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

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INTRODUCTION

This case is a test of the promise the United States made, to itself and the international community, to honor and adhere to its legal obligations to prevent, and not be complicit in, genocide. It is also a test of the federal judiciary's role in our constitutional system, as it asks the Court to operate as a truly independent, co-equal branch of government. In the face of a genocide—and the Executive's failure to prevent and complicity in that crime—the foundational principles of separation of powers compel the courts to assume such a role.

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948, in no small part at the instigation of and with the full support of the United States government, which ratified and implemented the treaty in 1988. As is clear in its title, the treaty sought to establish a multilayered legal framework of interlocking enforcement mechanisms in both national systems and international bodies to help *prevent* genocide, which by then had become a clear, peremptory norm in customary international law, rather than simply wait to punish it in its horrific aftermath.

Two courts have now found that the events described in this brief plausibly constitute genocide—the International Court of Justice ("ICJ") and the District Court below. After making its finding, the ICJ issued an interim order requiring Israel to take a series of urgent provisional measures to stop its genocidal acts against the

Palestinian people in Gaza. The District Court in this matter, however, invoked the political question doctrine and ruled that it was powerless to adjudicate whether the Executive's "unflagging support" for the "military siege against the Palestinians in Gaza" "intended to eradicate a whole people" violated the law prohibiting complicity in genocide, and the legal duty to prevent it. 1-ER-6, 1-ER-10. Despite affirming the plausibility of genocide charges against Israel, the District Court found that its "preferred outcome [was] inaccessible" because the Executive's actions were taken in the course of "foreign policy." 1-ER-8–10.

As set forth below, the political question doctrine does not and cannot shield executive actions that violate a legal duty from judicial review. Furthermore, there is no categorical "foreign policy" exception to this foundational principle, no matter how difficult or daunting the task. To the contrary, the constitutional command to judicially review and constrain executive violations of law takes on an urgent, even existential, dimension when the legal violation at issue is facilitating and accelerating the destruction of an entire people, as it is here.

Since the time Plaintiffs commenced this action, the number of those killed by Israeli forces in Gaza has nearly tripled. With Defendants' assistance, Israel has killed over 30,700 Palestinians, including approximately 12,750 children. Even more children are unaccompanied or separated from their parents—with many bearing the grim new acronym WCNSF: "Wounded Child, No Surviving Family."

With Defendants' assistance, more than 72,100 Palestinians in Gaza have been injured, nearly two million have been displaced, and the entire population of 2.2 million is facing crisis levels of starvation as a result of Israel's deliberate infliction of a siege that denies basic necessities for life, and is intended to bring about their destruction. With Defendants' assistance, Israeli bombardment has extensively destroyed housing and critical infrastructure, including water and sanitation facilities, decimated Gaza's healthcare system, and leveled educational, social, and religious institutions. It is undisputed that Defendants have provided (and continue to provide) the weapons—as well as the diplomatic license—for Israel to carry out this mass destruction of human life and society. They have done so on an expedited basis and in blatant disregard of warnings by international experts—and even the court below—that their "unflagging support" is furthering a genocide.

To borrow from former Supreme Court Justice and then-Nuremberg Prosecutor Robert H. Jackson, the question for this Court is whether our system of governance, and the law against genocide, is "utterly helpless to deal with crimes of this magnitude" by defendants "of this order of importance."[1] The law was not

[1] Robert H. Jackson, Chief Counsel for United States, Opening Statement before the International Military Tribunal (Nuremberg), *Second Day, Wednesday, 11/21/1945, Part 04, in* II Trial of the Major War Criminals before the Int'l Mil. Tribunal: Proceedings 11/14/1945-11/30/1945 98-102 (1947), https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/.

helpless during the Nuremberg proceedings, and it is not helpless now. The Genocide Convention and its ratification and implementation, as well as the international system and frameworks put in place to prevent genocide, require the judiciary to uphold these commitments. Our constitutional system was founded on the principle that the law is not helpless; rather, that these powerful Defendants are "answerable" to it, and it is the duty of the court to apply it. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 141 (1803).

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1350 (Alien Tort Statute or "ATS"), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. §§ 2201, *et seq*. (Declaratory Judgment Act). This Court has appellate jurisdiction to review the district court's final judgment of dismissal entered on January 31, 2024, pursuant to 28 U.S.C. § 1291. 1-ER-2. Plaintiffs-Appellants timely filed a Notice of Appeal on February 8, 2024. 3-ER-508–510.

STATEMENT OF ISSUES

1. Did the District Court err in dismissing Plaintiffs' Complaint against Defendants for their failure to prevent, and complicity in, genocide on political question grounds because the case implicates "foreign policy," where there is no such generalized textual commitment to the executive branch and where Defendants' actions are not discretionary policy decisions but violate binding customary

international law and statutorily-defined, *erga omnes* (owed to all) legal duties which must be subject to judicial review?

2. Did the District Court err in failing to separately consider Plaintiffs' independent request for declaratory relief, as is required by this Court, especially where its dismissal relied on the nature of Plaintiffs' requested injunctive relief, and where declaratory relief would not impose on the Executive a judicially-specified course of action?

STATEMENT OF THE CASE

A. Procedural History

On November 13, 2023, Plaintiffs-Appellants—two Palestinian organizations with staff members in Gaza, three Palestinians in Gaza, and five Palestinian-Americans with family members in Gaza—brought suit seeking declaratory and injunctive relief against Defendants-Appellees President Biden, Secretary of State Blinken, and Secretary of Defense Austin for their role in Israel's genocide in Gaza. 3-ER-419–507, ¶¶ 9, 18-32. Plaintiffs seek to enforce customary international law, as part of federal common law cognizable and judicially enforceable under the Alien Tort Statute (28 U.S.C. § 1350) and the court's federal question jurisdiction (28 U.S.C. § 1331), prohibiting complicity in genocide and imposing a legal duty to prevent the genocide perpetrated by Israel against the Palestinian people in Gaza.

The Complaint alleges that, in violation of the universal prohibition against genocide, Israel, acting with the intent to destroy in whole or in part the Palestinian population in Gaza, has committed genocidal acts, namely (i) killing members of the Palestinian population in Gaza, (ii) deliberately inflicting on the Palestinian population of Gaza conditions of life calculated to bring about its physical destruction in whole or in part, and (iii) causing serious bodily or mental harm to the Palestinian population in Gaza. 3-ER-419–507, ¶¶ 66-165. It alleges that Defendants have been, or should have been, aware of the serious risk that Israel would commit genocide—or that it was already underway—but that despite such awareness, Defendants have failed to exercise their considerable influence to prevent the genocide and have knowingly provided assistance to Israel with substantial effect on its commission of genocide. 3-ER-419–507, ¶¶ 166-248.

On November 16, Plaintiffs filed a motion for preliminary injunctive relief. 3-ER-308–338. On December 8, Defendants filed a response to Plaintiffs' motion, and filed a motion to dismiss Plaintiffs' Complaint, 3-ER-280–307, which contended, under Fed. Rule Civ. P. 12(b)(1), that the case was nonjusticiable because it raised political questions and that Plaintiffs lacked standing. They also argued that, under Rule 12(b)(6), Plaintiffs' claims fail as a matter of law, but by mischaracterizing Plaintiffs' claims as being asserted directly under the Genocide Convention. Defendants did not dispute the facts alleged by Plaintiffs, nor that they

would face irreparable harm absent an injunction. Following additional briefing, on January 26, 2024, the District Court held a hearing on the preliminary injunction motion and motion to dismiss. The District Court heard oral argument, as well as live testimony from Plaintiffs and their expert on Jewish history, Holocaust and genocide studies. On January 31, 2024, the District Court issued its order granting Defendants' motion to dismiss and denying Plaintiffs' preliminary injunction motion. 1-ER-3–11. On February 27, this Court granted Plaintiffs' motion to expedite the briefing schedule, and ordered the clerk to place this case on the calendar for a hearing in June. Order of Feb. 27, 2024, ECF No. 18.1.

B. The Customary International Law Prohibition on Genocide

The prohibition on genocide is a *jus cogens* norm in customary international law, which is binding on all states at all times. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992). In the aftermath of World War II and the horror of the Holocaust, the universal prohibition against genocide, and the corresponding legal duty to prevent it, was also codified in a treaty: the Genocide Convention, which was unanimously adopted by the United Nations General Assembly in 1948. The United States ratified the Genocide Convention in 1988, via legislation cosponsored by then-Senator Joseph Biden, and the political branches implemented the obligation to punish genocide and complicity in genocide by

imposing federal criminal liability for those offenses.[2] 18 U.S.C. §§ 1091, *et seq*. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) ("the Convention's definition has been incorporated, with insignificant modifications, into domestic law in the form of the Genocide Convention Implementation Act"), *vacated on other grounds sub nom. Rio Tinto PLC v. Sarei*, 569 U.S. 945 (2013).

The treaty ratification and the criminal statute codify and reaffirm the pre-existing legal prohibition against genocide under customary international law. *Kadić v. Karadžić*, 70 F.3d 232, 242 n.6 (2d Cir. 1995) (finding that a private remedy for genocide preexisted and continued after ratification of Genocide Convention and enactment of criminal statute); *Sarei*, 671 F.3d at 758-59 (same); *Al-Tamimi v. Adelson*, 916 F.3d 1, 11 (D.C. Cir. 2019) ("it is well settled that genocide violates the law of nations").

Under customary international law, as well as under Article II of the Genocide Convention, genocide is defined as certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," including:

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[2] *See Remarks by President Ronald Reagan on Signing the Genocide Convention Implementation Act of 1987 (the Proxmire Act), in* 24 Weekly Compilation of Presidential Documents (Nov. 4, 1988), https://www.reaganlibrary.gov/archives/speech/remarks-signing-genocide-convention-implementation-act-1987-proxmire-act-chicago ("this legislation still represents a strong and clear statement by the United States that it will punish acts of genocide with the force of law and the righteousness of justice").

1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part.

Article III(e) of the Convention includes "[c]omplicity in genocide" as one of the forms of liability punishable under the Convention, alongside direct commission, conspiracy, attempt, and incitement. A defendant is liable for aiding and abetting a violation of international law when they knowingly provide assistance, encouragement, or moral support that has a substantial effect on the violation. *Doe I v. Cisco Sys., Inc.*, 73 F.4th 700, 724 (9th Cir. 2023).

Article I of the Convention imposes an obligation on all parties "to employ all means reasonably available to them . . . to prevent genocide." Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, 221, ¶ 430 (Feb. 26). The duty to prevent genocide does not require that "the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them." *Id*. at 225, ¶ 438. Nor does it require ultimate proof that there is a genocide; as the United States recognized when it intervened in Ukraine's case against Russia at the ICJ, a State's "obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be

committed." *See* Allegations of Genocide under Convention on Prevention and Punishment of Crimes of Genocide (*Ukr. v. Russ.*), Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, ¶ 22 (Sept. 7, 2022), https://www.icj-cij.org/sites/default/files/case-related/182/182-20220907-WRI-01-00-EN.pdf (citing *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 222, ¶ 431). The provision of arms, ammunition, and other weapons, instruments, or means used in the commission of genocide, knowing they would be used for that purpose, constitutes complicity in genocide, *Cisco Sys.*, 73 F.4th at 726, and therefore necessarily also constitutes failure to prevent genocide.

On January 26, 2024, the ICJ issued a landmark ruling determining that Israel's acts and omissions in Gaza constitute plausible violations of the Genocide Convention. Application of Convention on Prevention and Punishment of Crime of Genocide in the Gaza Strip *(S. Afr. v. Isr.)*, Order, ¶ 54 (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf (ECF No. 87). The ICJ further ruled that "Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of [the Genocide] Convention." *Id*. at ¶ 78.

C. Statement of Facts

Plaintiffs' Complaint and preliminary injunction motion detail a decades-long pattern of violence against the people of Palestine, which has culminated in Israel's total and genocidal siege of Gaza: commencing on October 7, 2023, Israeli officials, with the material assistance, support, and encouragement of Defendants Biden, Blinken and Austin, have expressed their intention to wage and have in fact waged an unprecedented and unrelenting military assault that has killed more than 30,700 Palestinians.[3] It has caused serious physical and/or mental harm to the population of Gaza, and has deprived it of the basic essentials and conditions of life necessary for human survival, with the intent of destroying the population. Despite international condemnation of this genocidal campaign, Israel has continued it for five months with Defendants' full support and endorsement.

1. Evidence of Israel's Genocidal Intent Against the Palestinian Population of Gaza

At the outset of Israel's genocidal campaign, senior Israeli officials at the highest levels of government made clear their intent to commit a genocide against the Palestinian people of Gaza. Within just the first week, senior Israeli officials, including the Prime Minister, President, and Minister of Defense, used

[3] *Hostilities in the Gaza Strip and Israel reported impact, 6 March 2024 at 15:00*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Mar. 6, 2024), https://www.unocha.org/publications/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-reported-impact-6-march-2024-1500.

dehumanizing language against Palestinians in Gaza, referring to them as "human animals," and, without distinction between civilians and those directly participating in hostilities, as "the enemy" or "terrorists," who need to "leave the world." 3-ER-419–507, ¶¶ 11–12, 66–67, 72, 74, 175, 189, 289, 319. On October 7, Prime Minister Benjamin Netanyahu ordered more than two million Palestinians to "get out now" warning that "[Israel] will be everywhere and with all our might." 3-ER-419–507, ¶¶ 11, 67, 173, 319. On October 9, Israeli Defense Minister Gallant announced: "I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed". 3-ER-419–507, ¶¶ 11, 72. He vowed that "Gaza won't return to what it was before. We will eliminate everything." 3-ER-419–507, ¶¶ 12, 99. On October 10, Israel Defense Forces spokesperson Daniel Hagari announced that Israel had already dropped "hundreds of tons of bombs," adding that "the emphasis is on damage and not on accuracy." 3-ER-419–507, ¶¶ 11, 74. On October 13, Israeli President Isaac Herzog announced: "It is an entire nation out there that is responsible. It is not true this rhetoric about civilians not being aware, not involved. It's absolutely not true." 3-ER-419–507, ¶¶ 12, 91.

Evidence of such genocidal intent only increased as Israel escalated its campaign of mass expulsion and elimination of Palestinians. On October 12, Israel ordered over one million Palestinians in northern Gaza to "evacuate" to southern Gaza within 24 hours. 3-ER-419–507, ¶¶ 12, 83. On November 1, the day before the

death toll rose to 9,376, 3-ER-461 ¶ 144, Israeli Minister of Heritage Amichai Eliyahu described "everything . . . blowing up and being flattened" as a "pleasure for the eyes," 3-ER-460 ¶ 140, and in the following days, continued to justify the bombing of civilians and withholding of humanitarian aid to the entire Strip, asserting that "there are no non-combatants in Gaza" and providing humanitarian aid to Gaza would constitute "a failure." 3-ER-461 ¶ 148. Netanyahu invoked the Biblical story of Amalek to justify Israel's assault on Gaza on October 29 and November 3. 3-ER-419–507, ¶¶ 13, 136, 145. In the Bible, God commands the extermination of Amalekite men, women, children, and animals, and this commandment has been described by one scholar as "divinely mandated genocide." 3-ER-419–507, ¶¶ 13, 136; 3-ER-378, ¶ 13.

2. Evidence of Israel's Genocidal Acts Against the Palestinian Population of Gaza

Israel has accompanied these statements of genocidal intent with affirmative genocidal acts. Israel has killed over 30,700 people in Gaza,[4] including approximately 12,750 children.[5] Approximately 17,000 children are unaccompanied or separated from their parents, many bearing a new designation – WCNSF:

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4 *Id*.

5 Daily Report on the Effects of the Israeli Aggression in Palestine, State of Palestine Ministry of Health (Mar. 6, 2024), https://site.moh.ps/Content/File/RrknIbj3YR3Inw5Lfz9CFamW_xHomT8spZHCsS8ldTAnDCcVi.pdf.

"Wounded Child, No Surviving Family."[6] The world, including Defendants, has watched the Palestinian people of Gaza, half of whom are children, be subjected to an unrelenting and unprecedented bombing campaign unleashed by Israel—a campaign that is both overwhelming in its destructive scale and deliberately indiscriminate in its devastation of Gazan life. Israel has leveled critical civilian infrastructure—including already by November 10, 2023, destruction of at least 45 percent of all housing units in Gaza, 3-ER-412; numerous hospitals and ambulances were either bombed or forced to cease life-saving operations due to lack of fuel and electricity, 3-ER-419–507, ¶¶ 82, 110, 115-22, 130, 146-47, 158-59, 165, 306; it has destroyed schools and universities, 3-ER-419–507, ¶¶ 2, 89, 141, 155, 291, 306; public, religious, and historic sites, 3-ER-419–507, ¶¶ 25, 27, 112, 165, 208; United Nations safe havens, 3-ER-419–507, ¶¶ 2, 89, 141; and refugee camps, 3-ER-419–507, ¶¶ 137-39, 141, 228, 306, and has attacked or withheld all the most fundamental attributes necessary for the existence of civilian life, including water, food, fuel, electricity and energy sources, and medicine and medical equipment. 3-ER-419–507, ¶¶ 2, 81-82, 84-87, 107, 115-24, 126-29, 147, 149-50, 153, 160, 298-99, 307-09. It has attacked flour stores, bakeries, and fishing boats. 3-ER-419–507, ¶¶ 149, 299. By December, half of the population of Gaza was starving, access to clean water

[6] *Hostilities in the Gaza Strip and Israel reported impact*, *supra* note 3; *Gaza: Children Under Attack*, OCHA (Jan. 17, 2024), https://www.unocha.org/news/gaza-children-under-attack.

remained obstructed, infectious diseases were spreading rapidly, and the health system and humanitarian aid operations were collapsing. 2-ER-238–259.

Experts on genocide have concluded that Israel's actions constitute genocide. In a declaration in support of Plaintiffs' preliminary injunction motion, scholars in genocide and Holocaust studies concluded that high-level Israeli officials have unequivocally made numerous, unambiguous statements of genocidal intent, which have been matched with concrete acts that constitute genocide under customary international law. 3-ER-379, ¶ 16 (declaring on November 13, 2023 that "[t]hese levels of destruction and killings in just over one month, together with the annihilatory language expressed by Israeli state leaders and senior army officers, point . . . to the unleashing of deadly violence against Palestinians in Gaza 'as such,' in the language of the UN Genocide Convention").

3. Unconditional U.S. Military and Diplomatic Support in Furtherance of Israel's Unfolding Genocide Against the Palestinian People of Gaza

From the outset of Israel's genocidal campaign, and nearly every day thereafter, the United States has made clear its unconditioned support of, and assistance to, Israel's assault on Gaza through material, financial, personnel, and diplomatic assistance and cover—support which Defendants have maintained, and even escalated, at every critical juncture of Israel's attack on Gaza. 3-ER-467–482 ¶¶ 172-248. Defendants have refused to draw any "red lines" for this assistance, 3-

ER-419–507, ¶¶ 6, 14-15, 218, 222, 244, 320, 333, even despite warnings by United Nations officials and other sources of a grave risk of genocide, as well as war crimes and crimes against humanity. 3-ER-419–507, ¶¶ 14, 179, 191, 200-01, 233, 240.

The weapons killing Palestinians in the Gaza Strip are predominantly American-made. 3-ER-419–507, ¶¶ 15, 182. The delivery of military assistance by Defendants to Israel in support of genocide has included tens of thousands of artillery shells, a million rounds of ammunition, thousands of unguided and guided munitions and bombs, and at least 1,800 Joint Direct Attack Munition (JDAM) kits. 3-ER-419–507, ¶¶ 184, 208-09, *see also* 2-ER-275–278. In the first month and a half since October 7, the United States transferred at least 15,000 bombs and over 50,000 155mm artillery shells to Israel. 2-ER-276. In that same time period, Israel dropped 22,000 U.S.-supplied guided and unguided bombs on Gaza. 2-ER-276. On December 8, 2023, Defendant Blinken invoked an emergency authority to bypass Congressional review and approve the immediate sale and delivery to Israel of nearly 14,000 120-millimeter tank munition cartridges and related equipment worth $106.5 million. 2-ER-272. This accelerated and unrestricted military assistance comes on top of Israel's access to an already-existing stockpile of U.S. weapons in Israel estimated in March 2023 to be worth up to $4.4 billion and Defendants' additional request for $14.1 billion to support Israel's military. 3-ER-419–507, ¶¶ 15, 169, 210. Beyond such substantial military assistance, Defendants have given diplomatic

license to this genocide by, among other things, repeatedly vetoing UN resolutions calling for a ceasefire in Gaza. 3-ER-419–507, ¶¶ 171, 206; 2-ER-233, ¶ 5(l).

The Biden Administration has admitted to meeting and speaking "daily" and coordinating regularly with Israeli officials, including on military strategy, and "informing" and "guiding" Israeli ground operations. 3-ER-419–507, ¶¶ 172, 175, 179, 194, 215, 226, 338, 3-ER-414–418, 2-ER-262, 2-ER-265, 2-ER-269. Israeli Defense Minister Gallant, when asked about humanitarian aid to Gaza, revealed that "[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. What are we supposed to do? Tell them no?" 3-ER-419–507, ¶ 211. As Netanyahu revealed during Defendant Biden's October 2023 visit to Israel, Defendants' "depth and breadth of cooperation" since the beginning of Israel's military campaign, has been "truly unprecedented" in the history of the two nations' alliance. 3-ER-419–507, ¶ 205.

Plaintiffs' expert testimony demonstrates that, through these actions, Defendants violated their legal duties under binding customary international law. A declaration from Professor William Schabas, a leading expert on genocide, concluded that "there is a serious risk of genocide committed against the Palestinian population of Gaza and that the United States of America is in breach of its obligation . . . to use its position of influence with the Government of Israel and to

take the best measures within its power to prevent the crime taking place." 3-ER-372, ¶ 31.

Josh Paul, a former high-level State Department official who was responsible for the oversight and approval processes for U.S. arms transfers, submitted a declaration describing the extensive weapons, munitions, and equipment Defendants have provided Israel since October 7, and concluded that "it would have been 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.

Finally, during the January 26 hearing, Dr. Barry Trachtenberg, an expert on Jewish history, Holocaust and genocide studies, testified that Israel's actions in Gaza constituted genocide, 2-ER-145–161, and that historically, legal actions for genocide come afterwards, after its victims have been killed, but that "what makes this situation so unique is we're watching the genocide unfold as we speak. And we're in this incredibly unique position where we can actually intervene to stop it," where "we have an opportunity here in the United States to stop the transmittal of weapons that are being used . . . ." 2-ER-163.

4. Plaintiffs' Grave and Irreparable Harms

Gaza-based Plaintiffs have been subjected to Israel's relentless bombardment, siege, and lack of access to food or clean water, and have been repeatedly displaced. 3-ER-419–507, ¶¶ 22–24. U.S.-based Plaintiffs have had family members displaced,

killed, and otherwise harmed by Israel's assault on Gaza, and they fear for the lives of their surviving family members there. 3-ER-419–507, ¶¶ 25-29. Organizational Plaintiffs Defense for Children International–Palestine and Al-Haq have felt the profound impacts of the genocide on their ability to further their missions, including from Israel's displacement of Gaza-based staff members and killing of staff members' families. 3-ER-419–507, ¶¶ 18–21.

When Plaintiffs submitted initial declarations in support of their preliminary injunction motion in November, at least 115 of Plaintiffs' family members had been killed by Israel's assault on Gaza. 3-ER-321. By the time that Plaintiffs filed their reply in support of their preliminary injunction motion on December 22, over 80 additional family members had been killed. 2-ER-187, ¶ 6; 2-ER-192, ¶12; 2-ER-196, ¶ 3; 2-ER-209, ¶¶ 9-10.

At the January 26th hearing, Plaintiffs collectively testified that by that point Israel had killed hundreds of their family members in Gaza, 2-ER-87, 2-ER-98, 2-ER-105, 2-ER-117, and that their families had been displaced multiple times, including from the north to the south of Gaza where Israel had announced they would be safe, only to be subjected to Israeli assaults there. *See, e.g.,* 2-ER-75, 2-ER-94–96. Plaintiff Basim Elkarra learned during the hearing's recess that another relative had been killed. 2-ER-128.

Plaintiff Dr. Omar Al-Najjar testified remotely from a hospital in Rafah, in southern Gaza where he had been displaced, and described how over the course of the hearing he had to leave his phone to tend to those wounded by an Israeli air strike, and to reassure himself that his sister and relatives were not among the injured. 2-ER-79. He said "I have lost everything with this war . . . I have nothing left but my breath, a lifeless body walking on this earth . . . . This is what Israel and its supporters have done to us." 2-ER-80.

Ahmed Abofoul, a staff member at Plaintiff Al-Haq who grew up in Gaza, testified that "the Gaza that we know no longer exists. Everything I knew in Gaza has been destroyed." 2-ER-89. U.S. Plaintiffs testified to the damaging and dehumanizing impact of knowing that their own government was supplying the weapons and support used to kill their family members and their people. 2-ER-123, 2-ER-135. Plaintiff Laila El-Haddad testified that Israel's destruction of Gaza "left me with a profound feeling of not just sorrow and sadness but helplessness and injustice . . . And all of this is compounded by the knowledge that my . . . government is complicit in the destruction of everything that I knew and I loved." 2-ER-102.

D. The District Court's Decision

On December 31, the District Court issued its order on both motions finding that:

> the undisputed evidence before this Court comports with the finding of the ICJ and indicates that the current

> treatment of the Palestinians in the Gaza Strip by the Israeli military may plausibly constitute a genocide in violation of international law. Both the uncontroverted testimony of the Plaintiffs and the expert opinion proffered at the hearing on these motions as well as statements made by various officers of the Israeli government indicate that the ongoing military siege in Gaza is intended to eradicate a whole people and therefore plausibly falls within the international prohibition against genocide.

1-ER-6. The District Court also "implore[d] Defendants to examine the results of their unflagging support of the military siege against the Palestinians in Gaza." 1-ER-10.

Nevertheless, it ruled that "the preferred outcome is inaccessible to this Court," incorrectly finding that precedent required it to abstain from exercising its jurisdiction to adjudicate Plaintiffs' legal claims under the political question doctrine. *Id*. Rather than recognize that Plaintiffs challenged breaches of binding law and legal duties, the Court found that Plaintiffs challenged the "appropriateness" of providing financial and military aid to Israel, which it found was a foreign policy decision committed to the political branches, 1-ER-9, and that to question or condemn such a decision could "cause international embarrassment." 1-ER-10.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 n.2 (9th Cir. 2004). "Legal issues underlying [a]

preliminary injunction decision are reviewed de novo," and a preliminary injunction decision "may be reversed if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Republic of Philippines v. Marcos*, 818 F.2d 1473, 1478 (9th Cir. 1987), *aff'd on reh'g*, 862 F.2d 1355 (9th Cir. 1988).

SUMMARY OF THE ARGUMENT

I. The District Court correctly observed that the political question doctrine "is concerned with the separation of powers between the separate branches of government." 1-ER-7. Yet, even having acknowledged that Defendants were providing "unflagging" support for the plausible genocide against the Palestinian people in Gaza, the court dismissed the case based on a fundamentally erroneous understanding of the political question doctrine—one which drew a bright separation-of-powers line to preclude judicial review simply because the case implicates "foreign policy" decisions. 1-ER-10. In so doing, the district court ignored the critical admonition in *Baker v. Carr*, 369 U.S. 186, 211 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," and it abdicated the historic judicial role, in a proper separation-of-powers scheme, to check unlawful executive branch conduct. As *Baker* made clear, courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Id.* at 217.

In *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189 (2012)—a case the District Court failed to apply, let alone cite—the Supreme Court firmly rejected such avoidance of judicial review of the legality of sensitive foreign policy decisions. Instead, as *Zivotofsky I* explained, ever since *Marbury*'s original pronouncement about the judicial role in a separation-of-powers scheme, the relevant question regarding justiciability turns on whether binding law regulates executive conduct. *Id.* at 196. If under the Constitution or a statute, "the executive possesses a constitutional or legal discretion," the courts generally demure to the executive branch's policy judgment. *Marbury,* 5 U.S. at 166. However, where, as here, the executive branch faces a legal duty, through statute and binding international law, the executive is "amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." *Id*.

This "Duty-Discretion Distinction" pervades political question cases from *Baker*, to the Supreme Court's "Enemy Combatant" cases, to *Zivotofsky I* itself, as well as to numerous cases before this Court and other courts of appeals, particularly those that apply binding international prohibitions recognized by the political branches through domestic implementation to constrain executive "foreign policy" or "national security" decisions. *See infra* section I(B). The Distinction also demonstrates why, contrary to the District Court's heavy reliance, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), a pre-*Zivotofsky* case, is no bar to

adjudication as it did not involve a concrete legal duty as against, or breach by, the executive, but instead implicated executive discretionary funding decisions. Accordingly, as *Zivotofsky I* emphasized—even in the context of adjudicating the fraught political context of the status of Jerusalem—comparing executive conduct as against a legal duty "is a familiar judicial exercise." *Zivotofsky I*, 566 U.S. at 196.

Plaintiffs do not question routine foreign policy choices or discretionary executive foreign aid distributions. Instead, here, they invoke the legal duty to prevent and not facilitate genocide—considered the "crime of crimes"—a legal obligation that is fundamental, binding and *non*discretionary. As codified in the 1948 Genocide Convention, which the United States played a key role in drafting in response to the horrors of the Holocaust and ultimately ratified in 1988, the legal duty has achieved non-derogable *jus cogens* status in customary international law and is thus plainly enforceable under the ATS in federal district courts. *See Sarei*, 671 F.3d at 744 (genocide "fall(s) within the limited federal jurisdiction created by the [ATS]"); *Al-Tamimi*, 916 F.3d at 11 (same).

Indeed, in legislation co-sponsored by then-Senator Joseph Biden, the United States adopted criminal law prohibitions on genocide to mirror and enforce the customary international prohibition on genocide, further supporting the justiciability of Plaintiffs' claims. Now, as President, Defendant Biden and his officers retain no

policy discretion to engage in or support genocide; this triggers a corresponding judicial duty to "say what the law is." *Marbury*, 5 U.S. at 177.

II. The District Court also erred in failing to independently address Plaintiffs' separate claims for injunctive relief and declaratory relief. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 815 (2017) ("the political question doctrine requires analysis on a claim-by-claim basis"). Even if the injunctive relief requested were to render those claims nonjusticiable, nothing about a judicial declaration that the Executive is violating the law—and leaving it to the Executive branch to thereafter conform its behavior to that judicial declaration of legal duties—could conceivably implicate the political question doctrine.

ARGUMENT

I. SEPARATION-OF-POWERS PRINCIPLES AND MODERN SUPREME COURT AND APPELLATE COURT RULINGS DEMONSTRATE THAT THE "NARROW" POLITICAL QUESTION DOCTRINE CANNOT DISPLACE THE JUDICIARY'S DUTY TO REVIEW THE ASSERTED ILLEGALITY OF EXECUTIVE BRANCH CONDUCT AT ISSUE IN THIS CASE EVEN IF THE CONDUCT IMPLICATES FOREIGN POLICY.

Rather than undertaking the required "discriminating analysis" of Plaintiffs' legal claims (and forms of relief) and identifying the precise question at issue in this case, *Baker*, 369 U.S. at 211, the District Court incorrectly supposed that judicial review of any claim that implicates the foreign policy interests of the Executive branch is foreclosed. Yet, the Constitutional framework, Founding Era jurisprudence

and the Supreme Court's modern exposition about the judicial role in foreign affairs—in *Youngstown Sheet & Tube Co. v. Sawyer* (*Youngstown Steel*), 343 U.S. 579 (1952), the post 9/11, so-called "Enemy Combatant" cases, and *Zivotofsky I* itself—demonstrate that the judiciary has a constitutionally committed role to ensure executive compliance with international law. Thus, a "more focused" view of Plaintiffs' claims, *Zivotofsky I*, 566 U.S. at 197, reveals that the only question the court must resolve is whether Defendants' actions violate binding legal duties to prevent genocide and not aid and abet it; that is a legal question at the heart of the judicial role.

A. The District Court Erred in Invoking a Categorical Foreign Policy Exception to the Court's Mandatory Article III Jurisdiction, Which Has No Support in the Constitution's Text or Supreme Court Precedent.

Contrary to the District Court's assumption, under the first political question consideration set forth in *Baker*, there is no "textually demonstrable constitutional commitment" to the executive branch of an undifferentiated foreign affairs power, let alone power to simply disregard binding international legal obligations. *Baker*, 369 U.S. at 217. Because the executive enjoys no discretion to violate the law, the judiciary has a corresponding constitutional duty to constrain unlawful executive action.

1. Because the Political Question Doctrine is a Narrow Exception to the Court's Mandatory Duty to Decide Cases Pursuant to Article III, the Court Must Undertake a Discriminating Determination Before Finding a Political Question is Inextricable from the Case.

As the Supreme Court recently emphasized, the political question doctrine represents a "narrow exception" to the judiciary's constitutional duty to decide cases and controversies—a duty the court must fulfill even in disputes it would otherwise "gladly avoid." *Zivotofsky I*, 566 U.S. at 194–95 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821)). Indeed, in the sixty years since *Baker*, and despite numerous invocations, the Supreme Court has ordered a case dismissed on political question grounds only three times. *Nixon v. United States*, 506 U.S. 224 (1993) (holding the Constitution commits the "sole" power to try impeachments to Senate); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (holding plenary rule-making regarding militia is expressly committed to Congress); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (finding a political question because of a lack of judicially manageable standards to adjudicate partisan gerrymandering). This is because the judiciary's obligation to exercise the "judicial Power" over "Cases" and "Controversies," U.S. Const. art. III, § 2, cl. 1, is largely mandatory, reflecting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Although *Baker* identified six factors to consider as part of the political question inquiry, recent Supreme Court jurisprudence instructs courts to focus on the first two factors, *i.e.* whether there is: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; or (2) a "lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky I*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. at 228); *see also Rucho*, 139 S. Ct. at 2494, 2495-96 (limiting consideration of political question inquiry to first two *Baker* factors); *Mecinas v. Hobbs*, 30 F. 4th 890, 901 (9th Cir. 2022) (only referencing first two *Baker* factors in finding no political question), *cert. denied*, 143 S. Ct. 525 (2022).[7]

[7] The four other *Baker* factors the Supreme Court has demoted in importance are: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; "an unusual need for unquestioning adherence to a political decision already made"; or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. As Professor Ramsay emphasized, *Zivotofsky I*'s sidelining of those factors is significant because they were the "most open-ended" and conclusively signaled that "foreign affairs controversies" are no different than domestic legal questions. Michael D. Ramsay, *War Powers Litigation After Zivotofsky v. Clinton*, 21 Chap. L. Rev. 177, 178–79 (2018). For this reason, the District Court erred in crediting the prudential sixth factor – "embarrassment," 1-ER-10 – as a basis upon which to decline adjudication of *jus cogens* norms accepted by the political branches as creating *erga omnes* binding obligations that have clear definitions providing judicially manageable standards.

Moreover, even in considering the "textual commitment" prong, *Baker* itself surfaces the Duty-Discretion Distinction to which courts have since regularly adhered, and that is central to this case between executive discretion and legal duty. The "foreign relations" cases the Court explained had been properly dismissed on political question grounds "involve the exercise of a *discretion* demonstrably committed to the executive or legislature." *Baker*, 369 U.S. at 211 (emphasis added); *see also id*. at 211–13 (largely distinguishing "foreign relations" cases on the discretion-duty axis). In contrast, the *Baker* Court emphasized, as Plaintiffs argue here, "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id*. at 217; *see also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (political question doctrine only bars review of claims questioning the "prudence of the political branches in matters of foreign policy or national security constitutionally committed to their *discretion*.") (emphasis added).

Thus, before ceding its jurisdiction, a court must make a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, and dismiss as nonjusticiable only when political questions are "inextricable from the case." *Id.*; *see also Ctr. for Biological Diversity*, 868 F.3d at 827 (in cases touching on national security and foreign affairs, "a court does not adequately discharge its duty by pointing to the broad authority of the President and Congress

and vacating the field without considered analysis"). Put another way, "[a]bstraction and generality do not suffice." *Al-Tamimi*, 916 F.3d at 8. This mandate explains why, in *Al-Tamimi*, the D.C. Circuit recognized Palestinian plaintiffs' claims against Israeli-settler defendants for committing genocide in the occupied territories as a "purely legal issue" and thus cognizable "by the courts." *Id*. at 11. At the same time, it suggested that counts related to Israeli settler war crimes may ultimately raise political questions if they actually required resolution of questions about sovereignty over disputed territories, which is the textually committed province of the executive pursuant to the recognition power. *See id.* (citing *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II)*, 576 U.S. 1, 5 (2015)); *Al Shimari v. CACI Premier Tech., Inc*., 840 F.3d 147, 151, 153-54 (4th Cir. 2016) (concluding ATS claims for violations of customary international law prohibitions on torture and war crimes are justiciable, and distinguishing from nonjusticiable questions which turn on claims of military negligence alone).

The District Court's error was compounded by reliance on an overbroad understanding of maximalist executive power in the field of foreign relations from outlier Supreme Court cases. For example, *Baker* specifically disparaged *Oetjen v. Central Leather Co*., 246 U.S. 297, 302 (1918), relied upon by the District court, 1-ER-8, as the example of a "sweeping statement" of exclusive foreign relations power that courts should avoid in undertaking a political question analysis. *Baker*, 369 U.S.

at 211, 211 n.31. And the District Court's reliance on the much criticized language from *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319–20 (1936), suggesting that the executive is the "sole organ" of foreign relations, could not conceivably be correct given the Court's subsequent decision in *Youngstown Steel* invalidating the President's invocation of plenary foreign affairs power to seize domestic steel mills. 343 U.S. at 587–89. *See also Zivotofsky II*, 576 U.S. at 20 (refusing "to acknowledge that unbounded power" of the executive as "the sole organ of the federal government in the field of international relations").[8] *Cf. Baker*, 369 U.S. at 213 (judicial deference to executive decisions "rests on reason, not habit"). And, critically, the district court failed to recognize that, unlike in this case, none of these cases involved executive action that was taken in *violation of a binding legal duty*. *See* Section I(B) *infra*.

[8] Similarly, dicta relied upon by the District Court from *Haig v. Agee*, 453 U.S. 280, 292 (1981), that conduct of "foreign relations" is "immune from judicial inquiry," is irreconcilable with numerous modern separation of powers cases, *see infra* Section I(B), and has no relevance to the political question doctrine as the *Haig* Court actually reviewed—and ratified—the executive's decision to deny a passport. 1-ER-8.

2. The Constitution's Text and Founding Era and Modern Supreme Court Jurisprudence Demonstrate that there is No Generalized Textual Commitment of "Foreign Policy" Power to the Executive and that the Judiciary is to Have a Meaningful Role in Checking Executive Violations of International Law.

a. The Constitution

The Constitutional framework belies the certitude reflected in the District Court's opinion, that the judiciary must indiscriminately cede jurisdiction over foreign affairs matters to the executive. The Constitution and subsequent Founding-Era practice envisioned a robust role for the judiciary in ensuring the political branches' adherence to the law of nations. *See* Thomas H. Lee, *Article IX, Article III and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787-1792*, 89 Fordham L. Rev. 1895, 1899 (2021).

First, reflecting a system built on the separation of powers, the Constitution lodged many foreign affairs powers that had been considered "executive" by the British Crown with Congress,[9] whereas the Constitution's textual commitment of foreign relations power to the President is comparatively limited.[10] Thus, "whatever

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[9] These legislative powers included: to provide for "common Defense"; "to regulate Commerce with foreign nations"; "to define. . . Offenses against the Law of Nations"; "to declare War, . . . and make Rules concerning the Captures on Land and Water; "to provide and maintain a Navy"; to call forth "the Militia" and to comprehensively regulate the militia. U.S. Const. art. I, § 8.

[10] Article II confers on the President the status as "Commander in Chief" of the army, navy; the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"; the power to "receive ambassadors and other public ministers," and to appoint, with advice and consent of

else Article II's grant of executive power meant, it did not imply plenary foreign affairs authority unless otherwise indicated." Martin Flaherty, Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs 60 (2019).

As for the judicial branch, "even a quick scan of Article III reveals the extent to which foreign affairs were a focus of federal judicial power." Lee, 89 Fordham L. Rev. at 1933. Specifically, Article III extends the "judicial power" to federal laws and treaties; to "all Cases affecting Ambassadors, other public Ministers, and Consuls"; "to all Cases of admiralty and maritime Jurisdiction" and to suits between a state "or Citizens thereof, and foreign states, Citizens or Subjects;" while the Supreme Court retains original jurisdiction in "all Cases affecting Ambassadors, other public Ministers and Consuls." U.S. Const. art. III, § 2, cls. 1-2. Article VI confirms that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, § 2, cl. 2. *See also* Ramsay, 21 Chap. L. Rev. at 189 (emphasizing that unlike subjects such as impeachment, the Constitution has no jurisdictional carve-outs for foreign affairs or war and vests the judiciary with power to constrain unlawful executive action).

The first Congress also recognized the centrality of the judiciary in ensuring compliance—including executive branch compliance—with the "law of nations" by

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the Senate, "ambassadors and other public ministers" and critically, the responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 2, cls. 1-2; § 3.

directly incorporating the concept into federal law via the ATS.[11] Ultimately, the Constitution's "structural grants of foreign affairs power to each of the branches belies the notion that any one enjoys an unlimited well of authority when it comes to the nation's external relations." Flaherty, Restoring the Global Judiciary, at 60.

b. Founding Era Cases Involving Breaches of International Law

Representative cases from the Founding Era throughout the 19th Century reveal a firm understanding, stemming from *Marbury* itself, of the judicial role in enforcing executive branch compliance with international law. Indeed, during this period the Supreme Court repeatedly and uncontroversially ruled in *favor of foreign nationals* and *against* U.S. citizens and the *executive* in adjudicating *legal* disputes *during wartime*.

Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804), involved an American captain's seizure of a ship he believed to be French enemy property during the U.S.-France "Quasi War." The Marshall Court refused to accept the captain's interpretation of the Non-Intercourse Act and famously declared that, "an act of Congress ought never to be construed to violate the law of nations, if any other

[11] Congress also did so by enacting The Prize Act, which was understood to incorporate customary international law to regulate naval captures by U.S. privateers. An Act Concerning Letters of Marque, Prizes and Prize Goods, ch. 107, 2 Stat. 759 (1812); *see also The Adeline*, 13 U.S. 244, 284 (1815) (applying law of nations to limit prize capture). Congress further validated judicial enforcement of international law by incorporating the definition of piracy "as defined by the law of nations" into the Piracy Act of 1819, Pub. L. No. 15-77, ch. 77, 3 Stat. 510 (1819).

possible construction remains." *Id*. at 118; *see also United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801) (holding vessel seizure violated terms of treaty ending U.S.-France Quasi War, as Justice Marshall affirmed that treaties are the "Supreme Law of the Land" under the Constitution). In *Little v. Barreme*, 6 U.S. 170, 174 (1804) the Court unanimously found the President's order to seize a Danish ship suspected of violating the U.S. embargo on France violated Congressional regulations and the international law of neutrality (a then-central tenet of customary international law), precluding the U.S. from acts of aggression against neutral states.

In successive cases throughout the 19th century, the Court continued to follow the Duty-Discretion Distinction by issuing merits rulings in cases where the Constitution, a Congressional statute or international law had constrained executive authority. In *Brown v. United States*, 12 U.S. 110, 128-29 (1814), the Court invalidated a U.S. Attorney's seizure of a British vessel during the War of 1812 because no positive law conferred discretion to seize and because the seizure was contrary to the law of nations. *See also The Amiable Isabella,* 19 U.S. (6 Wheat.) 1, 68 (1821) (court would be "betraying its duty" if it failed to interpret international law in adjudicating seizure dispute); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115, 126 (1851) ("no discretionary power existing in any executive officer" to seize property contrary to law "can be tolerated under our system of government").

In *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862), the Court did not hesitate to rule on the legality of President Lincoln's naval blockade of domestic cargo ships during the Civil War, concluding that it was consistent with customary international law. In *The Paquete Habana*, 175 U.S. 677, 700 (1900), the Court found that seizure of neutral states' fishing vessels during the Spanish American war violated the law of nations and famously proclaimed: "[i]nternational 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 administration." *Id*. (emphasis added); *see also Koohi v. United States*, 976 F. 2d 1328, 1331 (9th Cir. 1992) (referring to *Paquete Habana* as "[t]he controlling case" and concluding that "federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians").

At the same time, the Court deferred judicial review of questions properly lodged in the textually committed *discretion* of the executive branch, such as around recognition of territorial sovereignty. *See, e.g., Williams v. Suffolk Ins. Co*. 38 U.S. (13 Pet.) 415, 422 (1839) (refusing to question President Jackson's refusal to recognize the Falkland Islands as Argentinian); *Kennett v Chambers*, 55 U.S. (14 How.) 38, 51 (1852) (refusing to question status of Texas as part of rebellious Mexican province and not a state); *Charlton v. Kelly*, 229 U.S. 447, 476 (1913) (no judicial review of executive's decision not to void extradition treaty with Italy).

This foundational Duty-Discretion Distinction carries through to the present day. *See infra* Section I(A)(2)(c), I(B); Ramsay, 21 Chap. L. Rev at 188 ("*Zivotofsky[I]*'s distinction between interpreting legal texts on the one hand, and second-guessing the exercise of executive discretion, on the other, has strong roots in post-ratification practice and is supported by the Constitution's text.").

c. Modern Supreme Court Jurisprudence: The Duty-Discretion Distinction From Youngstown Steel to the "Enemy Combatant" Cases to Zivotofsky

Youngstown Steel was a seismic pronouncement on the centrality of the judiciary in reviewing the legality of executive branch conduct, with evident reverberations in Supreme Court jurisprudence in the past 20 years. In the lead opinion by Justice Black, a committed textualist, the Court rejected the President's proposed wartime power to seize steel mills because no positive law authorized it. *Youngstown Steel*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

Justice Jackson's seminal and now controlling concurring opinion rejected the generalized executive powers upon which the District Court seemingly relies, *i.e.* that the "Vesting Clause" grants unlimited "executive powers," because such "unlimited executive power" was reminiscent of the kind wielded by George III, so it seems doubtful that the Framers "were creating their new Executive in his image." *Id*. at 640–41 (Jackson, J., concurring). Justice Jackson also vehemently rejected the

executive's claim over "nebulous, inherent powers never expressly granted but said to have accrued to the office" from prior practice, as such claims are fundamentally inconsistent with the Constitutional text, and to the very idea of a law-bound executive in a constitutional republic. *Id.* at 646–47, 650–55. Ultimately, Justice Jackson makes clear that executive power "reaches so far as there is law" – but no farther – as "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Id.* at 646.

In the recent set of landmark separation of powers cases, the so-called "Enemy Combatant" cases, the Supreme Court followed Justice Jackson's admonitions by repeatedly rejecting (four times in four years) claims to exclusive executive dominion over "national security" policy during armed conflict and confirmed a robust judicial role in constraining executive conduct via statute, treaty and the Constitution. As Justice O'Connor explained in *Hamdi v. Rumsfeld*, since *Youngstown Steel*, the Supreme Court has "long since made clear that a state of war is not a blank check for the President." 542 U.S. 507, 536 (2004) (plurality opinion) (citing *Youngstown Steel*, 343 U.S. at 587).

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court rejected the executive's argument that the courts lacked jurisdiction to review habeas corpus petitions filed by so-called "enemy combatants" detained by the U.S. military in Guantanamo Bay. The government argued that the case presented a nonjusticiable political question

because the sovereign status of Guantanamo was for executive recognition alone and the court could otherwise not "micro-manage[] the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting." Brief for Respondents at *12, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739. For the Court, however, the "answer to the question presented is clear": because "Petitioners contend that they are being held in federal custody in *violation of the laws* of the United States"—including violation of the "Constitution or laws or treaties of the United States," 28 U.S. § 2241(c)—federal courts have jurisdiction to hear habeas petitions challenging "the legality of their detention." *Rasul*, 542 U.S. at 483–84, 483 n.15 (emphasis added). *Rasul* also held that courts have jurisdiction to review claims brought—like Plaintiffs' here—under the ATS, considering "immaterial" the fact that petitioners were in military custody. *Id*. at 485.

In *Hamdi v. Rumsfeld*, the executive claimed exclusive authority to denominate a person captured on the battlefield as an "enemy combatant" and detain him indefinitely without judicial review, because "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decisionmaking" precludes "a court's review or second guessing." Brief for Respondents at *10, 26, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020. Rejecting the demand for judicial abdication, "as this

approach only serves to *condense* power into a single branch of government," the Court stressed that a proper conception of separation of powers "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi,* 542 U.S. at 536.

In *Hamdan v. Rumsfeld*, the Court held that the executive had no independent authority to convene military commissions to try al Qaeda suspects beyond the scope codified by Congress in the Universal Code of Military Justice and rejected the executive's claim that the exercise of the President's Commander-in-Chief and foreign affairs powers during wartime "is entitled to be given effect by the courts." Brief for Respondents at *9, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875. Contrary to the executive's claim, the Court found the Geneva Conventions constrain the military during this kind of armed conflict and even prescribed the terms under international law that any new military commission would have to follow. *Hamdan*, 548 U.S. at 632–33.

And, in *Boumediene v. Bush*, the Court held, in contravention of the joint will of Congress and the President, that detainees in Guantanamo are entitled to the constitutional protections of the Suspension Clause and that, rather than accepting the determinative word from the military about a detainee's "enemy combatant" status, the judiciary must conduct a "meaningful" habeas review into the legal and factual basis for the detention. 553 U.S. 723, 783 (2008). Moreover, undertaking a

"discriminating analysis" mandated by *Baker*, akin to that in *Zivotofsky I,* the Court rejected the government's argument that the question of the sovereign status of Guantanamo rendered the case a nonjusticiable political question because, while sovereignty determinations are traditionally in the realm of executive discretion, the fact that the U.S. exercises practical control over that territory conferred habeas jurisdiction. *Id.* at 754–55.

Most recently, in *Zivotofsky I*, the Court reviewed a conflict between a statute authorizing individuals effectively to denominate Jerusalem as part of Israel (by listing "Jerusalem, Israel" in one's passport), and long-standing State Department policy prohibiting the designation of "Jerusalem" as the capital of "Israel" on a passport. *Zivotofsky I,* 566 U.S. at 191. The D.C. Circuit had held that the case presented a nonjusticiable political question because the executive had the exclusive—and thus unreviewable—power to define the status of Israel's sovereignty over Jerusalem. *Id.* at 195. The Supreme Court reversed 8-1, concluding that the D.C. Circuit had conflated jurisdiction with the merits of the executive-congressional conflict, and thereby "misunderstood the issue." The Court found that that the legality of executive decisions regarding recognition of sovereignty over Jerusalem was justiciable, even where the Constitution textually committed the power to recognize foreign sovereigns to the Executive. *Id.* at 197. Echoing *Marbury*, the Court explained why the case was plainly justiciable:

> The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right.

Id. at 196; *see also id.* at 208 (Sotomayor, J., concurring in part) ("In no fashion does the question require a court to review the *wisdom of the President's policy* toward Jerusalem or any other decision *committed to the discretion* of a coordinate department.") (emphases added). The Court stressed that while resolution of this legal question "demands careful examination of the textual, structural and historical evidence" at issue, "[t]his is what courts do." *Id*. at 201. Indeed, examining executive action as against a prevailing legal norm to find if such action is lawful is "a familiar judicial exercise." *Id*. at 196.

When the case came back to the Court in *Zivotofsky II*, the Court reached the merits and held that congressional efforts to limit the executive's discretion to resolve questions of sovereignty over Jerusalem violated separation of powers, because the Constitution vests exclusive "recognition power" to the executive, and Congress infringed on that power by trying to "force the President . . . to contradict his prior recognition determination." 576 U.S. at 4-5. In so deciding, however, the Court made it clear that "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy." *Id*. at 21. The Court thus explicitly *rejected* the Secretary of State's claim that *Curtiss-Wright* supported its interpretation of

executive power of the kind accepted by the district court in this case: that "the President has 'exclusive authority to conduct diplomatic relations,' along with 'the bulk of foreign-affairs powers.'" *Id*. at 19. Instead, the Court emphasized that, though the executive did have exclusive power to recognize sovereigns, this power was "quite narrow . . . [and] extend[ed] no further than [the Executive's] formal recognition determination." *Id*. at 30.

Zivotofsky I and *II* make clear that the courts have the power, responsibility, and ability to review executive conduct against existing law. The cases also confirm that executive primacy in "foreign policy" is recognized only in those "narrow" cases when a specific power, *e.g.,* sovereign recognition, is textually committed to executive discretion. *See supra* Section I(A)(2)(b). The judicial mandate to review legal questions, and the corresponding careful limitation of exclusive executive power to only that which has been specifically and narrowly committed, carries through forcefully today and ultimately requires adjudication of Plaintiffs' claims here. *See generally, infra* Section I(B)(1)-(2); *Al-Tamimi*, 916 F.3d at 13-14 (recognizing that genocide claims are a purely legal question while claims turning on executive recognition power may not be justiciable).

B. The Legal Questions in the Case are Justiciable Because Plaintiffs Seek Enforcement of Binding International Legal Obligations and Do Not Challenge Discretionary Executive Foreign Policy Decisions.

1. The Judiciary Must Ensure the Executive's Compliance with Legal Duties Even in the Foreign Policy Realm

The Duty-Discretion Distinction—as announced in *Marbury v. Madison*, applied in the Founding Era and 19th century cases, and reaffirmed in the modern Court's jurisprudence—mandates judicial review of executive branch conduct that violates international law. In *Marbury*, Justice Marshall sought to establish a "rule of law" to guide the court's jurisdiction over executive conduct. 5 U.S. at 165. The Constitution vests the President "with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character." *Id.* at 165–66. But "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id*. at 166. Because the question of the vesting of the commission is a legal one—even if determined by the common law, and not by statute—it "must be tried by the judicial authority." *Id*. at 167. Here, because Plaintiffs do not challenge the wisdom of discretionary executive foreign assistance decisions, but executive actions that breach a clear, binding legal duty against aiding genocide, their claims are justiciable.

Like *Zivotofsky I*, *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), reinforces that *Marbury*'s Duty-Discretion Distinction, rooted in separation of powers principles, must inform the political question determination, even in a fraught foreign policy context. The Court examined claims seeking mandamus and declaratory relief after the Secretary of Commerce failed his statutory duty to certify Japan for engaging in violations of international whaling agreements. *Japan Whaling,* 478 U.S. at 221–22. The Court rejected the contention that the claims are nonjusticiable because they "involve foreign relations," *id*. at 229, because the claims do not "revolve around policy choices and value determinations constitutionally committed" to the political branches. *Id*. at 230. The Court emphasized that courts possess authority to "construe treaties and executive agreements," and the Secretary's failure to certify Japan for violations of international whaling agreements was a "purely legal question of statutory interpretation." *Id*.

> The Court must first determine the nature and scope of the duty imposed upon the Secretary by [the relevant statutes], a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below.

Id. The Court therefore addressed the merits and found that the Secretary had not violated his duties under the proper interpretation of the relevant statutory and treaty provisions. *Id*. at 240–41.

In numerous subsequent decisions implicating U.S. foreign policy determinations, courts of appeals have followed *Japan Whaling* and *Zivotofsky I* and adhered to the Duty-Discretion Distinction. In *El-Shifa*, the D.C. Circuit found en banc that claims that the U.S. military was "mistaken" in its determination that the plaintiff was operating a chemical weapons plant were nonjusticiable because the court would need to second-guess the correctness or wisdom of a discretionary military judgment. 607 F.3d at 845. But, as Judge Griffith explained for the full D.C. Circuit:

> We have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. … [W]e have distinguished between claims requiring us to decide whether taking military action was "wise"—"a 'policy choice[] and value determination [] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'"—and claims "[p]resenting purely legal issues" such as whether the government had legal authority to act.

Id. at 842 (citations omitted). Put another way, courts do not adjudicate claims seeking a "determination[] whether the alleged conduct *should* have occurred." *Id*. (quotation omitted); *compare id*. at 843 (stressing that "neither a common law nor statutory claim may require the court to reassess 'policy choices and value determinations'" exclusively entrusted to the political branches) (quoting *Japan Whaling*, 478 U.S. at 230). *See also Jaber v. United States*, 861 F.3d 241, 247 (D.C. Cir. 2017) (quoting *El-Shifa*, 607 F.3d at 844) (holding that a claim requiring the

court to determine whether a drone strike was "mistaken and not justified" is nonjusticiable in the absence of a legal duty); *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) (finding no political question where plaintiffs challenged the *legality* of implementing the U.S. policy prohibiting funds from going to foreign NGOs that perform or promote abortion abroad, rather than challenging the "political and social wisdom of [the] foreign policy").

2. Post-*Zivotofsky I* Case Law Confirms that Customary International Law is a Binding and Judicially Enforceable Legal Constraint on the Executive

The international law duty raised in this case is clear and firm. The prohibition on genocide is a *jus cogens* norm in customary international law that is an *erga omnes* duty (owed to all), which is binding on all states at all times. *See Siderman de Blake*, 965 F.2d at 714–15. The universal prohibition against genocide is codified in the 1948 Genocide Convention. When the United States ratified the Genocide Convention in 1988, Congress created criminal liability for those found guilty of, or complicit in, genocide. 18 U.S.C. §§ 1091, *et seq*. By ratifying the Genocide Convention and codifying a domestic criminal statute, the United States reaffirmed the pre-existing legal prohibition against and right of action for genocide under customary international law. *Kadić*, 70 F.3d at 242 n.6 (finding that a private remedy for genocide preexisted and continued after ratification of Genocide Convention and enactment of criminal statute); *Sarei*, 671 F.3d at 759 (same).

In *Al-Tamimi*, Palestinian plaintiffs sued, including under the ATS, American citizens, non-profits, and companies for supporting settlements in occupied Palestinian territory (referred to by the court as "disputed territories") that caused mass expulsions and "mass killings of Palestinians." 916 F.3d at 4. The district court dismissed the case on political question grounds after concluding that, because of the disputed status of the occupied territory and settlements, "Plaintiffs ask this court to wade into foreign policy involving one of the most protracted diplomatic disputes in recent memory." *Id.* at 5 (quotation omitted). The D.C. Circuit reversed, after undertaking a "discriminating analysis" of the sensitive questions posed, and analyzing the specific claims "to determine whether they *require* us to answer them." *Id.* at 9 (citations omitted).

Careful review of the claims revealed that they boiled down to two questions. First, the war crimes and trespass claims ultimately required resolution of the question: "*who has sovereignty over the disputed territory?*" *Id*. at 10. Per *Zivotofsky II*, the court concluded this might present a bona fide political question because questions related to the status of Jerusalem and occupied territories fall to the political branches and "not the Judiciary," and are thereby not justiciable. *Id*. at 11 (quoting *Zivotofsky II*, 576 U.S. at 5). Second, the court needed to answer the question: "*are Israeli settlers committing genocide?*" *Id*. That question presented a "purely legal issue," and was accordingly justiciable under the ATS, which the court

recognized authorizes suits for genocide. *Id.* at 11-12. Therefore, the court retained jurisdiction over claims that it found purely related to this second question regarding genocide and which were extricable from the first (potentially) political question.

Al Shimari is equally instructive. There, the district court dismissed an ATS suit brought by Abu Ghraib torture survivors against a private military contractor for its role in a conspiracy with U.S. military to abuse detainees, in violation of the international law prohibitions on torture, cruel and inhuman treatment, and war crimes. 840 F.3d at 151. The district court had relied on a line of cases involving negligent contractors acting under the control of the military, *see e.g., Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011) (alleging contractor negligence in use of a generator that electrocuted plaintiff), which were dismissed because questioning the judgment of contractors acting under military control would require evaluation of "discretionary operational decisions made by, or at the direction of, the military on the battlefield." *Al Shimari*, 840 F.3d at 155.

Reversing the district court, the Fourth Circuit observed such cases are "negligence case[s]," while "the present case involves allegations of intentional acts," which required the court to "frame our analysis in accordance with that distinction." *Id*. at 156. Plaintiffs' torture and war crimes claims, brought under federal common law via the ATS, "would not require the courts to evaluate sensitive military judgments because the claims challenge the legality, rather than the

reasonableness, of CACI's conduct." *Id.* at 154; *see also id*. at 157 ("the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity"); *id*. at 162 (Floyd, J., concurring) ("While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the *President* to declare such conduct lawful," with determinations of legality "constitutionally committed to the courts") (emphasis added).

As in the Founding Era cases, *Al Shimari* affirmed the relevance of international law in constraining unlawful executive conduct: when an entity "acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield . . . actions from judicial review." *Id*. at 158 (citing *Baker*, 369 U.S. at 217); *see also id*. at 162 (Floyd, J., concurring) ("although the reasonableness of military conduct may not be justiciable, the *lawfulness* of that conduct assuredly is");[12] *Schieber v. United States*, 77 F.4th 806, 811 (D.C. Cir. 2023) (reversing determination that awarding compensation to Holocaust descendants intruded into executive diplomatic prerogative and stressing that the fact that the legal question turns on an

[12] The Fourth Circuit affirmed the binding nature of international law duties in conducting a political question analysis. *See id*. at 159 (stressing that political question doctrine "does not strip courts of their authority to construe treaties and agreements entered into by the executive branch, despite the potential political implications of judicial review"); *id.* ("Conducting a 'textual, structural and historical' examination of a statute or treaty 'is what courts do'") (quoting *Zivotofsky I*, 566 U.S. at 201).

"international agreement" rather than statute or regulation "is hardly enough to transform the legal and factual questions in these cases into political ones," since "courts routinely interpret treaties"), *cert denied*, No. 23-548, 2024 WL 156506 (Jan. 16, 2024).

Significantly, the *Al Shimari* court rejected the possibility that the ATS claims for torture and war crimes could constitute political questions because, "Congress has established criminal penalties for commission of acts constituting torture and war crimes." 840 F.3d at 158 (citing domestic torture and war crimes statutes). Here, too, there is a congressionally-enacted statute, 18 U.S.C. § 1091, that criminalizes acts of genocide, which is coterminous with the international law definition of genocide upon which Plaintiffs directly rely in this case. Accordingly, for the genocide claims here, as with the torture claims in *Al Shimari*, such "commission of unlawful acts is not based on 'military expertise and judgment' and is not a function committed to a coordinate branch of government." 840 F.3d at 147, 158 (quotation omitted); *see also id*. at 161 ("the terms 'torture' and 'war crimes' are defined at length in the United States Code and in international agreements to which the United States government has obligated itself.").

3. The District Court Misapplied Ninth Circuit Precedent

The District Court's decision to abdicate its judicial role because this case touches on foreign policy is also contrary to cases in the Ninth Circuit, particularly

those that follow *Zivotofsky I*. For example, in *Ctr. for Biological Diversity*, this Court found no political question where plaintiffs alleged that building a U.S. military base in Okinawa violated the executive obligation under the National Historic Preservation Act to "take into account" the base's impact on environmental and economic interests. 868 F.3d at 823–26.

In *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019), this Court adjudicated a challenge to President Trump's reprogramming of funds to build a border wall because the case would not question whether such use is "worthy or whether, as a policy judgment, funds should be spent on them"; instead the relevant question was whether the reprogramming of funds was consistent with the Appropriation Clause and a relevant statute. *See also Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (rejecting executive's claim that judiciary could not review President Trump's executive order to exclude Muslims non-citizens from U.S. entry because the asserted unreviewability of alleged unlawful action, even in the context of national security, "runs contrary to the fundamental structure of our constitutional democracy"), *amended*, 858 F.3d 1168 (9th Cir. 2017).

The District Court's almost exclusive reliance on the pre-*Zivotofsky I* decision, *Corrie v. Caterpillar, Inc.*, is misplaced. In *Corrie*, plaintiffs sued the bulldozer company because of its awareness that the bulldozers it sold to the Israeli government would be used to destroy Palestinian homes. 503 F.3d at 977. The claims

in *Corrie* implicated discretionary decisions made by the executive because "these 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." *Id.* at 982 (emphasis added). Unlike here, *Corrie* did not assert violation of a direct legal prohibition—in statute, the Constitution or international law—by the executive. *See id*. at 983 (plaintiffs' action implicates whether Caterpillar "should" have sold bulldozers, whether such sales were "necessary," and the wisdom of "a policy determination" by the executive). The District Court again failed to apprehend the critical distinction between binding law and discretionary foreign policy choices.[13]

The district court's reliance on *Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017), is equally misplaced. There, the Marshall Islands brought an action seeking a judicial dictate that the United States pursue negotiations—a power textually committed to the executive, *id.* at 1200—to reduce nuclear armaments under the Non-Proliferation Treaty. This Court found a political question because, in the absence of an enforceable legal duty, the case would simply question the *wisdom* of the "decision of when, where, whether and how the United States will negotiate with foreign nations to end the nuclear arms race," *id.*, and

[13] Any reading that *Corrie* would still be nonjusticiable if there were a firm legal duty constraining the executive could not be reconciled with *Zivotofsky I*, decided 12 years later.

because the case otherwise lacked judicially manageable standards in the absence of legislation or a definable international legal duty making the treaty enforceable in U.S. courts. *Id.* at 1201. Where there is a binding legal duty to undertake measures to prevent and not be complicit in genocide, the court would not be questioning the wisdom of discretionary policy choices, but enforcing agreed upon legal obligations.

C. There are Judicially Manageable Standards to Assess Whether Defendants Have Violated International and Domestic Law Prohibiting Genocide.

The crime of genocide has a universally recognized legal definition against which the court can assess Defendants' conduct as alleged in the Complaint. *See* Genocide Convention art. II. *See also* 3-ER-419–507, ¶¶ 257-73. Thus, there are judicially manageable standards because for decades, international courts have adjudicated cases of genocide,[14] and courts in the United States have affirmed that claims of genocide are cognizable. *See Kadić*, 70 F.3d at 242 n.6 (private remedy

[14] For a sampling of cases prosecuted in the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), *see Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement (Sept. 2, 1998); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Judgement and Sentence (Jan. 27, 2000); *Prosecutor v. Popović et al.,* Case No. IT-05-88-A, Appeal Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (conspiracy to commit genocide and aiding and abetting the crime); *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Trial Judgement Vol. I (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016). For cases brought between states on allegations of genocide and the duty to prevent before the ICJ, *see* Application of Convention on Prevention and Punishment of Crime of Genocide *(Gam. v. Myan.)*, Order on Request for Indication of Provisional Measures, 2020 I.C.J. 3 (Jan. 23); *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 95, ¶ 126.

for genocide preexisted and continued after Genocide Convention and enactment of criminal statute); *Sarei*, 671 F.3d at 759 (same). In *Al-Tamimi*, the court specifically addressed this question and found that "the ATS—by incorporating the law of nations and the definitions included therein—provides a judicially manageable standard to determine whether Israeli settlers are committing genocide." 916 F.3d at 11–12. And, as noted above, the ICJ has issued provisional measures in the case brought by South Africa charging Israel with genocide of the Palestinian people in Gaza. *S. Afr. v. Isr.*, Order (ECF No. 87). Accordingly, this case clearly does not "turn on standards that defy judicial application." *Baker*, 369 U.S. at 211.

Indeed, the United States has codified the Genocide Convention's prohibitions in a criminal statute. 18 U.S.C. § 1091(a); *see also* 18 U.S.C. § 2 (aiding and abetting liability). Likewise, the duty to prevent genocide is clearly established under customary international law and has been readily applied by international courts. *See* Genocide Convention art. I; 3-ER-362, 366–372 ¶¶ 8, 18–31; 3-ER-419–507, ¶¶ 267–70. Defendants themselves have acknowledged the standards under customary international law governing when that duty is triggered, which they have violated. *See Ukr. v. Russ.*, Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America; *id*. at ¶ 22 (citing *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 222, ¶ 431) (a State's "obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should

normally have learned of, the existence of a serious risk that genocide will be committed.").

II. EVEN IF THE COURT FINDS THAT INJUNCTIVE RELIEF HERE IS NONJUSTICIABLE, IT SHOULD NEVERTHELESS HOLD THAT PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF IN NO WAY INTRUDES ON EXECUTIVE PREROGATIVES.

The District Court's dismissal focused exclusively on the specific injunctive relief requested by Plaintiffs, and deemed it intrusive on executive prerogative. But again failing in its obligation to undertake a "discriminating analysis," the District Court ignored Plaintiffs' independent request for declaratory relief, 3-ER-505, ¶¶ a, b; such relief, while fulfilling the Court's obligation to "say what the law is," could not conceivably interfere with executive branch prerogatives.

This Court has instructed that each claim for relief must be assessed separately when determining whether it is barred by the political question doctrine. *See Ctr. for Biological Diversity*, 868 F.3d at 815 ("the political question doctrine requires analysis on a claim-by-claim basis"). In *Center for Biological Diversity*, this Court reversed the lower court's political question dismissal and after independently reviewing each form of relief requested, ruled that neither plaintiffs' claims for declaratory relief nor their claims for injunctive relief presented a political question in their challenge to the Department of Defense's decision to approve, after negotiations with Japan, the construction of a U.S. military base in Okinawa. *Id*. at

815, 826, 829. This Court stressed that a declaration of executive illegality does not constitute a political question because it only requires a court to "engage in the 'familiar judicial exercise' of reading and applying" the law. *Id.* at 823 (quoting *Zivotofsky I*, 566 U.S. at 196).

In *Powell v. McCormack*, petitioners challenged the constitutionality of a 1987 resolution passed by the House of Representatives excluding member-elect Adam Clayton Powell from the 90th Congress. 395 U.S. 486 (1969). The Court was faced with the questions of whether the resolution was unconstitutional and whether Powell was entitled to backpay for his exclusion. *Id*. at 496. The Court determined that petitioners' claims were justiciable although respondents argued that petitioners were seeking coercive relief and "federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts." *Id.* at 517. The Court held, "[w]e need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued . . . . and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate." *Id*. at 517–18. The Court then held that the political question doctrine did not bar review of petitioners' claims, as "a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution." *Id*. at 548. The Court granted declaratory relief, and remanded to the

lower court to separately determine the appropriateness of a mandamus for backpay. *Id*. at 550.

As the United States recognized in another context, "a declaratory judgment order would be sufficient to enforce the Court's holding because [federal officials] are presumed to adhere to the law as declared by the court[.]" Defs.' Suppl. Br. re Order on Mot. for Summ. J. at 7, *Al Otro Lado, Inc. v. Mayorkas,* 619 F. Supp. 3d 1029 (S.D. Cal. 2022) (No. 3:17-cv-02366-BAS-KSC), ECF No. 770 (internal quotations and citations omitted). As the United States has argued, the declaratory judgment "would memorialize this Court's central holding, clearly set forth 'the rights and other legal relations of' the parties, 28 U.S.C. § 2201(a) . . . ." *Id*.

To issue a declaratory judgment, a court would not have to expressly direct the Executive to take a judicially-specified course of action. A court could declare that:

> Defendants have violated their duty under customary international law, as part of federal common law, to take all measures within their power to prevent Israel from committing genocide against the Palestinian people of Gaza; [and] that Defendants have violated their duty under customary international law, as part of federal common law, that prohibits their complicity in genocide by knowingly continuing to provide assistance that enables and facilitates Israel's commission of genocidal acts against the Palestinian people of Gaza.

3-ER-505, ¶¶ a, b. Defendants would thereafter bear the burden of deciding what steps they must take to ensure compliance with this legal judgment—after the judiciary has fulfilled its own duty to adjudicate the lawfulness of executive conduct.

CONCLUSION

The judgment of the District Court should be reversed, and the case should be remanded for further proceedings.

Dated: March 7, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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