[ORAL ARGUMENT NOT SCHEDULED]

No. 17-5207

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BASSEM AL-TAMIMI, et al.,

Plaintiffs-Appellants,

v.

SHELDON ADELSON, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES UNITED STATES OF AMERICA AND ELLIOTT ABRAMS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies:

A. Parties and Amici

Except for the following, all of the parties and amici appearing before the district court and this Court are listed in the Brief for Plaintiffs-Appellants: the United States substituted itself as a defendant for Elliott Abrams below and is an appellee in this Court; Ali Ali, Saad Malley, Ossama Ali Ahmed Abo Hassan, and Neddal Assad Attwan were identified as plaintiffs in the amended complaint but are not listed as appellants in the brief; and Hayat Abu-Teer is listed as an appellant in the brief but was not identified as a plaintiff in the amended complaint.

B. Rulings Under Review

The rulings under review (issued by Judge Tanya S. Chutkan) are the memorandum opinion and order filed on August 29, 2017. The memorandum opinion is reported at 264 F. Supp. 3d 69.

C. Related Cases

This case has not previously been before this Court or any court other than the district court. Counsel for the government are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(c). *Peled v. Netanyahu*, No. 17-cv-260 (D.D.C.), involves similar claims and factual allegations brought against different defendants.

s/ Thomas Pulham
Thomas Pulham

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INTRODUCTION

The plaintiffs (now appellants) in this case—mostly Palestinians from East Jerusalem, the West Bank, and the Gaza Strip—brought suit in district court seeking $1 billion in damages caused by the alleged unlawful actions of the Israeli military and Israeli settlers in those territories. They urge that the defendants—an assortment of corporations, organizations, and individuals—are directly and secondarily liable for the harms caused abroad because the defendants have engaged in a wide-ranging, but ill-defined, conspiracy to "encourage" the unlawful actions of Israeli military officials and settlers through fundraising, lobbying, public speaking, and interactions with Israeli government officials. As the district court recognized, the plaintiffs ask the judiciary "to wade into foreign policy involving one of the most protracted diplomatic disputes in recent memory." Op. 7 (JA __). The political question doctrine forbids this. But even if the political question doctrine did not bar adjudication of the plaintiffs' claims, they are still subject to dismissal because no statute provides the district court with jurisdiction to hear them.

STATEMENT OF JURISDICTION

The plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1350, and 1367. Am. Compl. ¶ 1 (JA __). The district court dismissed the action for lack of jurisdiction on August 29, 2017. Dkt. Nos. 120, 121 (JA __, __). The plaintiffs filed a timely notice of appeal on September 11, 2017. Dkt. No. 124 (JA __). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The following issues are presented in this appeal:

1. Whether the district court correctly held that it lacked jurisdiction over the plaintiffs' claims because they are non-justiciable under the political question doctrine.

2. Whether the plaintiffs' claims fall within any statutory grant of jurisdiction.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Amended Complaint

The plaintiffs in this case are a collection of individuals—"for the most part . . . Palestinian nationals," but also a few U.S. citizens—from East Jerusalem, the West Bank, and the Gaza Strip, as well as five Palestinian village councils. Compl. 45 (JA __). They claim that they, or their relatives, have suffered various injuries, including physical attacks and theft or destruction of property, at the hands of Israeli "armed settlers and [Israel Defense Forces] veteran soldiers." *Id.* They further claim that the defendants have engaged in a wide-ranging conspiracy to achieve "the expulsion of all non-Jews from OPT [*i.e.*, the "Occupied Palestinian Territories" of East Jerusalem, the West Bank and the Gaza Strip] and the creation of new segregated 'Jewish-only' cities and villages." *Id.* at 12 (JA __). The gist of the conspiracy is that the defendants "financed, encouraged, and deliberately collaborated with" Israeli settlers and

members of the Israeli military, knowing that the expansion of Israeli settlements "would result in massive ethnic cleansing of the Palestinian population." *Id.*

The defendants are divided into five categories, based on their alleged roles in the conspiracy. The "Donor Defendants" are eight individuals and one foundation who allegedly "share a pro-Zionist agenda" and provided financial support "to promote the growth of settlements" in the "Occupied Palestinian Territories." Am. Compl. 47-52 (JA __-__). The thirteen "Tax-Exempt Entity Defendants" allegedly received the donors' charitable donations and transferred the funds to Israeli settlements, knowing that the funds would be used to purchase military hardware and training and otherwise to support "the criminal activities of . . . violence-prone settlers." *Id.* at 53-63, 104 (JA __, __). The three "Bank Defendants" allegedly "transferred millions of dollars every year to various settlements" and provided banking services to the areas identified in the complaint, including financing for construction and ATM facilities. *Id.* at 63-65 (footnote omitted) (JA __, __). The "Construction/Support Firms" are American, Israeli, and international corporations that allegedly served as "friendly collaborator[s] in the settlement enterprise" by contracting with settlement officials to provide equipment, security services, and construction services. *Id.* at 65-78, 109 (JA __, __). And finally, the "Settlement and [Israel Defense Forces] Advocate/Promoter"—former Deputy National Security Advisor Elliott Abrams—has allegedly been "the settlements' paid self-appointed U.S. spokesperson." *Id.* at 19, 52. (JA __, __).

The allegations focusing on Abrams generally fall into two categories. The first concerns activities undertaken in relation to the Israeli government. For example, Abrams is alleged to have "urged senior aides to former [Israeli] Prime Ministers Sharon, Barack [sic], and Olmert and settlement officials to continue annexing privately-owned Palestinian property knowing that settlement expansion would necessarily entail the violent expulsion of the local Palestinian population." Am. Compl. 52 (JA __) (footnote omitted); *see also id.* at 113 (JA __) (alleging "discreet discussions" with "former aides to [Israeli] Prime Ministers . . . on topics including the need for additional settlement funding and expansion"); *id.* at 176 (JA __) (alleging that Abrams "consistently encouraged . . . Prime Minister Olmert's senior staff" to continue "confiscating more private Palestinian property").

The second category of allegations relates to Abrams's public expressive activities in which he "has advocated and justified continued settlement growth" in order "to promote the settlement enterprise." Am. Compl. 20 (JA __). For example, Abrams has allegedly "engaged in lobbying efforts for at least 20 years to convince congressional leaders that Palestinian farmers, not fanatical settlers, are responsible for wholesale violence in the [Occupied Palestinian Territories] because they repeatedly attack settlements." *Id.* at 39 (JA __). He has also "written numerous articles . . . justifying settlement growth and the ongoing seizure of private Palestinian property." *Id.* at 43 (JA __). And as a "self-appointed U.S. spokesperson," he has "extoll[ed] the virtues of settlement expansion and the settler's inherent right to reclaim historic

biblical land now owned by Palestinians." *Id.* at 52 (JA __); *see also id.* at 108 (JA __) (Abrams gave "speeches over the past 30 years condemning Palestinian violence and promoting the idea that Palestinians are the root cause of violence in the Middle East").

The plaintiffs bring three causes of action against Abrams based on these allegations: (1) war crimes, crimes against humanity, and genocide in violation of the law of nations (Count II); (2) aiding and abetting the commission of war crimes (Count III); and (3) participation in a civil conspiracy to expel all non-Jews from East Jerusalem, the West Bank, and the Gaza Strip (Count I). A fourth claim of aggravated and ongoing trespass (Count IV) was brought against the Defendant Banks and Construction/Support Firms. Plaintiffs seek $1 billion in damages. Am. Compl. 144, 180, 189¶¶ 180, 227, 233 (JA __, __, __).

B. Prior Proceedings

1. The United States substituted itself for Abrams as a defendant pursuant to the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in relevant part at 28 U.S.C. § 2679). The government then moved to dismiss Counts I through III of the amended complaint. The government offered three primary grounds for dismissal: first, the claims against the United States are barred by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (FTCA); second, the claims are non-justiciable under the political question doctrine; and third, the statutes relied on by the plaintiffs do not provide jurisdiction for their claims.

2. The district court granted the government's motion to dismiss. First, the court held that the plaintiffs' claims present non-justiciable political questions, including "the limits of state sovereignty" and "rights of private landowners" in "foreign territories where boundaries have been disputed since at least 1967"; "the legality of Israeli settlements in the West Bank, Gaza, and East Jerusalem"; and "whether the actions of Israeli soldiers and private settlers in the disputed territories constitute genocide and ethnic cleansing." Op. 6 (JA __). The court observed that ruling on the plaintiffs' claims would require it "to wade into foreign policy involving one of the most protracted diplomatic disputes in recent memory," a task constitutionally committed to the political branches of government. Op. 7 (JA __). And "given the centrality of the question of sovereignty over these disputed lands and in particular the ongoing expansion of settlements on those lands," adjudication of the plaintiffs' claims could "conflict with the other branches' sensitive positions regarding the legality and implications of the settlements," issues "very much at the forefront of the Executive's ongoing diplomatic efforts in the region." Op. 7, 8-9 (JA __, __).

Next, the district court held that the government had properly substituted itself as a defendant "for claims against Abrams arising out of his eight years at the White House" (although not for any other periods of time), and proceeded to consider the various bars to jurisdiction erected by the FTCA. For example, the court agreed with the government that "the FTCA's foreign-country exception bars all of Plaintiffs'

claims against the United States" because "Plaintiffs allege that they were injured in the West Bank, Gaza, East Jerusalem, and/or other settlement areas." Op. 18 (JA __). While this ground did not apply to allegations regarding "conduct that occurred both before and after Abrams's time at the White House," the court explained that any such claims were covered by the political question analysis. Op. 15 (JA __). Because these two grounds covered all of the claims against the government and Abrams, the district court did not consider the government's additional jurisdictional arguments.

SUMMARY OF ARGUMENT

Under the political question doctrine, "courts lack jurisdiction over political decisions that are by their nature committed to the political branches" of government. *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (internal quotations omitted). Cases presenting non-justiciable political questions typically include one or more of the factors identified by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962). This case—in which Palestinian individuals attempt to hold former Deputy National Security Advisor Elliott Abrams (among others) liable for allegedly supporting or encouraging Israeli settlements in East Jerusalem, the West Bank and the Gaza Strip—involves several such factors.

The plaintiffs' claims regarding the status of lands in these areas implicate some of "the most difficult and complex [questions] in international affairs," which are constitutionally committed to the executive and legislative branches. *Zivotofsky ex rel.*

Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081 (2015); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). This lawsuit threatens to interfere with ongoing efforts of the political branches to address these issues. Further, there are no "judicially discoverable and manageable standards for resolving" many of the questions raised in the plaintiffs' amended complaint, *Baker*, 369 U.S. at 217, which invited the district court "to draw some big-picture conclusions" regarding Israeli settlements and "the root cause of violence in the Middle East." Am. Compl. 78, 175 (JA __, __). Other factors are also implicated by the plaintiffs' challenge to these settlements and their claim that actions taken by the Israeli military and Israeli settlers (allegedly supported and encouraged by the defendants) constituted genocide and other crimes under international law.

The plaintiffs forfeited any challenge to the district court's conclusion that their claims are barred by the political question doctrine, by failing to make relevant arguments in their opening brief. But even if this Court were to consider arguments previously raised in their opposition to a motion for summary affirmance, the plaintiffs have failed to establish any error in the district court's judgment.

Finally, even if plaintiffs' claims were not barred by the political question doctrine, the district court would still lack jurisdiction to hear them. The plaintiffs invoke the Alien Tort Statute, 28 U.S.C. § 1350, as the source of jurisdiction for two of the three counts brought Abrams. But none of their allegations "displace the presumption against extraterritorial application" of that statute. *Kiobel v. Royal Dutch*

Petroleum Co., 569 U.S. 108, 124 (2013). The claims are brought primarily by Palestinians living abroad, seeking recovery for injuries caused by Israeli citizens (including the Israeli military) on foreign soil. Allegations regarding Abrams's domestic conduct, most of which concern expressive activities protected by the First Amendment, are too insubstantial or conclusory to support jurisdiction here, especially in the context of a suit by private parties under the Alien Tort Statute. The Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992), is not a grant of jurisdiction and does not apply to U.S. persons in any event. Once counts under those statutes are dismissed, there can be no supplemental jurisdiction under 28 U.S.C. § 1367 over plaintiffs' state law claims.

STANDARD OF REVIEW

The district court's order dismissing the case for lack of subject-matter jurisdiction is subject to de novo review. *See, e.g.*, *American Civil Liberties Union v. CIA*, 823 F.3d 655, 661 (D.C. Cir. 2016).

ARGUMENT

I. The Plaintiffs' Claims Present Non-Justiciable Political Questions.

The political question doctrine reflects the principle that "courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (internal quotations omitted). It "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." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Cases presenting non-justiciable political questions typically include one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; 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 the 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 from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962); *see also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc). "To find a political question, [the Court] need only conclude that one factor is present," *Schneider*, 412 F.3d at 194, but this case involves several.

1. "There is no question that the first *Baker* factor is implicated in this case." Op. 6 (JA __). "The conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government . . . ." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *see also Schneider*, 412 F.3d at 195 ("Just as Article I of the Constitution evinces a clear textual allocation to the legislative branch, Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive.").

While "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211 (quoted in *El-Shifa*, 607 F.3d at 841), "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Indeed, "[d]isputes involving foreign relations" present "quintessential sources of political questions." *El-Shifa*, 607 F.3d at 841 (quotation marks omitted).

The plaintiffs here seek to hold various defendants liable for their alleged support of, or participation in, the "settlement enterprise," meaning the establishment of "Israeli civilian communities built on lands occupied or otherwise administered by Israel" in 1967, including East Jerusalem, the West Bank, and the Gaza Strip. Am. Compl. 11 & nn. 1-2; *id.* at 21 (JA __, __). They argue that these settlements amount to theft of Palestinian land by Israeli settlers. *See, e.g.*, *id.* at 20 (JA __) (alleging that "continued settlement growth . . . necessarily meant the theft of more private Palestinian property"); *id.* at 121 (JA __) (stating that "the Zionist dream . . . was premised on ethnic cleansing and theft of private property").

But as the Supreme Court has explained, "[q]uestions touching upon the history of the ancient city [of Jerusalem] and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015). The plaintiffs' attempt to "have this Court adjudicate the rights and liabilities

of the Palestinian and Israeli people" in these areas, *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005), would thrust the judiciary into a realm textually committed to other branches of government. *See also id.* ("A ruling on any of these issues would draw the Court into the foreign affairs of the United States, thereby interfering with the sole province of the Executive Branch.").

Moreover, the political branches are actively engaging with the very questions the plaintiffs asked the district court to address. *See* Op. 9 (JA __) (noting that resolution of Israeli-Palestinian conflict is "still very much as the forefront of the Executive's ongoing diplomatic efforts in the region"); *see also, e.g.*, Remarks on Signing a Proclamation on Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem, 2017 Daily Comp. Pres. Doc. 1 (Dec. 6, 2017) (marking "the beginning of a new approach to conflict between Israel and the Palestinians" by recognizing Jerusalem "as the capital of Israel," while not taking a position on "any final status issues, including the specific boundaries of the Israeli sovereignty in Jerusalem, or the resolution of contested borders"). The plaintiffs themselves allege that Congress has been involved by holding hearings and issuing "resolutions: (a) condemning Palestinian violence; and (b) cutting off vital humanitarian aid to the Palestinians." Am. Compl. 43 (JA __). Their complaint makes clear that they intend for this lawsuit to interfere with these ongoing efforts by labeling Abrams's communications with Israeli officials while working in the White House and his testimony before Congress as a private citizen as

parts of an unlawful conspiracy, or even war crimes. *See id.* at 108 (JA __) ("Abrams' overt acts alone included: (a) meeting secretly with Israeli Prime Minister aides and encouraging them to keep announcing new settlements" and "(b) giving congressional testimony and speeches over the past 30 years condemning Palestinian violence and promoting the idea that Palestinians are the root cause of violence in the Middle East"); *id.* at 177 (JA __) (allegation in Count II that Abrams "encouraged . . . Israeli Prime Minister Olmert's senior staff . . . to continue financing and confiscating more private Palestinian property" and "secured another congressional resolution condemning Palestinian violence").

"[C]ourts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy." *El-Shifa*, 607 F.3d at 842; *see also Oetjen*, 246 U.S. at 302 ("[T]he propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). "Whether plaintiffs dress their claims in the garb of . . . federal statutes, or the [common law of] tort," or the law of nations, "the character of those claims is, at its core, the same: peculiarly volatile, undeniably political, and ultimately nonjusticiable." *Doe I*, 400 F. Supp. 2d at 112.

There are also no "judicially discoverable and manageable standards for resolving" the issues raised in the plaintiffs' complaint. *Baker*, 369 U.S. at 217. The Supreme Court recently recognized that "whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns." *Zivotofsky ex rel.*

Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012). And that is precisely what the plaintiffs' complaint called on the district court to do when it brought claims that Israeli settlers, with the assistance of the Israeli armed forces, have engaged in widespread theft of Palestinian land in "Occupied Palestinian Territories," including East Jerusalem. *See* Op. 6 (JA __) (noting that resolution of such claims "would require this Court to determine," among other questions, "the limits of state sovereignty in foreign territories where boundaries have been disputed since at least 1967").

Equally as problematic, the plaintiffs invited the district court "to draw some big-picture conclusions" regarding "the settlement enterprise," including whether "the root cause of violence in the Middle East" is "Palestinian farmers and homeowners" or "rabid, rampaging, out-of-control settlers." Am. Compl. 78, 175 (JA __, __); *see also id.* at 108 (JA __) (alleging that "Abrams' overt acts" in the claimed civil conspiracy included "giving congressional testimony and speeches over the past 30 years condemning Palestinian violence and promoting the idea that Palestinians are the root cause of violence in the Middle East"). There are no judicially discoverable and manageable standards for determining whether the assertion that "Palestinian farmers are the root cause of violence in the Middle East" is "a complete fabrication," as the plaintiffs allege. *Id.* at 20 (JA __).

The presence of these two factors—which have been described as "the most important," *Harbury v. Hayden*, 522 F.3d 413, 419 (D.C. Cir. 2008)—is sufficient to deprive courts of jurisdiction over the plaintiffs' claims, *see Schneider*, 412 F.3d at 194,

but several other factors are also implicated by "the centrality of the question of sovereignty over these disputed lands[,] and in particular the ongoing expansion of settlements on those lands." Op. 7 (JA __). Determining the equities between Israelis and Palestinians in the West Bank, for example, would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217; *see* Op. 8 (JA __). And the possibility that a court ruling would "conflict with the other branches' sensitive positions regarding the legality and implication of the settlements, broader questions of Israel's sovereignty, and the right to private ownership and control over the disputed lands," Op. 8 (JA __), risks embarrassing the government through "multifarious pronouncements" on the nature and equities of the conflict. *Baker*, 369 U.S. at 217. As the district court recognized, when a "court is asked to make a determination on issues at the forefront of global relations while the United States government continues to determine how best to approach these same issues, it should decline to weigh in on such sensitive diplomatic and geopolitical matters." Op. 8 (JA __).

Several of the other *Baker* factors are also implicated by the plaintiffs' claim that alleged actions taken by the Israeli military and Israeli settlers (allegedly supported and encouraged by Abrams) constituted genocide. *See, e.g.*, Am. Compl. 145 (JA __) (identifying "Israeli army soldiers" as among the "war criminals that the Plaintiffs are complaining of"); *id.* at 146 (JA __) (alleging that Donor Defendants violated the "Genocide Convention" by making "significant contributions to the Israeli army"); *id.*

at 94 (JA __) (alleging that Israeli soldiers have committed "heinous atrocities"); *id.* at 159 (JA __) (alleging that "the army's mission was [to] protect rampaging settlers who were engaging in wholesale violence, including ethnic cleansing and the violent subjugation of the Palestinian population"). The plaintiffs also "request damages in the sum of $1 billion for their damages arising out of the war crimes, crimes against humanity, and genocide committed by the Israeli army and violence-prone settlers." *Id.* at 184. Some of these damages are specifically traced to official military actions taken by the Israeli government. *See, e.g.*, Am. Compl., Ex. C, at 6-10, 12-15 (JA __, __) (referring to alleged damages caused by "a series of Israeli bombardments by the IAF . . . during the 2014 invasion of Gaza").

Resolution of these claims would implicate the fourth and sixth *Baker* factors. Given the level of political and military support provided Israel by the American government, 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." *Doe I*, 400 F. Supp. 2d at 112. Such a ruling would therefore "expres[s] lack of the respect due coordinate branches of government," and also create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217; *see Schneider*, 412 F.3d at 198 (finding the fourth factor present where the Court "could not determine Appellants' claims without passing judgment on [a] decision of the executive branch"); *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007)

(finding a political question present where "[a] court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy toward Israel").

2. a. The plaintiffs' sole reason for arguing that the district court's political question ruling was wrong is that the court "erroneously concluded that the Justice Department had itself filed a 'Declaration of Interest' on behalf of the State Department." Br. 12. Their contention that "only the State Department has the right and authority to file formal Statements of Interest concerning lawsuits that may interfere with the executive's foreign policy agenda," *id.*, lacks any support in the law and is flatly wrong. Congress expressly assigned to the Department of Justice the responsibility to "attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. When doing so, the Department of Justice regularly consults with federal agencies, including, as appropriate, the State Department. But the authority to make the filing rests with the Department of Justice. Here, the government's interests were asserted through a motion to dismiss filed after the United States substituted itself as a defendant for Mr. Abrams. No more is required. *See, e.g.*, *El-Shifa*, 607 F.3d at 855, 856-61 (holding that the political question doctrine barred claims in a case where the government filed a motion to dismiss).

b. The plaintiffs "see no reason to brief" the political question doctrine further because they did so in their opposition to a motion for summary affirmance. Br. 20.

This Court has repeatedly held that a party forfeits an argument "by failing to adequately raise it *in [its] opening brief*." *Herron v. Fannie Mae*, 861 F.3d 160, 165 (D.C. Cir. 2017) (emphasis added); *see also City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003). It is therefore insufficient to attempt to incorporate by reference wholesale arguments made in a motion that the Court previously denied. *See United States v. Lewallyn*, No. 17-12162, 2018 WL 2684044, at *1 (11th Cir. June 5, 2018) (per curiam) (declining to consider an issue briefed in a motion for summary disposition but not raised in a response brief); *cf. United States v. McGill*, 815 F.3d 846, 909 (D.C. Cir. 2016) (per curiam) (explaining that "woefully underdeveloped arguments are forfeited" by appellants who "summarily purport to join" the arguments of another party). In any event, the arguments in the plaintiffs' opposition to summary affirmance lack merit.

First, the plaintiffs failed to establish any error in the district court's application of the *Baker* factors. They urged that their claims do not involve an issue committed to a coordinate political branch, and would not require a court to contradict or disrespect decisions already made by those branches because "Congress has enacted statutes criminalizing the conduct engaged in by the Defendants on U.S. soil." Opp'n Summ. Affirmance 4, 10. But application of the political question doctrine does not "hing[e] upon whether the conduct of defendants was 'lawful' or 'unlawful.'" *Bin Ali Jaber v. United States*, 861 F.3d 241, 247 n.1 (D.C. Cir. 2017); *see also Schneider*, 412 F.3d at 193 (involving allegations of torture and summary execution). In any event, the

core issues to be litigated in this matter occurred on foreign soil and involve (among other things) the actions of a foreign military, thus necessarily raising foreign relations concerns. The plaintiffs also argue that there is no lack of manageable standards to resolve their case because evidence can be easily obtained to determine whether property was stolen. Opp'n Summ. Affirmance 5-7. "[R]ecasting foreign policy and national security questions in tort terms," however, "does not provide standards for making or reviewing foreign policy judgments." *Schneider*, 412 F.3d at 197. And finally, the plaintiffs assert that no policy determination need be made because various domestic and foreign officials have already declared the settlements to be "illegal." Opp'n Summ. Affirmance 8. Even assuming the truth of this latter assertion, the fact remains that these are "sensitive diplomatic and geopolitical matters" "at the forefront of global relations," Op. 8 (JA __), and resolution of the plaintiffs' claims would "forc[e] [the courts] to pass judgment on the policy-based decision[s]" that the political branches have made in deciding how best to approach these issues. *Schneider*, 412 F.3d at 197.[1]

Second, the plaintiffs argued that the district court had misunderstood the nature of their claims because they "never referred to the sovereignty of Jerusalem as

[1] *Kaplan v. Central Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185 (D.D.C. 2013), upon which plaintiffs rely, Opp'n Summ. Affirmance 11, is inapposite. The plaintiffs in that case sought "relief under several federal statutes authorizing recovery for specific conduct," such as the Anti-Terrorism Act. *Kaplan*, 961 F. Supp. 192; *see also* Op. 10-11 n.9 (JA __). The plaintiffs here have not invoked any similar statutes.

a central concern in their pleadings" and in fact no plaintiff had "claimed that his or her stolen property was located in Jerusalem." Opp'n Summ. Affirmance 13. The fact that the plaintiffs never expressly referred to the sovereignty of Jerusalem is irrelevant; the entire premise of their lawsuit is that land in the "Occupied Palestinian Territories"—which plaintiffs define to include East Jerusalem, *see* Am. Compl. 11 n.2 (JA __)—is currently in the possession of Israeli citizens but rightly belongs to Palestinians, and they asked for damages based on that contention. *See also id.* at 26 (JA __) (alleging that the defendants "are intentionally and literally cleansing East Jerusalem . . . of all non-Jews" (emphasis omitted)). As the district court recognized, it would be impossible to adjudicate these claims without resolving questions of sovereignty and the rights of foreign citizens in these territories. But even if there were any question on this point, the plaintiffs do not deny that their claims would require a determination that Israeli military officials and settlers committed various war crimes and crimes against humanity. As explained above, that alone suffices to render their claims non-justiciable.

II. No Statute Provides Jurisdiction Over The Plaintiffs' Claims.

Even if the political question doctrine did not render the plaintiffs' claims non-justiciable, the district court would still lack jurisdiction to hear them because they do not fall within any statutory grant of jurisdiction. The district court did not consider these arguments because all of the plaintiffs' claims were covered by its political question and FTCA rulings. But this Court "may affirm a district court on grounds

other than those upon which it relied." *United States Int'l Trade Comm'n v. Tenneco W.*, 822 F.2d 73, 80 (D.C. Cir. 1987).

A. The Alien Tort Statute

The amended complaint invoked the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), as the source of jurisdiction for Count II (war crimes, crimes against humanity, and genocide) and Count III (aiding and abetting the same) for the majority of individual plaintiffs.[2] The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013), the Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." While the presumption is not typically applied to statutes that are "strictly jurisdictional," the Court observed that "the principles underlying the canon" applied equally to the ATS.

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[2] The complaint provides that "[i]n the event that Plaintiffs' claims under the ATS are dismissed with prejudice, 28 U.S.C. § 1332 Diversity Jurisdiction would be invoked." Am. Compl. 35 (JA __). But the plaintiffs have not made any effort, in either this Court or the district court, to show that such jurisdiction would lie. Given the complaint's vague allegations regarding plaintiffs' the citizenship, *see id.* at 39 (JA __) ("Plaintiffs include Palestinian nationals domiciled abroad, Palestinian nationals domiciled in the United States, and Palestinian-American citizens, all of whom are domiciled in the United States and abroad."); *see also id.* at 45 (JA __) ("The Plaintiffs herein are American citizens in some cases . . . but for the most part are Palestinian nationals from various villages in the [Occupied Palestinian Territories]."), it is far from clear that "the citizenship of each plaintiff is diverse from the citizenship of each defendant." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

Id. at 116. Specifically, the presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* (quoting *EEOC v. Arabian American Oil. Co.*, 499 U.S. 244, 248 (1991)). "[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." *Id.* Courts faced with claims under the ATS should therefore be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

The Supreme Court explained that "even where" claims asserted under the ATS "touch and concern the territory of the United States," jurisdiction will lie only if the claims "do so with sufficient force to displace the presumption against extraterritorial application" of domestic law. *Kiobel*, 569 U.S. at 124-25. This inquiry takes place against the backdrop of the ATS's function, *see RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Kiobel*, 569 U.S. at 123-24; *Sosa*, 542 U.S. at 714-18, 722-24 & n.15, including, for example, to provide redress in situations in which the United States could be viewed as having harbored or otherwise provided refuge to an actual torturer or other "enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

The claims in this case, however, are brought primarily by Palestinians living abroad, seeking recovery for injuries caused by Israeli armed forces or Israeli settlers acting on foreign soil. *See* Op. 18 (JA __) (finding that all of the plaintiffs' injuries were suffered in a foreign country). On their face, and absent the identification of any United States interest to support jurisdiction here, such claims to do not displace the presumption against extraterritoriality. The plaintiffs concede that their claims cannot be based on any allegations "which arise out of [Abrams's] eight years of public service as a government employee." Br. 22. Thus, any allegations regarding discussions with Israeli officials must be disregarded (and would be too removed from supposed war crimes and genocide to be controlling in any event).

The remaining allegations relating to Abrams's domestic conduct, most of which concern his public expressive activities, are far too insubstantial to displace the presumption against extraterritorial application. For example, the plaintiffs allege that Abrams published articles, gave speeches, and testified before Congress regarding issues of great public importance. *See, e.g.*, Am. Compl. 113 (JA __) (Abrams "g[ave] congressional testimony and speeches and author[ed] articles claiming that Palestinians are the root cause of Mideast violence, and that the settlements are not actually expanding"). "A claim is too 'insubstantial and frivolous' to support federal question jurisdiction when it is 'obviously without merit' or when 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can

be the subject of controversy.'" *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194-95 (D.C. Cir. 2004) (quoting *Hagans v. Lavine*, 415 U.S. 528, 538 (1974)). The claims that Abrams's expressive activities—all protected by the core of the First Amendment—amount to war crimes or genocide in a foreign country (or aiding and abetting the same), and that the plaintiffs are entitled to $1 billion in damages as a result, fall within both categories. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993 (1982) ("The use of speeches . . . cannot provide the basis for a damages award."); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[T]he advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression.").

Other allegations of wrongdoing are entirely conclusory or threadbare. *See, e.g.*, Am. Compl. 125 (JA __) (Abrams "made sure" that a report criticizing settlement activity "was never publicized in America in order to ensure that there would be no executive or congressional action undertaken to halt settlement expansion"); *id.* at 176 (JA __) (Abrams "for approximately 20 years has engaged in a pattern of conduct designed to intimidate, punish, and crush the spirit of the Palestinian people"); *id.* at 177 (JA __) (Abrams "personally sabotaged" an agreement "to afford maximum freedom of movement to the Gazan population . . . because he knew that if the Gazan population continued to be confined to an open-air prison, that would heighten tension in the area, and lead to more bloodshed and violence"). Such allegations are insufficient to displace the presumption against extraterritorial

application of the ATS. *See, e.g.*, *Mustafa v. Chevron Corp.*, 770 F.3d 170, 190 (2d Cir. 2014) ("[O]ur jurisdictional analysis need not take into account allegations that, on their face, do not satisfy basic pleading requirements.").

Some of the allegations in this category suggest, without providing any details, that Abrams was involved in (or at least physically near) the raising of funds to support the activities alleged to constitute war crimes. *See, e.g.*, Am. Compl. 108 (JA __) (Abrams was a speaker at "AIPAC's annual convention and pro-settlement gala fundraising dinners"); *id.* at 112 (JA __) (Abrams and donors "cooperated" and "coordinated their fundraising activities"); *id.* at 176 (JA __) (Abrams "encouraged" donors "to continue financing and confiscating more private Palestinian property"). In some non-ATS contexts, the actual solicitation of funds for unlawful foreign activities, or the use of the domestic banking system to transfer funds for use in such activities, might support an application of U.S. law that is not explicitly extraterritorial. Compared to private plaintiffs, the U.S. Government traditionally exercises a considerable "degree of self-restraint and consideration of foreign governmental sensibilities." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (parenthetically quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999)). Accordingly, Congress may be presumed to require a less substantial domestic nexus in a statute enforced by the government—which can take into account the potential impact on foreign relations in deciding whether to prosecute an action—than it might require for a statute enforced

through private civil actions. *See RJR Nabisco*, 136 S. Ct. at 2110. In the context of the ATS, however, attenuated, vague, and conclusory allegations involving fundraising efforts—like the ones involving Abrams—do not constitute a sufficient domestic nexus to displace the presumption of extraterritoriality. The "need for judicial caution" about "foreign policy concerns" when "considering which claims c[an] be brought under the ATS" may counsel forbearance even in circumstances where an express statutory cause of action under domestic law, reflecting the considered judgment of Congress and the Executive, might be found applicable. *Kiobel*, 569 U.S. at 116.[3]

B. Torture Victim Protection Act

Presumably because the jurisdictional grant in the ATS is limited to suits brought "by an alien," 28 U.S.C. § 1350, the plaintiffs purported to invoke the Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992), "on behalf of the U.S. citizen plaintiffs against all Defendants in Count II, similar to and on the same bases as the ATS invoked on behalf of the non-U.S. citizen Plaintiffs." Am. Compl. ¶ 3 (JA __). "Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir.1995). Moreover, there is no

[3] Thus, regardless of whether any of the various defendants "have continuously violated" "at least eight federal criminal statutes," as plaintiffs urge (Br. 15), that allegation does not establish that the presumption of extraterritoriality has been rebutted with respect to the ATS.

question that "Congress exempted American government officers and private U.S. persons from the statute." *Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009). Count II must be dismissed as brought against Abrams by U.S. citizens as well.

C. Supplemental Jurisdiction

Finally, the complaint asserts that the district court had "supplemental jurisdiction over Plaintiffs' state claims" in Count I. Am. Compl. ¶ 10 (JA __). But once it is determined that the district court lacked jurisdiction over Counts II and III, "then it could not exercise supplemental jurisdiction" over any other claims under 28 U.S.C. § 1367. *Saksenasingh v. Secretary of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997). Count I must therefore also be dismissed.[4]

[4] The jurisdictional section of the plaintiffs' complaint discusses several other federal statutes, including 18 U.S.C. §§ 1956(b)(2) (money laundering), 981 (civil forfeiture), and 371 (conspiracy). As the district court noted, however, the complaint "do[es] not describe how these criminal statutes provide the court with jurisdiction in this case." Op. 2 n.3 (JA __). The plaintiffs have now conceded that these statutes do not "justify their jurisdictional claims." Br. 15-16; *see also, e.g.*, *Daviditis v. National Bank of Mattoon*, 262 F.2d 884, 886 (7th Cir. 1959) (explaining that various sections of Title 18 "pertain to criminal proceedings and . . . in no way confer jurisdiction as to the civil controversies described in the complaint).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,033 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Thomas Pulham
Thomas Pulham

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas Pulham
Thomas Pulham

ADDENDUM

TABLE OF CONTENTS

28 U.S.C. § 1350

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Pub. L. 102-256 (excerpts), 106 Stat. 73, note following 28 U.S.C. § 1350

§ 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991".

§ 2. Establishment of Civil Action

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

. . .