IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDIGENOUS PEOPLE OF BIAFRA, a United Kingdom registered Community Interest Company, *Plaintiff*, *v.* ANTONY BLINKEN, Secretary of State, in his official capacity, *et al.*, *Defendants*.	)	Civil Action No. 1:21-cv-2068 (ABJ)

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

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INTRODUCTION

Plaintiff Indigenous People of Biafra ("Plaintiff" or "IPOB") challenges the U.S. Government's delivery to Nigeria of 12 A-29 Super Tucano Aircraft ("the A-29 Aircraft"). In August 2017 the DoD[1] notified Congress of the A-29 Aircraft's approval for sale to Nigeria in accordance with the requirements of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2751, *et seq.*, and in or around July 2021 the DoD delivered half of the contracted-for planes to Nigeria. Plaintiff appears to assume that delivery of the A-29 Aircraft should have triggered Defendants' separate statutory obligations under the Leahy Laws ("Amendments" in the Complaint), and, if applied, such laws would have prevented the delivery of the planes.

Plaintiff's complaint should be dismissed for several reasons. First, Plaintiff lacks standing to challenge the delivery of the A-29 Aircraft to Nigeria. Second, Plaintiff fails to assert or state any actionable claim for relief. Third, the authority to enter into foreign military sales—and thus deliver the A-29 Aircraft to Nigeria—as well as to make decisions regarding the use of funds appropriated by Congress to the Executive Branch (thus triggering application of the Leahy Laws)—has been committed to Defendants' discretion by law. Last, Plaintiff's claims raise a non-justiciable political question by asking this Court to supplant its judgment for that of the Executive and Legislative Branches in this sensitive area of foreign affairs and national security policy concerning the sale of arms to a foreign country. For these reasons, set forth further below, the case must be dismissed.

[1] As Defendants Antony Blinken, Secretary of State, and Lloyd Austin, Secretary of Defense, are sued in their official capacities, they are referred to herein, when discussing the instant suit, as part and parcel of the agencies they respectively govern, the U.S. Department of State ("the State Department") and the U.S. Department of Defense (the "DoD" and, together with the State Department, "Defendants").

BACKGROUND

I. Foreign Military Sales Under the Arms Export Control Act

The Arms Export Control Act ("AECA"), originally enacted as the Foreign Military Sales Act in 1968, provides the authority for, among other things, the sale of defense articles[2] to foreign governments (otherwise known as "foreign military sales"). *See* 22 U.S.C. § 2751, *et seq.* The AECA acknowledges that, "[b]ecause of the growing cost and complexity of defense equipment, it is increasingly difficult and uneconomic for any country, particularly a developing country, to fill all of its legitimate defense requirements from its own design and production base[,]" and "authorizes sales by the United States Government to friendly countries having sufficient wealth to maintain and equip their own military forces at adequate strength." *Id.* § 2751. The right to sell rests with the Executive Branch, which is expressly authorized to "sell defense articles . . . to any eligible country or international organization if such country or international organization agrees to pay in United States dollars." *Id.* § 2761(a)(1). Sales may be for cash or credit, or a mixture of both, and the Executive Branch decides the funding arrangement. *See id.* §§ 2762, 2763.

Under the AECA, a prerequisite to any sale is that the requesting foreign country must have been the subject of a presidential determination that "the furnishing of defense articles and defense services to [that] country . . . will strengthen the security of the United States and promote world peace." *Id.* § 2753(a)(1). If such a determination has been made, and the foreign government meets other prerequisites, *id.* §§ 2753(a)(2) – (4), the State Department, in coordination with the DoD's Defense Security Cooperation Agency ("DSCA"), reviews the foreign government's request. The

[2] Under the AECA, "defense article" includes "any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war[.]" 22 U.S.C. § 2794(3)(A). The same definition applies to the Leahy Laws. *See* 22 U.S.C. § 2403(d)(1); 10 U.S.C. § 301(2).

Secretary of State, under the direction of the President, is responsible for determining whether there will be a foreign military sale, and, if so, the amount of the sale, taking into account whether "the foreign policy of the United States would be best served thereby." *Id.* § 2752(b).

Congress is notified of the potential sale if it meets certain monetary thresholds after the State Department conducts its review and decides to support the sale; such notice must formally occur 30 calendar days before the Executive Branch can finalize the foreign military sale. *Id.* § 2776(b). DSCA submits the required formal notification detailing certain particulars of the sale to the Chairperson of the Senate Foreign Relations Committee, the Speaker of the House of Representatives, and the House Foreign Affairs Committee; the notification is also published in the Federal Register. *Cf. id.* §§ 2776(b)(1), (f). The notification also "contain[s] an item, classified if necessary, identifying the sensitivity of the technology . . . and a detailed justification of the reasons necessitating the sale of such articles or services in view of the sensitivity of such technology." § 2776(b)(1). The Senate Committee on Foreign Relations or the House Committee on Foreign Affairs also may "request" an additional report. *See id.*

Under the statutory scheme, Congress need not act to approve a sale, but Congress can "enact[] a joint resolution prohibiting the proposed sale[.]" *Id.* § 2776(b)(1)(P). If Congress enacts such a joint resolution, the Executive Branch may not proceed with the sale unless the President vetoes the joint resolution and Congress does not override the veto. *Id.* § 2776(b)(1). However, if Congress does not enact such a joint resolution to block the sale within 30 calendar days of receiving formal notice of the proposed sale, the Executive Branch may proceed with the sales process. *Cf. id.* § 2776(b)(1)(P). DSCA implements the actual sale once a final contract is in place. The actual transfer may not necessarily occur right away. Congress can request to be notified prior to the

shipment of arms, *id.* § 2776(i), and, even after the 30-day statutory deadline has passed, may have to be notified if certain events occur. *Id.* § 2753(c).

II. The Leahy Laws

Two separate statutory provisions, originally proposed by Senator Patrick Leahy, impose similar restrictions on separate categories of assistance provided by the U.S. Government to foreign security forces. The first provision (the "State Leahy Law"), Section 620M of the Foreign Assistance Act of 1961 ("FAA"), Pub. L. No. 87-195, 75 Stat. 424, current through Pub. L. No. 117-50, 135 Stat. 407 (2021) (22 U.S.C. § 2378d (2014)),[3] applies to "assistance" provided by the Secretary of State. Specifically, "[n]o assistance shall be furnished under [the FAA] or the [AECA] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights." 22 U.S.C. § 2378d(a). The prohibition does not apply if the Secretary of State determines and reports to specified congressional committees that "the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice." *Id.* § 2378d(b). If assistance is withheld, the Secretary of State must inform the foreign government of the basis for withholding and, "to the maximum extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security forces to justice." *Id.* § 2378d(c).

The second provision (the "DoD Leahy Law")—housed in Title 10 of the U.S. Code (designated for laws regarding the Armed Forces)—applies to the DoD's use of funds for "training, equipment, or other assistance" for units of foreign security forces; specifically: "[o]f the amounts

[3] The expansive authority of the FAA covers a wide variety of international assistance programs, for both military and non-military assistance. *See* 22 U.S.C. § 2151 *et seq.*

made available to the [DoD], none may be used for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights." 10 U.S.C. § 362. If "required by extraordinary circumstances," however, the Secretary of Defense may waive applicability of the DoD Leahy Law, following consultation with the Secretary of State. *Id.* § 362(c). The prohibition also does not apply if "the Secretary of Defense, after consultation with the Secretary of State, determines that the [foreign government] has taken all necessary corrective steps, or if the equipment or other assistance is necessary to assist in disaster relief operations or other humanitarian or national security emergencies." *Id.* § 362(b).

The Leahy Laws apply only to certain Executive Branch assistance to a qualifying foreign security force unit using funds appropriated by Congress to a federal agency; they do not apply to purchases made with a foreign country's national funds. The language of both Leahy Laws bears this out. *See* 22 U.S.C. § 2378d(a) ("No assistance shall be furnished under [the FAA] or the [AECA] . . ."); 22 U.S.C. § 2378d(c) ("In the event that *funds* are withheld from any unit pursuant to this section, . . .") (emphasis added); 10 U.S.C. § 362(a) ("*Of the amounts made available to the Department of Defense*, none may be used . . .") (emphasis added). Further, while the language of the Leahy Laws only includes various descriptions of "assistance," *see* 22 U.S.C. § 2378d; 10 U.S.C. § 362, the language of the AECA explicitly addresses "sales." *See, e.g.*, 22 U.S.C. § 2761 (covering "Sales from stocks"); 22 U.S.C. § 2762 (regarding "cash sales"); 22 U.S.C. § 2763 (addressing "Credit sales").

The history of the Leahy Laws also demonstrates they solely impact the use of appropriated funds. *See* Nina M. Serafino *et al.*, Cong. Rsch. Serv., R43361, "Leahy Law" Human Rights Provisions And Security Assistance: Issue Overview, at 3-4 (2014) (describing the evolution of the

Leahy Laws). The first appearance of any type of Leahy Law was in the 1997 annual consolidated appropriations act and applied only to counter-narcotics funds channeled through the State Department. *Cf.* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208 § 543, 110 Stat. 3009, 157 (1996). Thereafter, limitations more akin to the current State Leahy Law were included in the annual State Department appropriations acts, with the scope of the restrictions broadening to cover all Foreign Operations funds provided to foreign security force units. *See*, *e.g.*, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 570, 111 Stat. 2386, 2429 (1997). Starting with the appropriations act for fiscal year 1999, Congress began including similar constraints on funds appropriated to the DoD. *See* Dep't of Def. Appropriations, 1999, Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998). In 2008, Congress added the State Leahy Law to the FAA,[4] though Congress continued to use the annual appropriations act to limit the funds appropriated for the DoD. *Compare* Section 651 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Division J of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2341 (2007)), *with* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, §§ 7015(f), 7016, 125 Stat. 786, 1202. Then, in 2014, Congress codified the DoD Leahy Law in Title 10 of the U.S. Code. Dec. 19, 2014, Pub. L. No. 113-291, Div. A, Tit. XII, § 1204(a)(1), 128 Stat. 3531. Though Congress occasionally broadened the application of either Leahy Law, or adjusted the text of either to more closely align with the other, the Leahy Laws have always applied only to appropriated funds. *See*, *e.g.*,

[4] The State Leahy Law originally was codified as FAA Section 620J, but in 2012 was renumbered to be 620M. *See* Consolidated Appropriations Act, 2012 (Pub. L. No. 112-74, Div. I, Dep't of State, Foreign Operations, and Related Programs Act, 2012, § 7034(k), 125 Stat. 768, 1213 (2011)).

Consolidated Appropriations Act for the State Department, 2012 (Pub. L. No. 112-74); Consolidated Appropriations Act for the DoD, 2014 (Pub. L. No. 113-76, 128 Stat. 5). In 2016 Congress re-codified the DoD Leahy Law at its present location. *See* Pub. L. No. 114-328, Div. A, Tit. XII, Subtit. E, § 1241(1), 130 Stat. 2000, 2509 (2016). Thus, from their origins to today, the Leahy Laws have always been a tool used by Congress to restrict the use of funds appropriated to the Executive Branch to furnish training, equipment, or other assistance to foreign security forces.

III. The Authorization to Sell the A-29 Aircraft to the Nigerian Government

On January 2, 1973, the President issued the determination required under the AECA regarding foreign military sales to Nigeria, specifically finding that the sale of defense articles and services to Nigeria would "strengthen the security of the United States and promote world peace." Presidential Determination No. 73-10, 38 Fed. Reg. 7211-01, 7211 (Mar.19, 1973). *Cf.* 22 U.S.C. § 2753(a)(1). Following a request from the Nigerian government to purchase the A-29 Aircraft, the State Department approved a possible sale of such defense articles, *see* DSCA, Press Release, Government of Nigeria –A-29 Super Tucano Aircraft, Weapons, & Associated Support (Aug. 3, 2017), https://www.dsca.mil/press-media/major-arms-sales/government-nigeria-29-super-tucano-aircraft-weapons-and-associated, and, on August 2, 2017, DSCA notified Congress of the intended sale. *See*, *e.g.,* 163 Cong. Rec. S. 4753, 4754-55 (Aug. 2, 2017); Arms Sales Notification, 82 Fed. Reg. 40,757, 40,757-59 (Aug. 28, 2017). Though notified of the sale, and despite members of Congress occasionally raising it within the legislative body,[5] Congress did not pass a joint resolution to block

[5] *See*, *e.g.*, Security & Humanitarian Situation in Northeastern Nigeria,163 Cong. Rec. S. 1297, (Feb. 16, 2017) (statement of Sen. Cardin); Enhancing Human Rights Protection in Arms Sales Act of 2019, 165 Cong. Rec. S. 1981 (Mar. 26, 2019) (statement of Sen. Cardin, co-sponsor of the bill); Amendment offered by Rep. Engel (NY) to the National Defense Authorization Act for Fiscal Year 2020 ("NDAA FY2020"),165 Cong. Rec. H. 5337 (July 10, 2019); Amendment offered by Sen.

the sale of the A-29 Aircraft, and, to date, has not taken legislative action to block the sale. *See*, *e.g.*, Marc Selinger, A-29 Aircraft Sale to Nigeria Clears Hill, Defense Daily, (Sept. 29, 2017), https://www.defensedaily.com/29-aircraft-sale-nigeria-clears-hill-2/uncategorized/ (Sept. 29, 2017) (acknowledging that "Congress took no action to block" the sale). Because Congress did not enact a Joint Resolution of Disapproval within thirty days of receiving formal notification of the potential sale, there was no statutory impediment to proceeding with the sale. *See* 22 U.S.C. § 2776(b)(1). The DoD delivered six of the A-29 Aircraft to Nigeria on or around July 22, 2021. *See* Reuters, Nigeria Receives First Six Light Attack Plane, (July 23, 2021), https://www.reuters.com/world/africa/nigeria-receives-first-six-light-attack-planes-united-states-2021-07-22/.

IV. The Instant Lawsuit

Plaintiff filed its Complaint on August 2, 2021. *See* ECF Nos. 1-2. Therein, Plaintiff alleges four claims, that the delivery of the A-29 Aircraft "under the [FAA] of the [AECA]" violated the State Leahy Law (Count 1), 22 U.S.C. § 2378d;[6] contravened the DoD Leahy Law (Count 3), 10 U.S.C. § 362;[7] and exceeded statutory authority under, or contravened, either the State Leahy Law or the DoD Leahy Law and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (C)

Menendez (NJ) to the NDAA FY2020. 169 Cong. Rec. 99 (June 13, 2019); NDAA FY2020, H. Rep. 116-333 (Dec. 09, 2019); Conference Report; Senate Comm. on Foreign Relations, Hr'g on Managing Security Assistance to Support Foreign Policy (Sept.26, 2017) (statement of Sen. Corker).

[6] Plaintiff misunderstands the interplay between the AECA and the FAA, which, as explained herein, are separate statutes.

[7] Although Plaintiff's Complaint, in alleging injury under the DoD Leahy Law, cites 10 U.S.C. § 2249e, the former citation for the law, it is currently codified at 10 U.S.C. § 362. Herein, even if referring back to an allegation made in the Complaint, Defendants will refer to 10 U.S.C. § 362.

(Counts 2 and 4).[8] ECF No. 2, ERRATA Complaint ("Compl.") ¶¶ 41-64. Plaintiff is the only identified party in the Complaint's caption of the case, and throughout that document the singular form of "Plaintiff" is used. For this reason, despite the identification of 10 separate John Does (together, "Does") in the Complaint's "Parties" section, Defendants assume Plaintiff is the only party to the case.

STANDARDS OF REVIEW

In evaluating a motion to dismiss under Federal Rules of Procedure 12(b)(1) or 12(b)(6) (respectively, "Rule 12(b)(1)" or "Rule 12(b)(6)"), the Court must "construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C. Cir. 2004) (internal quotation marks and citations omitted). Nevertheless, "the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions." *Gallagher v. Eat to the Beat, Inc.*, 480 F. Supp. 3d 79, 82 (D.D.C. 2020) (citations omitted) (Jackson, J.).

I. Subject-Matter Jurisdiction

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561(1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). It is "presume[d] that federal courts lack

[8] In most places, Plaintiff's Complaint alleges violations of "5 U.S.C. 706 (A) and (C)." Compl. at 1, ¶ 1, ¶¶ 62-63, Prayer for Relief. That citation does not exist. For purposes of responding to the pleading, Defendants will assume Plaintiff intended to rely upon 5 U.S.C. § 706(2)(A) and (C) throughout. *See* Compl. ¶¶ 50-51.

jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted).

II. Failure to State a Claim

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The requirement to "accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," however. *Id.* (citation omitted). A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). "A pleading must offer more than labels and conclusions or a formulaic recitation of the elements of a cause of action, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Gallagher*, 480 F.Supp.3d at 83 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks and citations omitted).

ARGUMENT

This case should be dismissed for any of five reasons. First, this Court lacks jurisdiction to address Plaintiff's claim for lack of standing to challenge Defendants' actions in furtherance of the A-29 Aircraft's delivery to Nigeria. Second, even if Plaintiff could demonstrate Article III standing, Plaintiff has stated neither an actionable claim for relief nor a claim upon which relief can be granted. Third, the authority to deliver the A-29 Aircraft, and to make decisions regarding the financing of any sale of such defense articles, has been committed to Defendants' discretion by law.

Fourth, Plaintiff's claims raise a non-justiciable political question. Finally, the Court should decline to enter any discretionary relief in this case because it would be inappropriate for the Court to weigh in on a sensitive foreign affairs matter.

I. Plaintiff Lacks Article III Standing to Assert Any of its Claims.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Daimler Chrysler*, 547 U.S. at 341). One element of this limitation is that a plaintiff must have standing to sue, a requirement that is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.*

As the party invoking federal jurisdiction, Plaintiff bears the burden of alleging facts that establish the "irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560—namely, that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan*, 504 U.S. at 560). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). And "standing is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (Kavanaugh, J.) (quoting *Lujan*, 504 U.S. at 562). Further, "[c]laims for declaratory or injunctive relief carry 'a significantly more rigorous burden to establish standing.'" *Matthews v. District of Columbia*, 507 F. Supp. 3d 203, 208 (D.D.C. 2020) (quoting *Swanson Grp. Mfg. LLC v. Jewell*,

790 F.3d 235, 240 (D.C. Cir. 2015)). Plaintiff falls far short of meeting this burden.

A. Plaintiff Asserts Only Associational Standing, But Has Not Demonstrated Membership.

Plaintiff avers that it "is a registered Community Interest Company that advocates through peaceful means an independent Biafran nation separate from Nigeria[,]" whose goal is supported by "[t]he overwhelming majority of Biafrans" ("a political, religious, and ethnic minority in Nigeria numbering approximately 70 million"). Compl. ¶ 4, 20. Plaintiff does not allege injury on its own behalf anywhere in the Complaint. *See generally* Compl. Rather, Plaintiff alleges that the Does "reasonably fear" that the A-29 Aircraft will be used by the Nigerian Air Force to kill or injure them or destroy their property because of their IPOB membership, religion, or Biafran heritage. *Id.* ¶¶ 46, 52, 58, 64 (alleging in Counts 2 and 4 that the fear of death or injury is imminent).

An organization can establish standing "by showing either an injury to itself ('organizational standing')" or "a cognizable injury to one or more of its members" (associational or representative standing). *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 39 (D.C. Cir. 2016) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) & *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977)). Because Plaintiff alleges only injuries to its purported members and not itself, it presumably seeks to establish associational standing solely to act in place of the Does. *See Simon v. E. Ky. Welfare Rts. Org.,* 426 U.S. 26, 40 (1976) ("Since they allege no injury to themselves as organizations, . . . they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right."); *AARP v. U.S. Equal Emp. Opportunity Comm'n ("AARP I")*, 226 F. Supp. 3d 7, 15-16 (D.D.C. 2016) (citing *Conservative Baptist Ass'n of Am., Inc. v. Shinseki*, 42 F. Supp. 3d 125, 129 (D.D.C. 2014)) ("where an organization itself has not suffered an injury, but its members have, the organization may bring suit

on behalf of its members."). Plaintiff therefore bears the burden of showing that it has members whose interests it seeks to represent, *Elec. Privacy Info. Ctr. v. Pres. Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 307 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017), and specifically identifying "at least one 'member [who] had or would suffer harm' from each challenged agency action." *Sec. Indus. & Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 400 (D.D.C. 2014) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)); *Flyers Rts. Educ. Fund v. Dep't of Transp.*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) (requiring the plaintiff to "identify at least one member with independent standing to sue the Department" (citing *Warth*, 422 U.S. at 511)). Plaintiff does not meet this burden.

Some courts apply slightly different tests to determine whether an organization may represent the interests of purported members based on whether that membership is traditional (*i.e.* formal) or its functional equivalent. *See AARP I*, 226 F. Supp. 3d at 16-17 (citations omitted) (discussing the "gap in the associational standing case law" between traditional and functional equivalent organizations). It is unclear given the Complaint's paucity of detail what category Plaintiff's representation of the Does falls into. Though the Complaint alleges that all of the Does are Plaintiff's members, Compl. ¶¶ 5-14, 35, 46, 52, 58, 64, that alone cannot establish membership for associational standing purposes, under either theory. *See AARP I*, F. Supp. 3d at 16 (noting that, regardless of whether an organization is a traditional membership organization or its functional equivalent, "it is equally clear that a mere assertion that an individual is a 'member' of an organization is not sufficient to establish membership."). Moreover, since each individual Doe description entirely mirrors the other nine Doe paragraphs, *see* Compl. ¶¶ 5-14, there is no meaningful opportunity to assess any of the Does' alleged membership statuses in a particularized

way.[9] Further, the Complaint neither alleges nor demonstrates that Plaintiff is a membership organization, *id.* ¶¶ 4, 17, and lacks any explanation of how Plaintiff is organized, led, or operated. *See generally* Compl. Without any of this information, Plaintiff has not alleged that it is a traditional membership organization able to represent the Does. *Cf. Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015) (finding associational standing where declarations showed plaintiff was a membership organization representing members' interests).

Nor has Plaintiff alleged facts or provided documentation showing it should be treated as the functional equivalent of a membership organization; the key factor in that analysis is whether Plaintiff represents individuals that have all the "indicia of membership" in Plaintiff. *Hunt*, 432 U.S. at 344. According to the Complaint, Plaintiff "advocates through peaceful means an independent Biafran nation." Compl. ¶ 4. For the Does, they all reside in or are native to regions in Nigeria "on land historically occupied by Biafrans," *id.* ¶¶ 5-14, and, due to their religion, heritage, membership in Plaintiff, and peaceful advocacy for an independent Biafran state, "reasonably fear" the use of the

[9] As an additional threshold matter, Defendants object to Plaintiff relying on associational standing where the purported membership is entirely anonymous without affirmatively obtaining leave of Court to do so. Although it is possible to establish associational standing through anonymous members, Plaintiff's sole reliance on the Does combined with the absence of particularized allegations of fact or offers of proof fails to demonstrate membership or the Does' individual bases to sue. *See Young Am.'s Found. v. Gates*, 560 F. Supp. 2d 39, 48-50 (D.D.C. 2008) (finding associational standing "just barely" based on anonymous members given an affidavit offering many specific details on impact to association members), *aff'd*, 573 F.3d 797 (D.C. Cir. 2009); *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 225-26 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018), and *aff'd and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891(2020) (finding associational standing given reliance upon anonymous affidavits demonstrating membership); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 892 (C.D. Cal. 2010), *vacated other grounds*, 658 F.3d 1162 (9th Cir. 2011) (finding associational standing based on a John Doe given demonstration of particularized allegations supporting membership). Without such information, Defendants cannot meaningfully understand and respond to the Complaint, and Plaintiff cannot establish associational standing.

A-29 Aircraft against them, *id.* ¶ 35. Reading the Complaint in the light most favorable to Plaintiff, the most alleged is that the Does' alleged characteristics—identical for each Doe—align with a class of persons relevant to Plaintiff's mission. That is not enough to demonstrate membership, however, either in a traditional or equivalent sense, because the representative elements of any possible relationship between Plaintiff and the Does are neither alleged nor established.

For example, there is no articulation of how members (or the Does) can participate in Plaintiff's advocacy efforts; whether members (or the Does) can, do, or must play a role in selecting Plaintiff's leadership, guiding Plaintiff's activities, or financing Plaintiff's activities; or how Plaintiff's governing laws or practices pertain to membership (such as bylaws requiring leaders to be Biafran). *See generally* Compl. Courts routinely require such manner of information before finding the requisite indicia of membership that would permit representation by Plaintiff in this lawsuit. *Cf. AARP v. U.S. Equal Emp. Opportunity Comm'n ("AARP II")*, 267 F. Supp. 3d 14, 23 (D.D.C.), *on reconsideration*, 292 F. Supp. 3d 238 (D.D.C. 2017) (affirming earlier finding of associational standing on functional equivalency grounds, but acknowledging it was a "close question"); *Conservative Baptist Ass'n*, 42 F. Supp. 3d at 133–34 (holding organization failed to demonstrate that the individuals it purported to represent in lawsuit were members); *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 207–09 (D.D.C. 2007) (concluding organization lacked standing to bring claim on behalf of its purported members because individuals do not possess the requisite "indicia of membership"); *Air All. Houston v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 128-29 (D.D.C. 2019), *appeal dismissed sub nom. Pub. Emps. for Env't Resp. v. U.S. Chem. Safety & Hazard Investigation Bd.*, No. 19-5089, 2019 WL 4565521 (D.C. Cir. Aug. 26, 2019) (finding traditional membership and associational standing through application of "indicia" test); *Freedom Watch, Inc. v. McAleenan*, 442 F.

Supp. 3d 180, 193 (D.D.C. 2020) (finding no associational standing where the plaintiff "d[id] not identify a single member or provide any declarations or statements to indicate the organization brings suit on behalf of their interests"); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (describing "indicia of membership" to include electing the leadership of the association, guiding the association's activities (such as choosing to bring litigation), and financing those activities).[10] Because the Complaint is devoid of any allegations establishing the Does' membership in Plaintiff, either traditionally or through equivalency, Plaintiff lacks standing.

B. None of The Doe Individuals Possess Standing to Sue in Their Own Right.[11]

Where an organization is suing on behalf of its members, the organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Hunt*, 432 U.S. at 343. Even if Plaintiff is found to represent the Does in this suit, Plaintiff still lacks standing given none of the Does would have standing to sue in their own right.

[10] Although this case law includes decisions from different stages in litigation than this motion, it represents the type of information that is needed to demonstrate associational standing and the wide disparity between that bar and the allegations in the Complaint.

[11] Plaintiff's claims necessarily rest on an assumption that application of the Leahy Laws to the AECA-permissible sale of the A-29 Aircraft would have prevented such sale; otherwise, the alleged violation is merely procedural, without impact on the Does. The Complaint makes this clear: it is the alleged prospective use of the planes by Nigeria that is the source of the Does' "reasonabl[e] fear," *see* Compl. ¶¶ 5-14, 35, 46, 52, 58, 64, and Plaintiff seeks a declaration that the sale violated the law and injunctions against "any further delivery" or "the return" of the A-29 Aircraft. *See* Compl. at 13 (Prayer for Relief, ¶¶ b-c). Defendants therefore analyze standing as if the injury, its cause, and its redressability derive from the actual furnishing of the A-29 Aircraft to Nigeria.

1. The Allegations in the Complaint Are Insufficient to Establish Injury.

Plaintiff's conclusory and incomplete manner in alleging standing as a membership organization also undermines its assertions regarding the Does' standing for injuries attributable to the United States as a result of the A-29 Aircraft's delivery. Again, Plaintiff alleges that the Does all "reasonably fear[] death, bodily injury, or destruction of [their] property by A-29 Super Tucano military aircraft if the planes are delivered by the United States to the Government of Nigeria and incorporated into the Nigerian Air Force to assist the ongoing genocide of Biafrans." Compl. ¶¶ 5-14. *See also id.* ¶¶ 35, 46, 52, 58, 64. This "reasonabl[e] fear" is alleged to be "[b]ased on" the Does' "Christian religion, their Biafran heritage, IPOB membership, peaceful advocacy of an independent Biafran state, and the ongoing genocide of Biafrans by [the Nigerian] President." *Id.* ¶ 35.

Plaintiff's allegations cannot be said to demonstrate sufficient facts alleging a reasonable fear of harm attributable to the actions of the United States Government for the sale of the A-29 Aircraft. *See Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006) (holding that "an organization bringing a claim based on associational standing must show that at least one specifically-identified member has suffered an injury-in-fact . . ."). Also, where a plaintiff "'seeks prospective declaratory and injunctive relief,'" as Plaintiff does here, it "must rely on concrete and particular current or future injuries-in-fact to establish standing." *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (quoting *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)); *see also Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994). Thus, Plaintiff's allegations must show more than a "possible future injury" allegedly caused by the United States to establish standing for prospective relief. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiff's claims entirely rest upon allegations of prior harm perpetrated by Nigerian government officials against Biafrans generally or in the geographic regions where Biafrans are alleged to reside. But for each of the Does, given the generality of the allegations in the Complaint, Plaintiff only speculates that their alleged future injury is attributable to the U.S. Government's actions in order to establish standing against the Defendants here. *See Conf. of State Bank Supervisors v. Off. of Comptroller of Currency*, 313 F. Supp. 3d 285, 296 (D.D.C. 2018) (finding that "speculative and conclusive language like 'significant risks'" was insufficient to establish standing). Whatever the threat of future attack from Nigerian government officials, Plaintiff's allegations of an imminent threat of future injury caused by the actions of the U.S. Government in selling arms to Nigeria is highly attenuated and speculative. Moreover, as outlined further below, Plaintiff's alleged injury is grounded in speculation over the actions of third parties—namely, Nigerian government officials. The D.C. Circuit has directed courts to "rigorously review allegations by plaintiffs who seek to invoke the subject matter jurisdiction of the federal courts based on the projected response of independent third parties to a challenged government action," *Arpaio*, 797 F.3d at 25, and has "repeatedly held that litigants cannot establish an Article III injury based on the independent actions of some third party not before [the] court," *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 990 (D.C. Cir. 2021) (quoting *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 25 (D.C. Cir. 2015)), *petition for cert. docketed sub nom. Westmoreland Mining Holding, LLC v. EPA*, No. 20-1778 (U.S. June 23, 2021) (quoting *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 25 (D.C. Cir. 2015)). This is because such theories of harm, which require a Court "to anticipate the future actions of various third parties" not before the Court, "stack[] speculation upon hypothetical speculation" rather than establish an imminent injury. *Id.* at 990–91. Likewise, here, because any harm to the Does could only occur through the occurrence of

a series of speculative events, and because any future harm would not arise unless third parties take numerous actions, the Does could not show that their alleged injury is "imminent," as required to establish standing for the prospective relief sought against the United States. *See Clapper*, 568 U.S. at 410–14 (concluding that the plaintiffs lacked standing because any injury would occur only after a series of independent actors exercised their judgment in a certain way).

2. Causation is Absent.

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

As an initial matter, the injuries alleged are the direct result of alleged actions by Nigerian government officials, not the U.S. Government. In the foreign affairs sphere, courts have repeatedly held that a plaintiff lacked standing to challenge an action by the U.S. Government where a foreign government engaged in the alleged underlying injurious conduct. *See, e.g.*, *Abulhawa v. Dep't of Treasury*, 239 F. Supp. 3d 24, 35 (D.D.C. 2017) (dismissing for lack of standing because "Plaintiffs' theory of causation is based on speculation upon speculation about how third parties might act" if the Department of the Treasury revoked the tax-exempt status of certain groups that support Israeli settlement expansion (citing *Allen v. Wright*, 468 U.S. 737, 757-59 (1984)), *aff'd*, No. 17-5158, 2018 WL 3446699 (D.C. Cir. June 19, 2018); *Bernstein v. Kerry*, 962 F. Supp. 2d 122, 128–29 (D.D.C. 2013) (holding that the plaintiffs' fear of future terrorist attacks was not fairly traceable to the provision of foreign aid to the Palestinian Authority because it required the Court to "speculate on whether defendants' funding policies were in fact aiding terrorists, whether the terrorists were using these funds for activities intended to harm plaintiffs, and whether these activities [were] leading to a 'certainly impending' injury for plaintiffs"), *aff'd*, 584 F. App'x 7 (D.C. Cir. 2014). Here, too, Plaintiff asks this Court to speculate on how Nigeria may use the procured defense articles. But "[f]ederal courts are simply 'not well-suited to draw the types of inferences regarding foreign affairs and international responses to U.S. policy that [Plaintiff's] theory of causation posits.'" *Fryshman v. U.S. Comm'n for Pres. of Am.'s Heritage Abroad*, 422 F. Supp. 3d 1, 8 (D.D.C. 2019) (quoting *Siegel v. Dep't of Treasury*, 304 F. Supp. 3d 45, 55 (D.D.C. 2018)).

Plaintiff's allegations concerning the conduct of Nigerian government officials "'only further demonstrates that numerous factors' and independent actors outside [Defendants'] control" would play a role in any potential actions by Nigeria in the future. *Id.* (quoting *Siegel*, 304 F. Supp. 3d at 55).

Specifically, Plaintiff alleges that the Nigerian president participated in the 1967 to 1970 civil war in Nigeria, Compl. ¶ 23, and that Nigerian government officials have been perpetrating injury on Biafrans since 1967, including several times this year, *id.* ¶¶ 24-30. Thus, Plaintiff's allegations of injury at the hands of the Nigerian government extend back decades, and undercut the contention that the United States' actions, in delivering the A-29 Aircraft, are the cause of any alleged present or future injury. *See Am. Freedom L. Ctr.*, 821 F.3d at 49; *cf. Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 37–40 (D.D.C. 2015) (finding that "a pre-existing downward trend" toward declining timber-harvest levels clearly undermines plaintiffs' standing argument by nullifying any assertion that the challenged action is itself the cause of the decline and the resulting injury).

In these circumstances, attributing the Does' alleged harm to the actions of the U.S. Government in delivering the A-29 Aircraft to Nigeria requires a long chain of causation involving several independent actions by third parties: first, a decision by Nigerian government officials to persecute Biafrans residing or located in Nigeria; next, a decision by Nigerian government officials to use the A-29 Aircraft to conduct such persecution; finally, attacks perpetrated by Nigerian government officials that harm at least one of the Does. This type of chain of events relying on decisions by third parties is "too attenuated" to support a finding that Defendant's actions in support of the sale to Nigeria is the cause of any potential injury to the Does in the future. *See Am. Freedom L. Ctr.*, 821 F.3d at 49 ("The greater number of uncertain links in a causal chain, the less likely it is that the entire chain will hold true."); *Elec. Privacy Info. Ctr. v. Dep't of Educ.*, 48 F. Supp. 3d 1, 20 (D.D.C. 2014) (finding that because plaintiffs would not suffer identity fraud unless their universities chose to disclose their personal information to third-party entities and those entities

fraudulently used or disclosed that information, plaintiffs failed to show that a regulation was the cause of their injuries).

3. The Requested Relief Would Not Redress Any Injury to the Does.

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

Even if this Court were to order Defendants to terminate the authorization for the sale of defense articles to Nigeria—assuming for the moment that such a remedy is available, *see infra* at 31-44—ample speculation would be necessary to conclude that individuals and a government half-a-world-away would change their behavior in response to an order against Defendants from this Court, let alone change their behavior in a way that had any effect on the Does. And Plaintiffs' allegations of an internal Nigerian conflict stretching back to 1967, Compl. ¶ 23, makes plain that, even if the A-29 Aircraft deliveries could conceivably be deemed a substantial factor in causing the alleged harm, "the undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces," *Renal Physicians Ass'n v. Dep't of Health & Human Servs.*,

489 F.3d 1267, 1278 (D.C. Cir. 2007).[12] Because redressing the Does' alleged injuries would necessarily depend upon actions of third parties that the court "cannot presume either to control or to predict," *Lujan*, 504 U.S. at 562 (citation omitted), Plaintiff cannot satisfy the redressability prong of the standing inquiry, *see Afifi v. Lynch*, 101 F. Supp. 3d 90, 110 (D.D.C. 2015).

Indeed, courts in this Circuit have repeatedly recognized that an order directing the U.S. Government to take certain actions in the foreign relations sphere would not redress a plaintiff's injuries because it is entirely speculative how foreign governments or organizations would react. For example, in *Bernstein*, the Court rejected a theory of standing advanced by American citizens residing in Israel who alleged injuries at the hands of terrorists supported by the Palestinian Authority. 962 F. Supp. 2d at 130. In finding an absence of standing to obtain an end to U.S. aid to the Palestinian Authority, the Court characterized the plaintiffs' argument that a change in the U.S. Government's policy would reduce the threat of terrorism as "at best, mere speculation." *Id.* Other courts in this Circuit have reached similar conclusions. *See, e.g.*, *Talenti v. Clinton*, 102 F.3d 573, 575–78 (D.C. Cir. 1996) (finding that uncertainty as to how Italy would react to the withholding of foreign assistance precluded a finding that the plaintiff's injury would be redressed); *Siegel*, 304 F. Supp. 3d at 53–55

[12] The Complaint also does not explain by what legal mechanism the U.S. Government would affect the return of the six 12 A-29 Aircraft already delivered to Nigeria. Nor has Plaintiff alleged that an increase by six in the already existing weaponry of Nigeria would create a redressable harm. *Cf. See Humane Soc'y of the U.S. v. Babbitt*, 46 F.3d 93, 100–101 (D.C. Cir. 1995) (holding that a procedural injury was not redressable because there was "no possibility" that the already completed action could be undone); *Narragansett Indian Tribal Historic Pres. Off. v. Fed. Energy Regul. Comm'n*, 949 F.3d 8, 12-14 (D.C. Cir. 2020) (finding that remedying a procedural injury "could not possibly prevent or mitigate the harm" to the plaintiff's interests because "there was 'no possibility' that the already completed action could be undone") (quoting *Humane Soc'y*, 46 F.3d at100-01); *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999) (holding no redressability given no legal entitlement to receive a benefit from the relief sought).

(concluding that plaintiffs whose property was seized by Israeli settlers lacked standing to enjoin the United States from providing aid to Israel because the attenuated chain of events between ending U.S. aid to the return of the plaintiffs' property "involve[d] numerous third parties," whose actions and reactions were impossible to predict); *Nyambal v. Mnuchin*, 245 F. Supp. 3d 217, 225 (D.D.C. 2017), *aff'd*, No. 17-5072, 2017 WL 5664980 (D.C. Cir. Nov. 8, 2017) (finding "there is considerable uncertainty"' as to whether the actions proposed by plaintiff would aid him or drive the challenged entity "into even greater intransigence"); *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 130 (D.D.C. 2003) (finding that blocking a loan to Guyana to build a competing telecommunications company would not redress the company's economic harm because Guyana could "borrow[] money for the same purpose elsewhere" or "fund[] the competing telecommunications system project itself"); *Aerotrade Inc. v. Agency for Int'l Dev.*, 387 F. Supp. 974, 975 (D.D.C. 1974) (finding "considerable uncertainty" as to whether suspension of aid to Haiti "would aid plaintiff in collecting its debt or would tend to drive Haiti into even greater intransigence"). Because it is entirely speculative how the Nigerian government would react to an order from this Court regarding any delivery of the A-29 Aircraft (already completed or prospective), it is not "likely" that any injury would be redressed by a favorable decision. *Lujan*, 504 U.S. at 561.

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

II. Plaintiff Has Not Asserted Any Actionable Claim.

Even if the Court determines Plaintiff has standing, Plaintiff's Complaint should be dismissed for failure to identify an actionable claim, since the Leahy Laws do not authorize a private

right to sue, and because Plaintiff has not stated a claim upon which relief can be granted given the absence of any allegation of the use of appropriated funds to deliver the A-29 Aircraft.

A. The Leahy Laws Do Not Provide a Private Cause of Action.

Even if jurisdiction were otherwise proper, Plaintiff's claims for relief under Counts 1 and 3 of the Complaint should be dismissed because the Leahy Laws do not offer private causes of action to enforce their terms. "[P]rivate rights of action to enforce federal laws must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citation omitted). When the existence of a private cause of action is challenged, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* (citation omitted). Where there is no such intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87 (citation omitted). Nor is it sufficient for a statute to be "designed to benefit a particular class;" rather, the controlling inquiry is whether Congress intended that statute to be enforced through private litigation. *Univs. Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754, 771 (1981).

The Leahy Laws do not contain the sort of "rights-creating language" that courts have found "critical" in assessing Congress's intent to create an implied right of action. *Sandoval*, 532 U.S. at 288 (internal quotation marks omitted). *See also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). They govern the relationship between Congress and the Executive Branch by imposing conditions on the State Department's or the DoD's respective uses of their Congressionally appropriated funds. *See* 22 U.S.C. § 2378d(a); 10 U.S.C. § 362(a)(1). *See also supra* at 5-7. Those conditions, however, are subject to exceptions. For State, the prohibition on the furnishing of assistance does not apply

where the Secretary of State makes, and reports to Congress of having made, the requisite determination. 22 U.S.C. § 2378d(b). For the DoD, the Secretary of Defense may both except the DoD-appropriated funds from the applicable condition after consulting with the Secretary of State and making the requisite determination as well as waive the application of the prohibition entirely upon determining such action is required by extraordinary circumstances. *See* 10 U.S.C. § 362(b)-(c). The interplay between Congress and the Secretary of State under the State Leahy Law demonstrates that it is for the political branches, not private citizens or the courts, to decide when it is appropriate to withhold assistance based on human rights concerns. *See Smith v. Reagan*, 844 F.2d 195, 201 (4th Cir. 1988) (declining to recognize a private cause of action under Hostage Act in part because of a statutory requirement that "all the facts and proceedings relative [to such actions] shall . . . be communicated by the President to Congress.") (citation and internal quotations omitted); *see also Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004) (finding no private right for a writ of mandamus for similar reasons as the *Smith* court). Similarly, by granting discretion to the Secretaries of State and Defense to make exceptions or waivers to the Leahy Laws' prohibitions, Congress provided "a strong indication" that it "did not intend the courts to intervene to 'enforce' the statute at the [insistence] of a private plaintiff." *Aerotrade, Inc.*, 387 F. Supp. at 976.

Even if the Leahy Laws were construed to create private rights that could be impaired by a failure to follow their requirements, they do not contain anything approaching explicit language authorizing private litigants a mechanism to enforce application. As the Supreme Court has recognized, "'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'" *Touche Ross*, 442 U.S. at 568 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979)). Rather, the statutory scheme must

still display an intent to provide for a cause of action. *See Alexander*, 532 U.S. at 290. Where, as here, the statute is framed as "a general prohibition or a command to a federal agency" rather than "legislation with an unmistakable focus on the benefited class," there is "far less reason to infer a private remedy in favor of individual persons." *Univs. Rsch. Ass'n*, 450 U.S. at 772 (citation and internal quotation marks omitted).

Several courts have considered whether the FAA creates a private cause of action on the part of citizens, without finding such a right. *See Clark v. United States*, 609 F. Supp. 1249 (D. Md. 1985) (discussed below); *Atl. Tele-Network*, 251 F. Supp. 2d at 131 at 131 ("To grant or deny a loan to a foreign nation is a decision fraught with foreign policy implications. Congress clearly did not confer the power to make such decisions upon aggrieved private citizens for their personal commercial advantage without regard to the national interest."); *Somali Dev. Bank v. United States*, 508 F.2d 817, 820 (Ct. Cl. 1974) (finding that "there is no doubt that the statutory language [of the FAA] . . . was enacted for the benefit of the taxpayers of the United States and that it confers no right of action on the plaintiffs."). In *Clark*, regarding a different section of the FAA, the Court stated:

> The [FAA] . . . does not create standing for any taxpayer or any private party to sue for its enforcement. [The section at issue is] clearly enacted to effect the relationship between the Congress and the President over disbursing foreign aid funds in light of an official policy of concern for human rights. The only parties with standing to seek adjudication . . . are the executive and legislative branches. One need only read the plain language of the section to reach this conclusion. The section requires the executive branch to satisfy certain conditions made by Congress before foreign aid can be disbursed to foreign governments or entities.

Clark, 609 F. Supp. at 1251.

Although *Clark* concerned a separate provision of the FAA to that at issue here, the same reasoning applies to the Leahy Laws, as demonstrated by *Abusharar v. Hagel*, 77 F. Supp. 3d 1005 (C.D. Cal. 2014). In that case, the plaintiff sued the Secretaries of State and Defense under the State

Leahy Law to enjoin a provision of military support to Israel. F. Supp. 3d at 1006. The court determined that there was "no private right of action under the [State] Leahy [Law]." *Id.* Acknowledging that its task was "'to interpret the statute . . . to determine whether it displays an intent to create not just a private right but also a private remedy,'" the court found "no evidence of such an intent." *Id.* (quoting *Alexander*, 532 U.S. at 286). The court further explained:

> While [the State Leahy Law] clearly means to deter human rights violations, there is no language indicating that a private enforcement right exists. On the contrary, the statute is directed specifically to the executive branch, and directly empowers the secretary of state to determine when a human rights violation occurs so that foreign aid may be halted. Thus, absent additional "rights-creating language," the Court cannot entertain a private right of action.

Id. at 1006-07. The same rationale applies to the instant suit's reliance upon the State Leahy Law (Count 1), and the DoD Leahy Law (in Count 3). No private right of action exists for either claim, and the Court should consequently dismiss both. *Cf. Robinson v. Deutsche Bank Nat'l Tr. Co.*, 932 F. Supp. 2d 95, 107 (D.D.C. 2013) (Jackson, J.) (granting motion to dismiss under Rule 12(b)(6)) ("In his pleadings, [the plaintiff] simply assumes that he can assert an independent claim under [the statute], and he fails to carry his burden of demonstrating that there is an express or a judicially inferred private right of action.").

B. Plaintiff Has Not Alleged Facts Triggering Application of the Leahy Laws.

The Leahy Laws only apply to the furnishing of defense articles—like the A-29 Aircraft—through the use of funds appropriated by Congress to the Executive Branch. *See supra* at 5-7. Plaintiff itself concedes this, as the Complaint acknowledges that the Leahy Laws prohibit "military assistance," "the expenditure of monies," or "the use of [the DoD] funds to assist through training, equipment, or otherwise" for foreign actors if the State Department or the DoD, respectively,

possess credible information that the foreign actor has committed gross violations of human rights. Compl. ¶¶ 15-16, 36, 38.

The Complaint's allegations of the relevant timeline of events, however, merely allege a direct sale of the A-29 Aircraft, moving immediately (in terms of the U.S. Government's actions) from alleging then-President Trump's approval of the sale of the A-29 Aircraft, to the current administration's delivery of six of those planes to Nigeria. *Id.* ¶¶ 32-34. Plaintiff fails to allege that the State Department—or the DoD—used (or will use) appropriated funds to provide assistance to fund the sale of the A-29 Aircraft to Nigeria.[13] Plaintiff therefore wholly fails to allege any prerequisite for applying the Leahy Laws to such delivery, invalidating Counts 1 and 3 of the Complaint. *See* Compl. at 9-11. While "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Twombly*, 550 U.S. at 555, Plaintiff must put forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

[13] Plaintiff alleges that Defendants are "entrusted" with administering the Leahy Laws, Compl. ¶ 15-16, which were intended to "shield citizens of foreign sovereigns from harm caused by United States weapons," *id.* ¶¶ 36-39; that then-President Trump "approved the sale of the [A-29 Aircraft] to Nigeria" on or about August 3, 2017, *id.* ¶ 32; that the Biden administration delivered six of the A-29 Aircraft to Nigeria on or about July 19, 2021, *id.* ¶ 34; that "[e]very unit of Nigeria's security forces [are] guilty of gross violations of human rights against Biafrans," and Defendants are aware of such conduct, *id.* ¶¶ 42, 48, 54, 60; that Defendant the Secretary of State "has not determined that the Government of Nigeria is taking effective measures to bring the responsible members of the security forces units to justice," *id.* ¶¶ 43, 49; and that Defendant the Secretary of Defense "has not determined that the exception or waiver provisions of [the DoD Leahy Law] apply to the delivery of the [A-29 Aircraft] to the Nigerian Air Force," *id.* ¶¶ 55, 61. Plaintiff also alleges that the delivery of the six A-29 Aircraft to Nigeria was pursuant "to the [FAA] of the AECA," and that the prior and projected deliveries of the A-29 Aircraft to Nigeria violated or will violate, exceeded the statutory authority of, or contravened either the State Leahy Law or the DoD Leahy Law, as well as exceeded the statutory authority of, contravened, or will violate the APA. *Id.* ¶¶ 44-45, 50-51, 56-57, 62-63. As explained above, while these allegations seek to challenge the delivery of the aircraft to Nigeria, they do not state a violation of the Leahy Laws.

alleged." *Iqbal,* 556 U.S. at 678 (internal quotation omitted). *See also Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 268 (D.D.C. 2018) (dismissing complaint under Rule 12(b)(6) where causal connection not stated in complaint); *Akpan v. Cissna*, 288 F. Supp. 3d 155, 165 (D.D.C. 2018) (granting Rule 12(b)(6) motion to dismiss where necessary facts not pled); *Cares Cmty. Health v. U.S. Dep't of Health & Hum. Servs.*, 346 F. Supp. 3d 121, 129 (D.D.C. 2018), *aff'd*, 944 F.3d 950 (D.C. Cir. 2019) (dismissing complaint under Rule 12(b)(6), in part, because the plaintiff "had not identified any non-discretionary duty [the defendant] has breached because the [plaintiff's] proposition . . . is 'wrong as a matter of law.'").

Moreover, as Plaintiff has not alleged Defendants' obligation to comply with the Leahy Laws in relation to the delivery of the A-29 Aircraft, Plaintiff likewise has not alleged that Defendants' actions in approving and delivering the planes were or will be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C). *See Statewide Bonding, Inc. v. U.S. Dep't of Homeland Sec.*, 422 F. Supp. 3d 35, 40 (D.D.C. 2019), *aff'd*, 980 F.3d 109 (D.C. Cir. 2020) (finding a failure to state a claim under 5 U.S.C. § 706(2)(A) as a matter of law where the federal agency's interpretation of its regulations was sound); *Elk Run Coal Co. v. U.S. Dep't of Lab.*, 804 F. Supp. 2d 8, 31 (D.D.C. 2011) (dismissing under Rule 12(b)(6) a claim pursuant to 5 U.S.C. § 706(2)(C) where the claims were "too vague to survive under *Iqbal*"). Plaintiff therefore also fails to state a claim upon which relief can be granted for its other two claims (Counts 2 and 4). *See* Compl. at 11-13.

III. Plaintiff's APA Claims Are Otherwise Barred Because the Challenged Conduct Has Been Committed to Agency Discretion by Law.[14]

It is well established that the APA does not provide for jurisdiction in cases—like this one—where the challenged agency action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). The reason for this is simple: a statute committing an action to the discretion of an agency provides no justiciable standards by which a court may review the agency's decision. *Webster v. Doe*, 486 U.S. 592, 599–00 (1988). This is true "even where Congress has not affirmatively precluded review[.]" *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In looking for a judicially manageable standard with which to interpret the State Department's authority and discretion to authorize foreign military sales, *see* 22 U.S.C. § 2752(b), and the State Department's and the DoD's respective uses of appropriated funds and related application of the Leahy Laws, 22 U.S.C. § 2378d, 10 U.S.C. § 362, the Court should consider the statutory language and structure as well as the nature of the agency decision(s) at issue. *See Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State ("LAVAS")*, 104 F.3d 1349, 1353 (D.C. Cir. 1997).

The sale of the A-29 Aircraft was carried out pursuant to the AECA. *See* 163 Cong. Rec. S. 4753, 4754-55 (Aug. 2, 2017); 82 Fed. Reg. at 40,757-59. That statute's general language, as well as its overall deference to the Executive Branch, render agency decision making to authorize foreign military sales presumptively unreviewable. *See, e.g.*, *LAVAS*, 104 F.3d at 1353 ("the broad language of the statute suggests that the State Department policy is unreviewable"). Specifically, Congress

[14] In the remaining sections of this memorandum, for the sake of argument, Defendants assume (without conceding) that Plaintiff's claims are properly asserted under the AECA and the Leahy Laws. Since Plaintiff's alleged harm and relief sought derive from the delivery of the A-29 Aircraft, the legal basis for such delivery—the AECA—is relevant to the remaining discussion.

mandated that the Secretary of State, under the direction of the President, "shall be responsible for the continuous supervision and general direction of sales . . . under [the AECA]," including determining "whether there will be a sale to . . . a country and the amount thereof . . . to the end that sales . . . will be integrated with other United States activities and to the end that the foreign policy of the United States would be best served thereby." 22 U.S.C. § 2752(b)(1). Statutes using similar language have been interpreted to commit the challenged action to the discretion of the agency. *See, e.g.*, *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005) (affirming the dismissal of an APA case where the statute authorized the Attorney General to take certain actions he "deem[ed]" to be in the "national interest."); *Webster*, 486 U.S. at 600 (finding language that authorized a political appointee to terminate an employee when "deem[ed] . . . necessary or advisable in the interests of the United States," "fairly exude[d] deference[,]" precluding judicial review under the APA).

Moreover, in conferring the AECA's deferential authority upon the Executive Branch, Congress acknowledged the complex evaluation involved in any arms sale.

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

22 U.S.C. § 2751. Such decision making typically "involves a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise[,]" thus committing it to agency discretion by law. *Chaney*, 470 U.S. at 831. As discussed by the D.C. Circuit in *LAVAS*—involving a challenge by Vietnamese migrants to a State Department policy applied under statutory authority,

104 F.3d at 1350—such a confluence of interests, especially given the deference in the statutory text, renders related decision making unreviewable.

> In this case the agency is entrusted by a broadly worded statute with balancing complex concerns involving security and diplomacy, State Department resources and the relative demand for visa applications. However, in this case the argument for executive branch discretion is even stronger. By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters.

Id. at 1353 (internal citations and quotation marks omitted). The *LAVAS* court found it "impossible to evaluate agency action" since there were "no judicially manageable standards . . . available for judging how and when an agency should exercise its discretion." *Id.* (quoting *Chaney*, 470 U.S. at 830). The same is true of the conferral of authority to the Executive Branch under the AECA. *See also Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000) (finding commitment to agency discretion by law of decision making related to, among other things, foreign policy and the national interest).

The provisions of the AECA and the FAA governing the State Department's and the DoD's respective capabilities to act in furtherance of a foreign military sale or govern assistance efforts also grant broad deference to the Executive Branch, with few limiting conditions. *See*, *e.g.*, 22 U.S.C. § 2763 ("The President is authorized to finance the procurement of defense articles . . . by friendly foreign countries . . . , *on such terms and conditions as he may determine consistent with the requirements of this section*.") (emphasis added); 22 U.S.C. § 2348 ("The President is authorized to furnish assistance to friendly countries . . . , *on such terms and conditions as he may determine*, for peacekeeping operations and other programs carried out in furtherance of the national security interests of the United States.")

(emphasis added).[15] Such deference offers no standard for the Court to apply against a decision by the State Department or the DoD to sell arms or provide aid. *See*, *e.g.*, *Chi. Acorn v. U.S. Dep't of Hous. & Urb. Dev.*, No. 05 C 3049, 2005 WL 8179274, at *7-8 (N.D. Ill. Oct. 5, 2005) (finding challenged conduct was committed to agency discretion by law where statutory language permitted the agency to act "on such terms and conditions as the Secretary may determine"); *Pramco, LLC v. Torres*, 286 F. Supp. 2d 164, 168-170 (D.P.R. 2003) (concluding that specific language permitting the agency's Administrator to act "upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable," demonstrated commitment to agency discretion by law). Moreover, these provisions implicate the same "complex concerns involving security and diplomacy, State Department resources and . . . foreign policy matters" rendering review of the agency decision making non-justiciable. *LAVAS*, 104 F.3d at 1353. *See also Watervale Marine Co. v. U.S. Dep't of Homeland Sec.*, 55 F. Supp. 3d 124 (D.D.C. 2014), *aff'd on other grounds*, 807 F.3d 325 (D.C. Cir. 2015) ("Likewise, it is established in this circuit that executive branch decision[s] involving complicated foreign policy matters[,] . . . are nonjusticiable by nature.") (internal citations and quotation marks omitted).

Indeed, even if one assumes that the delivery of the A-29 Aircraft involved some provision of assistance, and thus the use of appropriated funds, that too reflects decision making that is committed to agency discretion by law. The annual appropriations acts passed by Congress for the State Department and the DoD provide lump-sum appropriations for all foreign military financing

[15] The Secretaries of State or Defense, or in some cases their delegates, may act in the President's place. *See* Administration of Reformed Export Controls, Executive Order No. 13,637, 78 Fed. Reg. 16, 129 (Mar. 8, 2013); Administration of Foreign Assistance & Relations Functions, Executive Order No. 12,163, 44 Fed Reg. 56,673 (Sept. 29, 1979); 22 U.S.C. § 2752.

(in the case of the State Department) or to provide all foreign support or assistance (in the case of the DoD). *See*, *e.g.*, Pub. L. No. 116-6, 133 Stat. 13, 288 (2019) enacted HRJ 31, 116th Cong. (2019) (Foreign Military Financing Program) (appropriating $5,962,241,000 "[f]or necessary expenses for grants to enable the President to carry out the provisions of section 23 of the [AECA]"); Pub. L. No. 116-94, 133 Stat. 2534, 2836 (2020) (Foreign Military Financing Program) (same, but appropriating $6,156,924,000); Pub. L. No. 116-94, Tits. II and IX, 133 Stat. 2534, 2836 (2019) enacted H.R. 1865, 116th Cong. (2019) (Operations and Maintenance – Defense Wide) (appropriating $663,969,000 "to provide support and assistance to foreign security forces or other groups or individuals to conduct, support or facilitate counterterrorism, crisis response, or other [DSCA] programs"); Department of Defense Appropriations Act, 2020, Pub. L. No. 116-93, Div. A, Tits. II and IX, 133 Stat. 2317, 2321, 2367 (2019) (Operations and Maintenance – Defense Wide) (same, but appropriating $643,073,000).[16] The statutes appropriating these sums not only provide for funding in lump amounts, but also rest upon broadly deferential language in granting the amounts conferred (although the use of funds may be subject to certain conditions on use). *See*, *e.g.*, Pub. L. No. 116-6, 133 Stat. 13, 288 (2019) (Foreign Military Financing Section) ("to expedite the provision of assistance to foreign countries and international organizations, the Secretary of State, following consultation with the Committees on Appropriations and subject to the regular

[16] Amongst these general allocated lump-sum funds, other sums are allocated to address designated interests or for aid to particular regions. *See*, *e.g.*, Pub. L. No. 116-6, 133 Stat. 13, 288 (2019) (Foreign Military Financing Program); Pub. L. No. 116-94,133 Stat. 2543, 2836 (2019) (Foreign Military Financing Program); Pub. L. No. 115-245, Tits. II and IX, 132 Stat. 2981, 2985 (2018) (Operations and Maintenance – Defense Wide Sections); Pub. L. No. 116-94, Tit. II, 133 Stat. 2317, 2321 (2019) (Operations and Maintenance – Defense Wide); Pub. L. No. 116-93, Div. A, Tits. II and IX, 133 Stat. 2317, 2321, 2367 (2019) (Operations and Maintenance – Defense Wide); Pub. L. No.116-260, Div. C, Tits. II and IX, 134 Stat.1182, 1288, 1337 (2020) (Operations and Maintenance – Defense Wide).

notification procedures of such Committees, may use the funds appropriated under this heading to procure defense articles and services to enhance the capacity of foreign security forces"); Pub. L. No. 116-94, Tit. II, 133 Stat. 2317, 2321 (2019) (Operations and Maintenance – Defense Wide) (requiring quarterly reports to Congress).

The use of appropriated funds is the type of administrative decision making "traditionally regarded as committed to agency discretion[:] . . . [a]fter all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Similarly, choices by the State Department and the DoD regarding the use of appropriated funds to confer aid (or not) likewise fall outside justiciable matters. *See*, *e.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."); *Lincoln*, 508 U.S. at 192; *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002) (finding agency decision making regarding appropriations for an assistance program committed to agency discretion by law).

The same rationale applies if the delivery of the A-29 Aircraft implicated the Leahy Laws, which impose limitations on the provision of assistance using appropriated funds. *See* 22 U.S.C. § 2378d(a), (c); 10 U.S.C. § 362(a). *See also supra* at 5-7. Thus, by their very nature, any challenge to the application of the Leahy Laws likewise implicates the complex intersection of interests that firmly trench the AECA and the annual appropriations acts as being committed to agency discretion by law. *See*, *e.g.*, *LAVAS*, 104 F.3d at 1353; *Lincoln*, 508 U.S. at 192. Further, like the AECA, the Leahy Laws are written with broad deference to the Executive Branch: the provisions only apply if

the Secretary of State or Secretary of Defense has "credible information" of "a gross violation of human rights," 22 U.S.C. § 2378d(a), 10 U.S.C. § 362(a), and in such a circumstance, the Secretary of State may except the restriction on the use of funds by determining and reporting to Congress that the foreign partner is taking certain remediative efforts, 22 U.S.C. § 2378d(b), while the Secretary of Defense may except application (after consulting the Secretary of State) where the foreign partner "has taken all necessary corrective steps, or if the equipment or other assistance is necessary to assist in disaster relief operations or other humanitarian or national security emergencies." 10 U.S.C. § 362(b).[17] The Secretary of Defense may also waive application of the DoD Leahy Law's restriction on the use of funds, after consulting the Secretary of State, if "required by extraordinary circumstances." *Id.* § 362(c). Aside from reporting to Congress and, in the case of the Secretary of Defense, consulting the Secretary of State, the authority conferred is discretionary, without any articulated standards for either Secretary to apply when making the requisite determinations. Such a deferential grant of authority is a clear commitment to agency discretion by law. *See Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-CV-1491 (APM), 2020 WL 3402298, at *1 (D.D.C. June 11, 2020), *appeal dismissed*, No. 20-5171, 2020 WL 4931697 (D.C. Cir. July 16, 2020) (concluding that a statutory directive to determine funds to grant to Tribal governments was committed to agency discretion by law as it "contain[ed] no statutory reference point by which to judge the Secretary's decision") (internal quotation marks omitted).

In addition, "the existence of congressional oversight as an enforcement mechanism" is an indication that "Congress intended to preclude review." *Banzhaf v. Smith*, 737 F.2d 1167, 1170 (D.C. Cir. 1984). The AECA provides a detailed statutory scheme by which Congress is notified of

[17] The Secretary of Defense is also required to notify Congress. 10 U.S.C. § 362(e).

potential sales, has the ability to review and seek additional information about such sales, may block such sales through legislation, and will continue to be informed about sales in certain circumstances. *See* 22 U.S.C. §§ 2753(c), 2776(b)(1). This scheme shows that Congress, not the courts, is responsible for overseeing implementation of the AECA. The same holds true regarding the use of appropriated funds, and the application of the Leahy Laws—both specifically provide for Congressional oversight. *Cf.* 22 U.S.C. § 2378d(b); 10 U.S.C. § 362(e); Pub. L. No. 116-6, 133 Stat. 13, 288 (2019) (Foreign Military Financing Section); Pub. L. No. 116-94, 133 Stat. 2534, 2836 (2020) (Foreign Military Financing Section); Pub. L. No. 116-94, Tit. II, 133 Stat. 2317, 2321(2019) (Operations and Maintenance – Defense Wide); Pub. L. No. 116-93, Div. A, Tit. IX, 133 Stat. 2317, 2367 (2019) (Operations and Maintenance – Defense Wide); Pub. L. No. 116-260, Div. C, Tits. II and IX, 134 Stat.1182, 1288, 1337 (2020) (Operations and Maintenance – Defense Wide); 22 U.S.C. § 2378d(b); 10 U.S.C. § 362(e).

IV. Plaintiff's Claims Raise a Non-Justiciable Political Question.

Dismissal is also warranted because Plaintiff's claims raise a non-justiciable political question. *See Am. Jewish Cong. v. Vance*, 575 F.2d 939, 943 (D.C. Cir. 1978) (noting it is more prudent to first consider standing before political question issues). "Like standing, the political question doctrine is an aspect of 'the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts 'by the case or controversy' requirement of Article III of the Constitution." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44 (D.D.C. 2010) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974))). "The political question doctrine is 'essentially a function of the separation of powers,' and 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of

Congress or the confines of the Executive Branch.'" *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) & *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

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

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

369 U.S. at 217. Following the Supreme Court's decision in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012),[18] in which the Supreme Court discussed only the first two *Baker* factors, the D.C. Circuit has found that "if the first two *Baker* factors are not present, more is required to create a political question than apparent inconsistency between a judicial decision and the position of another branch." *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 (D.C. Cir. 2019).

[18] *Zivotofsky*, in which the political question doctrine did not require dismissal, is distinguishable. There, the Supreme Court found the courts were not asked to supplant the political branches' foreign policy decision because the plaintiff requested the enforcement of a specific statutory right. 566 U.S. at 196. And, the question presented was not political, but impacted whether Congress had enacted a statute that intruded upon the President's Article II powers, *id.* at 196-97—a distinct issue within the Court's purview. Here, Plaintiff seeks not the enforcement of a statutory right it possesses, and presents no claim that the statute violates the separation of powers. Instead, Plaintiff seeks to overturn the foreign policy decisions of the Executive and Legislative Branches.

This case meets five of the six *Baker* factors. First, there is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (discussing the "[d]irect allocation[s]" in the Constitution of those responsibilities to the legislative and executive branches). "Indeed, the Supreme Court has described the President as possessing 'plenary and exclusive power' in the international arena and 'as the sole organ of the federal government in the field of international relations.'" *Id.* at 194-95 (quoting *United States v. Curtiss–Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). As acknowledged within this Circuit, decision making regarding foreign policy goes to "the very heart" of the first *Baker* factor. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 261 (D.D.C. 2004) ("Foreign affairs do not encompass only United States policy in general toward another country, but also cover discrete choices made by the Executive and Legislative Branches concerning the full range of relationship issues between nations"), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005) (internal emphasis and citations omitted). Further, "[n]ational-security policy is the prerogative of the Congress and President." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citing U.S. Const. art. I, § 8; art. II, §§ 1, 2).

Allowing this case to proceed would entangle the Court in precisely the type of policy determinations the Constitution entrusts to the political branches. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."). By requesting that the Court declare that the delivery of the A-29 Aircraft will violate or did exceed, violate, or contravene statutory authority, Compl. ¶¶ 50-51, 62-63, Plaintiff effectively asks the Court to substitute its judgment for that of the Executive and Legislative Branches as to whether the United

States should furnish defense articles to Nigeria, and do so as a direct sale or through assistance. Since that delivery was pursued according to the AECA's requirements and rests on complex foreign policy and national security judgments, however, it is committed under the Constitution to the Executive and Legislative Branches and thus non-justiciable under the first *Baker* factor. *See Corrie*, 503 F.3d at 983 (refusing to decide a challenge to a defense contractor's sales under the AECA because doing so would require the court to "intrude into our government's decision to grant military assistance to Israel"); *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 93 (D.D.C. 2016) (finding claim posed a non-justiciable political question where the "contention [was] that the Executive Branch has abused its discretion—in APA terms—in refusing to evacuate U.S. citizens from Yemen . . . [thus] necessarily involv[ing] second-guessing the 'wisdom' of [the State and Defense Departments'] discretionary determinations"); *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.D.C. 1983) (per curiam) (barring a suit to enjoin security assistance under the FAA due, in part, to the political question doctrine); *Abusharar*, 77 F. Supp. 3d at 1006-07 (ordering the dismissal of a suit to enjoin military assistance to Israel based on the State Leahy Law, in part, given the political question doctrine).

In addition, "[j]udicial restraint in the area of foreign affairs is often appropriate because such cases 'frequently turn on standards that defy judicial application[.]'" *Harbury*, 522 F.3d at 419 (quoting *Baker*, 369 U.S. at 211). Here, any attempt to review adherence with the terms of the AECA or the Leahy Laws would require the Court to determine whether "the foreign policy of the United States would be best served" by selling the A-29 Aircraft, 22 U.S.C. § 2752(b), or granting related assistance for such planes, to Nigeria. Just as there is no "constitutional test for what is war," *see Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring), there are no judicially manageable standards to determine whether Defendants adequately considered national

security. Rather, the relief sought calls for value judgments to be made by Defendants and reviewed by Congress, accounting for complex and evolving diplomatic and military circumstances that can be addressed only by the Executive Branch.

Also, the Court would not be able to decide the case "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The determination that Nigeria is a foreign country to which the United States can sell defense articles was made in 1973, by the Nixon administration, *see* Presidential Determination No. 73-10, 38 Fed. Reg. at 7211, while the Trump administration decided to sell the A-29 Aircraft to Nigeria, as notified to Congress in 2017, *see* Compl. ¶ 32, and the Biden administration delivered the first six of the A-29 Aircraft to Nigeria this year, *see* Compl. ¶ 34. These decisions reflect several policy determinations across different presidential administrations over a span of 48 years, presumably the result of the balancing of complex foreign affairs considerations, not only involving Nigeria but also Sub-Saharan Africa and the rest of the world. *See*, *generally*, Lauren Ploch Blanchard *& Tomas F. Husted*, Cong. Rsch. Serv., IF 10174, In Focus: Nigeria, at 2 (2019) (summarizing U.S. Relations and Assistance); Tomas F. Husted *et al.*, Cong. Rsch. Serv., R46368, U.S. Assistance to Sub-Saharan Africa: An Overview, App. A., U.S. Assistance to Africa, By Country (2020). To re-evaluate such decision-making surely cannot be the province of this Court. *See Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (stating that foreign policy decisions are "delicate, complex, and involve large elements of prophecy" and are "of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"); *Schneider*, 412 F.3d at 195 ("[T]he 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.'" (quoting

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386 (2000)); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[I]n the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves.").

Moreover, the Court's independent resolution here would express a "lack of respect [that is] due [to] coordinate branches of government." *Baker*, 369 U.S. at 217. The A-29 Aircraft's delivery comported with the AECA's requirements, *see supra* at 7-8. The statutorily required sale notifications provided by the DSCA included public policy justifications and enclosures with additional information, to the appropriate Congressional members and committees. *See* 163 Cong. Rec. S. 4753, 4754-55 (Aug. 2, 2017); 82 Fed. Reg. at 40,757-59. Those members and committees reviewed that information, and Congress did not pass legislation to block the sale. If enough members of Congress thought they lacked sufficient information to consider whether the United States should make the sale to Nigeria, the appropriate committees could have requested additional information or those members could have disapproved the sales by enacting legislation to block the sales. *See* 22 U.S.C. § 2776(b)(1). They did not do so.[19] For the Court to now insert itself into the process to review the sufficiency of the Congressional notifications and Defendants' actions in furtherance of the delivery, as Plaintiff requests, would express a "lack of respect" due to the Executive and Legislative Branches. *Baker*, 369 U.S. at 217; *see also Aerotrade*, 387 F. Supp. at 977 (dismissing a claim that the President's failure to terminate aid to Haiti violated various statutes because "it is for Congress, not this Court, to re-examine the President's position" if necessary and noting that Congress had heard testimony on the issue and did not act); *Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (finding non-justiciable decision by Congress and the President to approve aid).

[19] Moreover, as noted above, *see supra* at note 5, Congressional interest in the sales has continued.

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

For all these reasons, the political-question doctrine affords another ground for dismissal here. As the *Abusharar* court found, in assessing claims under the State Leahy Law: "Plaintiff asks the Court to exert its own judgment over a sensitive area of foreign policy. The political question doctrine bars such intervention from the start. . . The decision to provide military support to a foreign nation is a quintessential political question that this Court cannot review." 77 F. Supp. 3d at 1006. Simply put, "[i]f Plaintiff seeks to change foreign policy, it must prove the worthiness of its cause in the political arena," not in a federal court. *Id.*

V. The Court Should Decline to Provide Discretionary Relief.

Even if Plaintiff's claims were justiciable, the Court nevertheless should decline adjudication. The relief sought (*i.e.*, injunctive and declaratory), *see* Compl., Prayer for Relief, is discretionary. The Court should decline to exercise any discretion it may have in this case because of the sensitive issues it raises. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207–08 (D.C. Cir. 1985) (Scalia, J.).

In *Sanchez-Espinoza*, the D.C. Circuit concluded that "it would be an abuse of our discretion

to provide discretionary relief" in a case involving foreign policy issues. 770 F.2d at 208. The APA suit there challenged the Government's alleged "plan . . . to destabilize and overthrow the government of Nicaragua," which purportedly included the provision of substantial "financial assistance" to train paramilitary groups. *Id.* at 205. Without deciding whether the case was barred under the political question doctrine, the Court nonetheless determined that "the withholding of discretionary relief" was required. *Id.* at 208. The Court observed that the conduct alleged in the complaint had "received the attention and approval of the President, the Secretary of State, [and other Executive Branch officials], and involve[d] the conduct of our diplomatic relations with [several] foreign states." *Id.* Under such circumstances, the Court concluded it would be inappropriate to weigh in on "so sensitive a foreign affairs matter." *Id.*

The same reasoning applies here. The actions that Plaintiff asks this Court to review received the attention of the Secretary of State, the DSCA, and Congress, *see supra* at 7-8, and yet the sales proceeded. *See Cf.* 22 U.S.C. § 2776(b)(1). And the delivery involves the conduct of our diplomatic relations with a foreign state, and also concerns the Executive and Legislative Branches' determinations that the related sales will promote U.S. national security interests. *See* 22 U.S.C. § 2751; *see also Al-Aulaqi*, 727 F. Supp. 2d at 42 (declining to issue "discretionary relief that would prohibit military and intelligence activities against an alleged enemy abroad"). Thus, even assuming *arguendo* that these factors (and those discussed above) were insufficient to render Plaintiff's claims unreviewable under the APA or a non-justiciable political question, they at least warrant the withholding of any discretionary relief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to counsel of record.

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