IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMIN ALLAWI ALI, et al. *Plaintiffs*, v. MOHAMED BEN ZAYED AL-NAHYAN, et al., *Defendants*.	No. 1:23-cv-576-RDM

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, seven Yemeni citizens, allege that they were injured by airstrikes in Yemen in 2015 and 2016 carried out by a coalition of nine countries, including the Kingdom of Saudi Arabia and the United Arab Emirates (UAE) supporting the Yemeni government against the Iran-backed Houthi rebels. Compl. ¶¶ 1-3, Dkt. 1. The Department of State authorized arms sales to these two strategic partners under the foreign military sales provisions of the Arms Export Control Act (AECA), 22 U.S.C. § 2752. Plaintiffs claim that these arms sales, and an alleged failure to monitor the end-use of those weapons in Yemen, caused Plaintiffs' injuries. As a result, Plaintiffs request that State's decision "to approve the arm sales . . . be overturned by the judicial branch," Compl. ¶ 226, and ask this Court to "cease *all* further military sales" of defense articles from the United States to Saudi Arabia and the UAE. Compl. ¶ 228 (emphasis added). Plaintiffs also request an injunction compelling DOD to conduct "a full investigation" into the end-use of weapons sold to Saudi Arabia and the UAE, as well as Court-ordered "restrictions on future sales." *Id.*

Perhaps recognizing the strikingly broad nature of their request for relief, Plaintiffs' opposition to Defendants' motion to dismiss attempts to recast their claims and narrow the scope of relief they seek. Plaintiffs reframe their effort to overturn State's decisions to sell defense articles to Saudi Arabia and the UAE as a simple question of statutory interpretation under the Administrative Procedure Act. Plaintiffs contend that they are "not asking this Court to 'second-guess' decisions regarding foreign policy or defense," and that Plaintiffs are in "no way seeking to interfere with any substantive decision regarding foreign relations or defense." Pls.' Opp'n to United States Government Defs.' Mot. to Dismiss at 38, Pls.' Opp'n (Pls.' Opp'n).

But the allegations in Plaintiffs' Complaint and the arguments in their brief make clear that is precisely what they are doing. Plaintiffs disagree with the Secretary of State's decisions to authorize the sale of military weapons to Saudi Arabia and the UAE from 2015 to 2021 and ask this Court to determine whether the Secretary correctly assessed that each sale "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). They also ask this Court to find that Saudi Arabia and the UAE have

engaged in a "consistent pattern of gross violations of internationally recognized human rights," *id.* § 2304(a)(2), a judgment that State has not made about either country. Such a decision and injunction would restrict the United States from providing any security assistance, as that term is defined in § 2304(d)(2), to these countries. *Id.*

Plaintiffs seek to enjoin the foreign military sales program, which the United States considers to be "a fundamental tool of U.S. foreign policy and national security."[1] In doing so, Plaintiffs seek to entangle the Court in sensitive foreign policy, national security, and military judgments concerning the sale of military arms, and monitoring of the uses of these arms, to two of the United States' most important partners in the Middle East. Every court to consider a challenge to the United States' provision of military aid to another sovereign has concluded that such claims are non-justiciable. The same is true here, and this Court should dismiss Plaintiffs' claims for any of three independent reasons.

First, Plaintiffs lack standing because it is undisputed that Defendants did not cause Plaintiffs' injuries and their allegations of past injuries are insufficient to support a claim of injunctive relief against the United States. As Plaintiffs acknowledge, as of 2021, the United States is not providing foreign military sales of weapons to Saudi Arabia or the UAE for use in offensive operations in Yemen. Compl. ¶ 227.[2] Relevant here, the Coalition's "airstrikes have stopped," and "Yemen has witnessed the longest period of de-escalation since the war began."[3] Additionally, in December 2023, the U.N. Special Envoy for Yemen announced the parties' commitment to a set of measures to implement a nation-wide ceasefire and improve living conditions.[4] Given the changed circumstances in Yemen since Plaintiffs' alleged injuries in 2015 and 2016, and their already attenuated theory of causality,

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[1] Press Release, U.S. Dep't of Def., *Department of Defense Unveils Comprehensive Recommendations to Strengthen Foreign Military Sales* (June 13, 2023), https://perma.cc/6UBM-J79E (DOD Press Release).

[2] Joseph R. Biden, *Remarks by President Biden on America's Place in the World* (Feb. 4, 2021), https://perma.cc/6ESM-JG5F ("We are ending all American support for offensive operations in the war in Yemen, including relevant arms sales.").

[3] U.S. Dep't of State, Dubai Regional Hub, *Special Online Press Briefing with Tim Lenderking, U.S. Special Envoy for Yemen* (Aug. 23, 2023), https://perma.cc/A9U2-BPAP

[4] U.N., OSESGY, *Update on Efforts to Secure a UN Roadmap to End War in Yemen* (Dec. 23, 2023), https://perma.cc/RT3B-3YC3

Plaintiffs have not demonstrated that they have standing to challenge Defendants' authorizations of the sales of arms—or the monitoring of such arms—or sufficiently imminent injury to support prospective injunctive relief barring the future sale of arms to Saudi Arabia and the UAE.

Second, Plaintiffs' claims are independently barred by the APA. Plaintiffs ask this Court to determine whether arms sales to Saudi Arabia or the UAE "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), which is a foreign policy determination that is decidedly committed to the Secretary of State's discretion and therefore unreviewable under the APA. The implementation of end-use monitoring is not final agency action, and even if it were, is likewise committed to agency discretion.

Third, Plaintiffs' claims are barred by the political question doctrine. By requesting that the Court declare that the Government's sales authorizations were arbitrary and capricious and enjoin future sales, Plaintiffs effectively ask the Court to substitute its judgment for that of the Executive and Legislative Branches regarding the delicate decision of whether the United States should sell defense articles and services to Saudi Arabia and the UAE, and how the United States should monitor the uses of such weapons. But such decisions rest on complex foreign policy and national security judgments which include weighing the benefit of any given sale along with human rights considerations and other risks of misuse; they are committed, under the Constitution and the AECA itself, to the political branches and are not justiciable.

ARGUMENT

I. Plaintiffs Lack Article III Standing to Challenge the State Department's and DOD's Decisions to Authorize Sales of Defense Articles and Services to Saudi Arabia and the UAE.

As Defendants argued in their motion to dismiss, Plaintiffs have not demonstrated Article III standing to challenge the authorization of foreign military sales (FMS) of defense articles to Saudi Arabia or the UAE, and they also lack standing to challenge DOD's end-use monitoring program. *See* Federal Defs.' Mot. to Dismiss at 22-33, Gov. MTD (Gov. MTD). Plaintiffs' opposition largely fails to respond to Defendants' arguments about injury, causation, and redressability and fails to address most of the key authorities—including most fatally, numerous cases holding that a plaintiff lacks

standing against the United States where the injuries were caused by a foreign sovereign. Gov. MTD at 28-29 (citing cases). This Court should dismiss Plaintiffs' claims for lack standing.

A. The State Department and DOD did not cause Plaintiffs' alleged injuries, and Plaintiffs' allegations of past injuries are insufficient to support prospective injunctive relief against the United States.

As Defendants argued in their motion, Plaintiffs failed to establish that State and DOD were the cause of their alleged injuries in 2015 and 2016. Gov. MTD at 22-33. To the contrary, Plaintiffs' Complaint admits that they were injured not by the United States, but rather by attacks from the Coalition in 2015 and 2016. Compl. ¶¶ 13-25; *id.* (alleging Plaintiffs "suffered significant bodily harm and property loss due to attacks by the Coalition"). Plaintiffs did not include any facts supporting their conclusory allegation that the weapons used in these two attacks were purchased through the FMS program, *id.* ¶ 164, or that the United States was involved in any of strategic decisions that led to these tragic bombings. As Defendants argued, attributing the alleged harm suffered by Plaintiffs to State's decision to authorize FMS arms sales to Saudi Arabia and the UAE involves an attenuated chain of causation involving the independent actions by multiple sovereign nations that is insufficient to support Article III standing against Defendants. Gov. MTD at 30.

Plaintiffs acknowledge in their opposition, as they must, that "the injuries were caused by the acts of third parties, Saudi Arabia and UAE, the leaders of the Coalition." Pls.' Opp'n at 24. Plaintiffs, however, contend that Defendants "grossly misstate the legal standard for establishing Plaintiffs' injuries are 'fairly traceable' to their actions." Pls.' Opp'n at 25. Plaintiffs rely on *Massachusetts v. EPA*, 549 U.S. 497 (2007), and argue that it is sufficient for them to show that Defendants' prior approvals of arms sales need only have made "incremental" contributions to causing their injury. Pls.' Opp'n at 25. Plaintiffs' reliance on *Massachusetts* is misplaced because "[n]o state is involved in this case," and Plaintiffs here face a significantly higher bar in demonstrating causation. *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007).

Under this higher standard, Plaintiffs "cannot establish an Article III injury" against the United States "based on the independent actions of some third party." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 990 (D.C. Cir. 2021) (citation omitted), *rev'd and remanded sub nom. West Virginia v. EPA*, 597 U.S. 697

(2022). Where standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," standing "is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (citations omitted). That is because in such circumstances "causation" typically "hinge[s] on the response of . . . [a] third party to the government action or inaction." *Id.* Courts are particularly "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013).

The burden to demonstrate standing based on a third party's actions is even greater where a claim puts the conduct of a foreign sovereign at issue: courts have repeatedly concluded that plaintiffs lack standing to challenge an action by the United States where a foreign government engaged in the alleged injurious conduct or where future injury would depend on a sovereign's independent actions. *See, e.g.*, *Indigenous People of Biafra v. Blinken*, 639 F. Supp. 3d 79, 86 (D.D.C. 2022). Plaintiffs failed to address the numerous cases holding that a plaintiff cannot challenge an action by the United States government where "the third party upon whose conduct redressability depends is a foreign sovereign." *Cierco v. Mnuchin,* 857 F.3d 407, 419 (D.C. Cir. 2017); *Compare* Gov. MTD at 28-29 (citing cases), *with* Pls.' Opp'n at 24-26 (not addressing cases involving foreign sovereigns). This includes *Biafra*, in which the court concluded that Nigerian plaintiffs lacked standing to seek an injunction against the United States to prevent the delivery of aircraft purchased through the FMS program. *See Biafra*, 639 F. Supp. 3d at 86. The court in *Biafra* correctly concluded that plaintiffs did not show causation necessary to support standing where their "alleged injury does not flow directly from the [U.S. Government's] delivery of the aircraft, but from the actions of the Nigerian government." *Id.* Plaintiffs failed to address these cases or engage with this crucial issue. *See Hawthorne v. Rushmore Loan Mgmt. Servs., LLC*, 20-cv-393-RDM, 2021 WL 3856626, at *12 (D.D.C. Aug. 30, 2021) (stating a court "may treat those arguments that the plaintiff failed to address as conceded" (citation omitted)).

The crux of Plaintiffs' response as to causation is that "[w]ithout the weapons transfers approved by the Govt. Defendants, the Coalition would not have the military capacity to conduct the

attacks on the civilian population of Yemen" and that Defendants "actions have been essential to the Coalition's massive attacks on civilians in Yemen." Pls.' Opp'n at 25. As support, Plaintiffs rely primarily on: allegations about the total amount of weapons sales between the United States and the Coalition between 2015 and 2021; sales through the FMS program during that same time period; a foreign report in 2017 that "three out of every five weapons used by the Coalition was U.S. made"; and an allegation that "U.S.-made bombs dropped by the Coalition are regularly found at sites in Yemen where innocent civilians have been killed or injured." *Id.* at 25-26 (quoting Compl. ¶ 3). These allegations, Plaintiffs believe, "allow the inference that the Govt. Defendants' approval of FMS to the Coalition was a 'substantial factor motivating the third parties' actions.'" *Id.* at 26 (quoting *Am. Freedom L. Ctr. v. Obama,* 821 F.3d 44, 49 (D.C. Cir. 2016)). But these allegations are insufficient to demonstrate that the United States was a substantial factor motivating the alleged actions of Saudi Arabia and the UAE in Yemen in 2015 and 2016.

In essence, Plaintiffs are arguing that foreign military sales over a seven-year time span was a substantial motivating factor in the two discrete airstrikes carried out in Yemen that injured Plaintiffs. But as Defendants argued, attributing the alleged harm suffered by Plaintiffs to State's approval of *all* FMS sales to Saudi Arabia and the UAE (including for numerous defense articles and services used in places other than Yemen), involves an attenuated chain of causation that depends on the independent actions of multiple sovereign nations that are no longer party to this lawsuit. Gov. MTD at 30.[5] In particular, Plaintiffs ground this chain of events on speculation regarding the actions of third-party military officials of Saudi Arabia and the UAE. *Id.* at 28. Plaintiffs have not alleged that the weapons used in the 2015 or 2016 attacks were procured through FMS sales, as opposed to weapons that were provided by other countries or already existed in the arsenal of any of the members of the Coalition. Similarly, Plaintiffs' allegation that "U.S.-made bombs dropped by the Coalition are regularly found at sites in Yemen where innocent civilians have been killed or injured," Pls.' Opp'n at 25-26, is

[5] Plaintiffs voluntarily dismissed all foreign defendants representing Saudi Arabia and the UAE, and "there are no representatives of the Governments of Saudi Arabia or U.A.E. or any other foreign government remaining as Defendants in this case." Dkt. 39.

insufficient to demonstrate that FMS sales caused Plaintiffs' injury or that Plaintiffs were present at any of those sites. *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) ("Of course, the plaintiffs must demonstrate that *they* would be injured."). Finally, Plaintiffs' assertions that Saudi Arabia and the UAE did not have the "military capacity" to conduct airstrikes in Yemen without weapons procured through FMS is a conclusory and unsupported allegation.

Nor have Plaintiffs demonstrated that they face an imminent or substantial risk of being harmed by Defendants' approvals of arms sales or end-use monitoring investigations in the future, as they must to support their claim for prospective injunctive relief against the United States. Gov. MTD at 23-27. Plaintiffs must demonstrate that future injuries are "'certainly impending,'" or that there is "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). Instead, Plaintiffs (incorrectly) assert that Defendants take the position that "***none*** of the 18,000 plus civilian victims of Coalition bombings, including Plaintiffs, would have standing to sue for injunctive relief." Pls.' Opp'n at 20 (emphasis in original). That misunderstands the government's argument. Defendants argue that these Plaintiffs have not satisfied their burden of showing that their injuries can serve the basis for relief *against the United States* where the United States did not cause such injuries, where Plaintiffs acknowledge that their "risk of future injuries" arises from "Coalition attacks," not from attacks by the United States, where the risks of injury from the Coalition have markedly decreased given that the Coalition's airstrikes have stopped, and where the United States is not providing weapons through FMS to Saudi Arabia or the UAE for offensive operations in Yemen.

Plaintiffs do not acknowledge, much less address, that events on the ground in Yemen have changed substantially since Plaintiffs' alleged injuries in 2015 and 2016, and any risk of future injury is markedly decreased because the Coalition has stopped airstrikes in Yemen. Gov. MTD at 25-26. Moreover, as of 2021, the United States ceased providing weapons through FMS to be used for offensive operations in Yemen by the Coalition. Compl. ¶ 227; *supra*, n.2. Plaintiffs' only response is that the Biden administration "appear[s] to be attempting to create a factual ambiguity as to whether there will be further FMS to the Coalition." Pls.' Opp'n at 27 n.6. But there is no ambiguity—

Plaintiffs have not, and cannot, allege that the United States has authorized foreign military sales for offensive operations to either Saudi Arabia or the UAE for use in Yemen since 2021, which is perhaps why the Complaint does not include allegations regarding sales to Saudi Arabia or the UAE that post-date 2021. Although Plaintiffs speculate that there *could* still be "defensive" sales to Saudi Arabia and the UAE that *could* be misused, *id.*, they do not point to any such problematic defensive weaponry sale or misuse. Such speculation is insufficient because it again "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562 (citation omitted).

The bulk of Plaintiffs' arguments regarding standing are intended to show that they face a risk of "ongoing bombings by Coalition forces," Pls.' Opp'n at 20-23, instead of showing, as they must, that that (1) the United States' future sales of weapons and future end-use monitoring investigations will substantially increase the risk that Plaintiffs suffer future injuries; and (2) with that increase taken into account, there is a substantial probability that Plaintiffs will suffer future injuries. Gov. MTD at 24. Plaintiffs do not address, much less apply, this increased-risk-of-harm test from the Court of Appeals, and as discussed above, have not demonstrated that they face an increased risk of harm. *Compare* Gov. MTD at 24-26*, with* Pls.' Opp'n at 20-24.

Plaintiffs rely primarily on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), to argue that they face a "reasonable prospect of future harm." Pls.' Opp'n at 22-23. But that case is inapposite: it did not involve independent actions by a sovereign nation. Rather, the plaintiffs in that case sought relief from an agency policy under which they alleged they would lose access to natural resources. *SCRAP*, 412 U.S. at 685. But *SCRAP's* broad approach to standing has been largely superseded by decisions such as *Lujan* and *Clapper*. *See Fla. Audubon Soc'y. v. Bentsen*, 94 F.3d 658, 671–72 (D.C. Cir. 1996) (describing *SCRAP* as an "outlier" after *Lujan*); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) ("The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court"); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 904 n.16 (Del. 1994) (*SCRAP* "ha[s] long been called into question, and narrowed to the point of invalidation").

Lujan and *Clapper* clarified what qualifies as an imminent injury-in-fact,[6] and as Defendants discussed in their opening brief and above, Plaintiffs' allegations of injury do not suffice.

Finally, Plaintiffs assert that the question of whether future harm is reasonably likely is a question "for the finder of fact" and "cannot be resolved on a motion to dismiss." Pls.' Opp'n at 23, *id.* at 24. But these are not factual disputes. Plaintiffs bear the burden of pleading that the United States caused their injury and that a future risk of injury is imminent and not speculative. Plaintiffs have not done so. Defendants' discussion of the many ways in which Plaintiffs' allegations rely on a speculative and attenuated chain of events does not create a factual dispute; it demonstrates that Plaintiffs' allegations of future injury are far too speculative to support standing for injunctive relief against the United States.

B. The requested relief will not redress Plaintiffs' alleged injury.

As Defendants argued in their motion, redressing Plaintiffs' alleged injuries depends upon the actions of third parties that the Court "cannot presume either to control or to predict," *Lujan*, 504 U.S. at 562 (citation omitted), which is fatal to redressability. Plaintiffs again fail to discuss the numerous cases recognizing that an order directing the United States to take certain actions would not redress a plaintiff's injuries because it is entirely speculative how a foreign government would react. *See* Gov. MTD at 32-33. Plaintiffs instead provide only a conclusory response: an injunction ordering the government "to comply with the AECA and [the] FAA before approving any further FMS to the Coalition" will "redress Plaintiffs' injuries because either the Govt. Defendants' compliance with the AECA and FAA will prevent any further FMS to the Coalition, or the Govt. Defendants will impose harm reduction conditions required by the AECA and FAA on the Coalition to prevent or at least

[6] To the extent that Plaintiffs intend to rely on ongoing emotional harm, mere "emotional harm—in and of itself—is not sufficient to satisfy Article III's injury in fact requirement" without more. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 25 (D.D.C. 2010) (citing *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995)). Here, Plaintiffs have not alleged that emotional harm or harms from "lack of access to medical care, food, water, and infrastructure," Pls.' Opp'n at 23, are harms that stem from a legally protected right, or would otherwise be judicially cognizable in this context. *Al-Aulaqi*, 727 F. Supp. 2d at 25.

reduce further injuries to Plaintiffs and other innocent civilians." Pls.' Opp'n at 27. But this argument is merely a legal conclusion about Defendants' compliance with the law, *see infra* Section II, and courts "do not assume the truth of legal conclusions," or "accept inferences that are unsupported by the facts set out in the complaint." *Kareem v. Haspel*, 986 F.3d 859, 865–66 (D.C. Cir. 2021) (citation omitted). That is because "the plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 866 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). As such, Plaintiffs have not demonstrated redressability. *See* Gov. MTD at 31-33.

II. Plaintiffs' APA claims should be dismissed.

As set forth in Defendants' motion to dismiss, Plaintiffs' claims are independently barred under the APA because they implicate foreign policy decisions committed to agency discretion under law and because an end-use monitoring investigation is not final agency action. Gov. MTD at 33-42. Plaintiffs allege that Defendants have violated the APA by: (1) their "decision to approve" and "to continue to approve the arm sales," to Saudi Arabia and the UAE, Compl. ¶¶ 219, 226, and (2) failing to sufficiently investigate the end use of arms by those countries, *id.* ¶ 227. Plaintiffs now claim in their opposition that they are not "'second-guessing' the Govt. Defendants' decisions" to approve arms sales; they frame their request as "very limited relief of statutory interpretation and enforcement." Pls.' Opp'n at 36, 38. They state that "Plaintiffs are merely seeking an injunction requiring the Govt. Defendants to comply with the court-clarified statutory restrictions of the AECA and FAA before providing any further FMS to the Coalition," and "seeking an order from the Court that, going forward, the Govt. Defendants must conduct end-use monitoring as required by AECA Section 2785(a)(2) before there can be any further FMS to the Coalition." *Id.* at 37-38.

Contrary to Plaintiffs' representations about the breadth of relief they seek, an order enjoining the United States from engaging in *all* FMS arms sales with two of the United States' most important partners in the Middle East is not a "very limited" request for relief. *Id.* at 38. The United States views FMS sales as "a fundamental tool of U.S. foreign policy and national security." *See supra*, DOD Press Release at n.1. As discussed below, Plaintiffs request would require this Court to make determinations as to whether any individual arms sale "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), which is a foreign policy determination that is decidedly committed to the Secretary's discretion and therefore unreviewable under the APA. And end-use monitoring is not final agency action, and even if it were, is likewise committed to agency discretion. The Court should dismiss these claims.

A. Approval of arms sales is committed to the Secretary's discretion.

An agency action is committed to agency discretion and unreviewable where, as here, there are "no judicially manageable standards" by which to assess the action and where the nature of the decision counsels against judicial review. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); Gov. MTD at 33-36. As Defendants argued, the AECA and FAA require broad deference to the Secretary's decisions to authorize foreign military sales and provide no judicially manageable standard that would allow this Court to assess the Secretary's decision to make a particular military sale. *Id.* at 33-36.

Plaintiffs urge that "[t]he AECA and FAA's limitations on [the] sales of U.S.-origin arms provides a statutory reference point," for review under the APA. Pls.' Opp'n at 29 (citation omitted). In particular, Plaintiffs appear to rely on language in 22 U.S.C. § 2754 (AECA) and 22 U.S.C. § 2304(a) (FAA) as the statutory text that will guide this Court's review of arms sales to Saudi Arabia and the UAE.[7] Pls.' Opp'n at 34-35. Section 2754 provides that "[d]efense articles and defense services shall be sold or leased by the United States Government . . . to friendly countries solely for internal security, for legitimate self-defense." 22 U.S.C. § 2754. The FAA, in section 2304(a)(2), separately restricts "security assistance" to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights," subject to certain exceptions. *Id.* § 2304(a)(2). Plaintiffs' accounting of the statutory provisions involved is incomplete, however, and does not address the language in Section 2752, under which the Secretary must ultimately decide "whether there will be a sale" to a country and whether such sale "will be integrated with other United States activities and to the end that the foreign policy of the United States would be best served

[7] Plaintiffs also cite to 22 U.S.C. § 2778(a)(1), which they describe as creating certain restrictions for direct commercial sales. Pls.' Opp'n at 34; *see* Gov. MTD at 16-17 (discussing direct commercial sales). Only foreign military sales, not direct commercial sales, are at issue in this lawsuit.

thereby," "taking into account other United States activities abroad, such as military assistance, economic assistance, and the food for peace program." *Id.* § 2752(b).[8]

Based on the language in these statutes, Plaintiffs believe this Court can easily "determine whether the Govt. Defendants violated Congressional policy set by the AECA and FAA by contributing to civilian harm in Yemen despite knowing that U.S.-origin defense articles were used in airstrikes against civilians." Pls.' Opp'n at 30. Plaintiffs also believe "this Court is well-equipped to confirm Saudi Arabia and the UAE's gross violations of human rights" and to "adjudicate whether State and DOD's decisions to continually approve arms transfers to the countries effectuated a purpose in the AECA or not." *Id.* at 35.

But the question of whether a particular sale would "best serve[]" the "foreign policy of the United States," 22 U.S.C. § 2752(b), involves a "complicated balancing of a number of factors which are peculiarly within [the Secretary's] expertise," *Heckler*, 470 U.S. at 831. Plaintiffs do not supply any standard under which this Court could reasonably determine whether any individual arms sale "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), or how this Court should determine whether a particular military sale is "solely for internal security" or "for legitimate self-defense," *id.* §2754. How should this Court weigh the risks of a particular sale, including risks of misuse or "human rights conditions," with the United States' diplomatic, geopolitical, and economic goals in a country or region, including the "long-term implications for regional security"?[9] The statutes do not provide any standards for this Court to decide whether the sale of a weapon would integrate into a country's existing arsenal or address particular military or strategic needs in a conflict.

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[8] Section 2752(c) also provides for coordination among diplomatic representatives of the United States to ensure that "recommendations of such representatives pertaining to sales are coordinated with political and economic considerations." 22 U.S.C. § 2752(c).

[9] *See* U.S. Dep't of State, Bureau of Political-Military Affairs, *U.S. Arms Sales and Defense Trade* (Jan. 20, 2021), https://perma.cc/ZZ64-RHUW ("For this reason, the United States takes into account political, military, economic, arms control, and human rights conditions in determining the provision of military equipment and the licensing of direct commercial sales to any country. Each proposed transfer we review is carefully assessed on a case-by-case basis, and approved if found to further U.S. foreign policy and national security interests.").

One need only peruse foreign military sales on the DSCA website to understand the impossibility of judicial resolution of such a task. To take a few examples: How should this Court weigh a $1 billion proposed FMS to Saudi Arabia that State has assessed "will improve Saudi Arabia's capability to meet current and future threats and increase its interoperability with the U.S.," and "support the foreign policy goals and national security objectives of the United States by improving the security of a friendly country that is a force for political stability and economic progress in the Middle East."[10] Or to take an example from another country, how would a court make a determination about Ukraine's request for a "20 Mi-17 helicopter[]," "[o]ne Patriot air defense battery and munitions," "[m]ore than 1,000 Javelin anti-armor systems," and assess how such aid will affect the United States' "urgent security assistance priority to provide Ukraine the equipment it needs to defend itself against Russia's war against Ukraine"?[11] How would a Court weigh whether the sale of an "F-35" to the UAE "represents a significant increase in capability and will alter the regional military balance"? *See* 85 Fed. Reg. 83910 (Dec. 23, 2020). As these examples indicate, a sovereign's requests for military weapons calls for highly technical military and diplomatic assessments, which implicates a highly discretionary determination by the Secretary that a particular sale is warranted under § 2752(b).

Similar questions are raised by the FAA's restrictions on security assistance: how is this Court to determine whether Saudi Arabia or the UAE engaged in "a consistent pattern of gross violations of internationally recognized human rights," such that those countries are restricted from receiving *any* security assistance from the United States? 22 U.S.C. § 2304(a)(2). As Defendants previously stated, neither the President nor State has decided that Saudi Arabia or the UAE have engaged in a consistent pattern of gross violations of human rights. Gov. MTD at 35. To the extent that Plaintiffs base their argument on the "Country Reports" referred to in their opposition, Pls.' Opp'n at 17, these reports did not "determine" that either Saudi Arabia or the UAE have engaged in a consistent pattern

[10] *See* Defense Security Cooperation Agency, *Saudi Arabia – Blanket Order Training* (Dec. 22, 2023), https://perma.cc/Q9NQ-9BXS.

[11] *See* U.S. Dep't of State, Bureau of Political-Military Affairs, *U.S. Security Cooperation with Ukraine* (Mar. 12, 2024), https://perma.cc/8RCJ-7GAS.

of gross violations of internationally recognized human rights, such that those countries would be ineligible for all security assistance under Section 2304(a)(2).

Neither Plaintiffs nor the statutory text supply an answer to these questions or a judicially manageable standard that would allow this Court to assess the Secretary's decision to approve the sale of arms. The judicial branch lacks the technical, diplomatic, military, intelligence, and foreign affairs expertise to make such a determination. The Secretary, however, does possess this expertise: whether and under what conditions to approve arms sales to Saudi Arabia and the UAE involve "complicated balancing of a number of factors which are peculiarly within [the Secretary's] expertise," *Heckler*, 470 U.S. at 831, and are therefore in the heartland of the Secretary's discretion to determine under § 2752(b) that a particular sale is warranted. These are precisely the types of decisions that are committed to agency discretion and therefore unreviewable under the APA.

The Presidential Policy Directives on the process and criteria to guide U.S. Arms Transfers do not alter this analysis.[12] The Obama-era directive in place in 2015 and 2016 sets forth ten "national security and foreign policy goals," as well as 13 criteria to ensure that a sale of arms "maintains the appropriate balance between legitimate arms transfers to support U.S. national security and that of our allies and partners," and does not "serve to facilitate human rights abuses or violations of international humanitarian law or otherwise undermine international security." *Id.*; *see also* Dkt. 37-2 at 15-16 (discussing these criteria). These criteria range from considerations about whether a sale will ensure "consistency with U.S. regional stability interests," to whether a sale "supports U.S. strategic, foreign policy, and defense interests through increased access and influence, allied burden sharing, and interoperability," and the risks that a recipient "would use the arms to commit human rights abuses." Obama Mem. Plaintiffs do not address these directives or argue that they alter the analysis,

[12] *See* Press Release, White House, *Presidential Policy Directive—United States Conventional Arms Transfer Policy* (Jan. 15, 2014), https://perma.cc/8ZV4-LLYX (Obama Mem.); *see also* Donald J. Trump, *National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy* (Apr. 19, 2018), https://perma.cc/QVV6-DFQ7; Joseph R. Biden, *Memorandum on United States Conventional Arms Transfer Policy* (Feb. 23. 2023), https://perma.cc/XW32-WZ4J.

and weighing these criteria similarly involve a complicated balancing of considerations of foreign policy, military capability, human rights risks, and technological vulnerabilities presented by each sale. These criteria do provide any judicially manageable standards that would guide this Court in reviewing the Secretary's decision, and the nature of this decision counsels against review. *See infra*, n.13.

Plaintiffs do not address the numerous cases holding that foreign policy and national security judgments are committed to agency discretion, except to remarkably assert that Defendants "have not made the case that such interests are at stake here." Pls.' Opp'n at 30. It is hard to imagine a case that more directly implicates foreign policy than one involving the Secretary's decision to authorize the sale of military arms to strategic partners in the Middle East. The case on which Plaintiffs primarily rely does not lead to different conclusion. *Id.* at 32-36 (relying on *Loc. 1219, Am. Fed'n of Gov't Emps. v. Donovan*, 683 F.2d 511, 514 (D.C. Cir. 1982)). In *Local 1219*, the court considered whether "settling a complaint of union election irregularities is 'agency action committed to agency discretion by law,' and is thus unreviewable under the APA." *Loc. 1219*, 683 F.2d at 514 (quoting 5 U.S.C. § 701(a)(2)). In that case, the court considered whether the Assistant Secretary of Labor Management Relations was granted the discretion to pursue settlement remedies "as he considers appropriate." Unlike here, the agency had "promulgated regulations setting forth specific standards for labor organizations and a detailed scheme for enforcing compliance with those standards," that could provide judicially manageable standards for assessing the appropriate remedy for settlement of a labor dispute. *Id.* at 515. In rejecting the argument that "reviewing settlement agreements" and "settlement negotiations involve[d] special matters of agency expertise," the court noted that "courts are well acquainted with the task of approving settlements of enormous complexity." *Id.* at 516.

Far from being "directly applicable to the issues presented here," Pls.' Opp'n at 33, deciding whether to approve arms sales to a country or whether a country engaged in a consistent pattern of gross violations of human rights is not remotely analogous to a court's review and approval of settlement conditions. Moreover, no such "detailed" regulatory scheme exists that would provide this Court with standards by which to judge the Secretary's decision to authorize foreign military sales.

Loc. 1219, 683 F.2d at 514-15.[13] Indeed, the D.C. Circuit has never relied on *Local 1219* in the foreign affairs context, and Plaintiffs did not address the cases cited by Defendants in which the D.C. Circuit has determined that judgments like the one here involving national security and foreign policy are not reviewable under the APA. *See* Gov. MTD at 34-35 (citing *Dist. No. 1*, 215 F.3d at 42; *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997)).

In sum, the approval of the sale of arms to foreign countries is fraught with political and foreign affairs considerations, often not publicly known. Congress has committed those determinations, subject to ongoing congressional reporting and review requirements, to the Secretary's discretion. The broad language in the AECA and FAA provides no judicially manageable standards that would allow this Court to assess the Secretary's decision to make a particular sale. Because these decisions are committed to agency discretion under law, this Court should dismiss this claim.

B. End-use monitoring is not challengeable under the APA.

The AECA requires that the "President shall establish a program which provides for the end-use monitoring of [defense] articles and services." 22 U.S.C. § 2785(a)(1); Gov. MTD at 17 (discussing end-use monitoring). "To the extent practicable" the end-use monitoring program "shall be designed to provide reasonable assurance that" the recipient of the arms complies with requirements imposed by the United States and that the articles and services are being used for the purposes they were provided. *Id.* § 2785(a)(2). The only requirements the AECA imposes on the "conduct" of "carrying out" the end-use monitoring program—as opposed to broad guidance on the design of the program—

[13] And even when "regulations provide specific criteria" to govern the agency's decision, a court may still find that "the subject matter of the agency's decision does not admit of judicially manageable standards." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000). In *District Number 1*, a regulation provided specific standards for the Maritime Administration ("MarAd") to use to evaluate an application to transfer a vessel's registry out of the United States, including, the condition of the vessel, the identity of the transferee, and the interest in retaining the vessel. *Id.* at 39–40. Even though the agency's decision was guided by these regulatory standards, the D.C. Circuit found that because "the primary factors driving the MarAd's decision are national defense, the adequacy of the merchant marine, foreign policy, and the national interest," a review of the agency's decision would constitute impermissible "second guessing" of the Executive's "judgments on questions of foreign policy and national interest." *Id.* at 41-42. As Defendants argued, regardless of whether there are judicially manageable standards for review, the nature of the decision to approve a foreign military sale counsels against review under the APA. Gov. MTD at 34-35.

are found in § 2785(b), which states that the President "shall ensure that the program provides for the end-use verification" of certain defense articles and services and "prevents diversion … of technology" in defense articles. *Id.* § 2785(b)(1)-(2).

It is unassailable that State and DOD have established end-use monitoring programs that fulfill their basic statutory obligation. *See* Gov. MTD at 17 n.4, 37. Relevant here, the Golden Sentry Program administered by DOD conducts end-use monitoring of FMS defense articles and services, including those transferred to Saudi Arabia and the UAE.[14] *Id.* Consistent with 22 U.S.C. § 2785(c), Defendants submit reports to Congress each year on their end-use monitoring programs, including separate reports on the Golden Sentry Program for FMS transfers, and the Blue Lantern Program for DCS transfers.[15] Thus, other than the requirements in § 2785(b) that are not implicated here, there is nothing in the AECA that "that unambiguously requires end-use monitoring to take a certain form or use specific investigatory tools." Gov. MTD at 37.

Plaintiffs' claim that Defendants have not "sufficiently investigated the end-use of U.S.-made arms as required by law," and ask this Court to "require a full investigation consistent with the applicable law to determine whether prior sales were in violation of the law." Compl. ¶ 228. Plaintiffs state in their opposition that they are not challenging the adequacy of any particular investigation. *See* Pls.' Opp'n at 37 ("any debate about whether their investigation was adequate is premature"). That position, however, is contrary to their Complaint which explicitly challenges Defendants' failure to "*sufficiently investigate*[] the end-use of U.S.-made arms," Compl. ¶ 228 (emphasis added); *see Gutrejman v. United States*, 596 F. Supp. 3d 1, 10–11 (D.D.C. 2022) ("Among other difficulties, this characterization of Plaintiff's claims is belied by her own allegations."). Regardless of any daylight between adequacy and sufficiency, a claim challenging end-use monitoring investigations is not proper under the APA because end-use monitoring is not final agency action. Gov. MTD at 36-37. Plaintiffs

[14] *See* DSCA, Security Assistance Management Manual (SAMM) C8, *End Use Monitoring, available at* https://perma.cc/2HWL-2DAP; *see Bega v. Jaddou*, 22-cv-02171-BAH, 2022 WL 17403123, at *3 (D.D.C. Dec. 2, 2022) (Court may take judicial notice of "factual content found on official public websites of government agencies.").

[15] *See* U.S. Dep't of State, *News & Events*, https://perma.cc/4R92-UCYS (Yearly Golden Sentry and Blue Lantern end-use monitoring reports).

do not respond to Defendants' argument that end-use monitoring is not final agency action, and the Court "may treat those arguments that the plaintiff failed to address as conceded." *Hawthorne*, 2021 WL 3856626, at *12 (citation omitted).

Even if this Court were to consider Plaintiffs' claim, it still fails under the APA. The contours of Plaintiffs' end-use monitoring claim are murky at best, but their claim seems to be that Defendants "failed to conduct end-use monitoring." Pls.' Opp'n at 37. Plaintiffs do not substantively respond to the government's argument that "Plaintiffs point to no statutory text that unambiguously requires end-use monitoring to take a certain form or use specific investigatory tools; nor can they." Gov. MTD at 36-37. Plaintiffs instead assert that their "Complaint speaks for itself," "refer to the Govt. Defendants' failure to comply with the law, as reinforced by the GAO Report," and conclude that "there is no question" that "Defendants failed to conduct end-use monitoring as required by the AECA." Pls.' Opp'n at 36-37. Plaintiffs, however, never explain what they mean by "end-use monitoring as required by the AECA." *Id.* Nor do Plaintiffs explain how Defendants' existing end-use monitoring program violated the law or articulate how the Golden Sentry Program departs from the AECA's statutory requirements. They simply quote the text of the AECA and assume *ipso facto* that "[t]here is no question the Govt. Defendants failed to conduct end-use monitoring as required by the AECA," because end-use monitoring did not lead to Plaintiffs' preferred results. *Id.* at 36.

To the extent that this claim is based on the GAO report, that also misses the mark. Plaintiffs erroneously and repeatedly assert that Defendants "admitted to [the] GAO that they failed to conduct 'end use monitoring' of the use of weapons provided to the Coalition as required by section 2785 of the AECA." *Id.* at 17. On this basis, Plaintiffs assert "it is clear that the Govt. Defendants *failed to implement* the end-use monitoring program." *Id.* at 18 (emphasis added). Plaintiffs are simply incorrect that Defendants "admitted" *in* the GAO report that they "fail[ed] to conduct end-use monitoring." *Id.* at 17. The basis of Plaintiffs' assertion appears to be the following statement in the GAO report: "DOD has not reported and State *could not provide evidence* that it has investigated indications that U.S.-origin equipment transferred to [the Coalition] through FMS may have been used for unauthorized purposes or against anything other than legitimate military targets." *Id.* (quoting U.S. Gov't

Accountability Off., GAO-22-105988, Yemen: State and DOD Need Better Information on Civilian Impacts of U.S. Military Support to Saudi Arabia and the United Arab Emirates 26 (2022) ("GAO Rep.")) (emphasis added); *see also id.* ("DOD has not reported to relevant State officials *nor could State provide evidence* that it investigated indications that U.S.-origin equipment transferred to Saudi Arabia and UAE through FMS was used for unauthorized purposes or against anything other than legitimate military targets.") (quoting GAO Rep. at 22) (emphasis added). A statement by the GAO that DOD has not reported and that State could not provide evidence to the GAO that they conducted end-use monitoring is not an admission that State or DOD actually failed to conduct end-use monitoring. *See id.* at 18 ("Both State and DOD failed to respond fully to GAO's inquiries about compliance with applicable laws."). To the contrary, the portion of the GAO Report that contains the official statement from the State Department indicates that State *did* conduct an "investigation of the issues of civilian harm in the conflict in Yemen and potential unauthorized use or transfer of U.S.-origin arms." GAO Rep. at 64; *see also id.* ("Throughout the Yemen conflict, the Department and interagency partners have routinely investigated reports of alleged civilian harm."); *id.* at 25 ("Further, DOD and State have investigated some allegations of potential end-use violations; specifically, the agencies investigated allegations that UAE made unauthorized transfers of U.S.-origin defense articles in Yemen.").[16]

Even if a end-use monitoring is considered final agency action, the conduct of an investigation is a prototypical example of a decision committed to agency discretion and therefore unreviewable. Gov. MTD at 36. As discussed above, there is nothing in the AECA "that unambiguously requires end-use monitoring to take a certain form or use specific investigatory tools," and therefore there are no judicially manageable standards by which this Court could assess end-use monitoring investigations. *Id.* at 37. Plaintiffs have not otherwise articulated any manner in which Defendants

[16] Similarly, to the extent that Plaintiffs seek to rely on the GAO's opinions expressed in the report about the adequacy of end-use monitoring investigations, they may not impute such opinions to Defendants because the GAO is not part of the Executive Branch. The GAO is an "independent agency within the legislative branch that exists in large part to serve the needs of Congress." *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983); *see also* U.S. Gov't Accountability Off., *About*, https://perma.cc/3D5C-N7T2. The opinions of a Legislative Branch agency are just that; they do not constitute admissions of either the State Department or Department of Defense. *Cf. Bowsher v. Synar*, 478 U.S. 714, 722-27 (1986).

end-use monitoring program fails to comply with statutory criteria in the AECA. Finally, to the extent that Plaintiffs' claim is based on their belief that Saudi Arabia and the UAE engage in a consistent pattern of gross violations of human rights, as discussed, State has not made such a judgment. Regardless, the AECA does not command that an end-use monitoring investigation include consideration of particular criteria; it provides only that the program must, to the extent practicable, be *designed* to provide "reasonable assurances" that articles "are being used for the purposes for which they are provided." 22 U.S.C. § 2785(a)(2). How Defendants carry out particular investigations is left to their discretion. Accordingly, Plaintiffs' end-use monitoring claim is not challengeable under the APA and should be dismissed.

III. Plaintiffs' claims raise non-justiciable political questions.

Plaintiffs' claims are independently barred by the political question doctrine, which forecloses judicial second-guessing of the sensitive foreign affairs, national security, and military policy judgments that Plaintiffs challenge here. *See* Gov. MTD at 38-42. Plaintiffs' opposition attempts to recast their claims as merely a question of "statutory interpretation" under the APA. Pls.' Opp'n at 38; *id.* at 43 ("[T]his case, seeking judicial review of the Govt. Defendants' failure to comply with specific statutory mandates, is not within the 'narrow category of carefully defined cases' within the political question doctrine." (citation omitted)). Plaintiffs insist that they are "not asking this Court to 'second-guess' decisions regarding foreign policy or defense," and that Plaintiffs are in "no way seeking to interfere with any substantive decision regarding foreign relations or defense." *Id.* at 38. But that is precisely what Plaintiffs ask this Court to do.

"Among other difficulties, this characterization of Plaintiff's claims is belied by [their] own allegations." *Gutrejman*, 596 F. Supp. 3d at 10–11. Most glaringly, Plaintiffs' Complaint explicitly states that Defendants' "decision to continue to approve the arms sales … should be overturned by the judicial branch." Compl. ¶ 226. Plaintiffs explicitly request that the Court "confirm Saudi Arabia and the UAE's gross violations of human rights" and "adjudicate whether State and DOD's decisions to continually approve arms transfers to the countries effectuated a purpose in the AECA or not." Pls.' Opp'n at 34. Plaintiffs assert repeatedly that Defendants violated the AECA and the FAA and, had

they "adopted monitoring standards and procedures as outlined in the FAA and AECA, they would have affirmatively denied the arms sales." *Id.* at 18 (quoting Compl. ¶ 164). To provide the relief Plaintiffs seek, this Court would have to determine that Saudi Arabia or the UAE are engaged in a "consistent pattern of gross violations of internationally recognized human rights," 22 U.S.C. § 2304(a)(2), a judgment that the Secretary of State has *not* made. Similarly, the Court would have to disagree with the Secretary's determination that "the foreign policy of the United States [is] best served" by past and future FMS sales to Saudi Arabia and the UAE. *Id.* § 2752(b). Thus, Plaintiffs, who ask the Court to "overturn" prior arms-sales decisions are indeed asking this Court to "second guess" and "interfere with," Pls.' Opp'n at 38, the Secretary's decisions authorizing arms sales.

Courts have consistently resisted parties' attempts to recast substantive challenges to the Executive's foreign-policy laden decisions as procedural or statutory challenges under the APA. *See Mobarez v. Kerry*, 187 F. Supp. 3d 85, 90 (D.D.C. 2016). Similar to this case, the plaintiffs in *Mobarez* attempted to reframe their substantive challenge to the Executive's decision not to evacuate Plaintiffs from Yemen as an APA claim that the Secretary of State violated a statute. *Id.* at 95. Then-Judge Brown Jackson rejected plaintiffs reframing of their claim as one involving statutory interpretation and instead found that the case presented a non-justiciable political question because the Court could not decide "whether or not State and DOD acted arbitrarily and capriciously in violation of the APA in evaluating the facts and deciding not to extract private American citizens from Yemen—without invading 'a textually demonstrable constitutional commitment' to another branch." *Id.* at 93 (citation omitted). The court further found that there were no judicially manageable standards because even assuming the statute "mandate[d]" action by the State and Defense Departments, "none of these provisions solves Plaintiffs' political-question problem, because none sets forth the kind of stark, obligatory action—*entirely* devoid of discretion." *Id.* at 96. So too here.

Defendants explained in Section II that Defendants' decisions to approve and monitor arms sales are quintessentially discretionary in nature and that neither the AECA nor the FAA provides judicially manageable standards for assessing the validity of these determinations. Judicial review of that endeavor is similarly barred by the political question doctrine. FMS sales are an essential tool of

the United States' foreign policy, "with potential long-term implications for regional security." *See supra* n.9. That is why the Secretary assesses each sale "on a case-by-case basis" and takes "into account political, military, economic, arms control, and human rights conditions" implicated by each sale. *Id.* Plaintiffs ask this Court to substitute its judgment for that of the Executive Branch in determining whether the United States should sell defense articles and services to Saudi Arabia and the UAE. As in *Mobarez*, neither the AECA or FAA requires "obligatory action—*entirely* devoid of discretion," aside from establishing an end-use monitoring program, which Defendants have done. 187 F. Supp. 3d at 96. And this Court cannot analyze whether these authorizations were arbitrary and capricious or not in accordance with law without second-guessing the Secretary's assessment that any individual arms sale "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); whether a sale is "solely for internal security" or "for legitimate self-defense," *id.* § 2754; and whether Saudi Arabia or the UAE engaged in "a consistent pattern of gross violations of internationally recognized human rights," *id.* § 2304(a)(2). Making these determinations would contravene the political question doctrine, straying far beyond the "familiar judicial exercise" of how a statute should be interpreted or whether it is constitutional. *Cf. Mobarez*, 187 F. Supp. 3d at 90, 92 (citation omitted); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).[17]

That is why courts have consistently held that the United States' decision to provide military aid to a foreign sovereign is "a political decision inherently entangled with the conduct of foreign relations," and therefore, a "determination of whether foreign aid to [a country] is necessary at this particular time" is "inappropriate for judicial resolution." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) (citation omitted); *id.* ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."); *Republic of Marshall*

[17] For the same reason, Plaintiffs' discussion of agency actions that are "not in accordance with law" is inapposite. Pls.' Opp'n at 42. The cases Plaintiffs cite did not involve the assertion of the political question doctrine, and as explained herein, determining whether the Secretary's decision to approve arms sales to Saudi Arabia and the UAE is not in accordance with law would require this Court to substitute its judgment for that of the Executive Branch.

Islands v. United States, 865 F.3d 1187 (9th Cir. 2017). In *Caterpillar*, the Court concluded that the decision of whether to provide aid to Israel presented an "examin[ation of] the United States government's role in financing the IDF's purchases of . . . [the] bulldozers." 503 F.3d at 979. But "these sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States." *Id.* at 982. To allow the action to proceed "would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel." *Id.* As the court reasoned, the judiciary "cannot intrude into our government's decision to grant military assistance to Israel" because "that foreign policy decision is committed under the Constitution to the legislative and executive branches." *Id.* at 983.

Similarly, a court recently concluded that the United States' provision of military aid to Israel "raise[s] fundamentally non-justiciable political questions." *Def. for Child. Int'l-Palestine v. Biden*, No. 23-CV-5829-JSW, 2024 WL 390061, at *3 (N.D. Cal. Jan. 31, 2024), *appeal filed,* No. 24-704 (9th Cir. Feb. 8, 2024). "Plaintiffs' challenge to the appropriateness of providing financial and military aid to Israel is a challenge to the manner in which the President and Executive Branch officials conduct the foreign affairs of the United States." *Id.* at *4. There, as here, "[p]laintiffs' request to have this Court enjoin the government of the United States from providing military or financial assistance to Israel invokes matters are 'intimately related to foreign policy and national security' and are 'largely immune from judicial inquiry and interference.'" *Id.* (citation omitted). This is consistent with numerous other decisions finding that the Executive Branch's determination about providing military or other aid to a foreign sovereign presents a non-justiciable political question. *See Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (dismissing on political question grounds a challenge to a statute appropriating funds for military assistance to Israel); *Abusharar v. Hagel*, 77 F. Supp. 3d 1005 (C.D. Cal. 2014) (dismissing on political question grounds suit to enjoin the Secretaries of State and Defense from providing military support to Israel after the plaintiff's home in the Gaza Strip was allegedly destroyed in a bombing by the Israeli military); Mem. Op. at 15, *John Doe I v. Israel*, No. 1:02-cv-01431 (D.D.C. Oct. 3, 2003), Dkt. 42 ("claims involving arms sales to Israel—which occur pursuant to a sensitive and

detailed statutory and regulatory scheme inextricably intertwined with critical foreign policy decisions—are nonjusticiable political questions better left to consideration by the political branches"); *Mahorner v. Bush*, 224 F. Supp. 2d 48, 53 (D.D.C. 2002) (claim seeking to enjoin the President and Treasury Secretary from providing financial aid to Israel presented nonjusticiable political question); *Bernstein v. Kerry*, 962 F. Supp. 2d 122, 126 & n.6 (D.D.C. 2013) (dismissing challenge to U.S. funding of the Palestinian Authority on standing grounds and because "this case is fraught with serious political questions that deprive the Court of jurisdiction").

Against the weight of this authority, Plaintiffs contend that courts "have adjudicated APA claims arising out of actions that agencies have taken pursuant to the AECA." Pls.' Opp'n at 41-42 (citing *Goldstein v. U.S. Dep't of State*, 153 F. Supp. 3d 319, 338 (D.D.C. 2016); *Washington v. U.S. Dep't of State*, 420 F. Supp. 3d 1130, 1141-47 (W.D. Wash. 2019)). But neither of these cases involved a challenge to a foreign military sale. The Ninth Circuit concluded in *Washington* that the designation of an item as a "'defense article' is within the President's sole discretion" even though the AECA required the President to "exercise this designation authority '[i]n furtherance of world peace and the security and foreign policy of the United States.'" *Washington v. U.S. Dep't of State*, 996 F.3d 552, 557 (9th Cir. 2021) (quoting 22 U.S.C. § 2778(a)(1)). And Defendants in *Goldstein* did not assert that the claims were barred by the political question doctrine; the court instead dismissed the case for lack of standing. *Goldstein*, 153 F. Supp. 3d at 331.

Plaintiffs also rely on *Al-Tamimi v. Adelson*, 916 F.3d 1 (D.C. Cir. 2019) and *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147 (4th Cir. 2016), to argue that the political question doctrine does bar a court from determining that a country committed genocide. Pls.' Opp'n at 39-40. But neither case helps Plaintiffs. *Al-Tamimi* held that the court could resolve claims that Israeli settlers and other defendants were committing genocide against Palestinians in certain disputed territory without touching upon a nonjusticiable political question. 916 F.3d at 13.[18] Critically, the court determined

[18] Only one of the defendants was a U.S. official and when the United States was substituted for him, the claims against the United States were dismissed on sovereign immunity grounds. *Al-Tamimi*, 916 F.3d at 6 n.3.

that answering the question would not have created any inter-branch conflict because no U.S. foreign policy was at issue. The Executive Branch initially had expressed concern that addressing claims of genocide against the *Israeli military* could create such a conflict because "a judicial finding that the Israeli armed forces had committed the alleged offenses would implicitly condemn American foreign policy by suggesting that the [government's] support of Israel is wrongful." *Id.* (citation omitted). Although the court recognized that the Executive Branch's opinion on the "foreign policy ramifications of the court's resolution of a potential political question" was "owed deference," it deemed the issue moot when the plaintiffs waived any liability claim against the Israeli military. *Id.* Here, Plaintiffs explicitly ask this Court to reach a conclusion about gross violations of human rights that the Secretary has not made, and unlike in *Al-Tamini,* foreign policy considerations about Saudi Arabia and the UAE's conduct in Yemen are at the heart of Plaintiffs' claims.

Al Shimari v. CACI Premier Technology is likewise inapposite. There, Iraqi nationals claimed that they were tortured by a military contractor while in U.S. custody in the Abu Ghraib prison in Iraq. The Fourth Circuit held that the contractor's actions could be shielded from judicial review by the political question doctrine only "if they were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments." *Al Shimari*, 840 F.3d at 151. As the Fourth Circuit later explained, where the military's control of the contractors is "plenary and actual," rendering the contractors' decisions "de facto military decisions," the political question doctrine bars judicial review. *In re KBR, Inc.*, 893 F.3d 241, 264 (4th Cir. 2018) (citation omitted). As Defendants have argued, this case clearly implicates sensitive military and foreign policy considerations and ultimate determinations made by the Secretary to approve arms sales to Saudi Arabia and the UAE. Because Plaintiffs' claims are also independently barred by the political question doctrine, the Court should dismiss this suit.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Motion to Dismiss, the Court should dismiss Plaintiffs' claims.

Dated: April 4, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2024, 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.

Dated: April 4, 2024

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