

1 BRIAN M. BOYNTON  
 Principal Deputy Assistant Attorney General  
 Civil Division  
 2 United States Department of Justice  
 DIANE KELLEHER  
 3 Assistant Branch Director  
 Federal Programs Branch  
 4 JEAN LIN  
 Special Litigation Counsel  
 5 JONATHAN D. KOSSAK  
 Trial Attorney  
 6 Dep't of Justice, Federal Programs Branch  
 1100 L St. NW, Washington, DC 20005  
 7 Tel: (202) 305-0612  
 8 Email: jonathan.kossak@usdoj.gov

9 Attorneys for Defendants

10 **IN THE UNITED STATES DISTRICT COURT**  
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 12 **OAKLAND DIVISION**

13 DEFENSE FOR CHILDREN  
 INTERNATIONAL – PALESTINE; AL-  
 14 HAQ; AHMED ABU ARTEMA;  
 MOHAMMED AHMED ABU ROKBEH;  
 15 MOHAMMAD HERZALLAH; A.N.;  
 LAILA ELHADDAD; WAEIL ELBHASSI;  
 16 BASIM ELKARRA; and DR. OMAR EL-  
 NAJJAR,

17 Plaintiffs,

18 v.

19 JOSEPH R. BIDEN, Jr., *President of the*  
 20 *United States*; ANTHONY J. BLINKEN,  
*United States Secretary of State*; LLOYD  
 21 JAMES AUSTIN III *United States Secretary*  
*of Defense*, in their official capacities,

22 Defendants.

No. 4:23-cv-05829-JSW

**DEFENDANTS' NOTICE OF  
 MOTION, MOTION TO DISMISS,  
 AND MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT  
 THEREOF AND IN OPPOSITION TO  
 PLAINTIFFS' MOTION FOR  
 PRELIMINARY INJUNCTION**

Hearing: January 26, 2024 at 9:00 am

Honorable Jeffrey S. White  
 United States District Judge

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NOTICE OF MOTION.....1

MOTION TO DISMISS .....1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION .....1

BACKGROUND .....3

I. FACTUAL BACKGROUND .....3

II. PLAINTIFFS’ COMPLAINT AND THE PRELIMINARY INJUNCTION MOTION.....5

ARGUMENT .....6

I. LEGAL STANDARDS.....6

II. THE COURT LACKS JURISDICTION OVER THIS MATTER .....8

    A. Plaintiffs’ Claims Raise A Nonjusticiable Political Question.....8

    B. Plaintiffs Lack Standing Because Their Alleged Injuries Are Caused by an Independent Third-Party, Israel, Over Which the Court Lacks Authority .....13

III. PLAINTIFFS’ CLAIMS FAIL AS A MATTER OF LAW .....16

IV. THE BALANCE OF EQUITIES TIPS AGAINST ISSUANCE OF AN INJUNCTION .....18

CONCLUSION.....19

**TABLE OF AUTHORITIES**

**CASES**

*Abusharar v. Hagel*,  
77 F. Supp. 3d 1005 (C.D. Cal. 2014) ..... 8, 12

*Aerotrade, Inc. v. U.S. Agency for Int’l Dev. Dep’t of State*,  
387 F. Supp. 974 (D.D.C. 1974)..... 13

*Am. Beverage Ass’n v. City & Cnty. of San Francisco*,  
916 F.3d 749 (9th Cir. 2019) ..... 7

*Am. Ins. Ass’n v. Garamendi*,  
539 U.S. 396 (2003)..... 10

*Ashcroft v. Iqbal*,  
556 U.S. 662 (2009)..... 7, 8

*Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*,  
729 F.3d 937 (9th Cir. 2013) ..... 18

*Baker v. Carr*,  
369 U.S. 186 (1962)..... 8, 9

*Belbacha v. Bush*,  
520 F.3d 452 (D.C. Cir. 2008)..... 18

*Bell Atl. Corp. v. Twombly*,  
550 U.S. 544 (2007)..... 7

*Bernstein v. Kerry*,  
962 F. Supp. 2d 122 (D.D.C. 2013), *aff’d*, 584 F. App’x 7 (D.C. Cir. 2014)..... 12, 14, 15

*Betterroads Asphalt Corp. v. United States*,  
106 F. Supp. 2d 262 (D.P.R. 2000)..... 15

*Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*,  
333 U.S. 103 (1948)..... 10

*Cierco v. Mnuchin*,  
857 F.3d 407 (D.C. Cir. 2017)..... 15

*Clapper v. Amnesty Int’l USA*,  
568 U.S. 398 (2013)..... 14

*Coal. of Clergy, Laws., & Professors v. Bush*,  
310 F.3d 1153 (9th Cir. 2002) ..... 16

*Corrie v. Caterpillar, Inc.*,  
503 F.3d 974 (9th Cir. 2007) ..... *passim*

*Crockett v. Reagan*,  
558 F. Supp. 893 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983)..... 13

1 *Davis v. Pension Benefit Guar. Corp.*,  
571 F.3d 1288 (D.C. Cir. 2009)..... 18

2 *Demjanjuk v. Meese*,  
3 784 F.2d 1114 (D.C. Cir. 1986)..... 17

4 *Dickson v. Ford*,  
521 F.2d 234 (5th Cir. 1975) ..... 8, 12

5 *Do Thi Tran v. U.S. Dep’t of State*,  
6 Civ. A. No. 13-646, 2014 WL 1877414 (E.D. La. May 9, 2014)..... 15

7 *Doe I v. State of Israel*,  
400 F. Supp. 2d 86 (D.D.C. 2005)..... 13

8 *Eagle Broadband, Inc. v. Transcon. Props., Inc.*,  
9 No. 2:05-CV-1525-BES-GWF, 2006 WL 8441642 (D. Nev. Apr. 4, 2006)..... 7

10 *Earth Island Inst. v. Christopher*,  
11 6 F.3d 648 (9th Cir. 1993) ..... 10

12 *El-Shifa Pharm. Indus. Co. v. United States*,  
607 F.3d 836 (D.C. Cir. 2010)..... 8

13 *First Nat’l City Bank v. Banco Nacional de Cuba*,  
14 406 U.S. 759 (1972)..... 19

15 *Fleck & Assocs., Inc. v. Phoenix*,  
471 F.3d 1100 (9th Cir. 2006) ..... 16

16 *Franklin v. Massachusetts*,  
17 505 U.S. 788 (1992)..... 14

18 *Fryshman v. U.S. Comm’n for Pres. of Am.’s Heritage Abroad*,  
19 422 F. Supp. 3d 1 (D.D.C. 2019)..... 15

20 *Garcia v. Google, Inc.*,  
786 F.3d 733 (9th Cir. 2015) ..... 7, 18

21 *Greater Tampa Chamber of Com. v. Goldschmidt*,  
22 627 F.2d 258 (D.C. Cir. 1980)..... 15

23 *Haig v. Agee*,  
453 U.S. 280 (1981)..... 9, 10

24 *Hanoch Tel-Oren v. Libyan Arab Republic*,  
25 517 F. Supp. 542 (D.D.C. 1981), *aff’d*, 726 F.2d 774 (D.C. Cir. 1984)..... 17

26 *Harisiades v. Shaughnessy*,  
342 U.S. 580 (1952)..... 10

27 *Holtzman v. Schlesinger*,  
28 484 F.2d 1307 (2d Cir. 1973)..... 13

DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’  
MOT. FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 *Hughes v. United States*,  
 Civ. A. No. 2:19-cv-00037, 2020 WL 4196459 (S.D. W. Va. May 11, 2020)..... 18

2 *Indigenous People of Biafra v. Blinken*,  
 3 639 F. Supp. 3d 79 (D.D.C. 2022) ..... 15

4 *Japan Whaling Ass’n v. Am. Cetacean Soc’y*,  
 478 U.S. 221 (1986)..... 9

5 *Jensen v. Nat’l Marine Fisheries Serv. (NOAA)*,  
 6 512 F.2d 1189 (9th Cir. 1975) ..... 10

7 *Kokkonen v. Guar. Life Ins. Co. of Am.*,  
 8 511 U.S. 375 (1994)..... 14

9 *Lamont v. Woods*,  
 948 F.2d 825 (2d Cir. 1991)..... 12

10 *Linda R.S. v. Richard D.*,  
 11 410 U.S. 614 (1973)..... 17

12 *Luftig v. McNamara*,  
 373 F.2d 664 (D.C. Cir. 1967)..... 10

13 *Lujan v. Defs. of Wildlife*,  
 14 504 U.S. 555 (1992)..... 14

15 *Mahorner v. Bush*,  
 224 F. Supp. 2d 48 (D.D.C. 2002), *aff’d*, 2003 WL 349713 (D.C. Cir. Feb. 12, 2003)..... 12

16 *Manybeads v. United States*,  
 17 730 F. Supp. 1515 (D. Ariz. 1989) ..... 18

18 *Marbury v. Madison*,  
 19 5 U.S. (1 Cranch) 137 (1803)..... 8

20 *Martin v. Int’l Olympic Comm.*,  
 740 F.2d 670 (9th Cir. 1984) ..... 7

21 *Matar v. Dichter*,  
 22 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff’d*, 563 F.3d 9 (2d Cir. 2009)..... 8

23 *Mazurek v. Armstrong*,  
 520 U.S. 968 (1997)..... 6

24 *Medellin v. Texas*,  
 25 552 U.S. 491 (2008)..... 16

26 *Nietzche v. Freedom Home Mortg. Corp.*,  
 Case No. 3:18-cv-1930, 2019 WL 5057174 (D. Or. Oct. 8, 2019),  
 27 *aff’d*, 2023 WL 2570417 (9th Cir. Mar. 20, 2023) ..... 18

28

DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’  
 MOT. FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 *Nken v. Holder*,  
556 U.S. 418 (2009)..... 18

2 *Oetjen v. Cent. Leather Co.*,  
3 246 U.S. 297 (1918)..... 10

4 *Princz v. Fed. Republic of Germany*,  
26 F.3d 1166 (D.C. Cir. 1994)..... 16

5 *Republic of Marshall Islands v. United States*,  
6 79 F. Supp. 3d 1068 (N.D. Cal. 2015), *aff'd*, 865 F.3d 1187 (9th Cir. 2017) ..... 15

7 *Republic of Marshall Islands v. United States*,  
8 865 F.3d 1187 (9th Cir. 2017) ..... *passim*

9 *Saldana v. Occidental Petroleum Corp.*,  
774 F.3d 544 (9th Cir. 2014) ..... 8

10 *Salmon Spawning & Recovery All. v. Gutierrez*,  
11 545 F.3d 1220 (9th Cir. 2008) ..... 14

12 *Sanchez-Espinoza v. Reagan*,  
568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985)..... 13

13 *Sarnoff v. Connally*,  
14 457 F.2d 809 (9th Cir. 1972) ..... 13

15 *Schlesinger v. Reservists Comm. to Stop the War*,  
418 U.S. 208 (1974)..... 13

16 *Schneider v. Kissinger*,  
17 412 F.3d 190 (D.C. Cir. 2005)..... 9

18 *Serra v. Lappin*,  
19 600 F.3d 1191 (9th Cir. 2010) ..... 2, 16

20 *Sherley v. Sebelius*,  
644 F.3d 388 (D.C. Cir. 2011)..... 18

21 *Sims v. Stuart*,  
22 291 F. 707 (S.D.N.Y. 1922)..... 7

23 *Snyder v. Chi. Transit Auth.*,  
No. 22 CV 6086, 2023 WL 7298943 (N.D. Ill. Nov. 6, 2023)..... 17, 18

24 *Sosa v. Alvarez-Machain*,  
25 542 U.S. 692 (2004)..... 16, 17

26 *Talenti v. Clinton*,  
102 F.3d 573 (D.C. Cir. 1996)..... 15

27 *Tanner Motor Livery, Ltd. v. Avis, Inc.*,  
28 316 F.2d 804 (9th Cir. 1963) ..... 7

DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’  
MOT. FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*,  
551 U.S. 308 (2007)..... 8

2 *Terenkian v. Republic of Iraq*,  
3 694 F.3d 1122 (9th Cir. 2012) ..... 8

4 *United States v. Aguilar*,  
883 F.2d 662 (9th Cir. 1989) ..... 16

5 *United States v. Curtiss-Wright Exp. Corp.*,  
6 299 U.S. 304 (1936)..... 10

7 *United States v. Munoz-Flores*,  
8 495 U.S. 385 (1990)..... 19

9 *United States v. Texas*,  
599 U.S. 670 (2023)..... 17

10 *Winter v. Nat. Res. Def. Council, Inc.*,  
11 555 U.S. 7 (2008)..... 7

12 *Zivotofsky v. Clinton*,  
566 U.S. 189 (2012)..... 9, 10

13 **STATUTES**

14 18 U.S.C. §§ 1091 *et seq.*..... 1, 16, 17

15 18 U.S.C. § 1091..... 6

16 18 U.S.C. § 1092..... 3, 17

17 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021,  
18 Pub. L. No. 116-283, § 1273, 134 Stat. 3388, 3979 ..... 4

19 **RULES**

20 Fed. R. Civ. P. 12..... 2, 18

21 **UNITED STATES CONSTITUTION**

22 U.S. Const. art. II, § 2 ..... 10

23 **OTHER AUTHORITIES**

24 132 Cong. Rec. 2295 (1986)..... 17

25 CBS News, *Transcript: John Kirby on “Face the Nation,” Dec. 3, 2023*, Face the Nation  
26 (Dec. 3, 2023),  
<https://perma.cc/JY23-Y7TX>..... 5

27 Convention on the Prevention and Punishment of the Crime of Genocide  
28 (“Genocide Convention”), Dec. 9, 1948, 78 U.N.T.S. 277 ..... 1, 6, 17

DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’  
MOT. FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 Staff of Senate Comm. on Foreign Relations, 99th Cong., 1st Sess., *Report on Genocide*  
*Convention* (Comm. Print 1985)..... 17

2 The White House, *Remarks by President Biden on the October 7th Terrorist Attacks and*  
*the Resilience of the State of Israel and Its People* (Oct. 18, 2023),  
 3 <https://perma.cc/D7A9-RSBU> ..... 3

4 The White House, *Remarks by President Biden on the Release of Hostages from Gaza*  
 5 (Nov. 24, 2023),  
<https://perma.cc/UR4Z-EG8F> ..... 3

6 The White House, *FACT SHEET: White House Calls on Congress to Advance*  
 7 *Critical National Security Priorities* (Oct. 20, 2023),  
<https://perma.cc/B8AJ-V4LC> ..... 4

8 U.S. Dep’t of Defense, *Readout of Secretary of Defense Lloyd J. Austin III’s Call with Israeli*  
 9 *Minister of Defense Yoav Gallant* (Oct. 31, 2023),  
<https://perma.cc/AW85-ZGPR>..... 5

10 U.S. Dep’t of State, *Secretary Antony J. Blinken at a Press Availability* (Nov. 30, 2023),  
 11 <https://perma.cc/R4T8-7ZSC> ..... 5

12 U.S. Dep’t of State, *Secretary Blinken’s Meeting with Israeli Prime Minister Netanyahu*  
 13 (Nov. 30, 2023),  
<https://perma.cc/M33P-3CHF> ..... 5

14 U.S. Dep’t of Defense, *Statement from Secretary of Defense Lloyd J. Austin III on Steps to*  
 15 *Increase Force Posture* (Oct. 21, 2023),  
<https://perma.cc/S9VA-VMYD> ..... 5

16 U.S. Dep’t of State, *Appointment of David Satterfield as Special Envoy for Middle East*  
 17 *Humanitarian Issues* (Oct. 15, 2023),  
<https://perma.cc/C2LA-7YUF> ..... 4

18 U.S. Dep’t of State, *Secretary Blinken’s Travel to Israel, Jordan, Qatar, Bahrain,*  
 19 *Saudi Arabia, the United Arab Emirates, and Egypt* (Oct. 12, 2023),  
<https://perma.cc/275U-6FSC> ..... 4

20 U.S. Dep’t of State, *Travel to Tel Aviv, Amman, Ramallah, Baghdad, Ankara, Tokyo,*  
 21 *Seoul, and New Delhi, November 2–10, 2023,*  
<https://perma.cc/HRV9-LHYU> ..... 4

22

23

24

25

26

27

28

DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’  
 MOT. FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW



1 **NOTICE OF MOTION**

2 Please take notice that on January 26, 2024, at 9 a.m., Defendants Joseph R. Biden, Jr.,  
3 President; Antony J. Blinken, Secretary of State; and Lloyd James Austin, III, in their official  
4 capacities, will and hereby do move the Court to dismiss this action.

5 **MOTION TO DISMISS**

6 Defendants move to dismiss this action for lack of subject matter jurisdiction under Rule  
7 12(b)(1) of the Federal Rules of Civil Procedure and for failure to state a claim under Rule  
8 12(b)(6) for the reasons set forth in the following Memorandum of Points and Authorities.

9 \* \* \*

10 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO**  
11 **DISMISS AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

12 Plaintiffs—Palestinian advocacy organizations based in Ramallah, Palestinian residents of  
13 the Gaza Strip, and U.S. citizens with relatives in Gaza—sued pursuant to the Convention on the  
14 Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), Dec. 9, 1948, 78  
15 U.N.T.S. 277, and its implementing criminal legislation, 18 U.S.C. §§ 1091 *et seq.* They seek a  
16 mandatory injunction compelling the President and the Secretaries of State and Defense to take all  
17 measures within their power to prevent Israel from purportedly committing genocide against the  
18 Palestinian people in Gaza. They also seek to enjoin any further U.S. military or financial  
19 assistance to Israel, including any diplomatic support for Israel in the international community.  
20 Plaintiffs have also moved for a preliminary injunction, seeking part of the ultimate relief requested  
21 in the Complaint—the halting of aid to Israel.

22 This Court should dismiss the Complaint and deny the preliminary injunction motion for  
23 three independent reasons: (1) this suit presents a quintessential nonjusticiable political question,  
24 (2) Plaintiffs cannot meet the Article III standing requirements, and (3) neither the Genocide  
25 Convention nor its implementing criminal statute creates a private right of action.

26 Since Hamas’s October 7, 2023 terrorist attack on Israel, the President and the Secretaries  
27 of State and Defense have been working to mitigate the humanitarian crisis unfolding in Gaza, to  
28 prevent the escalation of the armed conflict between Israel and Hamas into a broader regional  
DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’ MOT.  
FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 conflict, and to support Israel’s right to defend itself. These diplomatic efforts helped lead to a  
2 seven-day pause in the fighting that permitted more humanitarian aid to flow into Gaza and saw  
3 the release of some hostages, including U.S. nationals. Although the pause has ended, intense  
4 diplomatic efforts are ongoing. Plaintiffs seek to have the Court override the Executive Branch’s  
5 foreign policy and national security determinations. But decisions about whether and how to  
6 attempt to influence foreign nations, and whether and how to provide them military assistance,  
7 financial assistance, or other support, are constitutionally committed to the political branches of  
8 the Government. Plaintiffs’ suit thus presents a nonjusticiable political question, and this Court  
9 has no subject matter jurisdiction to proceed. *See Republic of Marshall Islands v. United States*,  
10 865 F.3d 1187 (9th Cir. 2017); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).

11 Even if the political-question doctrine did not preclude judicial review here (which it does),  
12 Plaintiffs still cannot overcome another jurisdictional hurdle—their lack of standing. Plaintiffs’  
13 alleged injuries are the result of the military and other activities of an independent foreign  
14 sovereign, Israel, over which this Court has no authority. There is no order that is within this  
15 Court’s jurisdiction to fashion that could provide effective relief to Plaintiffs—namely, preventing  
16 Israel from taking the sovereign actions it chooses to take to respond to the October 7th attack.  
17 Plaintiffs therefore cannot meet the causation or redressability prongs of the standing requirements.

18 Beyond these jurisdictional bars, Plaintiffs fail to state a claim upon which relief can be  
19 granted. Fed. R. Civ. P. 12(b)(6). Plaintiffs assert two claims under the Genocide Convention and  
20 its implementing legislation, respectively: Count I, “Violation of the Duty to Prevent Genocide,”  
21 and Count II, “Complicity in Genocide.” Plaintiffs also suffuse among those two purported causes  
22 of action references to customary international law prohibiting genocide. However, “customary  
23 international law is not a source of judicially enforceable private rights[.]” *Serra v. Lappin*, 600  
24 F.3d 1191, 1197 (9th Cir. 2010). A treaty may in some cases provide a source of judicially  
25 enforceable private rights if it is self-executing, but the Genocide Convention is not self-executing.  
26 Instead of providing for enforcement under domestic law, Article V of the Convention requires  
27 implementing legislation by the contracting parties to give effect to its provisions. Moreover, the  
28 Genocide Convention Implementation Act, a criminal statute in Title 18 enforceable only by the

1 federal government, affords Plaintiffs no relief because it explicitly provides that “[n]othing in this  
 2 chapter [i.e. Chapter 50A on Genocide] shall be construed as . . . creating any substantive or  
 3 procedural right enforceable by law by any party in any proceeding.” 18 U.S.C. § 1092. Thus,  
 4 the criminal statute is likewise not a source of private rights.

5 Finally, although the Court need not consider the preliminary injunction factors because  
 6 Plaintiffs’ claims fail as a matter of law, the balance of equities weighs overwhelmingly against  
 7 the issuance of a preliminary injunction. The Constitution squarely commits foreign policy and  
 8 national security decisions to the political branches of the Government. Plaintiffs, however, ask  
 9 the Court to override those decisions in violation of the constitutional separation of powers, which  
 10 is decidedly against the Government and public interest. Plaintiffs’ asserted harms are not  
 11 redressable by this Court, which further warrants the denial of Plaintiffs’ extraordinary request for  
 12 preliminary injunctive relief, even if the Court were not inclined to dismiss their Complaint.

## 13 **BACKGROUND**

### 14 **I. FACTUAL BACKGROUND**

15 On October 7, 2023, Israel was attacked by Hamas. Since then, Israel has been mounting  
 16 a military campaign against Hamas in the Gaza Strip. The President, the Secretary of State, and  
 17 numerous other senior administration officials have been engaged in diplomatic discussions with  
 18 actors throughout the region regarding the conflict. The President has visited the region to  
 19 reinforce the United States’ support for Israel and the families of victims, including U.S. nationals  
 20 killed or taken hostage, while making clear that “[t]he United States unequivocally stands for the  
 21 protection of civilian life,” and emphasizing that “[t]he vast majority of Palestinians are not  
 22 Hamas.”<sup>1</sup> Since his trip to Israel, the President has “been focused on accelerating the delivery of  
 23 humanitarian assistance to Gaza in coordination with the United Nations and the Red Cross.”<sup>2</sup> The  
 24 President has also appointed a Special Envoy for Middle East Humanitarian Issues, who is leading  
 25

---

26 <sup>1</sup> The White House, *Remarks by President Biden on the October 7th Terrorist Attacks and*  
 27 *the Resilience of the State of Israel and Its People* (Oct. 18, 2023), <https://perma.cc/D7A9-RSBU>.

28 <sup>2</sup> The White House, *Remarks by President Biden on the Release of Hostages from Gaza*  
 (Nov. 24, 2023), <https://perma.cc/UR4Z-EG8F>.

1 diplomatic efforts in the region to address the humanitarian crisis and facilitate the provision of  
2 life-saving assistance to the most vulnerable people.<sup>3</sup>

3 In addition to U.S. commitments related to military assistance to Israel for 2019–2028 as  
4 reflected in a Memorandum of Understanding signed in 2016, Compl. ¶ 168,<sup>4</sup> the President has  
5 also requested supplemental funding from Congress to strengthen Israel’s defense through  
6 Department of State assistance, bolster the Israel Defense Forces through Department of Defense  
7 assistance, ensure Israel’s air and missile defense systems’ readiness, enhance U.S. embassy  
8 security, and extend humanitarian assistance to civilians impacted by the war in Israel and Gaza.<sup>5</sup>

9 Meanwhile, the Secretary of State has traveled to Israel, Jordan, Qatar, Bahrain, Saudi  
10 Arabia, the United Arab Emirates, and Egypt to emphasize the United States’ “condemnation of  
11 the terrorist attacks in Israel,” “reaffirm the United States’ solidarity with the government and  
12 people of Israel,” and “engage regional partners on efforts to help prevent the conflict from  
13 spreading, secure the immediate and safe release of hostages, and identify mechanisms for the  
14 protection of civilians.”<sup>6</sup> In another trip to Israel, Jordan, Ramallah, Iraq, and Turkey in early  
15 November, the Secretary of State further “discussed urgent mechanisms to stem violence, calm  
16 rhetoric, reduce regional tensions, and reaffirm the U.S. commitment to working with partners to  
17 set the conditions necessary for a durable and sustainable peace in the Middle East, to include the  
18 establishment of a Palestinian state.”<sup>7</sup> And in his most recent trip towards the end of the seven-  
19 day humanitarian pause in the fighting—which the United States helped secure through close talks  
20 with Israel, Qatar, and Egypt—the Secretary met with the Israeli Prime Minister to reaffirm U.S.

21  
22 <sup>3</sup> U.S. Dep’t of State, *Appointment of David Satterfield as Special Envoy for Middle East Humanitarian Issues* (Oct. 15, 2023), <https://perma.cc/C2LA-7YUF>.

23 <sup>4</sup> In the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year  
24 2021, Pub. L. No. 116-283, § 1273, 134 Stat. 3388, 3979, Congress authorized “not less” than \$3.3  
billion in annual military aid to Israel through 2028.

25 <sup>5</sup> The White House, *FACT SHEET: White House Calls on Congress to Advance Critical National Security Priorities* (Oct. 20, 2023), <https://perma.cc/B8AJ-V4LC>.

26 <sup>6</sup> U.S. Dep’t of State, *Secretary Blinken’s Travel to Israel, Jordan, Qatar, Bahrain, Saudi Arabia, the United Arab Emirates, and Egypt* (Oct. 12, 2023), <https://perma.cc/275U-6FSC>.

27 <sup>7</sup> U.S. Dep’t of State, *Travel to Tel Aviv, Amman, Ramallah, Baghdad, Ankara, Tokyo, Seoul, and New Delhi, November 2–10, 2023*, <https://perma.cc/HRV9-LHYU>.

1 support for Israel’s right to protect itself while complying with international humanitarian law,  
 2 stress the imperative of accounting for humanitarian and civilian protection needs in southern  
 3 Gaza, and discuss the need to accelerate the delivery of critical, life-saving humanitarian assistance  
 4 to Gaza.<sup>8</sup>

5 At the same time, the Secretary of Defense has ordered the movement of U.S. forces to the  
 6 Middle East region to “bolster regional deterrence efforts, increase force protection for U.S. forces  
 7 in the region, and assist in the defense of Israel,”<sup>9</sup> while also expressing to Israeli military leaders  
 8 “the need to prioritize civilian safety in military operations . . . and urg[ing] continued progress to  
 9 increase assistance to civilians in Gaza.”<sup>10</sup>

10 While the humanitarian pause has ended, the United States has not “stopped [its] efforts . .  
 11 . trying to work hour by hour to see if [it] can get [the humanitarian] pause reinstated[,] . . . get  
 12 those hostages out,” and increase the delivery of “humanitarian assistance.”<sup>11</sup> The United States  
 13 has also reiterated its expectations that security assistance is “going to be used in keeping with  
 14 [the] law of armed conflict.”<sup>12</sup>

## 15 **II. PLAINTIFFS’ COMPLAINT AND THE PRELIMINARY INJUNCTION MOTION**

16 On November 13, 2023, Plaintiffs filed this suit seeking to compel the President and  
 17 Secretaries of Defense and State to “take all measures within their power to prevent Israel’s  
 18 commission of [allegedly] genocidal acts against the Palestinian people of Gaza.” Compl. at  
 19

---

20 <sup>8</sup> U.S. Dep’t of State, *Secretary Blinken’s Meeting with Israeli Prime Minister Netanyahu*  
 21 (Nov. 30, 2023), <https://perma.cc/M33P-3CHF>. See also U.S. Dep’t of State, *Secretary Antony J.*  
 22 *Blinken at a Press Availability* (Nov. 30, 2023), <https://perma.cc/R4T8-7ZSC> (“Israel has the right  
 23 to do everything it can to ensure that the slaughter Hamas carried out . . . can never be repeated,”  
 but “[i]t’s imperative that Israel act in accordance with international humanitarian law and the laws  
 of war, even when confronting a terrorist group that respects neither”).

24 <sup>9</sup> U.S. Dep’t of Defense, *Statement from Secretary of Defense Lloyd J. Austin III on Steps*  
 25 *to Increase Force Posture* (Oct. 21, 2023), <https://perma.cc/S9VA-VMYD>.

26 <sup>10</sup> U.S. Dep’t of Defense, *Readout of Secretary of Defense Lloyd J. Austin III’s Call with*  
 27 *Israeli Minister of Defense Yoav Gallant* (Oct. 31, 2023), <https://perma.cc/AW85-ZGPR>.

28 <sup>11</sup> CBS News, *Transcript: John Kirby on “Face the Nation,” Dec. 3, 2023*, Face the Nation  
 (Dec. 3, 2023), <https://perma.cc/JY23-Y7TX>.

<sup>12</sup> *Id.*

1 Prayer for Relief, ECF No. 1. Count I of the Complaint alleges that Defendants violated their duty  
 2 under Article I of the Genocide Convention<sup>13</sup> by supporting Israel’s military actions against Hamas  
 3 in Gaza. *Id.* ¶¶ 313-21. Count II alleges that Defendants, by providing diplomatic, financial, and  
 4 military support to Israel, are complicit in Israel’s purported commission of genocide, in violation  
 5 of Article III(e) of the Genocide Convention<sup>14</sup> and its implementing legislation, the Genocide  
 6 Convention Implementation Act, 18 U.S.C. § 1091, which makes genocide a federal crime.  
 7 Compl. ¶¶ 322-40. Plaintiffs seek an order declaring that Defendants have violated “customary  
 8 international law, [purportedly] as part of federal common law,” and requiring Defendants to, *inter*  
 9 *alia*, “exert influence over Israel to end its bombing of the Palestinian people of Gaza, . . . to lift  
 10 the siege on Gaza, . . . [and to] prevent the ‘evacuation’ or forcible transfer and expulsion of  
 11 Palestinians from Gaza.” *Id.* at Prayer for Relief. Plaintiffs also seek an order enjoining  
 12 Defendants from providing further military or financial assistance to Israel and “from obstructing  
 13 attempts by the international community, including at the United Nations, to implement a ceasefire  
 14 in Gaza and lift the siege on Gaza.” *Id.*

15 On November 16, 2023, Plaintiffs filed a motion for preliminary injunction seeking to  
 16 halt all U.S. “military or financial support, aid, or any form of assistance” to Israel’s response to  
 17 Hamas’s October 7th attack. Notice of Mot. & Mot. for Prelim. Inj.; Mem. of P. & A. in Supp.  
 18 Thereof at 1, ECF No. 19 (“PI Br.”).

## 19 ARGUMENT

### 20 I. LEGAL STANDARDS

21 A preliminary injunction is “an extraordinary and drastic remedy, one that should not be  
 22 granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v.*  
 23 *Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). To satisfy this standard, a plaintiff must  
 24 establish that he or she is likely to succeed on the merits, likely to suffer irreparable harm in the

---

25 <sup>13</sup> Article I of the Convention states that “[t]he Contracting Parties confirm that genocide,  
 26 whether committed in time of peace or in time of war, is a crime under international law which  
 27 they undertake to prevent and to punish.” Genocide Convention, art. 1, 78 U.N.T.S. at 280.

28 <sup>14</sup> Article III of the Convention states that “[t]he following acts shall be punishable: . . . (e)  
 Complicity in genocide.” *Id.* art. III(e), 78 U.N.T.S. at 280.

1 absence of preliminary relief, that the balance of equities tips in his or her favor, and that an  
2 injunction is in the public interest. *Am. Beverage Ass’n v. City & Cnty. of San Francisco*, 916 F.3d  
3 749, 754 (9th Cir. 2019) (en banc) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20  
4 (2008)). “The first factor under *Winter* is the most important,” such that the Court need not  
5 consider the remaining factors if a plaintiff fails to show a likelihood of success on the merits.  
6 *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

7 Moreover, where “a party seeks mandatory preliminary relief that goes well beyond  
8 maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a  
9 preliminary injunction.” *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). For  
10 mandatory preliminary relief, a plaintiff must show that the law and facts clearly favor his or her  
11 position. *Garcia*, 786 F.3d at 740. Further, “courts have been reluctant to grant an affirmative  
12 injunction where the effect would be to grant final relief before the claims are adjudicated.” *Eagle*  
13 *Broadband, Inc. v. Transcon. Props., Inc.*, No. 2:05-CV-1525, 2006 WL 8441642, at \*2 (D. Nev.  
14 Apr. 4, 2006); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) (“[I]t is  
15 not usually proper to grant the moving party the full relief to which he might be entitled if  
16 successful at the conclusion of a trial.”); *Sims v. Stuart*, 291 F. 707, 707-08 (S.D.N.Y. 1922)  
17 (Learned Hand, J.) (explaining that while equity “will at times affirmatively restore the status quo  
18 ante pending the suit,” it will not, “[u]nder the guise of a mandatory injunction,” “take jurisdiction  
19 over a legal claim merely to hurry it along by granting final relief at the outset of the cause”).

20 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
21 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
22 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing  
23 a motion to dismiss, the court considers “the complaint in its entirety, as well as . . . documents  
24 incorporated into the complaint by reference, and matters of which a court may take judicial  
25 notice.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).<sup>15</sup> The court accepts

---

26  
27 <sup>15</sup> In considering the Government’s motion to dismiss, the Court may take judicial notice  
28 of government officials’ public statements. *See Saldana v. Occidental Petroleum Corp.*, 774 F.3d  
544, 551 n.1 (9th Cir. 2014) (taking judicial notice of government presentations to Congress); *see*

1 the factual allegations as true but “bare assertions” and “conclusory” allegations are “not entitled  
 2 to be assumed true.” *Iqbal*, 556 U.S. at 678, 681. The court applies this standard both when  
 3 analyzing whether the Complaint alleges facts sufficient to establish subject matter jurisdiction  
 4 and when analyzing whether the Complaint states a valid claim for relief. *See, e.g., Terenkian v.*  
 5 *Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012).

## 6 **II. THE COURT LACKS JURISDICTION OVER THIS MATTER**

### 7 **A. Plaintiffs’ Claims Raise A Nonjusticiable Political Question**

8 This Court lacks authority to decide the current dispute because “‘a determination of  
 9 whether foreign aid to Israel is necessary at this particular time is’ . . . inappropriate for judicial  
 10 resolution.” *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (quoting *Dickson v.*  
 11 *Ford*, 521 F.2d 234, 236 (5th Cir. 1975)); *see also Abusharar v. Hagel*, 77 F. Supp. 3d 1005, 1006  
 12 (C.D. Cal. 2014) (“[T]he decision to provide military [or financial] support to a foreign nation is a  
 13 quintessential political question.”). “The political question doctrine first found expression in Chief  
 14 Justice Marshall’s observation that ‘[q]uestions, in their nature political, or which are, by the  
 15 constitution and laws, submitted to the executive, can never be made in this court.’” *Caterpillar*,  
 16 503 F.3d at 980 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); *see also El-*  
 17 *Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (the  
 18 doctrine recognizes that “some ‘[q]uestions, in their nature political,’ are beyond the power of the  
 19 courts to resolve” (quoting *Marbury*, 5 U.S. at 170)). “The Supreme Court has since explained  
 20 that ‘[t]he nonjusticiability of a political question is primarily a function of the separation of  
 21 powers.’” *Caterpillar*, 503 F.3d at 980 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).  
 22 Accordingly, the doctrine “excludes from judicial review those controversies which revolve  
 23 around policy choices and value determinations constitutionally committed for resolution to the  
 24 halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Am. Cetacean*  
 25 *Soc’y*, 478 U.S. 221, 230 (1986).

26  
 27 

---

 28 *also Matar v. Dichter*, 500 F. Supp. 2d 284, 294 n.4 (S.D.N.Y. 2007) (“For purposes of the political  
 question inquiry, the Court may take judicial notice of the ‘official policy and opinion’ of the  
 United States and Israel.” (citation omitted)), *aff’d*, 563 F.3d 9 (2d Cir. 2009).



1 In *Baker v. Carr*, the Supreme Court identified six factors to determine whether a case  
2 presents a political question:

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

12 369 U.S. at 217. “[T]o find a political question, [the Court] need only conclude that one factor is  
13 present, not all.” *Republic of Marshall Islands*, 865 F.3d at 1200 (quoting *Schneider v. Kissinger*,  
14 412 F.3d 190, 194 (D.C. Cir. 2005)); *see also Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012)  
15 (discussing only the first two *Baker* factors).

16 Plaintiffs’ requested relief plainly implicates matters that are textually committed to the  
17 political branches of the Government. Plaintiffs seek an order compelling Defendants to “take all  
18 measures within their power” to prevent Israel from committing what Plaintiffs characterize as  
19 “genocide against the Palestinian people of Gaza.” Compl. at Prayer for Relief. Plaintiffs also  
20 attempt to invoke the power of this Court to require the Executive Branch to “exert influence over  
21 Israel” to end Israel’s bombing in Gaza, to “lift the siege on Gaza,” and to “prevent the [purported]  
22 ‘evacuation’ or forcible transfer and expulsion of Palestinians from Gaza.” *Id.* And Plaintiffs ask  
23 for an injunction to stop Defendants from providing military or financial assistance to Israel, or  
24 the sale or delivery of weapons and arms. *Id.* These are matters “intimately related to foreign  
25 policy and national security,” *Haig v. Agee*, 453 U.S. 280, 292 (1981), and thus are “largely  
26 immune from judicial inquiry or interference,” *Harisiades v. Shaughnessy*, 342 U.S. 580, 589  
27 (1952).<sup>16</sup>

28 <sup>16</sup> *See also Haig*, 453 U.S. at 292 (foreign policy and national security matters are “rarely  
proper subjects for judicial intervention”); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333  
U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political,  
not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities  
nor responsibility and have long been held to belong in the domain of political power not subject  
to judicial intrusion or inquiry.”); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967) (“It

1 “The conduct of the foreign relations of our government is committed by the Constitution  
2 to the executive and legislative—‘the political’—departments of the government.” *Oetjen v. Cent.*  
3 *Leather Co.*, 246 U.S. 297, 302 (1918); accord *Republic of Marshall Islands*, 865 F.3d at 1200-  
4 01. It has long been recognized that “[t]he President is the sole organ of the nation in its external  
5 relations, and its sole representative with foreign nations.” *United States v. Curtiss-Wright Exp.*  
6 *Corp.*, 299 U.S. 304, 319 (1936) (citation omitted); see also *Am. Ins. Ass’n v. Garamendi*, 539  
7 U.S. 396, 414 (2003) (“historical gloss on the ‘executive Power’ vested in Article II of the  
8 Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our  
9 foreign relations’” (citation omitted)). “[T]he Constitution plainly grants the President the  
10 initiative in matters directly involved in the conduct of diplomatic affairs.” *Earth Island Inst. v.*  
11 *Christopher*, 6 F.3d 648, 653 (9th Cir. 1993) (citation omitted); see also *Jensen v. Nat’l Marine*  
12 *Fisheries Serv. (NOAA)*, 512 F.2d 1189, 1191 (9th Cir. 1975) (similar). When diplomacy fails, it  
13 is also the President who has the constitutionally vested authority as Commander in Chief to deploy  
14 our military. See U.S. Const. art. II, § 2, cl. 1; *Chi. & S. Air Lines*, 333 U.S. at 109–10. To address  
15 Plaintiffs’ claims here, therefore, would contravene the political question doctrine, straying far  
16 beyond the “familiar judicial exercise” of how a statute should be interpreted or whether it is  
17 constitutional. *Zivotofsky*, 566 U.S. at 196.

18 The Court of Appeals’ decision in *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007),  
19 is dispositive here. There, the plaintiffs’ family members were killed or injured when the Israel  
20 Defense Forces (“IDF”) allegedly demolished their homes in the Palestinian Territories using  
21 bulldozers manufactured by Caterpillar, Inc., a U.S. corporation, and paid for by the United States.  
22 *Id.* at 977-78. The plaintiffs sued Caterpillar, raising state and federal law claims and alleging that  
23 Caterpillar knew its equipment would be used in violation of international law, and thus aided and  
24 abetted those violations. *Id.* at 979. The plaintiffs sought to enjoin further sales, among other  
25 relief. *Id.*

26  
27  
28 is difficult to think of an area less suited for judicial action than . . . the use and disposition of  
military power; these matters are plainly the exclusive province of Congress and the Executive.”).

1 The court found the case presented a nonjusticiable political question as resolving it would  
2 require the court to “examine the United States government’s role in financing the IDF’s purchases  
3 of . . . [the] bulldozers.” *Id.* But “these sales were financed by the executive branch pursuant to a  
4 congressionally enacted program calling for executive discretion as to what lies in the foreign  
5 policy and national security interests of the United States.” *Id.* at 982. To allow the action to  
6 proceed, the court said, “would necessarily require the judicial branch of our government to  
7 question the political branches’ decision to grant extensive military aid to Israel.” *Id.* The matter  
8 thus failed the first *Baker* factor because, as the court reasoned, the judiciary “cannot intrude into  
9 our government’s decision to grant military assistance to Israel”—“that foreign policy decision is  
10 committed under the Constitution to the legislative and executive branches.” *Caterpillar*, 503 F.3d  
11 at 983. The court further noted that a ruling in the plaintiffs’ favor would implicate several of the  
12 other *Baker* factors. For example, it would require the court to “implicitly question[], and even  
13 condemn[], United States foreign policy toward Israel,” and to “potential[ly] . . . caus[e]  
14 international embarrassment” if the court were to “undermine foreign policy decisions in the  
15 sensitive context of the Israeli-Palestinian conflict.” *Caterpillar*, 503 F.3d at 983-84. Further, the  
16 court was sensitive to the State Department’s imperative to “choose [its] words carefully,” and  
17 recognized that entering “a declaration that the IDF has systematically committed grave violations  
18 of international law” would “subvert United States foreign policy.” *Id.* at 984. The *Caterpillar*  
19 court’s analysis applies with even greater force here, as that case raised only an “indirect[]”  
20 challenge to the Government’s foreign policy, *id.*, whereas this case raises a direct one.

21 Also instructive is the Court of Appeals’ decision in *Republic of Marshall Islands v. United*  
22 *States*, a case involving the United States’ alleged breach of the Treaty on the Non-Proliferation  
23 of Nuclear Weapons, which “calls on each party to the Treaty ‘to pursue negotiations in good faith  
24 on effective measures’ to end the nuclear arms race and accomplish nuclear disarmament.” 865  
25 F.3d at 1190 (citation omitted). In addition to finding the treaty to be non-self-executing and  
26 plaintiffs’ asserted injuries not redressable, the court held that the case presented a nonjusticiable  
27 political question because, among other things, “the decision of when, where, whether, and how  
28 the United States will negotiate with foreign nations to end the nuclear arms race and accomplish

1 nuclear disarmament” is textually committed in the Constitution to a coordinate political  
2 department. *Id.* at 1200. As the court reasoned, “[w]e simply cannot square the primacy of the  
3 Executive in the conduct of foreign relations and the Executive Branch’s lead role in foreign  
4 policy’ . . . with an injunction that compels the United States to ‘call[ ] for and conven[e]  
5 negotiations for nuclear disarmament in all its aspects.’” *Id.* at 1201 (cleaned up). The same is  
6 true of Plaintiffs’ request to compel the Executive Branch to “exert influence over Israel.” Compl.  
7 at Prayer for Relief.

8 Not only is judicial review of Plaintiffs’ claims foreclosed by *Caterpillar* and *Republic of*  
9 *Marshall Islands*, but numerous other courts also have found challenges to the United States’  
10 financial and diplomatic support of Israel to be nonjusticiable. *See Dickson*, 521 F.2d at 236  
11 (dismissing on political question grounds a challenge to a statute appropriating funds for military  
12 assistance to Israel);<sup>17</sup> *Abusharar*, 77 F. Supp. 3d at 1006 (dismissing on political question grounds  
13 suit to enjoin the Secretaries of State and Defense from providing military support to Israel after  
14 the plaintiff’s home in the Gaza Strip was allegedly destroyed in a bombing by the Israeli military);  
15 Memorandum Op. at 15, *John Doe I v. Israel*, No. 1:02-cv-01431 (D.D.C. Oct. 3, 2003), ECF No.  
16 42 (attached as Ex. A) (“claims involving arms sales to Israel—which occur pursuant to a sensitive  
17 and detailed statutory and regulatory scheme inextricably intertwined with critical foreign policy  
18 decisions—are nonjusticiable political questions better left to consideration by the political  
19 branches”); *Mahorner v. Bush*, 224 F. Supp. 2d 48, 53 (D.D.C. 2002) (claim seeking to enjoin the  
20 President and Treasury Secretary from providing financial aid to Israel presented nonjusticiable  
21 political question), *aff’d*, 2003 WL 349713 (D.C. Cir. Feb. 12, 2003); *cf. Bernstein v. Kerry*, 962  
22 F. Supp. 2d 122, 126 & n.6 (D.D.C. 2013) (dismissing challenge to U.S. funding of the Palestinian  
23 Authority on standing grounds and because “this case is fraught with serious political questions  
24 that deprive the Court of jurisdiction”), *aff’d*, 584 F. App’x 7 (D.C. Cir. 2014).

25  
26 <sup>17</sup> *Cf. Lamont v. Woods*, 948 F.2d 825, 833 (2d Cir. 1991) (distinguishing *Dickson* on other  
27 grounds, but remarking that had the plaintiffs in *Dickson* “been successful, Congress’s foreign  
28 policy goal—to maintain the balance of power in the Middle East and to preserve Israel’s capacity  
to defend herself—could not have been achieved. Effectively, then, the challenge in *Dickson* was  
to the foreign policy itself” (citations omitted)).

1 While “[i]t is hard to conceive of an issue more quintessentially political in nature than the  
 2 ongoing Israeli-Palestinian conflict,” *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111–12 (D.D.C.  
 3 2005), courts similarly have yielded to the political branches when addressing challenges to U.S.  
 4 military or other aid in other conflicts. *See, e.g., Crockett v. Reagan*, 558 F. Supp. 893, 899-900  
 5 (D.D.C. 1982) (dismissing challenge to military aid to El Salvador due to lack of standards to  
 6 assess nature of U.S. involvement there), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983); *Sanchez-Espinoza*  
 7 *v. Reagan*, 568 F. Supp. 596, 601 (D.D.C. 1983) (court lacks standards to assess U.S. actions in  
 8 Nicaragua), *aff’d*, 770 F.2d 202 (D.C. Cir. 1985); *Aerotrade, Inc. v. U.S. Agency for Int’l Dev.*  
 9 *Dep’t of State*, 387 F. Supp. 974, 975-77 (D.D.C. 1974) (dismissing action challenging aid to  
 10 Haiti); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973) (challenge to U.S. bombing  
 11 and other military activities in Cambodia presented a political question); *Sarnoff v. Connally*, 457  
 12 F.2d 809, 809-10 (9th Cir. 1972) (affirming dismissal of challenge to the Vietnam War because  
 13 challenges to “foreign aid and appropriations aspects of congressional cooperation in [a military]  
 14 conflict . . . presents a political question”).

15 In sum, this case presents a political question, and “the presence of a  
 16 political question deprives a court of subject matter jurisdiction.” *Caterpillar*, 503 F.3d at 980;  
 17 *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (“[T]he  
 18 concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts  
 19 by the ‘case or controversy’ requirement of Art. III, embodies . . . the political question  
 20 doctrine[.]”).

21 **B. Plaintiffs Lack Standing Because Their Alleged Injuries Are Caused by an**  
 22 **Independent Third-Party, Israel, Over Which the Court Lacks Authority**

23 “Federal courts are courts of limited jurisdiction,” and it is therefore “presumed that a cause  
 24 lies outside this limited jurisdiction” unless a party demonstrates that jurisdiction exists. *Kokkonen*  
 25 *v. Guar. Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).<sup>18</sup> To satisfy the jurisdictional requirement

26  
 27 <sup>18</sup> At a minimum, the President is not a proper defendant because the Court lacks  
 28 “jurisdiction of a bill to enjoin the President in the performance of his official duties,” at least  
 outside of purely ministerial duties. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (citation  
 omitted).

1 of standing, Plaintiffs bear the burden of establishing the following three elements: “(1) he or she  
2 has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the  
3 injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a  
4 favorable court decision.” *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1225  
5 (9th Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Where the  
6 elements of standing “depend[] on the unfettered choices made by independent actors not before  
7 the courts and whose exercise of broad and legitimate discretion the courts cannot presume to  
8 control or to predict,” standing “is not precluded, but it is ordinarily substantially more difficult to  
9 establish.” *Lujan*, 504 U.S. at 562 (citation omitted). In such circumstances “causation and  
10 redressability ordinarily hinge on the response of . . . [a] third party to the government[’s] action  
11 or inaction.” *Id.* Courts have been particularly “reluctant to endorse standing theories that require  
12 guesswork as to how independent decisionmakers will exercise their judgment.” *Clapper v.*  
13 *Amnesty Int’l USA*, 568 U.S. 398, 413 (2013). The burden is on the plaintiff to allege facts  
14 sufficient to show that the third party’s behavior is causally linked to the government’s conduct  
15 and “permit[s] redressability of injury.” *Lujan*, 504 U.S. at 562. Plaintiffs have not done so here.

16 Israel, a sovereign nation, is an independent actor not before the Court. While the United  
17 States is providing military assistance and other support to Israel, it does not control Israel’s  
18 military operations. *See, e.g.*, Compl. ¶¶ 226-27 (quoting statements of the Pentagon’s Deputy  
19 Press Secretary Sabrina Singh indicating that the United States is not directing Israel’s ground  
20 operations). Plaintiffs have not shown that their alleged injuries are fairly traceable to the United  
21 States’ provision of military, financial, or diplomatic support to Israel. *Salmon Spawning*, 545  
22 F.3d at 1228 (noting the lack of traceability where even if the U.S. withdrew from an international  
23 agreement, the plaintiff could still be injured by the independent acts of another country). More  
24 importantly, even if the Court were to order the United States to withdraw such support, there is  
25 no indication that such an order would change Israel’s military operations in a way that would  
26 redress Plaintiffs’ alleged injuries. *Cf. Bernstein*, 962 F. Supp. 2d at 130 (“The Executive Branch  
27 has decided that the provision of foreign aid [to Palestinian organizations] encourages the peace  
28

1 process and . . . Plaintiffs’ disagreement . . .with this policy and their belief that a change in policy  
2 would [remedy the asserted harm] . . . is, at best, mere speculation.”).

3 Indeed, courts “have been particularly reluctant to find standing where the third party upon  
4 whose conduct redressability depends is a foreign sovereign.” *Cierco v. Mnuchin*, 857 F.3d 407,  
5 419 (D.C. Cir. 2017).<sup>19</sup> For example, in *Republic of Marshall Islands v. United States*, 79 F. Supp.  
6 3d 1068 (N.D. Cal. 2015) (White, J.), *aff’d*, 865 F.3d 1187 (9th Cir. 2017), in which, as discussed  
7 above, the plaintiffs sought to compel the United States’ compliance with the Non-Proliferation  
8 Treaty, this Court found it could not redress the plaintiffs’ alleged injury by compelling the  
9 performance of “only one nation to the Treaty”; that is, it could not fashion any meaningful decree  
10 that could “account for the participation of all of the nuclear and non-nuclear states that are parties  
11 to the Treaty but are not parties to this suit.” *Id.* at 1072. The same is true here. Israel is an  
12 independent sovereign that is not a party before this Court. The Court cannot fashion a remedy  
13 that could redress Plaintiffs’ alleged injuries. Accordingly, Plaintiffs lack standing to pursue their  
14  
15  
16

---

17 <sup>19</sup> See, e.g., *Talenti v. Clinton*, 102 F.3d 573, 577-78 (D.C. Cir. 1996) (dismissing action  
18 seeking to suspend aid to Italy given the possibility that Italy might respond in a way that would  
19 not redress the plaintiff’s alleged injury); *Greater Tampa Chamber of Com. v. Goldschmidt*, 627  
20 F.2d 258, 263 (D.C. Cir. 1980) (holding that plaintiffs lack standing to challenge the validity of an  
21 international agreement between the United States and another foreign sovereign regarding air  
22 travel where no order could force the other nation to agree to terms that would redress plaintiffs’  
23 injuries); *Indigenous People of Biafra v. Blinken*, 639 F. Supp. 3d 79, 87 (D.D.C. 2022) (noting  
24 difficulty of finding redressability when the dispute involves “independent actors” who are  
25 “foreign sovereigns over whom the Court exercises no authority”); *Fryshman v. U.S. Comm’n for*  
26 *Pres. of Am.’s Heritage Abroad*, 422 F. Supp. 3d 1, 8 (D.D.C. 2019) (“Federal courts are simply  
27 not well-suited to draw the types of inferences regarding foreign affairs and international responses  
28 to U.S. policy that Plaintiffs’ theory of causation posits.” (citation omitted)); *Do Thi Tran v. U.S.*  
*Dep’t of State*, Civ. A. No. 13-646, 2014 WL 1877414, at \*4 (E.D. La. May 9, 2014) (“[I]t is mere  
speculation to assume that a court order halting aid [to Vietnam] . . . would assist in resolution of  
Plaintiffs’ land disputes.”); *Bernstein*, 962 F. Supp. 2d at 129-30 (“It is nothing more than  
conjecture to argue that changing U.S. funding policies [for the Palestinian people] will reduce  
terrorism or plaintiffs’ subjective fears.”); and *Betterroads Asphalt Corp. v. United States*, 106 F.  
Supp. 2d 262, 267 (D.P.R. 2000) (“[T]he possibility that Plaintiff would recover its debt from the  
Government of the Dominican Republic if the United States withheld foreign assistance is too  
speculative to support standing.”).

DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’ MOT.  
FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 claims. *See also Republic of Marshall Islands*, 865 F.3d at 1119 (finding the plaintiffs’ asserted  
2 injuries were not redressable because the cited treaty was not self-executory).<sup>20</sup>

### 3 III. PLAINTIFFS’ CLAIMS FAIL AS A MATTER OF LAW

4 Plaintiffs assert claims under Articles I and III(e) of the Genocide Convention and the  
5 Genocide Convention Implementation Act. 18 U.S.C. §§ 1091 *et seq.*, *see* Compl. ¶¶ 313-40  
6 (Counts I & II). And while Plaintiffs do not explicitly allege a separate cause of action for  
7 violations of “customary international law” prohibiting genocide, they appear to raise the specter  
8 of such a claim. *See id.* ¶¶ 278-312, 313 & Prayer for Relief.

9 “[C]ustomary international law,” however, “is not a source of judicially enforceable private  
10 rights.” *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010) (citing *Princz v. Fed. Republic of*  
11 *Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994) and *Sosa v. Alvarez-Machain*, 542 U.S. 692,  
12 720 (2004)). As for the Genocide Convention, it is not a source of a privately enforceable right.  
13 Courts have “long recognized the distinction between treaties that automatically have effect as  
14 domestic law, and those that . . . do not by themselves function as binding federal law’ enforceable  
15 in domestic courts.” *Republic of Marshall Islands*, 865 F.3d at 1192 (quoting *Medellin v. Texas*,  
16 552 U.S. 491, 505 (2008)). The former is referred to as a self-executing treaty. *Serra*, 600 F.3d  
17 at 1197; *Medellin*, 552 U.S. at 505. The latter “requires congressional action via implementing  
18 legislation or, in some cases, is addressed to the executive branch.” *Republic of Marshall Islands*,  
19 865 F.3d at 1192. Notably, “[i]f the treaty calls for the signatory nations to enact legislation  
20 implementing the agreement, the treaty is considered executory and no private rights are conferred  
21 by it.” *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 547 (D.D.C. 1981)), *aff’d*,  
22 726 F.2d 774 (D.C. Cir. 1984); *see Republic of Marshall Islands*, 865 F.3d at 1194.

---

23  
24 <sup>20</sup> In addition, the individual plaintiffs who are not currently in the Gaza Strip—Waeil  
25 Elbhassi, Mohammad Herzallah, A.N., Laila Elhaddad, and Basim Elkarra, Compl. ¶¶ 25–29—  
26 have not alleged that they face an imminent future threat of harm to themselves. Rather, they  
27 allege that they fear for the safety of their family in Gaza. *Id.* The absence of an “an allegation of  
28 personal injury” to themselves, strips these plaintiffs of both constitutional and third-party  
standing. *Coal. of Clergy, Laws., & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002); *see*  
*also Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1105 (9th Cir. 2006) (noting that to overcome  
the prudential rule against asserting third-party rights, a litigant must “already [meet] the  
constitutional requirements” of “alleg[ing] a cognizable personal injury”).



1 Here, Article V of the Convention requires the enactment of “the necessary legislation to  
2 give effect to the provisions of the [ ] Convention.” Genocide Convention, art. V, 78 U.N.T.S. at  
3 280. The U.S. Senate conditioned its advice and consent to the ratification of the Convention on  
4 the enactment of the “implementing legislation referred to in Article V.” 132 Cong. Rec. 2295,  
5 2350 (1986). The Senate’s statement “was intended to ‘reinforce[] the fact that the Convention is  
6 not self-executing.’” *Demjanjuk v. Meese*, 784 F.2d 1114, 1117 (D.C. Cir. 1986) (quoting Staff of  
7 Senate Comm. on Foreign Relations, 99th Cong., 1st Sess., *Report on Genocide Convention* 26  
8 (Comm. Print 1985)); *see generally Republic of Marshall Islands*, 865 F.3d at 1197 (noting the  
9 significance of the President and the Senate’s intentions regarding the self-executing nature of a  
10 treaty’s provisions). Accordingly, Plaintiffs cannot assert any claim under the Convention itself.

11 Congress did enact the Genocide Convention Implementation Act of 1987, 18 U.S.C.  
12 §§ 1091 *et seq.*, which “attach[es] criminal penalties to the norm against genocide.” *Sosa*, 542  
13 U.S. at 749. But federal *criminal* law can only be enforced by the Executive Branch, *United*  
14 *States v. Texas*, 599 U.S. 670, 678 (2023), and private litigants lack standing to enforce it, *Linda*  
15 *R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). As to *civil* actions brought under the Act,  
16 Congress stated explicitly that “[n]othing in this chapter shall be construed as . . . creating any  
17 substantive or procedural right enforceable by law by any party in any proceeding.” 18 U.S.C.  
18 § 1092. *See also Sosa*, 542 U.S. at 748–49 (Scalia, J., concurring in part) (noting that in enacting  
19 the Genocide Convention Implementation Act, Congress and the Executive made the  
20 determination that the “norm [against genocide] should *not* give rise to a private cause of  
21 action”). Accordingly, courts have consistently held that the Act provides no private right of  
22 action. *See, e.g., Snyder v. Chi. Transit Auth.*, No. 22 CV 6086, 2023 WL 7298943, at \*4 (N.D.  
23 Ill. Nov. 6, 2023); *Hughes v. United States*, Civ. A. No. 2:19-cv-00037, 2020 WL 4196459, at \*4  
24 (S.D. W. Va. May 11, 2020); *Nietzche v. Freedom Home Mortg. Corp.*, Case No. 3:18-cv-1930,  
25 2019 WL 5057174, at \*6 (D. Or. Oct. 8, 2019), *aff’d*, 2023 WL 2570417 (9th Cir. Mar. 20,  
26 2023); and *Manybeads v. United States*, 730 F. Supp. 1515, 1521 (D. Ariz. 1989).

27 Because Plaintiffs’ claims fail as a matter of law, the Complaint should be dismissed under  
28 Fed. R. Civ. P. 12(b)(6). Indeed, the U.S. District Court for the Middle District of Florida recently  
DEFS.’ NOTICE OF MOTION, MOTION TO DISMISS, AND MEM. IN SUPPORT AND OPP’N TO PLS.’ MOT.  
FOR PRELIMINARY INJUNCTION, CASE NO. 4:23-cv-05829-JSW

1 dismissed, *sua sponte* and with prejudice, a nearly identical case on the basis that the complaint in  
2 that case failed to “state a valid, nonfrivolous claim for relief that is plausible on its face.”  
3 Endorsed Order, *Muslim Citizens of the State of Israel v. United States*, No. 8:23-cv-2697 (M.D.  
4 Fla. Nov. 27, 2023), ECF No. 3 (attached as Ex. B).

#### 5 **IV. THE BALANCE OF EQUITIES TIPS AGAINST ISSUANCE OF AN INJUNCTION**

6 Because Plaintiffs’ claims fail as a matter of law, the Court should dismiss the Complaint  
7 and deny the preliminary injunction motion. But even if the Court is not inclined to dismiss the  
8 Complaint, Plaintiffs have not demonstrated a substantial likelihood of success on the merits,  
9 which is a “threshold inquiry,” and accordingly, the Court “need not examine the remaining three”  
10 injunction factors under *Winter*. *Garcia*, 786 F.3d at 740 (quoting *Ass’n des Eleveurs de Canards*  
11 *et d’Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013)). Citing a pre-*Winter*, D.C.  
12 Circuit decision, Plaintiffs argue that “a motion for preliminary injunction cannot fail as a matter  
13 of law if the prospective harm is sufficiently grave, even in cases in which success on the merits  
14 is ‘far from clear.’” PI Br. at 7 (quoting *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008)).  
15 That is not the law of this circuit, nor is it a correct recitation of the law of the D.C. Circuit. *See*  
16 *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (“[W]e read *Winter* at least to suggest if  
17 not to hold ‘that a likelihood of success is an independent, free-standing requirement for a  
18 preliminary injunction.’” (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296  
19 (D.C. Cir. 2009)).

20 In any event, the balance of equities tips against issuance of a preliminary injunction here.  
21 *Nken v. Holder*, 556 U.S. 418, 435 (2009) (the balance of harms and public interest factors “merge  
22 when the Government is the opposing party”). The public and the Government have a strong  
23 interest in maintaining the constitutional separation of powers under which the Judiciary is  
24 restrained “from inappropriate interference in the business of the other branches of Government.”  
25 *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). While the loss of civilian lives on both  
26 sides of the conflict is tragic, the Constitution has assigned to the political branches the  
27 responsibility of determining the United States’ foreign policy regarding the conflict, including  
28 whether to provide military, financial or diplomatic support to Israel and under what

1 circumstances. “[T]he propriety of what may be done in the exercise of this political power is not  
2 subject to judicial inquiry or decision,” *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S.  
3 759, 766 (1972) (citations omitted). Accordingly, issuing the requested preliminary injunction in  
4 the circumstances here, which effectively would grant final relief to Plaintiffs, is decidedly against  
5 the public and government interest.

6 **CONCLUSION**

7 For the foregoing reasons, the Court should grant Defendants’ motion to dismiss and deny  
8 Plaintiffs’ motion for a preliminary injunction.

9  
10 Dated: December 8, 2023

Respectfully submitted,

11 BRIAN M. BOYNTON  
12 Principal Deputy Assistant Attorney General  
13 Civil Division

14 DIANE KELLEHER  
15 Assistant Branch Director  
16 Federal Programs

17 JEAN LIN  
18 Special Litigation Counsel

19 /s/ JONATHAN D. KOSSAK  
20 JONATHAN D. KOSSAK  
21 Trial Attorney (DC Bar No. 991478)  
22 U.S. Department of Justice  
23 Federal Programs Branch  
24 1100 L Street, NW,  
25 Washington, DC 20005  
26 Tel. (202) 305-0612  
27 Email: [Jonathan.kossak@usdoj.gov](mailto:Jonathan.kossak@usdoj.gov)

28 *Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of December, 2023, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF system for filing.

Dated: December 8, 2023

*/s/ Jonathan D. Kossak*  
JONATHAN D. KOSSAK  
Trial Attorney (DC Bar No. 991478)  
U.S. Department of Justice  
Federal Programs Branch