IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW YORK CENTER FOR FOREIGN POLICY AFFAIRS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE and ANTONY BLINKEN, in his official capacity as Secretary of State,

Defendants.

Civil Action No. 20-cv-3847 (PLF)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Non-profit organizations and private individuals do not determine the foreign policy of the United States. Yet that is what Plaintiffs attempt to do in this lawsuit challenging the Department of State's decisions to sell defense articles and services to the United Arab Emirates ("UAE").

During the fall of 2020, the State Department evaluated three requests from the UAE government to purchase various defense articles and services under the foreign military sales provision of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2751. Upon determining that the requests should be approved, the Department provided the statutorily required notice to Congress, which then entertained some debate over the sales but ultimately did not block the sales from proceeding. The Department recently concluded an additional review of the pending sales and determined that those sales should proceed because they advance the strategic objectives and foreign policy interests of the United States.

Through this lawsuit, Plaintiffs now ask the Court to substitute its judgment for that of the Executive and Legislative Branches in this sensitive area of foreign affairs and national security to block the sales of arms to a strategic partner of the United States. The Court should decline to do so as no Plaintiff has standing to challenge the State Department's authorizations. Plaintiffs' claim may also be dismissed because it does not fall within the zone of interests protected by the Arms Export Control Act. In addition, dismissal is warranted because the authority to enter into foreign military sales has been committed to the State Department's discretion, and Plaintiffs' claim raises a non-justiciable political question. For these reasons, set forth further below, the case must be dismissed.

BACKGROUND

I. Foreign Military Sales Under the Arms Export Control Act

The Arms Export Control Act, originally enacted as the Foreign Military Sales Act in 1968, provides the authority for and regulation of, among other things, the sale of defense articles and

defense services to foreign governments (otherwise known as "foreign military sales"). *See* 22 U.S.C. § 2751, *et seq.* The AECA permits the United States to sell defense articles and services to friendly countries that do not make such articles or provide such services themselves in order "to facilitate the common defense . . . to achieve specific national defense requirements and objectives of mutual concern" and to ensure the "operational compatibility of [the United States'] defense equipment" with its allies. 22 U.S.C. § 2751.

A foreign military sale is initiated by a request by a foreign government to purchase a particular defense article or service. As a prerequisite to any sale, the foreign country requesting such sale must have been subject to a presidential determination that "the furnishing of defense articles and defense services to [that] country . . . will strengthen the security of the United States and promote world peace."[2] *Id.* § 2753(a)(1). If the foreign government meets that and other prerequisites in the AECA, *id.* §§ 2753(a)(2) – (4), the State Department, in coordination with the Defense Security Cooperation Agency ("DSCA"), reviews the foreign government's request. The Secretary of State is responsible for determining whether there will be a foreign military sale, and, if so, the amount of the sale, taking into account whether "the foreign policy of the United States would be best served thereby." *Id.* § 2752(b). After conducting the review, if the State Department supports the sale and it reaches certain monetary thresholds, then Congress is notified of the potential sale. *Id.* § 2776(b).

The AECA requires that Congress be notified before entering into an agreement for the sale of certain defense articles or services. Congress must be formally notified 30 calendar days before the

[2] Contrary to Plaintiffs' assertion, the AECA does not require the President to make a determination that *each sale* of specific defense articles or services to a foreign country "will strengthen the security of the United States and promote world peace." *See* Am. Compl. ¶ 4. Rather, the Act permits the U.S. Government to sell defense articles and services to a country once the President has made a determination that the prospective purchaser is eligible for such sale. *See* 22 U.S.C. § 2753(a); *see also* DSCA, Security Assistance Management Manual ("SAMM") C4.1, *Who May Purchase Using the FMS Program*, *available at* https://samm.dsca.mil/chapter/chapter-4 (last accessed May 10, 2021).

Executive Branch can finalize a foreign military sale of, among other things, defense articles or services valued at $50 million or more to a government of a country such as the United Arab Emirates. *Id.* DSCA submits the required formal notification to the Chairperson of the Senate Foreign Relations Committee, the Speaker of the House of Representatives, and the House Foreign Affairs Committee, and that notification is also published in the Federal Register. *Id.* §§ 2776(b)(1), (f). The notification informs Congress of the prospective purchaser, the agency making the offer, any gifts or offsets, and the total estimated value of the sale and provides a description of and quantity of the defense articles or services involved in the prospective sale. *Id.* § 2776(b)(1) (referring to the provision of "information specified in clauses (i) through (iv) of subsection (a)"). The notification also "contain[s] an item, classified if necessary, identifying the sensitivity of the technology . . . and a detailed justification of the reasons necessitating the sale of such articles or services in view of the sensitivity of such technology." *Id.* Finally, if the sale is to be made to a country in the Middle East, the notification must include a determination that the sale of the defense articles or services "will not adversely affect Israel's qualitative military edge over military threats to Israel." *Id.* § 2776(h)(1). The Senate Committee on Foreign Relations or the House Committee on Foreign Affairs may "request" an additional report that contains, among other things, an evaluation by the State Department of the manner in which the proposed sale would "contribute to an arms race," "support international terrorism," or "increase the possibility of an outbreak or escalation of conflict."[3] *Id.* § 2776(b)(1). Absent a request from the appropriate committee, however, such report is not required. *See id.*

Under the statutory scheme, Congress need not act to approve a sale; rather, Congress can

[3] Plaintiffs cite to 22 U.S.C. § 2778(a)(2) to argue that the State Department must consider these factors before "grant[ing] a license to export" arms. Am. Compl. ¶¶ 4, 17. But those provisions of the AECA are not applicable to this case, which involves sales rather than export licenses. A similar provision in the AECA applies to foreign military sales, *see* 22 U.S.C. § 2791(a), but, as stated above, a report to Congress containing the State Department's evaluation of these factors is not required absent a request from the appropriate committee, *id.* § 2776(b)(1).

"enact[] a joint resolution prohibiting the proposed sale[]." *Id.* § 2776(b)(1)(P). If Congress enacts such a joint resolution, the Executive Branch may not proceed with the sale unless the President vetoes the joint resolution and Congress does not override the veto. However, if Congress does not enact such a joint resolution to block the sale within 30 calendar days of receiving formal notice of the proposed sale, the Executive Branch may proceed with the sales process. *See id.*

If the congressional notification period runs without a joint resolution of disapproval, DSCA implements the sale. A representative from the foreign government and a representative from the Department of Defense sign a Letter of Offer and Acceptance ("LOA"), in which the U.S. Government offers to sell defense articles or services to the foreign government under the terms specified in the LOA, and the foreign government accepts that offer. The actual transfer of defense articles or services may not necessarily occur right away. Congress can request to be notified prior to the shipment of arms, 22 U.S.C. § 2776(i), and, even after the 30-day statutory deadline has passed, can enact separate legislation to block sales.

II. The State Department's Authorizations to Sell Defense Articles and Services to the United Arab Emirates

The United Arab Emirates has long been a significant security partner for the United States, as the two countries "work[] collectively towards the common goal of a stable, secure, and prosperous Middle East."[4] Approximately 3,500 U.S. personnel are based in the Gulf Air Warfare Center at Al Dhafra Air Base in the UAE, and UAE ports host more U.S. Navy ships than any other port outside the United States and provide logistical support for the Navy. *Id.* In 2019, the United States and the UAE entered into a defense cooperation agreement, which underscored the two countries' "vital and longstanding collaboration in defeating terrorist groups, such as ISIS and al-Qa'ida, securing regional

[4] Dep't of State, *U.S. Security Cooperation With the United Arab Emirates* (Jan. 20, 2021), *available at* https://www.state.gov/u-s-security-cooperation-with-the-united-arab-emirates/ (last accessed May 10, 2021).

stability, and combatting threats against their common interests including terrorist financing." *Id.* And in a May 2021 call with Crown Prince Mohamed bin Zayed Al Nahyan, President Biden "reaffirm[ed] the longstanding partnership between the United States and the United Arab Emirates," "reflected on the collaborative efforts the United States and the United Arab Emirates have undertaken on issues [like] defense and security," and discussed "working together to address conflicts."[5]

Foreign military sales to the UAE have been a part of the countries' longstanding partnership.[6] Indeed, presidential authorization of foreign military sales to the UAE dates back to 1973, when President Nixon issued, through a memorandum to the Secretary of State, a Presidential Determination concerning the sale of defense articles and services to the UAE, as well as to other countries and organizations. Presidential Determination No. 73-10, 38 Fed. Reg. 7211 (Mar. 19, 1973). That Presidential Determination stated that, in accordance with the then-Secretary of State's recommendation, the sale of defense articles and services to the UAE "will strengthen the security of the United States and promote world peace." *Id.* That Presidential Determination is still in effect today and continues to fulfill one of the prerequisites for a foreign military sale to the UAE. *See* 22 U.S.C. § 2753(a).

With respect to the foreign military sales at issue here, on November 9, 2020, the State Department authorized DSCA to notify Congress of the Department's intent to approve three foreign military sales to the UAE government pursuant to its authority under the AECA: (1) MQ-9B Remotely Piloted Aircraft and related equipment for an estimated cost of $2.97 billion; (2) F-35 Joint Strike Fighters and related equipment for an estimated cost of $10.4 billion; and (3) munitions, sustainment

[5] White House, *Readout of President Joseph R. Biden, Jr. Call with Abu Dhabi Crown Prince Mohamed bin Zayed* (May 4, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/04/readout-of-president-joseph-r-biden-jr-call-with-abu-dhabi-crown-prince-mohamed-bin-zayed/ (last accessed May 10, 2021).

[6] *See* DCSA, https://www.dsca.mil/search/node?keys=uae (last accessed May 10, 2021) (listing prior foreign military sales to the UAE).

and support, and related equipment for an estimated cost of $10.0 billion. The Defense Security Cooperation Agency delivered the required certifications notifying Congress of the possible sales the next day. *See* 166 Cong. Rec. S6644-01 (daily ed. Nov. 10, 2020); 166 Cong. Rec. S6646-01 (daily ed. Nov. 10, 2020); 166 Cong. Rec. S6648-01 (daily ed. Nov. 10, 2020).

As explained in the Congressional Notifications, the State Department assessed that the "proposed sale[s] will support the foreign policy and national security of the United States by helping to improve the security of an important regional partner. The UAE has been, and continues to be, a vital U.S. partner for political stability and economic progress in the Middle East." 166 Cong. Rec. S6644-01, S6646-01, S6648-01. With regard to the sale of the MQ-9B Remotely Piloted Aircraft and related equipment, the State Department further assessed that

> The proposed sale will improve the UAE's capability to meet current and future threats by providing timely Intelligence, Surveillance, and Reconnaissance (ISR), target acquisition, locate submarines and counter-land and counter-surface sea capabilities for its security and defense. The capability is a deterrent to regional threats and strengthens its self-defense.

166 Cong. Rec. S6644-01. And with regard to the sale of the F-35 Joint Strike Fighters and related equipment, the State Department assessed that "[t]he proposed sale of F-35s will provide the Government of the UAE with a credible defense capability to deter aggression in the region and ensure interoperability with U.S. forces." 166 Cong. Rec. S6648-01. Finally, with regard to the sale of munitions, sustainment and support, and related equipment, the State Department assessed that

> The proposed sale will improve the UAE's capability to meet current and future threats by providing enhanced capabilities to various aircraft platforms in effective defense of air, land, and sea. The proposed sale of the missiles/munitions and support will increase interoperability with the U.S. and align the UAE Air Force's capabilities with existing regional baselines. Further, the UAE continues to provide host-nation support of vital U.S. forces stationed in the UAE and plays a vital role in supporting U.S. regional interests.

166 Cong. Rec. S6646-01.

On November 18, 2020, Senators Murphy, Menendez, and Paul introduced Joint Resolutions

of Disapproval in an attempt to block the sales. *See* S.J. Res. 77, 116th Cong. (2020); S.J. Res. 78, 116th Cong. (2020). On December 9, 2020, the Senate voted to reject motions to discharge from the Senate Foreign Relations Committee two proposed joint resolutions prohibiting the sales. *See* 166 Cong. Rec. S7317 (daily ed. Dec. 9, 2020); *see also* S.J. Res. 77, 116th Cong. (2020); S.J. Res. 78, 116th Cong. (2020).[7] Members of the House of Representatives also introduced proposed joint resolutions, but those were referred to the House Committee on Foreign Affairs and were never brought to a vote. *See* H.J. Res. 100, 116th Cong. (2020); H.J. Res. 101, 116th Cong. (2020); H.J. Res. 102, 116th Cong. (2020); H.J. Res. 103, 116th Cong. (2020). Because Congress did not enact a Joint Resolution of Disapproval within thirty days of receiving formal notification of the potential sale, there is no statutory impediment to proceeding with the sales.

On January 27, 2021, Secretary of State Blinken announced that the State Department was conducting a review of the proposed sales to ensure "that what is being considered is something that advances our strategic objectives and advances our foreign policy."[8] After conducting that review, the Department determined to proceed with the sales. *See* Am. Compl. ¶ 2.

III. The Instant Lawsuit

On December 30, 2020, Organizational Plaintiff New York Center for Foreign Policy Affairs ("NYCFPA") filed its original complaint challenging the State Department's authorizations of the sales to the UAE. *See* Dkt. 1. After the State Department completed its supplemental review of the November 2020 authorization for the sales, on April 14, 2021, NYCFPA filed an amended complaint, in which it added one Organizational Plaintiff, two Associational Plaintiffs, and 15 Individual

[7] The Senators introduced two other joint resolutions, which were referred to the Committee on Foreign Relations. *See* S.J. Res. 79, 116th Cong. (2020); S.J. Res. 80, 116th Cong. (2020). Congress took no further action on those proposed joint resolutions.

[8] *See* Dep't of State, *Secretary Antony J. Blinken at a Press Availability* (Jan. 27, 2021), *available at* https://www.state.gov/secretary-antony-j-blinken-at-a-press-availability/ (last accessed May 9, 2021).

Plaintiffs. *See* Am. Compl., Dkt. 8. The Individual Plaintiffs "are survivors of [] two air raids" on "a detention center for refugees and undocumented migrants" in Libya in July 2019 that was allegedly perpetrated by "an aircraft belonging to a foreign State" and has been "linked" to the UAE. *Id.* ¶ 13. The two Associational Plaintiffs, the Organization of the Families of Martyrs and Wounded of the Military College ("OFMWMC") and the Al'Abria' League for Families of Martyrs and Injured of Egyptian & Emirati Aggression ("Al'Abria' League"), are associations of the families of individuals who were killed or injured in an alleged "air attack by a UAE operated, Chinese manufactured drone" in Tripoli in January 2020 or "air raids carried out by the UAE F16 fighter jets" around Tripoli in August 2014, respectively. *Id.* ¶¶ 11, 12. The two Organizational Plaintiffs, NYCFPA and Human Rights Solidarity ("HRS"), are "non-governmental organization[s] concerned about the [h]uman [r]ights situation in Libya," and, in NYCFPA's case, in Yemen as well. *Id.* ¶¶ 9, 10.

Plaintiffs seek a declaratory judgment that the State Department's authorizations of the sales of defense articles and services to the UAE are invalid because they were arbitrary and capricious under the Administrative Procedure Act ("APA"). Claim for Relief ¶¶ 1–4. Plaintiffs also request that the Court enter an injunction requiring the State Department to "rescind the authorization and refrain from acting in a manner inconsistent with such a rescission." *Id.* ¶ 6, Prayer for Relief ¶¶ 1–3.

STANDARD OF REVIEW

Defendants move to dismiss the Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiffs bear the burden of demonstrating jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted).

Defendants also move to dismiss the Amended Complaint under Rule 12(b)(6). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to

relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (alteration omitted) (quoting *Iqbal*, 556 U.S. at 678).

ARGUMENT

This case should be dismissed for any of five reasons. First, this Court lacks jurisdiction to address Plaintiffs' claim because no Plaintiff has standing to challenge the State Department's authorization of sales of defense articles and services to the UAE. Second, even if Plaintiffs could demonstrate Article III standing, their interests still fall outside the zone of interests protected by the AECA. Third, the authority to enter into foreign military sales has been committed to the State Department's discretion. Fourth, Plaintiffs' claim raises a non-justiciable political question. Finally, the Court should decline to enter any discretionary relief in this case because it is inappropriate for the Court to weigh in on so sensitive a foreign affairs matter.

I. Plaintiffs Lack Article III Standing to Challenge the State Department's Decisions to Authorize Sales of Defense Articles and Services to the United Arab Emirates.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). One element of this limitation is that a plaintiff must have standing to sue, a requirement that is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.*

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of alleging facts that establish the three elements that constitute the "irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560—namely, that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

decision," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). And "standing is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (Kavanaugh, J.) (quoting *Lujan*, 504 U.S. at 562). Also, "[c]laims for declaratory or injunctive relief carry 'a significantly more rigorous burden to establish standing.'" *Matthews v. Dist. of Columbia*, No. 20-CV-595 (DLF), 2020 WL 7360213, at *2 (D.D.C. Dec. 15, 2020) (quoting *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015)). All Plaintiffs fall far short of meeting their burden.

A. The Individual Plaintiffs Fail to Establish Standing.

The Individual Plaintiffs, who are refugees currently living in a Libyan detention center following an air strike allegedly perpetrated by the UAE in 2019,[9] Am Compl. ¶ 13, assert that they "have already suffered significant harm due to the actions of the UAE," *id.* ¶ 82. They further allege that if sales of "highly sophisticated weaponry, including planes and drones capable of repeating the air strike at the detention center," to the UAE proceed, they will face "an unacceptable risk of harm" of being subject to another air strike, *id.*, because "there is a high likelihood that the UAE will transfer some of those weapons to forces in Libya or use the weapons itself to conduct military activities in Libya," *id.* ¶ 44.

These allegations, which rely on the actions of the UAE government, are insufficient to

[9] It is unclear whether the Individual Plaintiffs bring their claim on their own behalf, or whether HRS is attempting to act as their "next friend." *See* Am. Compl. at 1–2 ("c/o" language in case caption). A litigant who asserts next friend standing bears the burden of "clearly . . . establish[ing] the propriety of his status and thereby justify[ing] the jurisdiction of the court." *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990). If HRS is asserting next friend standing, HRS bears the burden of establishing why the Individual Plaintiffs cannot appear on their own behalf to prosecute the action, as well as establishing that HRS has "some significant relationship" with the Individual Plaintiffs and is "truly dedicated to the best interests" of the Individual Plaintiffs. *Id.* at 163–64. The Amended Complaint does not do so.

establish any of the three standing elements. As set forth below, the allegations fail to show that the U.S. Government caused any injury to the Individual Plaintiffs, that an order against the U.S. Government would redress any such injury, or that the Individual Plaintiffs will suffer from an imminent injury as a result of the U.S. Government's actions.

1. The State Department's Actions Did Not Cause Any Injury.

Causation requires "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The harm alleged must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *see also Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) ("Causation, or traceability, examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff."). Where, as here, "'the alleged injury flows not directly from the challenged agency action, but rather from independent actions of third parties,'" the plaintiff must show "that 'the agency action is at least a substantial factor motivating the third parties' actions.'" *Am. Freedom L. Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016) (quoting *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)). "The more attenuated or indirect the chain of causation between the government's conduct and the plaintiff's injury, the less likely the plaintiff will be able to establish a causal link sufficient for standing." *Ctr. for Bio. Diversity v. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).

As an initial matter, the injuries alleged are the direct result of actions alleged to have been taken by the UAE, not the United States Government. In the foreign affairs sphere, courts have repeatedly held that a plaintiff lacked standing to challenge an action by the U.S. Government where a foreign government engaged in the alleged underlying injurious conduct. *See, e.g.*, *Abulhawa v. Dep't of Treasury*, 239 F. Supp. 3d 24, 35 (D.D.C. 2017) (dismissing for lack of standing because "Plaintiffs' theory of causation is based on speculation upon speculation about how third parties might act" if the

Department of the Treasury revoked the tax-exempt status of certain groups that support Israeli settlement expansion (citing *Allen v. Wright*, 468 U.S. 737, 757–59 (1984))), *aff'd*, No. 17-5158, 2018 WL 3446699 (D.C. Cir. June 19, 2018); *Bernstein v. Kerry*, 962 F. Supp. 2d 122, 128–29 (D.D.C. 2013) (holding that the plaintiffs' fear of future terrorist attacks was not fairly traceable to the provision of foreign aid to the Palestinian Authority because it required the Court to "speculate on whether defendants' funding policies were in fact aiding terrorists, whether the terrorists were using these funds for activities intended to harm plaintiffs, and whether these activities [were] leading to a 'certainly impending' injury for plaintiffs"), *aff'd*, 584 F. App'x 7 (D.C. Cir. 2014). Here, too, the Individual Plaintiffs ask this Court to speculate on how the UAE may use the procured defense articles. But "[f]ederal courts are simply 'not well-suited to draw the types of inferences regarding foreign affairs and international responses to U.S. policy that Plaintiffs' theory of causation posits.'" *Fryshman v. U.S. Comm'n for Pres. of Am.'s Heritage Abroad*, 422 F. Supp. 3d 1, 8 (D.D.C. 2019) (quoting *Siegel v. Dep't of Treasury*, 304 F. Supp. 3d 45, 55 (D.D.C. 2018)).

Plaintiffs' allegations concerning the UAE's conduct over the last six years "'only further demonstrate[] that numerous factors' and independent actors outside the [State Department's] control" would play a role in the UAE's actions. *Id.* (quoting *Siegel*, 304 F. Supp. 3d at 55). Specifically, Plaintiffs' allegations of attacks in Libya by the UAE from 2014 through 2020 undercut their assertion that the State Department's authorizations of sales to the UAE will cause the Individual Plaintiffs' injuries. According to Plaintiffs, the UAE has been perpetrating attacks in Libya for six years, yet Plaintiffs make no allegations that any arms sold through the AECA's foreign military sales program were used in any of those attacks. *See generally* Am. Compl. ¶¶ 32–44. Plaintiffs even admit that their past harms were caused by the UAE, not the United States: they allege that they "have suffered direct harm from the activities of the UAE in Libya." *Id.* ¶ 80. Simply put, there is nothing in the Amended Complaint to suggest that the State Department's authorizations of sales were, are, or will be "a

substantial factor motivating" the UAE's actions. *See Am. Freedom L. Ctr.*, 821 F.3d at 49; *see also Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 39–40 (D.D.C. 2015) (Brown Jackson, J.) (finding that "a pre-existing trend toward declining timber-harvest levels clearly undermines Plaintiffs' economic injury standing argument rather than bolstering it, because that fact nullifies any assertion that the [rule] is itself the cause of the decline and the resulting economic injury").

In these circumstances, attributing the alleged harm of the Individual Plaintiffs to the actions of the U.S. Government in authorizing arm sales to the UAE involves an extenuated chain of causation involving the independent actions by one or more third parties: first, at the time the defense articles authorized by the United States arrive in the UAE, Libyan forces would have to remain embroiled in conflict; UAE officials would have to decide to be involved in that conflict; to the extent the Individual Plaintiffs are involuntarily held in the detention center, some third party in Libya would have to decide to keep them there; and UAE officials would have to decide to attack the same detention center housing the Individual Plaintiffs using the weapons it procured from the United States, or UAE officials would have to decide to ignore its requirement under the LOA to not transfer the arms procured from the United States, *see* 22 U.S.C. § 2753(a)(2), and transfer those arms to Libyan forces, who would then in turn have to decide to use those same arms to attack the detention center. This type of long chain of events relying on decisions by third parties is "too attenuated" to support a finding that the State Department's authorizations of sales to the UAE is the cause of any resulting injury to Plaintiffs in the future. *See Am. Freedom L. Ctr.*, 821 F.3d at 49 ("The greater number of uncertain links in a causal chain, the less likely it is that the entire chain will hold true."); *Elec. Privacy Info. Ctr. v. Dep't of Educ.*, 48 F. Supp. 3d 1, 20 (D.D.C. 2014) (finding that because plaintiffs would not suffer identity fraud unless their universities chose to disclose their personal information to third-party entities and those entities fraudulently used or disclosed that information, plaintiffs failed to show that a regulation was the cause of their injuries).

2. The Requested Relief Would Not Redress Any Injury to the Individual Plaintiffs.

For similar reasons, the Individual Plaintiffs' alleged injuries are not redressable through the relief sought against the State Department and the Secretary of State. Redressability requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. "As with the causation analysis, when redressability 'depends on the unfettered choices made by independent actors not before the court[ ] and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, it becomes substantially more difficult to establish standing.'" *Abulhawa*, 239 F. Supp. 3d at 36 (quoting *Scenic Am., Inc. v. Dep't of Transp.*, 836 F.3d 42, 50 (D.C. Cir. 2016)). "'Courts do not lightly speculate how independent actors not before them might' act, and, '[w]hen conjecture is necessary, redressability is lacking.'" *Id.* (quoting *West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017).

Even if this Court were to order Defendants to terminate the authorization for the sales of defense articles to the UAE—setting aside for the moment that such a remedy is not available here, *see infra*, Parts III; IV—ample speculation would be necessary to conclude that individuals and governments half-a-world-away would change their behavior in response to an order from this Court against Defendants, let alone change their behavior in a way that had any effect on the Individual Plaintiffs. And Plaintiffs' allegations of a regional conflict stretching back to 2014, Am. Compl. ¶ 32, makes plain that even if the State Department's three authorizations could conceivably be deemed a substantial factor in causing the alleged harm, "the undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces," *Renal Physicians Ass'n v. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1278 (D.C. Cir. 2007). Redressing the Individual Plaintiffs' alleged injuries therefore depends upon the actions of third parties that the court "cannot presume either to control or to predict," *Lujan*, 504 U.S. at 562, which is fatal under the redressability prong of the standing inquiry, *see Afifi v. Lynch*, 101 F. Supp. 3d 90, 110 (D.D.C. 2015).

Indeed, courts in this Circuit have repeatedly recognized that an order directing the U.S. Government to take certain actions in the foreign relations sphere would not redress a plaintiff's injuries because it is entirely speculative how foreign governments or organizations would react. For example, in *Bernstein*, the Court rejected a similar theory of standing advanced by American citizens residing in Israel, who allegedly suffered injuries at the hands of terrorists supported by the Palestinian Authority, and sought to end U.S. aid to the Palestinian Authority. 962 F. Supp. 2d at 130. In finding they lacked standing, the Court characterized the "Plaintiffs' disagreement with this policy and their belief that a change in policy would reduce the threat of terrorism" as "at best, mere speculation." *Id.* Other courts in this Circuit have reached similar conclusions. *See, e.g.*, *Talenti v. Clinton*, 102 F.3d 573, 575–78 (D.C. Cir. 1996) (finding that uncertainty as to how Italy would react to the withholding of foreign assistance precluded a finding that the plaintiff's injury would be redressed); *Siegel*, 304 F. Supp. 3d at 53–55 (concluding that plaintiffs whose property was seized by Israeli settlors lacked standing to enjoin the United States from providing aid to Israel because the attenuated chain of events from ending U.S. aid to the return of the plaintiffs' property "involved numerous third parties," whose actions and reactions were impossible to predict); *Nyambal v. Mnuchin*, 245 F. Supp. 3d 217, 224 (D.D.C. 2017), *aff'd*, No. 17-5072, 2017 WL 5664980 (D.C. Cir. Nov. 8, 2017) (finding that "there is considerable uncertainty' as to whether the actions that Mr. Nyambal suggests the Secretary could take to coerce the IMF into implementing best practices for the protection of whistleblowers would aid [him] . . . or would tend to drive [the IMF] into even greater intransigence"); *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 129 (D.D.C. 2003) (finding that blocking a loan to Guyana to build a competing telecommunications company would not redress the company's economic harm because Guyana could "borrow[] money for the same purpose elsewhere" or "fund[] the competing telecommunications system project itself"); *Aerotrade Inc. v. Agency for Int'l Dev.*, 387 F. Supp. 974, 975 (D.D.C. 1974) (finding "considerable uncertainty" as to whether suspension of aid to Haiti "would

aid plaintiff in collecting its debt or would tend to drive Haiti into even greater intransigence"). Because it is entirely speculative how the UAE government would react to an order from this Court stopping the arms sales, it is not "likely" that any injury would be redressed by a favorable decision. *Lujan*, 504 U.S. at 561.

3. The Allegations in the Amended Complaint Are Insufficient to Establish an Imminent Injury that is Required for Prospective Relief.

Finally, the Individual Plaintiffs' allegations of an imminent threat of future injury are likewise insufficient to obtain prospective relief. The Individual Plaintiffs allege that they were "attacked by the UAE" "using a U.S. made F-16 aircraft" "at the refugee detention center in Tajoura" in July 2019. Am. Compl. ¶¶ 13, 40, 82. They argue that the pending arms sales "pose[] an unacceptable risk" of harm of a future attack. *Id.* ¶ 82. But where a plaintiff "'seeks prospective declaratory and injunctive relief,'" as all Plaintiffs do here, "'he may not rest on past injury'" and instead "must rely on concrete and particular current or future injuries-in-fact to establish standing." *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109–10 (1983); *Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994). Thus, Plaintiffs' allegations must show more than a "possible future injury" allegedly caused by the United States to establish standing for prospective relief. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Indeed, an injury must be "'certainly impending,'" or there must be "a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409, 414 n.5). When a plaintiff asserts an increased-risk-of-harm by the defendant's actions, as the Individual Plaintiffs do here, the Court must "consider the ultimate alleged harm," such as death or bodily injury, "as the concrete and particularized injury and then . . . determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015). A plaintiff can

satisfy that requirement only by establishing "*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Pub. Citizen*, 489 F.3d at 1295. Thus, although the D.C. Circuit "does not completely bar increased-risk-of-harm claims," the "constitutional requirement of imminence . . . necessarily compels a very strict understanding of what increases in risk and overall risk levels can count as 'substantial.'" *Id.* at 1296.

The Individual Plaintiffs cannot establish either prong of the increased-risk-of-harm test attributable to the actions of the U.S. Government, as Plaintiffs merely allege that the pending arms sales "pose[] an unacceptable risk" of harm of a future attack. Am. Compl. ¶ 82. Such a conclusory allegation of alleged future injury is plainly insufficient to establish standing against the United States. *Conf. of State Bank Supervisors v. Off. of Comptroller of Currency*, 313 F. Supp. 3d 285, 296 (D.D.C. 2018) (finding that "speculative and conclusive language like 'significant risks'" was insufficient to establish standing). Whatever the threat of future attack from UAE or Libyan forces, Plaintiffs have not made any allegations concerning the increased risk of such harm resulting from the State Department's authorizations. *See Pub. Emps. for Env't Resp. v. Bernhardt*, No. 18-1547 (JDB), 2020 WL 601783, at *7 (D.D.C. Feb. 7, 2020) ("Without crucial facts about the 'current risk' or increased risk resulting from [the agency action], plaintiffs have not established imminence, and therefore have not established injury in fact."); *Elec. Privacy Info. Ctr.*, 48 F. Supp. 3d at 11 ("[P]laintiffs provide no evidence—not even any allegations—about how much more likely they are to be the victims of identity fraud now than before the passage of the Final Rule, and they provide absolutely no information about the absolute risk that their information will be used improperly."); *Carik v. Dep't of Health & Human Servs.*, 4 F. Supp. 3d 41, 53 (D.D.C. 2013) (Plaintiffs failed to show a substantial increase in risk where they had "not attempted to quantify the increased risk of physical injury from [the agency action.]").

Also, for reasons outlined above, the Individual Plaintiffs' allegation of an imminent threat of future injury caused by the actions of the U.S. Government in selling arms to the UAE is highly

attenuated and speculative. For any harm to occur, the defense articles first would have to be shipped to the UAE, which could take years.[10] *See McConnell v. FEC*, 540 U.S. 93, 226 (2003) (finding that a more than four-year gap between challenge and alleged injury was "too remote temporally to satisfy Article III"), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). The Individual Plaintiffs' claim of injury then depends on whether the conflict in Libya remains ongoing when the defense articles arrive, and, if so, that these Plaintiffs continue to live in detention centers, and that UAE officials, who are not before the Court, decide to use the procured defense articles in Libya or transfer them to Libyan forces (notwithstanding the prohibitions against misuse or transfer within the LOA, as required by the AECA, *see* 22 U.S.C. § 2753(a)(2)), and the UAE or Libyan forces attack the detention center using the defense articles procured from the sales at issue in this case to cause death or bodily injury to the Individual Plaintiffs. These types of "allegations of *possible* future injury," *Clapper*, 568 U.S. at 409 (quoting *Whitmore*, 495 U.S. at 158 (emphasis in original)), premised on a "highly attenuated chain of possibilities" are insufficient to establish standing, *id.* at 410; *see also Arpaio*, 797 F.3d at 21; *Elec. Privacy Info. Ctr. v. Fed. Aviation Admin.*, 892 F.3d 1249, 1255 (D.C. Cir. 2018) (concluding that the "highly attenuated chain of causation presented by [the plaintiff] dooms any attempt to establish probabilistic standing").

Moreover, it bears emphasis that, as outlined above, Plaintiffs ground this chain of events upon speculation over the actions of third parties—namely, UAE officials, and, in the event of a

[10] The actual delivery of the defense articles could take several years because before any defense articles are delivered, funds must be received from the UAE. *See* 22 U.S.C. § 2762. With a signed and funded LOA, the U.S. Government then must enter into contract negotiations with suppliers. *See* DSCA, SAMM C4.4.1, *Source of Supply*, *available at* https://samm.dsca.mil/chapter/chapter-4 (last accessed May 11, 2021). If the suppliers do not have the defense articles in stock, the contractors must manufacture the articles, which, depending on the complexity of the article, can take years. Finally, even once the articles are delivered, the UAE military must be trained to use certain articles. *See* DSCA, SAMM C2.1.6.2, *FMS Training*, *available at* https://samm.dsca.mil/chapter/chapter-2 (last accessed May 11, 2021).

transfer of arms, Libyan forces as well. The D.C. Circuit has directed courts to "rigorously review allegations by plaintiffs who seek to invoke the subject matter jurisdiction of the federal courts based on the projected response of independent third parties to a challenged government action," *Arpaio*, 797 F.3d at 25, and has "repeatedly held that litigants cannot establish an Article III injury based on the independent actions of some third party not before [the] court," *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d 914, 990 (D.C. Cir. 2021) (quoting *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 25 (D.C. Cir. 2015)). This is because such theories of harm, which require Court "to anticipate future actions of various third parties" not before the Court, "stack[] speculation upon hypothetical speculation" rather than establish an imminent injury. *Am. Lung Ass'n*, 985 F.3d at 990–91. Likewise, here, because any harm to the Individual Plaintiffs could only occur through the occurrence of a series of speculative events that may not take place for years, if ever, and because any future harm would not arise unless third parties take numerous actions, the Individual Plaintiffs cannot show that their alleged injury is "imminent," as required to establish standing to seek prospective relief. *See Clapper*, 568 U.S. at 410–14 (concluding that the plaintiffs lacked standing because any injury would occur only after a series of independent actors exercised their judgment in a certain way).

In sum, the Individual Plaintiffs cannot establish Article III standing on causation, redressability, and injury in fact grounds. Failure to establish any one element of standing is fatal to their claim; their failure to establish all three makes it plain that the Court lacks jurisdiction to hear the Individual Plaintiffs' claims.

B. The Associational Plaintiffs, Al'Abria' League and OFMWMC, Lack Standing.

The two Associational Plaintiffs, Al'Abria' League and OFMWMC, raise similar allegations to those of the Individual Plaintiffs, and their attempt to establish standing fails for the same reasons, and additional reasons as well. One Associational Plaintiff, the Al'Abria' League, "is an association of the families of the victims of the air raids carried out by UAE fighter jets" on "[f]ive locations" "around

Tripoli on August 18 and 23, 2014." Am. Compl. ¶ 12. The Amended Complaint does not identify a member of this association. The other Associational Plaintiff, OFMWMC, "is an association of families of the young cadets who were killed or injured in the air attack by a UAE operated, Chinese manufactured, drone at the Military College of Tripoli, on January 4, 2020." *Id.* ¶ 11. The Amended Complaint identifies the father of one of the victims as a member and a spokesperson of the association. *Id.* Both Associational Plaintiffs claim that their "members . . . have suffered direct harm from the activities of the UAE in Libya" and "remain at risk of additional UAE strikes if the United States provides the UAE with fighter planes and drones with which to carry out its military activities." *Id.* ¶¶ 80, 81.

An organization can establish standing "by showing either an injury to itself ('organizational standing')" or "a cognizable injury to one or more of its members" (associational or representative standing). *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 39 (D.C. Cir. 2016) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) & *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977)). Because the two Associational Plaintiffs raise only allegations of injuries to their members and not to themselves, they presumably seek to establish associational standing. Where an organization is suing on behalf of its members, the organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Hunt*, 432 U.S. at 343.

1. The Associational Plaintiffs Have Not Shown Indicia of Membership.

"Needless to say, [a] [p]laintiff must also show that it has 'members' whose interests it is seeking to represent." *Elec. Privacy Info. Ctr. v. Pres. Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 307 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017). To do so, "Plaintiffs bear the burden of specifically identifying at least one 'member [who] had or would suffer harm' from each

challenged agency action." *Sec. Indus. & Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 400 (D.D.C. 2014) (Friedman, J.) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)); *Flyers Rts. Educ. Fund v. Dep't of Transp.*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) (requiring the plaintiff to "identify at least one member with independent standing to sue the Department" (citing *Warth*, 422 U.S. at 511)); *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011); *Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). The Amended Complaint does not identify a single member of the Al'Abria' League and fails to allege facts that would establish that any identifiable member has standing in his or her own right. Accordingly, that Plaintiff does not satisfy the first requirement of associational standing. *See Conf. of State Bank Supervisors*, 313 F. Supp. 3d at 299 (finding that "CSBS does not carry its burden [to establish standing] because it fails to plead an injury in fact and it does not identify an injured member"); *Int'l Acad. of Oral Med. & Toxicology v. Food & Drug Admin.* (*IAOMT*), 195 F. Supp. 3d 243, 265 (D.D.C. 2016) (finding that the organization's failure to identify a "single member student who will unavoidably face mercury exposure . . . is enough to deny it standing").

As it relates to the Associational Plaintiff OFMWMC, although the organization claims Mr. Othman Salim Benammara as a member and spokesperson and additionally alleges that it has other members, Am. Compl. ¶¶ 11, 80, such bare allegations, standing alone, are insufficient to establish that Mr. Benammara and other unidentified "members" in fact display the indicia of membership necessary to allow the organization to represent their interests in this lawsuit, *see Conservative Baptist Ass'n of Am. v. Shinseki*, 42 F. Supp. 3d 125, 133–34 (D.D.C. 2014) (holding organization failed to demonstrate that the individuals it purported to represent in lawsuit were members); *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 207–09 (D.D.C. 2007) (concluding organization lacked standing to bring claim on behalf of its purported members because individuals do not possess the requisite "indicia of membership"); *see also Am. Legal Found. v. F.C.C.*, 808 F.2d 84,

91 (D.C. Cir. 1987) (describing "indicia of membership" as including electing the leadership of the association, guiding the association's activities (such as choosing to bring litigation), and financing those activities); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25–27 (D.C. Cir. 2002). Because the Amended Complaint is devoid of any allegations establishing an indicia of membership for either Associational Plaintiff, they lack standing.

2. No Member of the Associational Plaintiffs Has Standing To Sue In His Or Her Own Right.

Even if the Court were to find that the Associational Plaintiffs are membership organizations, the Court should nevertheless conclude that these Plaintiffs lack standing because no individual member has standing to sue in his or her own right. *See Flyers Rts. Educ. Fund*, 957 F.3d at 1361. First, the Associational Plaintiffs cannot establish an imminent injury for the same reasons the Individual Plaintiffs cannot do so. The Associational Plaintiffs allege that their members are families of those who were harmed by past attacks perpetrated by the UAE in Libya.[11] Am. Compl. ¶¶ 80, 81. But, as with the Individual Plaintiffs, these past attacks cannot serve as a basis to seek prospective relief against the U.S. Government.[12] *See supra* Part I.A.3. Also like the Individual Plaintiffs, the Associational Plaintiffs argue that their members "remain at risk of additional UAE strikes if the United States provides the UAE with fighter planes and drones with which to carry out its military activities." Am. Compl. ¶¶ 80, 81. And again, as with the Individual Plaintiffs, they entirely fail to establish how any of the three sales authorizations substantially increase their risk of harm of attack by independent third parties. *See* Part I.A.3. And even if they had made such allegations, the Associational Plaintiffs fail to

[11] Neither Associational Plaintiff alleges that either attack was perpetrated using arms from a foreign military sale under the AECA, which further calls into question the imminence of an injury resulting from the State Department's authorization of the three sales.

[12] Notably, the harm alleged by the Al'Abria' League occurred in August 2014, more than six years ago. Am. Compl. ¶ 12.

identify a member that will face such harm.[13] *See IAOMT*, 195 F. Supp. 3d at 265 (finding plaintiffs' "probabilistic prediction that at least one or some [of the organization's] members will face [economic] harms in the future" to be "insufficient" to establish an injury (citing *Summers*, 555 U.S. at 497–98)); *Coal. for Mercury–Free Drugs v. Sebelius*, 725 F. Supp. 2d 1, 9 n.7 (D.D.C. 2010), *aff'd*, 671 F.3d 1275 (D.C. Cir. 2012) ("[T]he Court must look only whether named and identified members" of the organization "meet the requisite conditions of standing."). Finally, again like the Individual Plaintiffs, any injury to the members of the organizations as a result of the State Department's actions could only occur after an attenuated chain of events, which would involve third parties not before the Court. *See* Part I.A.3. The Court would have to engage in even more speculation than for the Individual Plaintiffs to find that any member is subject to an imminent injury, as the Amended Compliant lacks any allegations that any members even reside in Libya. "This theory stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (quoting *Lujan*, 504 U.S. at 560).

The Associational Plaintiffs also cannot establish causation or redressability for the same reasons the Individual Plaintiffs cannot do so. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) ("Causation and redressability typically 'overlap as two sides of a causation coin,'" because "[a]fter all, if a government action causes an injury, enjoining the action usually will redress that injury." (quoting *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)). As described above, any injury to the members of the organizations would not be caused by the State Department's authorization of sales, but rather from a long chain of actions of third parties not before the Court, and it is entirely uncertain how those third parties would react if the Department revoked

[13] Although OFMWMC named one member, "merely naming an individual member, without illustrating why such individual has 'standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association,' falls short of what is required for representational standing." *IAOMT*, 195 F. Supp. 3d at 267 (quoting *UFCW Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996)).

its authorizations. *See supra* Parts I.A.1, I.A.2; *see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 936–37 (D.C. Cir. 2004) (finding that the associations lacked standing when "[t]he direct causes of [their members'] asserted injuries . . . are the independent decisions of educational institutions" and plaintiffs "offer nothing but speculation to substantiate their claim that a favorable decision from this court will redress their injuries by altering these schools' independent decisions"), *abrogated on other grounds as recognized by Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017). Because any theory of causation and redressability depends on "a lengthy chain of conjecture," *Fla. Audubon Soc.*, 94 F.3d at 666, the Associational Plaintiffs cannot establish standing.

3. The Associational Plaintiffs Have Not Established That This Case Is Germane To Their Purposes.

Finally, to establish associational standing, "an organization's litigation goals [must] be pertinent to its special expertise and the grounds that bring its membership together." *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988); *see also Wash. Legal Found.*, 477 F. Supp. 2d at 212. Because the Amended Complaint makes no allegations concerning the purpose of either Associational Plaintiff or any special expertise either Plaintiff has, *see* Am. Compl. ¶¶ 11, 12, 80, 81, the Associational Plaintiffs have failed to show that this case is germane to their purposes.

In sum, the Associational Plaintiffs lack standing for the same reasons the Individual Plaintiffs, as well as for their failure to identify members, establish indicia of membership, and show that the case is germane to their purposes. The Court should dismiss their claim.

C. Organizational Plaintiffs HRS and NYCFPA Lack Standing.

The Amended Complaint is devoid of any allegations concerning members for the two Organizational Plaintiffs, HRS and NYCFPA. *See generally* Am. Compl. To the extent HRS and NYCFPA seek to assert standing as organizations in their own right, they must satisfy the injury-in-fact, causation, and redressability standards. *See Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011); *R.J. Reynolds Tobacco Co. v. FDA*, 810 F.3d 827, 829 (D.C. Cir. 2016) (stating that, as

with any plaintiff, the organization's asserted injury must be "actual or imminent, not conjectural or hypothetical" (quoting *Lujan*, 504 U.S. at 560–61)). The D.C. Circuit has cautioned that when an organization is not "directly subject" to the challenged governmental action, "'standing is substantially more difficult to establish.'" *Am. Lung Ass'n*, 985 F.3d at 988 (quoting *Pub. Citizen*, 489 F.3d at 1289).

The D.C. Circuit has set forth a two-part inquiry to determine whether an organization has pleaded a cognizable injury. *Food & Water Watch*, 808 F.3d at 919. First, a court must ask whether the defendant's action "injured the [organization's] interest." *Id.* The alleged injury must be "more than simply a setback to the organization's abstract social interests." *Havens Realty*, 455 U.S. at 379. Rather, the challenged conduct must "'perceptibly impair[] the organization's ability to provide services." *Food & Water Watch*, 808 F.3d at 919 (quoting *Turlock*, 786 F.3d at 24). "Put otherwise, it must 'inhibit[ ]' the organization's 'daily operations' in a concrete way." *Citizens for Responsibility & Ethics in Wash. v. U.S. Office of Special Counsel* (*CREW*), 480 F. Supp. 3d 118, 127 (D.D.C. 2020) (quoting *People for the Ethical Treatment of Animals v. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). "[T]he Court's task is to differentiate between 'organizations that allege that their *activities* have been impeded'—which suffices for standing purposes—'from those that merely allege that their *mission* has been compromised'—which does not." *Id.* at 127–28 (quoting *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006)).

Once an organization has established that the defendant's action injured its interest, then "the organization must plausibly allege that it 'used its resources to counteract [the alleged] harm.'" *Texas Low Income Hous. Info. Serv. v. Carson*, 427 F. Supp. 3d 43, 53 (D.D.C. 2019) (quoting *Food & Water Watch*, 808 F.3d at 919) (brackets in original). A diversion of the organization's resources "cannot alone constitute the harm." *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 41 (D.D.C. 2018). Indeed, the organization must have "expended resources to counteract the injury to its ability to achieve its mission and not simply as a product of 'unnecessary alarmism constituting a self-inflicted

injury.'" *Chesapeake Climate Action Network v. Exp.-Imp. Bank*, 78 F. Supp. 3d 208, 229 (D.D.C. 2015) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). "Furthermore, an organization does not suffer an injury in fact where it 'expends resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended.'" *Food & Water Watch*, 808 F.3d at 919 (quoting *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)). "In this vein, the devotion of resources to advocacy for the organization's preferred policy — whether that advocacy is directed at Congress, the courts, or an administrative agency — falls short of the line." *CREW*, 480 F. Supp. 3d at 128.

Neither HRS nor NYCFPA meet their burden of establishing standing in their own right.

1. HRS Lacks Standing.

As an initial matter, HRS fails to establish either prong of the injury-in-fact test that applies to organizations. First, HRS fails to show that its daily operations are "inhibit[ed] . . . in a concrete way" by the State Department's actions. *CREW*, 480 F. Supp. 3d at 127. HRS alleges that the State Department's sales authorizations "will permit the UAE to continue or even expand its activities" in Libya, "further impeding the ability of HRS" to conduct its preferred "work on national reconciliation and transitional justice." Am. Compl. ¶¶ 10, 79. But HRS never explains how its daily operations are impeded by the State Department's actions. *See id.* Indeed, HRS admits that since the conflict in Libya began in 2014, its daily operations have not been "work on national reconciliation and transitional justice," but rather have consisted of "monitoring and reporting [human rights] violations."[14] *Id.* ¶ 10. Thus, even assuming that the State Department's actions will, as Plaintiffs allege, "permit the UAE to continue or even expand its activities" in Libya, *id.* ¶ 79, it is unclear how HRS's daily operations that it has undertaken for the past seven years would be at all affected.

[14] To the extent that HRS relies on these allegations of past harm to establish an injury-in-fact, as set forth above, such allegations are insufficient because Plaintiffs all seek only prospective declaratory and injunctive relief. *See supra* Part I.A.3.

Further, if HRS's theory is that the UAE will use the defense articles procured from the United States to attack Libya, and that, once the UAE uses such articles, HRS will have to "monitor[] and report[] violations to International Human Rights Law and International Humanitarian Law," *id.* ¶ 10, such harm would not occur unless an attenuated chain of events occurs, many of which involve third parties. *See supra* Part I.A.3. Just as with the other Plaintiffs, such speculation cannot manufacture an "imminent" or future injury for an organization. *See Ctr. for Bio. Diversity v. EPA*, 274 F.R.D. 305, 310 (D.D.C. 2011) (finding that "the implementation and enforcement of new emissions standards—and thus, the economic consequences thereof—are too hypothetical and too far removed from a judgment of this Court to constitute a 'certainly impending,' causally connected injury for standing purposes").

Nor does HRS establish that there is a "direct conflict between the defendant's conduct and the organization's mission." *CREW*, 480 F. Supp. 3d at 127. HRS alleges that it is "concerned about the [h]uman [r]ights situation in Libya." Am. Compl. ¶ 10. But to find that there is a direct conflict between the State Department's authorizations of sales to the UAE and HRS's concern about human rights in Libya, here again, the Court would have engage in impermissible speculation to conclude that the defense articles subject to the authorizations will be used by the UAE in Libya. And a conflict between the State Department's actions and HRS's "concern[] about the [h]uman [r]ights situation in Libya," *id.*, "does not confer standing," *IAOMT*, 195 F. Supp. 3d at 256–57; *see also Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (stating that "a mere setback to [an organization's] abstract social interests" is not a cognizable injury for Article III standing).

Second, HRS has not satisfied the second prong of the injury-in-fact test because it has not shown a "consequent drain on the organization's resources." *Havens Realty*, 455 U.S. at 379. There are no allegations in the Amended Complaint that HRS has been forced to "divert significant time and resources from [its core] activities" to respond to the State Department's actions, *Abigail All.*, 469 F.3d at 132–33, or to "devote scarce resources to identify and to counteract" those actions, *Spann v.*

Colonial Vill., Inc., 899 F.2d 24, 28 (D.C. Cir. 1990). The Amended Complaint indicates that HRS's core activities for the past seven years have been "monitoring and reporting [human rights] violations." Am. Compl. ¶ 10. HRS's assertion that it will have to continue this work does not amount to a diversion of resources resulting from the Government's actions sufficient to establish an injury-in-fact. *See Conservative Baptist Ass'n*, 42 F. Supp. 3d at 132 ("Any resources that [organization] expended . . . were in the normal course of [its] operations, and it cannot convert its ordinary activities and expenditures . . . into an injury-in-fact.").

Finally, HRS cannot establish causation or redressability. Here again, HRS's claim fails for the same reason the Individual and Associational Plaintiffs cannot establish causation and redressability—it would require the Court to engage in speculation concerning a long chain of events involving third parties. *See supra* Parts I.A.1, I.A.2, I.B.2. But HRS has an additional problem in establishing standing. HRS alleges that it "has been unable to engage in its chosen work and has had to refocus its activities and resources on monitoring and reporting [human rights] violations" since "General Khalifa Haftar and his allies (aided by the UAE) launched armed attacks in Benghazi and Tripoli in May 2014." Am. Compl. ¶ 10; *see also id.* ¶ 79. Thus, by Plaintiffs' own admission, the cause of any injury to HRS is "General Khalifa Haftar and his allies," as well as the UAE, not the actions of the State Department. *See id.* And, because it is the participants to the conflict in Libya that are allegedly injuring HRS, even if the Court entered Plaintiffs' requested relief, a declaratory judgment and an injunction against the State Department would not redress HRS's injury. Accordingly, although HRS claims that the State Department's actions will "further imped[e] the ability to HRS to conduct" its "work on national reconciliation, transitional justice, and promotion of human rights," *id.* ¶ 79, HRS's "bald allegation of standing is not enough to survive even a motion to dismiss where neither the factual allegations nor their logic establish redressability." *Renal Physicians Ass'n*, 489 F.3d at 1278 (citing *Nat'l Wrestling*, 366 F.3d at 938, 941–43).

2. NYCFPA Lacks Standing.

Of all the Plaintiffs, only NYCFPA alleges it is currently being injured by the State Department's sales authorizations. However, NYCFPA nevertheless fails to meet either prong of the organizational injury-in-fact test and also cannot establish causation or redressability.

First, NYCFPA does not allege that the authorizations "perceptibly impaired [its] ability to provide services." *Turlock*, 786 F.3d at 24. NYCFPA is a foreign policy research organization that "conducts in-depth research and analysis on every aspect of American foreign policy and its impact around the world" and "seeks to be an educational resource for policymakers and foreign policy leaders." Am. Compl. ¶¶ 9, 78. NYCFPA fails to allege that the State Department's authorizations impede NYCFPA from engaging in those activities. *See Nat'l Veterans Legal Servs. Program v. Dep't of Def.*, No. 14-1915, 2016 WL 4435175, at *6 (D.D.C. Aug. 19, 2016) (requiring that challenged conduct "undermine the organization's ability to perform its fundamental programmatic services"). Although NYCFPA claims that the State Department's authorizations have caused it "to expend significant resources tracking and countering the effects" of the authorizations,[15] as well as caused it to take efforts to "address the potential impact [of the authorizations] on its mission" and to "try to understand the justification" for the authorizations, Am. Compl. ¶ 78, these allegations merely show a shift in a research focus, not an impairment of NYCFPA's daily operations as a result of the State Department's actions, *see Texas Low Income Hous. Info. Serv.*, 427 F. Supp. 3d at 56 ("Texas Housers' allegations that it has had to focus its research, education and policy development efforts on Houston at the expense of other areas in Texas is a far cry from the direct impairment of day-to-day services that courts recognized as sufficient for standing purposes in these cases."); *Nat'l Veterans Legal Servs.*

[15] NYCFPA does not specify what activities it has undertaken to "counter[] the effects" of the authorizations, *see* Am. Compl. ¶ 78, and the Court should not speculate as to what those activities may be. Such conclusory statements that merely parrot the legal standard, *see Equal Rights Ctr.*, 633 F.3d at 1140, are "are insufficient to state a plausible basis for standing," *Williams*, 819 F.3d at 472 (quoting *Iqbal*, 556 U.S. at 663).

Program, 2016 WL 4435175, at *7 (finding that the organization's claim that it "has devoted and continues to devote scarce resources to investigating [a board's] unpublished rules, guidelines and practices" "does not amount to the kind of 'perceptible impairment' of [its] daily operations required to establish organizational injury"). And these efforts, conducted by an organization that "seeks to be an educational resource for policymakers and foreign policy leaders to best promote American interests and values around the world," Am. Compl. ¶ 78, amount to advocacy work, which is not a cognizable injury, *see Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) ("[T]o hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate standing doctrine's actual injury requirement[.]"); *Ctr. for Democracy & Tech. v. Trump*, No. 1:20-CV-01456 (TNM), 2020 WL 7318008, at *4 (D.D.C. Dec. 11, 2020) (finding that the organization's "alleged injury—resources spent monitoring federal agencies, participating in their proceedings, and working with lawmakers—is one to its advocacy work, which is not a cognizable injury"); *IAOMT*, 195 F. Supp. 3d at 257 (concluding plaintiff's claim that it was "forced to deviate a substantial portion of its resources to identify and dispute the FDA's errors" in a rule "does not suffice to confer standing" because "the only service alleged to be impaired is pure issue advocacy"). In sum, because NYCFPA has "not allege[d] impairment of its ability to provide services, only impairment of its advocacy," it has failed to establish an injury-in-fact. *Turlock*, 786 F.3d at 24.

NYCFPA also alleges that it "has been a constant advocate for the stabilization of the Middle Eastern region," and the State Department's authorizations "directly frustrate[] that mission by introducing significant arms into the region that are likely to be used to exacerbate the humanitarian disasters in Yemen and Libya."[16] Am. Compl. ¶ 77. But the Supreme Court has long held that a

[16] Here again, the allegation that the arms will be used to "exacerbate the humanitarian disasters" is speculative and relies on a chain of actions taken by third parties (this time in Yemen as well as in

"special interest" in a subject, standing alone, does not permit a plaintiff to file suit as "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived." *See Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972). And the D.C. Circuit has reiterated that "frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'" *Food & Water Watch*, 808 F.3d at 919 (quoting *Nat'l Taxpayers Union*, 68 F.3d at 1433); *Env't Working Grp. v. FDA*, 301 F. Supp. 3d 165, 172 (D.D.C. 2018) ("[I]njuries to an organization's . . . issue advocacy programs cannot be used to manufacture standing, because that would allow lobbyists on either side of virtually any issue to take the Government to court."). Accordingly, NYCFPA's claim of injury on this point, which involves nothing more than a generic recitation of interests and that it has had to "address the potential impact [of the authorizations] on its mission," Am. Compl. ¶ 78, falls far short of the requirement to show concrete impairment of its services or operations, *see Long Term Care Pharmacy All. v. UnitedHealth Grp., Inc.*, 498 F. Supp. 2d 187, 192 (D.D.C. 2007) ("The law is clear that actions contrary to an organization's mission do not create an injury if the organization's activities are not somehow impeded.").

At bottom, NYCFPA's alleged injuries are nothing more than a disagreement with the foreign policy of the United States. But concern about the effects of a U.S. Government policy on stabilization in the Middle East amounts to nothing more than a generalized grievance. *See Siegel*, 304 F. Supp. 3d at 51 (finding that "Plaintiffs' concern about the effect U.S. aid has on the country's 'image' abroad" is "a generalized grievance about the wisdom of governmental actions or policies" rather than a concrete injury-in-fact). This sort of generalized grievance about sensitive foreign-policy judgments by the political branches is "most appropriately addressed in the representative branches" rather than

Libya). *See* Parts I.A.3, I.B.2, I.C.1; *see also Texas Low Income Hous. Info. Serv.*, 427 F. Supp. 3d at 54 (finding that "the ends Texas Housers seeks ultimately depend on the subsequent action of a third party—Houston—makes its purported injury even more nebulous").

a federal courtroom. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982); *see also Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) ("Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." (quotation omitted)).

NYCFPA also has not satisfied the diversion-of-resources prong, as it has not shown that it has had to divert resources to counteract the State Department's authorizations in the form of expending "'operational costs beyond those normally expended' to carry out its advocacy mission." *Nat'l Ass'n of Home Builders*, 667 F.3d at 12 (quoting *Nat'l Taxpayers Union*, 68 F.3d at 1434). NYCFPA asserts that it has had to "divert resources away from its research of other essential topics in order to address the potential impact of the Arms Sale on its mission and to try to understand the justification for the Arms Sale." Am. Compl. ¶ 78. NYCFPA further alleges that it "must continue to divert the organization's resources from its broader research goals, so long as the Arms Sale remains authorized." *Id.* But, critically, NYCFPA does not allege that, as a result of the Government's action, it has had to expend costs beyond those normally expended, which is fatal to its injury-in-fact claim. *Food & Water Watch*, 808 F.3d at 919.

NYCFPA's assertions also fall short because conducting research on current events and educating policy-makers on foreign policy issues both fall well within NYCFPA's bailiwick as a foreign policy research and advocacy organization. *See id.* "Plainly, its efforts here" to research the State Department's authorizations "'fall[ ] neatly within the core set of activities it has long performed.'" *CREW*, 480 F. Supp. 3d at 133 (quoting *IAOMT*, 195 F. Supp. 3d at 258); *see also Elec. Privacy Info. Ctr.*, 48 F. Supp. 3d at 23 (noting that "the expenditures that [a privacy-focused public interest organization] has made in response to [an allegedly unlawful rule] have not kept it from pursuing its true purpose as an organization but have contributed to its pursuit of its purpose").

"In addition, the law is clear that 'budgetary choice[s]' do not satisfy the requirements for demonstrating a 'consequent drain on resources.'" *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 50 (D.D.C. 2018) (quoting *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011)). Thus, NYCFPA's voluntary decision to shift expenditures among "ordinary program costs" in furtherance of its mission is insufficient to confer standing. *Nat'l Taxpayers Union*, 68 F.3d at 1434; *see also Fair Emp't Council*, 28 F.3d at 1276 (finding "self-inflicted" harm, resulting "not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices," insufficient). In sum, NYCFPA's research and advocacy choices are proactive choices, not a necessary response to any certainly impending injury and are thus insufficient to establish an injury in fact.

Finally, NYCFPA cannot establish causation and redressability with regard to its claim that the State Department's authorizations have frustrated its mission of "stabilization in the Middle Eastern region, especially in regard to countries like Libya and Yemen," Am. Compl. ¶ 77, because, as with the other Plaintiffs, this allegation is speculative. *See supra* Parts I.A.1, I.B.2, I.C.1. As NYCFPA admits, both Libya and Yemen have been involved in conflicts since 2014 and 2015, respectively, which is long before the State Department authorized the sales to the UAE. *See* Am. Compl. ¶¶ 22, 23. And both conflicts have involved various third parties, which shows that the "humanitarian disasters" in those countries has not been caused by the State Department's actions here, nor would an order enjoining the authorizations "stabiliz[e]" those countries. *See id.* ¶¶ 22, 26, 32 (describing a "coalition" of forces that have conducted military operations in Yemen and the forces fighting in Libya). Accordingly, NYCFPA has failed to show that the State Department's actions have caused harm to its mission of stabilization or that enjoining those actions would redress such harm.

* * *

It is plain that NYCFPA amended its complaint to add various plaintiffs in an attempt to find a plaintiff that has standing to challenge the State Department's authorizations of the sale of defense

articles to the UAE. But "as Justice Kennedy has explained, in terms critically important to increased-risk cases brought by organizations, 'the doctrine of standing to sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves.'" *Pub. Citizen*, 489 F.3d at 1294 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.)). The same is true here: because, at bottom, each Plaintiff's claim is "remote and speculative," the Amended Complaint must be dismissed for lack of standing. *Id.* To hold otherwise would be an "impermissible basis for [] exercising the judicial power." *Id.*

II. Plaintiffs' Interests Fall Outside the Zone of Interests of the AECA.

Even if Plaintiffs could establish standing, their claims would still fail because they are outside the zone of interests served by the Arms Export Control Act. The zone-of-interests test requires the Court to assess whether Plaintiffs' interests "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129–30 (2014) (citation omitted). The test forecloses suit where the plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). The "relevant statute" for zone-of-interests purposes "is the statute whose violation is the gravamen of the complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990). Here, Plaintiffs challenge whether the State Department has followed the AECA's provision concerning foreign military sales. That statute, therefore, provides the frame of reference for the Court's zone-of-interests analysis.

Additionally, because the statute at issue does not regulate Plaintiffs, their claims "necessarily rest[] on the idea that [their] interests are among those Congress sought to protect." *Fed'n for Am. Immigr. Reform, Inc. v. Reno*, 93 F.3d 897, 900 (D.C. Cir. 1996); *Hazardous Waste Treatment Council v.*

Thomas, 885 F.2d 918, 922–23 (D.C. Cir. 1989) (explaining the difference between "regulated interests" and "protected interests"). "Protected interests are ones asserted either by intended beneficiaries of the statute at issue or by other suitable challengers—*i.e.*, parties whose interests coincide systemically, not fortuitously with those of intended beneficiaries." *Twin Rivers Paper Co. LLC v. Sec. & Exch. Comm'n*, 934 F.3d 607, 616 (D.C. Cir. 2019) (internal quotations omitted). "Put another way, the zone of interests test requires Plaintiffs to be 'reasonable—indeed, predictable—challengers of the Secretary's decisions.'" *Ctr. for Bio. Diversity v. Trump*, 453 F. Supp. 3d 11, 39–40 (D.D.C. 2020) (quoting *Patchak*, 567 U.S. at 227).

Plaintiffs' interests do not fall within the zone of interests protected by the AECA. The purpose of the AECA's foreign military sales provision is to permit the United States to sell defense articles and services to friendly countries that cannot or do not make such articles or provide such services themselves. 22 U.S.C. § 2751. Congress authorized such sales to friendly countries "to facilitate the common defense . . . to achieve specific national defense requirements and objectives of mutual concern" and to ensure the "operational compatibility of [the United States'] defense equipment" with its allies. *Id.* (further stating that the sales are meant to promote "effective and mutually beneficial defense relationships" to "maintain and foster the environment of international peace and security essential to social, economic, and political progress"). Congress reiterated that sales under the AECA were to be made "in furtherance of the security objectives of the United States and of the purposes and principles of the United Nations Charter." *Id.* Finally, Congress stated that foreign military sales should

> be approved only when they are consistent with the foreign policy interests of the United States, the purposes of the foreign assistance program of the United States as embodied in the Foreign Assistance Act of 1961, as amended, the extent and character of the military requirement, and the economic and financial capability of the recipient country, with particular regard being given, where appropriate, to proper balance among such sales, grant military assistance, and economic assistance as well as to the impact of the sales on programs of social and economic development and on existing or incipient arms races.

Id.

The legislative history echoes these intentions. The House Committee on Foreign Affairs recognized that "[t]he basic purpose of foreign assistance has been to enhance the security of the United States through the development of economic and military strength in the non-Communist world." H.R. Rep. No. 90-1641, at 2 (1968). The Committee also recognized that such sales (as opposed to the prior grant program under the Foreign Assistance Act of 1961) protect the public fisc: "The controlled sales of appropriate types of military equipment to allied and friendly nations . . . reduces the cost to the United States of supporting allied and friendly forces which are essential to the common defense of the non-Communist world." *Id.* at 3.

The common thread among the intentions set forth in the statute and legislative history is the advancement of the national security interests of the United States, as well as the protection of the public fisc. Moreover, the fact that the AECA establishes a detailed process for Congress to review and, if it deems necessary, block, the Executive Branch's decisions to sell defense articles and services "precludes any inference that . . . private advocacy organizations are peculiarly suitable challengers" of the decisions. *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 503 (D.C. Cir. 1994). Because allowing Plaintiffs to maintain their suit to challenge the foreign policy of the United States is "more likely to frustrate than to further statutory objectives," their claim should be dismissed as falling outside the zone of interests of the AECA. *Hazardous Waste*, 885 F.2d at 922.

III. Plaintiffs' APA Claim Is Barred Because the Authority to Authorize Foreign Military Sales Has Been Committed to the State Department's Discretion by Law.

It is well established that the APA does not provide for jurisdiction in cases like this one where the agency action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). The reason for this exception to the APA is simple: a statute committing an action to the discretion of the agency provides no justiciable standards by which a court may review the agency's decision. *Webster v. Doe*, 486 U.S. 592, 599–600 (1988). This is true "even where Congress has not affirmatively precluded

review." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In looking for a judicially manageable standard with which to interpret the State Department's authority and discretion to authorize foreign military sales, the Court should consider the statutory language and structure as well as the nature of the agency decision. *See Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002), *cert denied*, 537 U.S. 1193 (2003); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997).

Here, the statutory language provides broad deference to the Executive Branch. In the AECA, Congress specified that the Secretary of State, under the direction of the President, "shall be responsible for the continuous supervision and general direction of sales . . . under [the AECA]," including determining "whether there will be a sale to . . . a country and the amount thereof . . . to the end that sales . . . will be integrated with other United States activities and to the end that the foreign policy of the United States would be best served thereby." 22 U.S.C. § 2752(b)(1). Statutes using similar language have been interpreted to commit an action to the discretion of the agency. For example, the D.C. Circuit affirmed a dismissal of an APA case where the statute authorized the Attorney General to take certain actions when he "deem[ed]" such actions to be in the "national interest." *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005). Similarly, when Congress authorized the Director of the Central Intelligence Agency to terminate an employee whenever he "shall deem such termination necessary or advisable in the interests of the United States," the Supreme Court has held that such language "fairly exudes deference" and, thereby, precludes judicial review under the APA. *Webster*, 486 U.S. at 600.

In addition, "the existence of congressional oversight as an enforcement mechanism" is an indication that "Congress intended to preclude review." *Banzhaf v. Smith*, 737 F.2d 1167, 1170 (D.C. Cir. 1984). The AECA provides a detailed statutory scheme by which Congress is notified of potential sales, has the ability to review and seek additional information about such sales, may block such sales, and may continue to monitor sales in the event Congress does not act to block them. *See* 22 U.S.C.

§§ 2776(b)(1), (i). This scheme shows that it is Congress, not the Court, that is responsible for overseeing implementation of the provisions of the AECA.

Finally, the nature of the agency decision regarding the sale of defense articles is decidedly one involving the foreign affairs and national security of the United States and, therefore, not susceptible to review in Court. Congress itself made this clear by placing the AECA in Title 22, which concerns "Foreign Relations and Intercourse," and with its express language: "It is the sense of the Congress that all such sales be approved only when they are consistent with the foreign policy interests of the United States." 22 U.S.C. § 2751. The D.C. Circuit has repeatedly held that where, like here, the issue involves "judgments on questions of foreign policy and national interest," that issue is not "fit for judicial involvement," and is not reviewable under the APA. *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000); *Legal Assistance for Vietnamese Asylum Seekers*, 104 F.3d at 1353 ("By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters."). The nature of the decisions at issue in this case—authorizations of the sale of defense articles to a foreign government—undoubtedly involves judgments on the foreign affairs and national security of the United States. Thus, the decision on such sales is committed to the discretion of the agency by law and not susceptible to review in Court under the APA.[17]

IV. Plaintiffs' Claim Raises a Non-Justicable Political Question.

Plaintiffs' claim also may be dismissed because it raises a non-justiciable political question. *See*

[17] It is unclear whether Plaintiffs seek broad programmatic relief, such as an end to foreign military sales to the UAE. *See* Am. Compl. at 29 (asking this Court to "[r]emand this matter back to the Department with instructions to withdraw any authorization of the Arms Sale and *to refrain from acting in a manner inconsistent with such withdrawal*" (emphasis added)). If so, such challenge to programmatic foreign policy is well outside the kind of agency action subject to review under the APA—a rule, license, order, or sanction that determines the rights and obligations of members of the public. *See Lujan*, 497 U.S. at 891.

Am. Jewish Cong. v. Vance, 575 F.2d 939, 943 (D.C. Cir. 1978) (noting that when both standing and political question issues are before the Court, it is more prudent to determine the question of standing first). "Like standing, the political question doctrine is an aspect of 'the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the case or controversy requirement of Article III of the Constitution.'" *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44 (D.D.C. 2010) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974))). "The political question doctrine is 'essentially a function of the separation of powers,' and 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *El–Shifa Pharma. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) & *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

Although "[t]he precise 'contours' of the political question doctrine remain 'murky and unsettled,'" *Al-Aulaqi*, 727 F. Supp. 2d at 44 (quoting *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008)), in *Baker*, the Supreme Court enumerated the following six factors that may render a case non-justiciable under the doctrine:

> [1] 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; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment of multifarious pronouncements by various departments on one question.

369 U.S. at 217. Following the Supreme Court's decision in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012),[18] in which the Supreme Court discussed only the first two *Baker* factors, the D.C.

[18] Although the Supreme Court in *Zivotofsky* concluded the political question did not require dismissal, that case is distinguishable. In *Zivotofsky*, the plaintiff sued the State Department for failing to follow a statute that allowed Americans born in Jerusalem to elect to have "Israel" listed on their place of birth on their passports. 566 U.S. at 191. The Supreme Court found that because the plaintiff

Circuit has found that "if the first two *Baker* factors are not present, more is required to create a political question than apparent inconsistency between a judicial decision and the position of another branch." *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 (D.C. Cir. 2019).

This case meets nearly all of the *Baker* factors. First, there is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (discussing the "[d]irect allocation[s]" in the Constitution of those responsibilities to the legislative and executive branches). "Indeed, the Supreme Court has described the President as possessing 'plenary and exclusive power' in the international arena and 'as the sole organ of the federal government in the field of international relations." *Id.* at 195 (quoting *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 320 (1936). And "[n]ational-security policy is the prerogative of the Congress and President." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citing U.S. Const. art. I, § 8; art. II, §§ 1, 2).

Allowing this case to proceed would entangle the Court in precisely the type of policy determinations the Constitution entrusts to the political branches. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."). By requesting that the Court declare that the State Department's sales authorizations were arbitrary and capricious, Plaintiffs effectively ask the Court to substitute its judgment for that of the Executive and Legislative Branches as to whether the United States should sell defense articles and services to the United Arab Emirates. But as these decisions rest on complex foreign policy and national security judgments, they are

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"requests that the courts enforce a specific statutory right," "[t]he 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." *Id.* at 196. Here, however, Plaintiffs are not seeking the enforcement of any statutory right they possess; rather, they are seeking to overturn the foreign policy decisions by the Executive and Legislative Branches.

committed under the Constitution to the Executive and Legislative Branches and thus non-justiciable under the first *Baker* factor. *See id.* (refusing to decide a challenge to a defense contractor's sales under the AECA because doing so would require the court to "intrude into our government's decision to grant military assistance to Israel"); *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 93 (D.D.C. 2016) (Brown Jackson, J.) (finding that because the evaluation of plaintiffs' "contention that the Executive Branch has abused its discretion—in APA terms—in refusing to evacuate U.S. citizens from Yemen . . . would necessarily involve second-guessing the 'wisdom' of [the State and Defense Departments'] discretionary determinations," the claim posed a non-justiciable political question).

In addition, "[j]udicial restraint in the area of foreign affairs is often appropriate because such cases 'frequently turn on standards that defy judicial application[.]'" *Harbury*, 522 F.3d at 419 (quoting *Baker*, 369 U.S. at 211). Here, any attempt to review adherence with the terms of the AECA would require the Court to determine whether "the foreign policy of the United States would be best served" by selling the arms at issue to the UAE. 22 U.S.C. § 2752(b). And Plaintiffs' argument that "there is no indication that the State Department adequately considered U.S. national security," Am. Compl. ¶ 65, simply highlights that they seek review of a national security policy judgment and thus that there are no standards for the Court to apply. Just as there is no "constitutional test for what is war," *see Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) (what constitutes "hostilities" for purposes of War Powers Resolution "too obviously calls for a political judgment to be one suitable for judicial determinations"), there are no judicially manageable standards to determine whether the State Department "adequately considered national security."[19] Rather, the relief being

[19] Plaintiffs also erroneously argue that the AECA requires the State Department to find that each arms sale will "strengthen the security of the United States and promote world peace," and that the "Department failed to provide any evidence that it adequately considered [this] factor[]," Am. Compl. ¶ 58. Even if Plaintiffs' reading of the AECA were correct (and it is not, *see supra* p.2 n.2), there are no judicially manageable standards to determine whether arms sales would "strengthen the security of the United States and promote world peace."

sought calls for value judgments to be made by the Secretary of State and reviewed by Congress, accounting for complex and evolving diplomatic and military circumstances that can be developed only through the conduct of the nation's foreign policy.

Also, the Court would not be able to decide the case "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Plaintiffs cite to an alleged decision not to sell F-35 planes to Turkey to argue that the State Department's decision to sell F-35 planes to the UAE represents a change in policy and the State Department's failure to explain this supposed change in policy violates the APA. Am. Compl. ¶¶ 72–75. But to evaluate this claim, the Court would not only have to examine the rationale for "stripp[ing] Turkey from participation in the F-35 program," *id.* ¶ 72, but would also need to decide whether the UAE deal actually represents a change in position, all while trying to discern whether and to what extent there are any national security or foreign relations issues that warrant treating the two countries differently. *See Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (stating that foreign policy decisions are "delicate, complex, and involve large elements of prophecy" and are "of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"); *Schneider*, 412 F.3d at 195 ("[T]he 'nuances' of 'the foreign policy of the United States are much more the province of the Executive Branch and Congress than of this Court.'" (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000)); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[I]n the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves.").

Moreover, the Court's consideration of this case would express a "lack of respect [that is] due [to] coordinate branches of government." *Baker*, 369 U.S. at 217. Plaintiffs claim that the State Department failed to adequately justify the decisions to sell arms to the UAE. Am. Compl. ¶¶ 56, 75.

But the DSCA provided the statutorily required notifications, which included public policy justifications and classified enclosures with additional information, to the appropriate Congressional members and committees. *See* Arms Sales Notification, 85 Fed. Reg. 83,910, 83,911 (Dec. 23, 2020); Arms Sales Notification, 85 Fed. Reg. 83,914, 83,915 (Dec. 23, 2020); Arms Sales Notification, 85 Fed. Reg. 84,319, 84,320 (Dec. 28, 2020). Those members and committees reviewed that information, and, Congress, either by voting to reject motions to discharge from committee proposed Joint Resolutions of Disapproval or by letting such proposals die in committee, determined that the Government should go forward with the three sales. *See, e.g.*, 166 Cong. Rec. S7317 (daily ed. Dec. 9, 2020). If enough members of Congress thought they lacked sufficient information to consider whether the United States should make the sales to the UAE, the appropriate committees could have requested additional information or members could have voted to disapprove the sales, which would have blocked the sales. *See* 22 U.S.C. § 2776(b)(1). They chose to not do so.[20] For the Court to now insert itself into the process to review the sufficiency of the Congressional notifications, as Plaintiffs request, would express a "lack of respect" due to the Executive and Legislative Branches. *Baker*, 369 U.S. at 217; *see also Aerotrade*, 387 F. Supp. at 977 (dismissing a claim that the President's failure to terminate aid to Haiti violated various statutes because "it is for Congress, not this Court, to re-examine the President's position" if necessary and noting that Congress had heard testimony on the issue and did not act); *Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (finding that both Congress and the President had approved aid).

[20] Moreover, Congressional oversight of the sales has continued. On April 15, 2021, Senator Menendez introduced a bill that would require, among other things, the President to "publicly disclose" the certification under 22 U.S.C. § 2776(h) "relating to any sale, export, or 16 transfer of F-35 aircraft and associated defense articles and defense services to the United Arab Emirates." SECURE F-35 Exports Act of 2021, S. Rep. No. 1182, 117th Cong. § 2 (2021). That bill has been referred to the Senate Committee on Foreign Relations.

Finally, the Court could not resolve this case without risking "multifarious pronouncements" from coordinate branches with respect to the sale of arms to the UAE. *Baker*, 369 U.S. at 217. The Executive Branch has determined that selling certain defense articles and services to the UAE is appropriate, and Congress has not blocked those sales. Plaintiffs would have the Court second-guess that determination, at a potentially considerable cost to the United States' foreign relations. *See Talenti*, 102 F.3d at 578 ("The suspension of foreign assistance is a contentious act that may threaten diplomatic relations and undermine American influence abroad."); *Campbell*, 203 F.3d at 28 (Silberman, J., concurring) ("A pronouncement by another branch of the U.S. government that U.S. participation in Kosovo was 'unjustified' would no doubt cause strains with NATO.").

For all these reasons, the political-question doctrine affords another ground for dismissal here. As another court aptly stated: "War and violence are regrettable realities of this world, and in a country that celebrates freedom and equality, choosing which nations to support is a decision of grave significance. . . . But these difficult questions are left to the political branches, not to the courts." *Abusharar v. Hagel*, 77 F. Supp. 3d 1005, 1007 (C.D. Cal. 2014). Simply put, "[i]f Plaintiff[s] seek[] to change foreign policy, [they] must prove the worthiness of [their] cause in the political arena," not in a federal court. *Id.*

V. The Court Should Decline to Provide Discretionary Relief.

Even if Plaintiffs' claim were justiciable despite all the hurdles discussed above, the Court nevertheless should decline to adjudicate it. All of the relief Plaintiffs seek—injunctive and declaratory, *see* Am. Compl., Prayer for Relief—is discretionary, *see Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207–08 (D.C. Cir. 1985) (Scalia, J.). The Court should decline to exercise any discretion it may have in this case because of the sensitive foreign affairs and national security issues it raises.

In *Sanchez-Espinoza*, the D.C. Circuit concluded that "it would be an abuse of our discretion to provide discretionary relief" in a case involving foreign policy issues. 770 F.2d at 208. The plaintiffs

there brought an APA challenge to the Government's alleged "plan . . . to destabilize and overthrow the government of Nicaragua," which purportedly included the provision of substantial "financial assistance" to train paramilitary groups. *Id.* at 205. Without deciding whether the case was "so entirely committed to the care of the political branches as to preclude" review under the political question doctrine, the Court nonetheless determined that "the withholding of discretionary relief" was required. *Id.* at 208. The Court observed that the conduct alleged in the complaint had "received the attention and approval of the President, the Secretary of State, [and other Executive Branch officials], and involve[d] the conduct of our diplomatic relations with [several] foreign states." *Id.* Under such circumstances, the Court concluded it would be inappropriate to weigh in on "so sensitive a foreign affairs matter." *Id.*

The same reasoning applies here. Just as in *Sanchez-Espinoza*, the actions that Plaintiffs ask this Court to review had received the attention of the Secretary of State, as well as Congress. Am. Compl. ¶¶ 49, 51. After a further review by the State Department, the Department determined that the sales should proceed. *Id.* ¶¶ 2, 52. And, plainly, the sales involve the conduct of our diplomatic relations with a foreign state and also concern the Executive and Legislative Branches' determinations that such sales will promote U.S. national security interests. *See* 22 U.S.C. § 2751; *see also Al-Aulaqi*, 727 F. Supp. 2d at 42 (declining to issue "discretionary relief that would prohibit military and intelligence activities against an alleged enemy abroad"). Thus, even assuming *arguendo* that these factors (and those discussed above) were insufficient to render Plaintiffs' claim unreviewable under the APA or a non-justiciable political question, they at least warrant the withholding of any discretionary relief.

CONCLUSION

For the foregoing reasons, the Court should dismiss the case.

May 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2021, I electronically filed the foregoing Motion to Dismiss using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

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