410 F.3d at 543, 559; *see also* Svetozar Stojanovic, *The Destruction of Yugoslavia*, 19 Fordham Int'l L.J. 337, 340 n.5 (1995) (alleging that the Ustaše engaged in genocide and "killed between 350,000 and 700,000 Serbs, 50,000 Jews, and 20,000 [Roma].").

559. To decide those claims, a court would have needed to decide whether the Vatican Bank actively assisted with Ustaša war crimes. *Id.* at 559. Only the political branches, this Court held, could make that determination. *Id.* at 560. The Court explained that it is not "a war crimes tribunal," did not know "why the Allies made the policy choice not to prosecute the Usta[še] and the Vatican Bank," and could not "intrud[e] unduly on certain policy choices and value judgments that are constitutionally committed to [the political branches]." *Id.* (alterations in original) (quoting *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992)). The Court reasoned that allegations that the Vatican Bank violated international law by helping war criminals flee from prosecution "could also be levied against the United States, which provided similar aid driven by the sudden shift in priorities from fighting the Nazis to driving back Communism" and that "[i]t is not our role to sit in judgment as to whether the perceived Communist threat justified assisting alleged war criminals." *Id.* Thus, the court lacked jurisdiction to pass judgment on Ustaša conduct that occurred when the United States was at war with that regime because resolving those issues would necessarily call into question the Executive Branch's post-war foreign-policy decisions. *See id.* at 561.

Here, plaintiffs ask for a direct judicial evaluation of how the United States has reacted to allegations that a close ally has committed atrocity crimes. The "'delicate [and] complex' foreign policy decisions" necessary to resolve "conflicting priorities" are no less "subject to judicial intrusion or inquiry" when the litigation involves the

United States more directly. *Alperin*, 410 F.3d at 560 (quoting *Chicago & S. Airlines*, 333 U.S. at 111). "It is not [the courts'] place to speak for the U.S. Government by declaring that a foreign government is at fault for [alleged war crimes]. Any such policy . . . must first emanate from the political branches." *Id.* at 561.

3. The conclusion that this case inextricably involves political questions is underscored by the nature of the relief that plaintiffs seek. Plaintiffs ask for an injunction to halt the provision of "military assistance," "financing," "weapons or arms," and "military equipment or personnel" to Israel. 3-ER-506. That request conflicts squarely with this Court's holding in *Corrie* that the decision to "grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations." 503 F.3d at 983; *see also Dickson*, 521 F.2d at 236. Plaintiffs also seek a prohibitory injunction to prevent the United States from wielding its veto at the United Nations and a mandatory injunction to require the defendants "to take all measures within their power" to "exert influence over Israel" to achieve certain foreign-policy goals. 3-ER-506. If issued, those injunctions would displace the President from his position of primacy in foreign affairs and replace him with a judge. *See Republic of Marshall Islands*, 865 F.3d at 1190 ("[D]iplomatic negotiations . . . fall quintessentially within the realm of the executive, not the judiciary . . . ."); *see also id.* at 1201 ("We simply cannot square the primacy of the Executive in the conduct of foreign relations and the Executive Branch's lead role in foreign policy, with an injunction that compels the United States to call for and convene negotiations

for nuclear disarmament in all its aspects." (cleaned up)). A court cannot set U.S. foreign policy and oversee diplomacy by injunction or otherwise.

The political question doctrine applies as much to declaratory judgments as it does to suits for injunctive relief. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 228, 237 (1993) (holding that a suit for declaratory judgment presents a political question). Because the court cannot review the Executive Branch's discretionary foreign-policy decisions, it may not enter a declaratory judgment here either. *See Corrie*, 503 F.3d at 984.

4. *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189 (2012) is not to the contrary. In *Zivotofsky I*, the Supreme Court held that the political question doctrine did not bar a constitutional challenge to the validity of a federal statute entitling U.S. citizens born in Jerusalem to have Israel recorded as the place of birth on their passports. *Id.* at 194–95. That case required the courts to determine whether the Executive's constitutional authority to recognize a foreign sovereign precluded Congress from requiring that a passport identify Israel as the sovereign authority over Jerusalem. *Id.* at 191. The Court explained that to resolve the plaintiff's claim a court would need to "decide if Zivotofsky's interpretation of the statute is correct[] and whether the statute is constitutional." *Id.* at 196. Those are "familiar judicial exercise[s]," and "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Id.* at 196–97.

Here, by contrast, plaintiffs do not seek to "vindicate [a] statutory right," or challenge the constitutionality of a statute. *Cf. Zivotofsky I*, 566 U.S. at 195. The questions a court must answer to resolve plaintiffs' claims implicate policy judgments, not just law. A court would have to decide whether the United States has done enough to respond to allegations that its ally is engaged in genocide. To consider that question, a court would have to directly question the judgment of the Executive Branch in how it has responded to the conflict in Gaza. *Cf. Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411–12 (4th Cir. 2011) (a negligence determination presents political question when it requires a court to question the Marine Corps' military judgment). But a court may not "impose its own foreign policy judgment on the political branches." *Jaber v. United States*, 861 F.3d 241, 249 (D.C. Cir. 2017); *see also Zivotofsky I*, 566 U.S. at 196. It thus cannot consider this action.

B. The Executive Branch exercises unreviewable discretion when it negotiates with and provides military assistance to an ally engaged in an armed conflict.

1. Israel, a U.S. ally, is engaged in an armed conflict with Hamas. The President, the Secretary of State, and the Secretary of Defense must exercise policy judgment and discretion in determining how the United States supports its ally, safeguards its own interests, protects innocent civilians, contains the conflict, and pursues a just and lasting peace. In providing congressionally directed foreign military assistance to Israel, the Executive necessarily makes discretionary military and national-security judgments. It decides how best to provide military support to a

close partner and ally in its conflict with Hamas. It decides how to engage in diplomacy with Israel to safeguard civilians, amongst whom Hamas terrorists have sheltered, and with the wider region to prevent a broader conflict. And it decides what positions to take within the United Nations. Those policy judgments present quintessential political questions. They are not subject to judicial second-guessing.

Plaintiffs nevertheless argue that the political question doctrine does not apply because defendants are accused of failure to prevent and complicity in genocide allegedly committed by Israel, contending that international law imposes a binding and nondiscretionary duty not to commit genocide and to take all steps to prevent it. That argument, however, clashes with the Supreme Court's instruction to courts to conduct a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action," in determining whether a case poses a nonjusticiable political question. *Baker*, 369 U.S. at 211–12. Here, plaintiffs' theory of liability is that the United States has violated international law by failing to "take all measures within [its] power" to convince Israel to end any bombing operations in Gaza, lift its "siege" of Gaza, and prevent any transfer of Palestinians from Gaza; by providing congressionally authorized military assistance to Israel; and by vetoing Security Council resolutions and voting against a UN General Assembly resolution calling for

ceasefires or a pause in the hostilities in Gaza.[4] 3-ER-465–83. Those challenged actions (or inactions) implicate core discretionary decisions committed to the political branches.

2. The caselaw that plaintiffs cite is not to the contrary. Plaintiffs invoke *Al-Tamimi v. Adelson*, where the D.C. Circuit held that the political question doctrine did not bar at the pleading stage claims based on Israeli settlers' alleged commission of genocide. 916 F.3d 1, 13 (D.C. Cir. 2019). The plaintiffs alleged that the settlers murdered Palestinians, pillaged and stole private Palestinian property, forged deeds to Palestinian properties, and forcibly removed Palestinians from the disputed territory. *Id.* at 9 n.5, 9–10. In reaching its conclusion, the court emphasized that the plaintiffs had waived any theory of liability "based on the conduct of the Israeli military" and did not call into question the propriety of U.S. foreign policy towards Israel or the United States' provision of political and military support to Israel. *Id.* at 13. Thus, while the court recognized that "the official position of the Executive is highly relevant" in analyzing the prudential *Baker* factors because "[t]he Executive is institutionally well-positioned to understand the foreign policy ramifications of the court's resolution of a potential political question," it concluded that plaintiffs' waiver had mooted the potential for inter-branch conflict. *Id.* Obviously, this case—in sharp

[4] The United States has since enabled UN Security Council Resolution 2728 to be adopted. S.C. Res. 2728, U.N. Doc. S/RES/2728 (Mar. 25, 2024); *see* Linda Thomas Greenfield, Ambassador to the United Nations, Explanation of Vote (Mar. 25, 2024), https://perma.cc/9BAE-KDPY.

contrast to *Al-Tamini*—does attempt to impose liability based on the conduct of the Israeli military and does call into question the United States' foreign policy towards Israel and its provision of political and military support, as the Executive Branch has explained.

Plaintiffs similarly rely on *Al Shimari v. CACI Premier Technology, Inc.*, which held that the political question doctrine did not necessarily bar claims against a private company, CACI, which provided interrogation services for the U.S. military at the Abu Ghraib prison in Iraq. 840 F.3d 147, 152, 162 (4th Cir. 2016). The plaintiffs alleged that CACI employees committed torture, war crimes, and various intentional torts against detainees. *Id.* at 152. The Fourth Circuit reasoned that "most military decisions are committed exclusively to the executive branch" and that the political question doctrine would apply if the challenged conduct of a government contractor was either "under the 'plenary' or 'direct' control of the military" or "national defense interests were 'closely intertwined' with military decisions governing the contractor's conduct, such that a decision on the merits of the claim 'would require the judiciary to question actual, sensitive judgments made by the military.'" *Id.* at 154–55 (citation omitted). An affirmative response to either question, the court reasoned, would generally trigger application of the political question doctrine because "courts are ill-equipped to evaluate discretionary operational decisions made by, or at the direction of, the military on the battlefield." *Id.* at 155.

Although the court posited that the "military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity" and thus a contractor who engaged in unlawful conduct "cannot claim protection under the political question doctrine," it distinguished between actions in violation of "settled international law" and applicable "criminal law" from conduct that "involved sensitive military judgments" where "the lawfulness of such conduct was not settled at the time the conduct occurred." *Al-Shimari*, 840 F.3d at 157, 159–60 (citing *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008) (dismissing claims that the U.S. military's use of Agent Orange in the Vietnam War violated international law relating to the use of poisons and military necessity)). Notably, the Department of Defense had investigated the alleged wrongdoing at Abu Ghraib and had concluded that numerous crimes had been committed by CACI interrogators as well as military personnel, a number of whom were court-martialed or otherwise disciplined. *Al Shimari*, 840 F.3d at 152. *Al Shimari* did not resolve whether any claim against the Executive based on an alleged violation of international law would be justiciable, and unlike in *Al Shimari*, the precise Executive conduct complained about here involves sensitive military and national-security judgments.

3. The fallacy of plaintiffs' argument that any allegedly unlawful conduct is nondiscretionary is evident from the nature of the wrongdoing they allege. Even if the President, the Secretary of State, and the Secretary of Defense believed that a genocide was occurring, they would not have some "simple, definite duty" to perform

in order to prevent it. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866). Instead, they would be faced with a set of difficult and indeterminate policy choices. Efforts to prevent genocide fall along a continuum. *See* U.S. Dep't of State, *United States Strategy to Anticipate, Prevent, and Respond to Atrocities* 9–10 (2022), https://perma.cc/U2KV-AT7Y. Determining what actions would be required to respond to an alleged genocide ostensibly occurring amid an overseas conflict is far from the "purely legal question" that plaintiffs contend. Whatever vitality the distinction between ministerial and discretionary acts may have in other contexts, here the Executive Branch's response is not a "ministerial" act that a court can compel.

Indeed, this Court has already recognized as much. In *Alperin*, this Court explained that it is "not a war crimes tribunal" and could not decide whether the Ustaše, with the help of the Vatican Bank, committed genocide or war crimes. 410 F.3d at 560. That the defendants were obliged not to aid and abet in crimes against humanity undertaken during an aggressive war, *see The Nurnberg Trial*, 6 F.R.D. 69, 131 (Int'l Mil. Trib. 1946), did not allow this Court to sidestep the political question doctrine, *see Alperin*, 410 F.3d at 559. Similarly, in *Hmong 2 v. United States*,, the plaintiffs alleged that the United States violated international law by failing to protect the Hmong people from atrocities perpetrated against them after the Vietnam War. 799 F. App'x 508, 508 (9th Cir. 2020) (unpublished); *see also Hmong 2 v. United States*, No. 2:17-cv-927, 2019 WL 266298, at *1 (E.D. Cal. Jan. 18, 2019) (detailing allegations that the United States aided and abetted war crimes and genocide). This

Court treated the case as a straightforward application of *Corrie* and *Alperin* and affirmed that the claims presented nonjusticiable political questions. *Hmong 2*, 799 F. App'x at 509.

In some cases, genocide claims are justiciable. *See* 18 U.S.C. § 1091; *see also, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *Matter of O-R-E*, 28 I. & N. Dec. 330, 346–47 (B.I.A. 2021) (finding noncitizen was inadmissible for entry because he had participated in the Rwandan Genocide); *Mukeshimana v. Holder*, 507 F. App'x 524, 527–28 (6th Cir. 2012) (declining petition for review of BIA finding that noncitizen had committed a serious nonpolitical crime by participating in the Rwandan Genocide). But courts have jurisdiction to consider genocide claims only when the political-question doctrine does not apply.

* * *

Plaintiffs question whether the President, the Secretary of State, and the Secretary of Defense have done enough to stop an alleged genocide, which they assert is being undertaken by a U.S. ally in the midst of an armed conflict. In these circumstances, a court may not review the Executive Branch's discretionary decisions. Therefore, the district court properly dismissed this case under the political question doctrine.[5]

[5] Several amici also argue that the international-law norm of exhausting domestic remedies supports jurisdiction here. *See, e.g.*, Amicus Br. of International Law Scholars 28; Amicus Br. of International Human Rights Organizations 18–19;

Continued on next page.

II. Plaintiffs lack standing.

In addition to being nonjusticiable under the political question doctrine, plaintiffs' claims fail under Article III for lack of standing. To establish Article III standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Federal courts may 'act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *WildEarth Guardians v. U.S. Forest Serv.*, 70 F.4th 1212, 1216 (9th Cir. 2023) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

Here, plaintiffs fail to establish that their injuries are fairly traceable to the defendants' conduct. Further, because the harms plaintiffs allege are caused by a third party not before this Court, no decision could provide them with redress. And the plaintiffs seek relief beyond the power of the court to issue.

Amicus Br. of Ctr. for Justice & Accountability 9–10. But the general obligation to exhaust domestic remedies—whether as a mandatory principle in disputes between sovereigns or as a prudential, comity-based principle in other disputes—cannot expand Article III jurisdiction.

A. Plaintiffs cannot trace their alleged harms to the United States' conduct.

For a third party's actions to be fairly traceable to a government policy, the policy must "exert[] a 'determinative or coercive effect' on the third-party conduct that directly causes the injury." *WildEarth Guardians*, 70 F.4th at 1217 (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

In an action against the United States, a plaintiff cannot establish traceability when a foreign state's independent actions may continue to injure the plaintiff regardless of how the United States responds. *See Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008) (holding that traceability is not met when a foreign state may "refuse to accommodate the United States' request" that it alter its conduct). Indeed, courts "have been particularly reluctant to find standing where the third party upon whose conduct redressability depends is a foreign sovereign." *Cierco v. Mnuchin*, 857 F.3d 407, 419 (D.C. Cir. 2017). That reluctance makes sense in the international system because, definitionally, one sovereign state cannot control the actions of another. *See* Restatement (Third) of Foreign Relations Law § 206 & cmt. c. (Am. Law. Inst. 1987).

Israel is an independent sovereign and is not a party to this case. Although the United States is providing military assistance and other support to Israel, it does not control Israel's military operations. Plaintiffs fail to make any plausible allegations to the contrary. At best, they allege that the United States exerts some influence over

Israeli policy. *E.g.*, 3-ER-476, 478. But to find standing, the Court would have to assume that Israel would respond to the United States' actions by changing its conduct. *See Talenti v. Clinton*, 102 F.3d 573, 578 (D.C. Cir. 1996). Such an assumption would rest on speculation. "The suspension of foreign assistance is a contentious act that may threaten diplomatic relations and undermine American influence abroad." *Id.* A court cannot assume that a foreign state would simply acquiesce to the United States' demands. *Id.* And indeed, Israel has denied that any foreign state can meaningfully influence its wartime decisions. *See* SER-23 (Israeli Prime Minister Benjamin Netanyahu has stated at a Cabinet meeting that "Israel is a sovereign state. Our decisions in the war are based on our operational considerations[] . . . . The decision on how to use our forces is an independent decision of the [Israeli Defense Forces] and no-one else." (quoting Emily Rose, *Netanyahu Denies Reports of US Influence Over Israeli Military Activity*, Reuters (Dec. 24, 2023), https://perma.cc/J3AQ-MYXS)). [6]

Plaintiffs have not shown that their alleged injuries are fairly traceable to the United States' provision of military, financial, or diplomatic support to Israel. They therefore lack standing. *See, e.g.*, *Salmon Spawning*, 545 F.3d at 1228; *Talenti*, 102 F.3d at 578; *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 (D.C. Cir. 1980) (plaintiffs lack standing to challenge the validity of an international agreement

[6] *See also* Paul Ronzheimer & Carlo Martuscelli, *Netanyahu Vows to Defy Biden's 'Red Line' on Rafah*, Politico (Mar. 10, 2024), https://perma.cc/MSA3-GUAR.

between the United States and a foreign sovereign regarding air travel because no judicial order could force the other nation to agree to terms that would redress plaintiffs' injuries).

B. A judicial order could not remedy plaintiffs' alleged harms.

"Redressability invokes the separation of powers, asking whether the remedial action requested is 'committed to the judicial branch.'" *Shulman v. Kaplan*, 58 F.4th 404, 409 (9th Cir. 2023) (quoting *Republic of the Marshall Islands*, 865 F.3d at 1192). "To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries[] and (2) within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). Plaintiffs cannot meet those requirements for either of the forms of relief they seek.

1. The injunctive relief plaintiffs seek is neither substantially likely to redress their injuries nor within the power of a district court to award. To recapitulate, plaintiffs asked for an injunction to halt the provision of "military assistance," "financing," "weapons or arms," and "military equipment or personnel" to Israel; to require defendants "to take all measures within their power" to achieve certain foreign-policy goals; and to prevent the United States' from vetoing certain resolutions in the United Nations Security Council. 3-ER-505–06.

a. For the same reasons plaintiffs' alleged injuries are not fairly traceable to the federal government, *see supra* pp. 30–32, an injunction compelling the defendants to act would be unlikely to provide plaintiffs with substantial redress. Israel—not the

United States—is engaged in an armed conflict against Hamas. But Israel is not a party before this court. The United States cannot force Israel to act in any specific way, so a court order directing the United States to attempt to do so would be fruitless.

b. The injunctive relief plaintiffs seek is also beyond the power of a court to order.

As the Supreme Court acknowledged more than a century ago, courts lack jurisdiction "to enjoin the President in the performance of his official duties." *Mississippi*, 71 U.S. (4 Wall.) at 501. "The President's immunity from such judicial relief is 'a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.'" *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)). Injunctive relief is particularly inappropriate here because it would involve compelling the President to perform "purely executive and political" duties. *See Mississippi*, 71 U.S. (4 Wall.) at 499–501.

An injunction forbidding the President and the Secretaries of State and Defense from providing aid to Israel and requiring them to engage in diplomacy towards a concerted goal would violate the separation of powers. For the same reasons this case presents political questions, *see supra* pp. 11–28, an injunction lies beyond the power of the courts as well. If a court issued the injunction the plaintiffs

seek, the defendant officials could be threatened with contempt if the district court disagreed that they had "take[n] all measures within their power" to achieve certain foreign-policy goals. In essence, the court overseeing the injunction would be in charge of U.S. policy towards Israel. Our Constitution does not allow courts to take such a role.

An injunction controlling how the United States votes in the U.N. Security Council would impermissibly interfere with U.S. diplomacy for the same reasons. In addition, by statute, the U.S. Ambassador to the United Nations is required to "at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President." 22 U.S.C. § 287a. An injunction against the Secretary of State, therefore, would not bind the official who controls how the Ambassador votes. Only the President can determine how the United States' national interests are represented at the United Nations, and he cannot be enjoined to issue instructions to the Ambassador, *see Mississippi*, 71 U.S. (4 Wall.) at 501.

Moreover, "it is beyond the power of an Article III court to order, design, supervise, or implement" a remedial plan that "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana*, 947 F.3d at 1171. Even if an injunction left the details to the Executive Branch, it "would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the

order, which necessarily would entail a broad range of policymaking." *Id.* at 1172. As discussed, *see supra* p. 27, if the United States believes genocide is occurring, it has a range of policy options available to it. Neither litigants nor a court may direct which options the Executive Branch undertakes. That policy judgment is committed to the politically accountable branches of government. A court may not sit in judgment over whether the policies the Executive Branch chooses are sufficient. *See Juliana*, 947 F.3d at 1172.

2. Nor is a declaratory judgment available to plaintiffs.

To award a declaratory judgment, a court would need to engage in the same impermissible weighing of discretionary policy judgments as it would to award injunctive relief. As this Court explained in *Republic of the Marshall Islands*, there may be "significant overlap" in foreign-affairs cases between the political question doctrine and redressability, but "the analysis stems from the same separation-of-powers principle." 865 F.3d at 1192. Because a court lacks the power to enter a declaratory judgment that depends on the resolution of a political question, *see Nixon*, 506 U.S. at 228, 237, it cannot grant declaratory relief here. *See also supra* p. 21.

Moreover, the Declaratory Judgment Act creates a remedy, but it does not extend the jurisdiction of federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950); *see also Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014). *Skelly Oil* holds that "the existence of jurisdiction over a declaratory action depends on the answer to a hypothetical question: had the Declaratory

Judgment Act not been enacted, would there have been a nondeclaratory action (i) concerning the same issue, (ii) between the same parties, (iii) that itself would have been within the federal courts' subject-matter jurisdiction?" Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 841 (7th ed. 2015); *see also California v. Texas*, 593 U.S. 659, 672 (2021).

Here, there is no alternative action available to the plaintiffs. As discussed above, *see supra* pp. 11–28, 30–35, there is no Article III jurisdiction over plaintiffs' equitable claims for injunctive relief. Plaintiffs cannot seek damages. *See* 28 U.S.C. § 2879(b)(1) (the Federal Tort Claims Act provides the exclusive remedy against federal officials for alleged torts undertaken in the scope of their office or employment); *Jachetta v. United States*, 653 F.3d 898, 904 (9th Cir. 2011) (federal law violations are not cognizable under the Federal Tort Claims Act); *see also Macharia v. United States*, 334 F.3d 61, 67 (D.C. Cir. 2003) (actions involving foreign-policy decisions fall within the discretionary-function exception); *Four Star Aviation, Inc. v. United States*, 409 F.2d 292, 295 (5th Cir. 1969) (same). And defendants could never invert the litigation and sue plaintiffs over these claims. A court, therefore, could not issue a declaratory judgment without impermissibly expanding its own jurisdiction.

* * *

Plaintiffs allege that Israel has caused them injury. They do not have standing to challenge those injuries—or the United States' discretionary foreign-policy and national-security judgments related to Israel's conduct of the armed conflict in

Gaza—because a court could not offer them any effectual relief. For this reason as well, the district court lacked jurisdiction to entertain plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ISMAIL J. RAMSEY
United States Attorney

SHARON SWINGLE

/s/ Maxwell A. Baldi
MAXWELL A. BALDI
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-1754
maxwell.baldi@usdoj.gov

April 2024

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

/s/ Maxwell A. Baldi
MAXWELL A. BALDI

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1(a) because it contains 9,175 words (including zero words manually counted in any images). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Maxwell A. Baldi
MAXWELL A. BALDI