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; LAILA ELHADDAD; WAEIL ELBHASSI; BASIM ELKARRA; DR. OMAR EL-NAJJAR; AND AYMAN NIJIM,

Plaintiffs-Appellants,

v.

JOSEPH BIDEN, JR., President of the United States, ANTONY J. BLINKEN, Secretary of State, LLOYD JAMES AUSTIN III, Secretary of Defense,

Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* SCHOLARS OF CONSTITUTIONAL LAW, FEDERAL COURTS, AND INTERNATIONAL LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars of constitutional law, federal courts, and international law. They teach and write at American law schools about the enforcement of international law in domestic courts. Although they take no position on the merits of Plaintiffs' underlying claims, they share the view that the panel, like the District Court before it, has badly misinterpreted the political question doctrine. Petitioners allege the violation of a federal statute, a treaty ratified by the United States, and the norms of customary international law. They do not ask a court to opine about the wisdom of U.S. policy, nor do they invite a court to make unmoored value judgments. Instead, they ask that a federal district court decide whether the implementation of federal policy violates longstanding federal law. These allegations do not implicate the political question doctrine, and the panel judgment to the contrary is mistaken.

The panel opinion contradicts years of jurisprudence from both the Supreme Court and other circuit courts of appeals. Worse, it undermines a vital and hard-won judicial role in interpreting and applying federal law that restrains executive action in foreign affairs. *Amici* respectfully submit this brief to advise the Court of the stakes of the panel opinion and the importance of *en banc* rehearing.

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[1] *Amici*'s biographies are included in an Appendix. All parties have consented to the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The panel went astray in three steps. To begin with, it misstated the law. The nub of the panel's confusion is contained in this sentence: "We have repeatedly held that the political question doctrine applies in the face of allegations that a defendant had violated legal obligations rooted in international law, where the United States' foreign policy decisions were strongly implicated." Op. at 12. But this breathtaking pronouncement is not, and has never been, an accurate statement of the law—and for good reason. If the panel were correct, it would mean, for instance, that a plaintiff could ***never*** challenge Executive action that employed or abetted torture or genocide overseas.[2] Unsurprisingly, the panel's language contradicts a long line of Supreme Court precedent. As *Amici* demonstrated below, the Court has frequently found that defendants violated international legal obligations, even where U.S. foreign policy decisions were "strongly implicated." Amicus Br. below at 18-22.

Because the panel misstated the doctrine, it arrived at a decision that cannot be squared with controlling law. In *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012), the Court held that the political question doctrine did not apply because the Court

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[2] While the panel attempted to temper its holding by elsewhere asserting that "[a]lthough some cases involving alleged genocide will be justiciable, as the United States agrees," the rationale of the holding would render all cases alleging genocide committed or aided by the US Government non-justiciable. Op. at 13. When asked at oral argument whether the government could think of any examples of such cases, the government could not present any.

had not been asked to "supplant a foreign policy decision of the political branches with the courts' *unmoored determination* of what United States policy toward Jerusalem should be." (emphasis added). Just as in *Zivotofsky*, the lower court in this case was not being asked to make "unmoored determinations" of what U.S. policy ought to be. Instead, and as in *Zivotofsky*, the court was asked whether the implementation of that policy violates federal law. Just as in *Zivotofsky*, therefore, the political question doctrine does not apply.

The panel attempted to distinguish *Zivotofsky* by suggesting the Plaintiffs had asked the district court to evaluate "military decisions and strategy" and to make "policy choices and value determinations." Op. at 13-14. But this is mistaken in two respects. For one thing, it frames the doctrine far too broadly. Presumably, *every* action taken by the Executive that implements foreign policy is pursuant to some "strategy," and the Supreme Court has never implied, let alone held, that this insulates those decisions from judicial scrutiny. More importantly, Plaintiffs emphatically *do not* question the Executive policy to arm Israel; they challenge whether the implementation of that policy complies with federal law, and that is a question that can and must be answered by a federal court.

And finally, the panel conflated the political question doctrine—a "narrow exception" to federal jurisdiction, *Zivotofsky*, 566 U.S. at 195—with a pleading rule. The panel observed that "[m]any, if not most grievances can be styled as the

violation of an asserted legal obligation . . . [and] there is no valid support for the idea that merely alleging the violation of a claimed legal duty means that the political question doctrine does not apply." Op. at 11. Set aside for the moment that this case presents no ordinary "grievance[]," but rather a claim that the United States is violating a fundamental norm of customary international law and a treaty designed "to safeguard the very existence of certain human groups and… to confirm and endorse the most elementary principles of morality." Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28). Set aside also that this treaty has been ratified by the United States and that its obligations have been made part of the federal criminal law. 8 U.S.C. § 1091. Even if this were not so, the political question doctrine is not a pleading rule, and there has never been a suggestion that the Plaintiffs have run afoul of the pleading requirements in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). On the contrary, both the International Court of Justice and the district court below found that Plaintiffs' allegations stated a plausible legal claim, and several courts of appeal have held that allegations under the Genocide Convention are justiciable under the Alien Tort Statute, 28 U.S.C. § 1350.

En banc review is thus warranted because of the extraordinary importance of the issue presented, and because the panel's ruling conflicts with existing jurisprudence.

ARGUMENT

THE PANEL'S OPINION MISSTATES THE DOCTRINE AND CREATES A CONFLICT WITH SUPREME COURT AND CIRCUIT LAW

A. The Panel Opinion Conflicts with Binding Authority

Relying primarily on *Corrie v. Caterpillar, Inc*. 503 F.3d 974 (9th Cir. 2007) and *Alperin v. Vatican Bank*, 410 F. 3d 532 (9th Cir. 2004), the panel distilled the political question doctrine in this Circuit into this erroneous proposition: No court may inquire into "allegations that a defendant had violated legal obligations rooted in international law, where the United States' foreign policy decisions were strongly implicated." Op. at 12. Regardless of whether this is an accurate distillation of Circuit law, it is most certainly not an accurate statement of the political question doctrine as set forth by the Supreme Court.

In *Zivotofsky*, the D.C. Circuit—like the panel here—held that the political question doctrine blocked inquiry into a decision by the Executive to list "Jerusalem" rather than "Israel" on the passport of a person born there. 566 U.S. at 193-94. The circuit reasoned that "[o]nly the Executive . . . has the power to define U.S. policy regarding Israeli sovereignty over Jerusalem and decide how best to implement it." *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1232 (D.C. Cir. 2009), *rev'd*, 566 U.S. 189 (2012). The circuit brushed aside the fact that Zivotofsky grounded his challenge in a federal statute, insisting that "policy decisions made pursuant to the President's recognition power are nonjusticiable political questions[,]" *id*., and that

the circuit was not willing "to be the first court to hold that a statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable." *Id*. at 1233.

The Supreme Court reversed. In an 8-1 decision, the Court held that the D.C. Circuit had misinterpreted Zivotofsky's claim. The federal courts were "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." 566 U.S. at 196. Instead, Zivotofsky asked "that the courts enforce a specific statutory right." *Id.* This request called upon the judiciary to decide "if Zivotofsky's interpretation of the statute is correct, and [if so,] whether the statute is constitutional[,]" which the Court recognized was "a familiar judicial exercise." *Id.*

So too, here. Petitioners do not challenge U.S. policy in Israel or Gaza, and they accept that the power to arm an ally is for the political branches. But as in *Zivotofsky*, it is emphatically for the courts to determine whether this policy is being implemented in a way that violates a federal statute, a treaty ratified by the United States, or customary international law. Though this may be a question the courts "'would gladly avoid,'" *id.* at 194 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)), it is nonetheless "a familiar judicial exercise." *Id.* at 196.[3]

[3] The panel also tried to distinguish *Zivotofsky* by suggesting that nothing more was at stake than "a birthplace on a passport." Op. at 14. Yet the Executive certainly saw

B. Plaintiffs' Claims Involve Judicially Manageable Standards

As Justice Sotomayor noted in her concurrence in *Zivotofsky*, "[t]he political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable[.]" *Id.* at 202 (Sotomayor, J., concurring in part and concurring in the judgment). In this case, however, the panel completely ignored the circuit cases which have held that allegations of genocide are justiciable under the Alien Tort Statute, 28 U.S.C. §1350. *See*, *e.g.*, *Al-Tamimi v. Adelson*, 916 F.3d 1, 11 (D.C. Cir. 2019) (the Alien Tort Statute "provides a judicially manageable standard to determine whether Israeli settlers are committing genocide"); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) ("allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy . . . Bosnian Muslims

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it as no small matter. The State Department said the statutory interpretation favored by Zivotofsky would upset "longstanding policy" in the region, and President Bush warned it would "'interfere[] with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.'" *Zivotofsky*, 566 U.S. at 191-92 (quoting Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005)). Yet Zivotofsky did not question that policy, nor did he ask a federal court to substitute its own judgment for that of the Executive. Instead, he alleged that U.S. policy violated federal law, and that was a question for the judiciary. Plaintiffs make the same argument.

and Bosnian Croats clearly state a violation of the international law norm proscribing genocide" and were cognizable under the Alien Tort Statute).[4]

And because the Petitioners' allegations involve judicially manageable standards, the panel's reliance on *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) is nonsensical. The panel cited *El-Shifa* for the proposition that "the political question doctrine bars our review of claims that, *regardless of how they are styled,* call into question the prudence of the political branches in matter of foreign policy." Op. at 12. But neither *El-Shifa* nor any other D.C. Circuit authority supports this over-broad proposition. In *El-Shifa*, the circuit merely recognized the well-settled proposition that "[n]either a common law nor statutory claim may require the court to reassess 'policy choices and value determinations' the Constitution entrusts to the political branches alone." *Id.* at 843 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). That holding is uncontroversial but irrelevant, since the D.C. Circuit has also held that alleged violations of the Genocide Convention are not unreviewable discretionary value determinations; they present legal questions with judicially

[4] *See also Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (ruling that allegations of governmental torture and violations of other well-established, universally recognized norms of international law are cognizable in domestic court) (internal citations omitted).

manageable standards, cognizable under the Alien Tort Statute. *See Al-Tamimi*, 916 F.3d at 11.

Indeed, the courts of appeals have often emphasized and endorsed precisely the distinction urged by Plaintiffs—viz., "policy choices" are for the political branches while "purely legal issues" are for the courts. *See*, *e.g.*, *id.* (even in "a case involving foreign affairs," the basic rule still applies that "policy choices are to be made by the political branches and purely legal issues are to be decided by the courts"); *Al Shimari v. CACI*, 840 F.3d 147, 158 (4th Cir. 2016) (refusing to dismiss on political question grounds claims alleging that U.S. military contractors tortured Iraqi civilians during a military conflict, relying on the distinction between discretionary policy and purely legal claims).

And of course, this is no new development of the law. The distinction between allegations that challenge discretionary executive policy and those alleging a violation of federal law is as old as *Marbury* and lies at the heart of the political question doctrine. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (distinguishing between political questions "depending on executive discretion," and those the court should hear which depend on "particular acts of congress, and the general principles of law"); *Japan Whaling Ass'n*, 478 U.S. at 230 (drawing a distinction between discretionary policy matters and issues that are legal in nature);

Zivotofsky, 566 U.S. at 196 (same). The panel ignored this pivotal distinction that the U.S. Supreme Court has abided by for more than 200 years.

CONCLUSION

Amici urge the Court to grant Plaintiffs' petition for *en banc* review.

Dated: September 9, 2024

Respectfully submitted,

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STATEMENT OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Ninth Circuit Rule 29-3, counsel for *amici* asserts that all parties have consented to the filing of this brief.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS

Counsel for *amici curiae* states pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) that (1) no counsel for a party authored this brief in whole or in part; (2) that no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and; (3) no person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(g)(1) because it contains 2,281 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman) using Microsoft Word in 14-point font.

/s/ Jennifer B. Condon

Jennifer B. Condon

September 9, 2024

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was filed and served on all parties electronically through the Court's CM/ECF system on September 9, 2024.

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APPENDIX

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and peace, and the Arab-Israeli conflict. Some of his books include The Genocide Convention: An International Law Analysis (Ashgate Publishing Ltd., 2006) and The Case for Palestine: An International Law Perspective (Duke University Press, 2005). He has published a wide range of academic articles concerning the consequences of issues such as mass displacement, ethnic cleansing, and torture. He has also authored several amicus briefs and has offered expert testimony in federal court and state on international law issues. In 2013, Professor Quigley received an award from the Consulate-General of Mexico for his outstanding contributions to the event of the Signature of the Vienna Convention on Consular Relations.

KERMIT ROOSEVELT, DAVID BERGER PROFESSOR OF THE ADMINISTRATION OF JUSTICE, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL – Professor Roosevelt is a Professor of Constitutional Law and Conflict of Laws for the University of Pennsylvania Carey Law School. He has authored several scholarly books in both fields, including Conflict of Laws (Foundation Press, 2010), which provides an analytical overview of conflicts, as well as The Myth of Judicial Activism: Making Sense of Supreme Court Decisions (Yale, 2006), which discusses how citizens can ascertain whether the Supreme Court is abusing its authority to interpret the Constitution. He has also published many academic articles, including Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove for the Northwestern Law Review, as well as Detention and Interrogation in the Post-9/11 World for the Suffolk University Law Review. In 2014, he was selected by the American Law Institute as the Reporter for the Third Restatements of Conflict of Laws.

BETH STEPHENS, DISTINGUISHED PROFESSOR OF LAW, RUTGERS LAW SCHOOL – Professor Stephens focuses on the enforcement of international norms and on business and human rights. She has published a variety of articles on the relationship between international and domestic law, focusing on the enforcement of international human rights norms through domestic courts and the incorporation of international law into U.S. law. She co-authored a book analyzing U.S. enforcement of human rights norms, International Human Rights Litigation in U.S. Courts (Martinus Nijhoff Publishers, 2d ed. 2008). She has also written on the international law norms governing corporations, including Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies, in Building a Treaty on Business and Human Rights: Context and Contours (Surya Deva and David Bilchitz, eds. 2017), and Are Corporations People? Corporate Personhood Under the Constitution and International Law, 44 Rutgers L.J. 1 (2014). Professor Stephens was an Advisor to the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of

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