[ORAL ARGUMENT NOT YET SCHEDULED]

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

Lead Case No. 22-5068

JENNY SCHIEBER, ET AL.

Plaintiffs-Appellants,

-v-

UNITED STATES OF AMERICA

Defendant-Appellee

On Appeal from the Orders and Final Judgments of the
United States District Court for the District of Columbia
Case Nos.
1:21-cv-1371-JDB
1:20-cv-265-FYP
1:20-cv-263-CKK
1:20-cv-266-RDM
1:20-cv-260-FYP

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties, Intervenors, and Amici Curiae

The parties to this consolidated appeal are Appellants (1) Jenny Schieber; (2) Louis Schneider and Regina English (3) Esther Gutrejman; (4) Solange Faktor; (5) Simon Bywalski.

The Appellee is the United States.

No *amici* appeared before the district court.

2. Rule 26.1 Disclosure Statement

Appellants are natural persons.

3. Rulings Under Review

Appellants seek review of the orders and judgments of the district court as follows:

(1) Order (Judge John D. Bates) dated January 26, 2022 (D.D.C. Case No. 1:21-cv-1371), ECF 13 [JA 38], entered pursuant to the Memorandum Opinion entered on that same day, *Schieber v. United States*, 2022 WL 227082 (D.D.C. Jan. 26, 2022) [JA 39-55].

(2) Order (Judge Colleen Kollar-Kotelly) dated March 10, 2022 (D.D.C. Case No. 1:20-cv-263), ECF 33 [JA 63], entered pursuant to the Memorandum Opinion entered on that same day, *Faktor v. United States*, 2022 WL 715217 (D.D.C. March 10, 2022) [JA 64-76].

(3) Order (Judge Randolph D. Moss) dated March 22, 2022 (D.D.C. Case No. 1:20-cv-266), ECF 29 [JA 104], entered pursuant to the Memorandum Opinion entered on that same day, *Gutrejman v. United States*, 2022 WL 856284 (D.D.C. March 22, 2022) [JA 84-103].

(4) Order (Judge Florence Y. Pan) dated April 22, 2022 (D.D.C. Case No. 1:20-cv-260), ECF 32 [JA 114], entered pursuant to the Memorandum Opinion entered on that same day, *Schneider v. United States*, 2022 WL 1202426 (D.D.C. April 22, 2022) [JA 115-126].

(5) Order (Judge Florence Y. Pan) dated May 13, 2022 (D.D.C. Case No. 1:20-cv-265), ECF 30 [JA 134], entered pursuant to the Memorandum Opinion entered on that same day, *Bywalski v. United States*, 2022 WL 1521781 (D.D.C. May 13, 2022) [JA 135-

146].

4. Related Cases

The case on review has not previously been before this Court or any other appellate court.

This consolidated appeal is comprised of five cases brought by different plaintiffs in the United States District Court for the District of Columbia that arise from administrative actions taken by the State Department pursuant to authority derived from a legal peace agreement between the French Republic and the United States.

(1) *Schieber v. United States*, No. 22-5068 (D.C. Cir.) (notice of appeal filed Mar. 21, 2022);

(2) *Faktor v. United States*, No. 22-5118 (D.C. Cir.) (notice of appeal filed May 20, 2022);

(3) *Schneider v. United States*, No. 22-5151 (D.C. Cir.) (notice of appeal filed May 23, 2022)

(4) *Bywalski v. United States*, No. 22-5152 (D.C. Cir.) (notice of appeal filed May 23, 2022)

(5) *Gutrejman v. United States*, No. 22-5141 (D.C. Cir.) (notice of appeal filed June 7, 2022).

All appeals were timely filed and were consolidated by order of the Clerk dated July 11, 2022 (Doc. No. 1954313).[1]

[1] Cross-appeals filed by the government in *Schneider* (22-5163), *Bywalski* (22-5160) and *Gutrejman* (22-5159) were also consolidated by the same order.

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over Appellants' claims under 28 U.S.C. §1331 because the case was brought under the Administrative Procedure Act, 5 U.S.C. §551 *et seq*. ("APA"), challenging final federal agency action.

This Court has subject-matter jurisdiction pursuant to 28 U.S.C. §1291 because all orders appealed from are final judgments that dispose of all the parties' claims in the case.

Appellants timely noticed their appeals.

STATEMENT OF THE ISSUES

The issues raised on appeal are:

(1) May Plaintiffs maintain an action under the Administrative Procedure Act for arbitrary and capricious agency adjudication, notwithstanding the non-self-executing U.S.-France Holocaust legal peace agreement?

(2) Does the U.S.-France Holocaust legal peace agreement bar judicial review under APA, 5 U.S.C. §701(a)(1)?

(3) Does the political question doctrine preclude the district court from exercising subject matter jurisdiction to review Plaintiffs' APA claims?

STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in a separate addendum.

STATEMENT OF THE CASE

Factual Background

On December 8, 2014, the United States and the French Republic signed an executive agreement ("Agreement") to establish a compensation fund ("Fund") for non-French national Holocaust victims who were deported from France to Nazi German concentration camps. [JA 9-37]. T.I.A.S. No. 15-1101.[2] Under the Agreement, France agreed to pay $60 million to the United States to establish the Fund to be deposited in an interest-bearing account "in accordance with the

[2] Agreement between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs, Dec. 14, 2014, T.I.A.S. No. 15-1101 (entered into force on Nov. 1, 2015). For a brief history of the historical, political, legislative and judicial background of the Agreement, *see* R. Bettauer, "A Measure of Justice for Uncompensated French Railroad Deportees, during the Holocaust," 20 ASIL INSIGHTS, No. 5 (Mar. 1, 2016), https://www.asil.org/insights/volume/20/issue/5/measure-justice-uncompensated-french-railroad-deportees-during-holocaust [Last visited, Sept. 19, 2022].

applicable domestic procedures of the United States […]" Art. 4(4) [JA 16].[3] In exchange, the United States agreed to "secure, with the assistance of the Government of the French Republic if need be, at the earliest possible date, the termination of any pending suits or future suits that may be filed in any court at any level of the United States legal system against France concerning any Holocaust deportation claim." Art. 5(2) [JA 17]. The Agreement entered into force on November 1, 2015.

One of the Agreement's stated objectives was to provide "an exclusive mechanism for compensating" individuals (1) who "survived deportation from France, their surviving spouses, or their assigns" and (2) who are "not able to gain access to the pension program established

[3] The procedure for the deposit of funds received by the State Department from foreign governments is governed by 22 U.S.C. §2668a, which provides in its entirety:

> All moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury. The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due. Each of the trust funds covered into the Treasury as aforesaid is appropriated for the payment to the ascertained beneficiaries thereof of the certificates provided for in this section.

by the French Republic for French nationals, or by international agreements concluded by the French Republic to address Holocaust deportation claims." Art. 2(1) [JA 15].

Under the Agreement, the United States is required to distribute the Fund "according to criteria which it shall determine unilaterally, in its sole discretion." Art. 6(1) [JA 18]; *see also* 22 U.S.C. §2668a. The Agreement mandates that, in making eligibility determinations, the United States "shall rely" on (1) an applicant's "sworn statement of nationality appearing in [...] the Annex to this Agreement" [JA 21-22]; (2) her "sworn representation" regarding whether she has received (or is eligible to receive) funding from other programs that provide compensation for Holocaust deportation; and (3) "any relevant information obtained" pursuant to information sharing between the United States and France. Art. 6(2)(c) [JA 18].

The Agreement also includes an intergovernmental dispute resolution provision, Art. 8: "Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the parties." [JA 19].

The Claims Process

The Department of State began accepting claims on November 2, 2015. The claims were processed and adjudicated by the Office of International Claims and Investment Disputes in the State Department's Office of the Legal Adviser. *See* https://2009-2017.state.gov/p/eur/rt/hlcst/deportationclaims/index.htm (last accessed on September 19, 2022). The deadline to file claims was initially set at May 31, 2016 but was subsequently extended.

All claimants were required to complete and submit, State Department Form DS-7713 entitled "Statement of Claim Related to Deportation from France During the Holocaust."[4]

[4] Form DS-7713 is attached here as Exhibit "A" and is available at: https://2009-2017.state.gov/documents/organization/249134.pdf. (last accessed on September 19, 2022).

See also the Federal Register notices under the Paperwork Reduction Act for the information collected in Form DS-7713, "60-Day Notice of Proposed Information Collection: Statement of Claim Related to Deportation During the Holocaust," 80 FED. REG. 22604-01, 2015 WL 1802386 (April 22, 2015); and "30-Day Notice of Proposed Information Collection: Statement of Claim Related to Deportation During the Holocaust," 80 FED. REG. 37352-02, 2015 WL 3943095 (June 30, 2015).

Form DS-7713 instructs claimants to "provide all available identifying information and documentation regarding the relevant individual's deportation from France during the Second World War, including if possible the date, convoy, and place of departure and arrival of such deportation." [DS-7713, Sec. 4]. In addition, the Form includes a "Release and Penalties" section. [DS-7713, Sec. 5]. The Form must be signed by the claimant who must certify that "the statements set forth in this Statement of Claim, including any papers attached to or filed with this Statement of Claim, are true and accurate, and that all material facts have been set forth in this Statement of Claim."[5]

After completing the DS-7713, claimants must submit it to the State Department via post, e-mail (DeportationClaims@state.gov) or facsimile. After receiving the Statement of Claim and accompanying documentation, the State Department sends an acknowledgment letter confirming receipt. The State Department also contacts the claimant in the event they need additional information or documentation. According to the State Department, each "claims form and accompanying evidence

[5] False statements on a DS-7713 that are knowingly and willfully made would presumably be punishable by imprisonment and/or fines under 18 U.S.C. §1001. Form DS-7713 explicitly refers to 18 U.S.C. §1001.

will be considered on a case-by-case basis. Claimants will be contacted regarding any follow-up questions and with a determination as to the eligibility of the claim."[6]

Plaintiffs' Applications for Compensation

Plaintiffs (or their predecessors-in-interest) were neither French nationals entitled to compensation under French Holocaust compensation programs nor were they entitled to compensation as nationals of other countries for Holocaust deportation under any agreement concluded by France addressing Holocaust deportation. Art. 3(2) [JA 15]. Finally, none of the Plaintiffs (or their predecessors-in-interest) received compensation under another nation's program or that of an institution providing compensation specifically for Holocaust deportation. Art. 3(4) [JA 16]. That Plaintiffs met these eligibility requirements is undisputed. Accordingly, Plaintiffs were eligible to receive compensation from the Fund.

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6 https://2009-2017.state.gov/p/eur/rt/hlcst/deportationclaims/248921.htm (last accessed on September 19, 2022).

The Department of State nonetheless denied Plaintiffs' claims in their entirety. The following chart briefly summarizes the circumstances giving rise to claimants' eligibility and the government's grounds for denial.

Plaintiff	**Basis for Claim**	**Grounds for denial**
Schneider [Case No. 1:20-cv-260]	Arrested in and deported from France to Nazi concentration camp in 1943 [JA 117-118]	Area of deportation was occupied by Italy and therefore was not considered a deportation from France; moreover, Plaintiffs must have been deported by Italian authorities [JA 117-118]
Gutrejman [Case No. 1:20-cv-266]	Plaintiff's predecessor was deported from France and was a Romanian national [JA 87-88]	Despite unambiguous affidavit and supporting documents, Claimant failed to proffer adequate proof of nationality and proof of marriage [JA 87-88]
Faktor [Case No. 1:20-cv-263]	Plaintiff's mother and father were deported from France to Auschwitz. Mother was killed, father survived. Claim was submitted on behalf of surviving spouse. Plaintiff provided written sworn testimony that her father was not a French national (*i.e.*, stateless) [JA 66-67]	Despite unambiguous affidavit and supporting documents, Claimant failed to proffer adequate proof of statelessness [JA 67]
Schieber	Plaintiff's mother and father were deported from France to Auschwitz. Mother was killed, father survived. Claim was	Despite unambiguous affidavit and supporting documents, Claimant failed

[Case No. 1:21-cv-1371]	submitted on behalf of surviving spouse. Plaintiff provided written sworn testimony that her father was not a French national (*i.e.*, stateless) [JA 41]	to proffer adequate proof of statelessness [JA 41-42]
Bywalski [Case No. 1:20-cv-265]	Plaintiff's mother and father were deported from France to Auschwitz. Father was killed, mother survived. Claim was submitted on behalf of surviving spouse. Plaintiff provided written sworn testimony that his mother was not a French national (*i.e.*, stateless) [JA 137]	Despite unambiguous affidavit and supporting documents, Claimant failed to proffer adequate proof of statelessness [JA 137-138]

Procedural Background

Plaintiffs all timely filed DS-7713s for compensation from the Fund. Plaintiffs attached affidavits and other documentary evidence to support their claim for compensation per the instructions provided by the State Department. *See also*, Agreement, Art. 5(4) [JA 17-18].

As described above, the State Department denied Plaintiffs' claims for a variety of reasons (*see* Table, at 9, *supra*). Subsequently, Plaintiffs filed lawsuits under the APA, alleging that the State Department's denial of their requests for compensation was arbitrary and capricious. 5 U.S.C. §706(2). They alleged that the State Department's findings are

unsupported by the record and do not fall within the bounds of reasonable decision-making. Plaintiffs sought a judicial declaration that the denial of their claims should be overturned under the APA.

The government moved to dismiss all the complaints for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP") and for failure to state a claim under Rule 12(b)(6) of FRCP. The government argued that federal jurisdiction in each of the cases was lacking under the political question doctrine. The government also argued that the complaints should be dismissed because the Agreement precludes judicial review under APA, 5 U.S.C. §701(a).[7] The various district judges granted the government's motions to dismiss in every case. However, the decisions are not unanimous on the grounds for dismissal. The following chart briefly describes the outcomes in the various cases:

[7] That statute provides as follows:

> This chapter applies, according to the provisions thereof, except to the extent that—
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

	Dismissal under Rule 12(b)(6) (Agreement does not create private right of action.	**Dismissal under 5 U.S.C. §701(a)(1) (Agreement precludes judicial review)**[8]	**Dismissal under Rule 12(b)(1) (nonjusticiable political question)**
Schieber v. United States	✓	✓	
Bywalski v. United States	✓		✓
Schneider v. United States	✓		✓
Faktor v. United States	✓	✓	
Gutrejman v. United States	✓[9]		✓

Plaintiffs timely filed appeals which were subsequently consolidated.

SUMMARY OF ARGUMENT

The district court in each of the cases misconceived the proper analytical framework for reviewing Plaintiffs' claims. In each instance,

[8] No court below made any conclusions regarding the government's Section 701(a)(2) arguments.

[9] Although Judge Randolph Moss in *Gutrejman* concluded that the Agreement does not bestow a right of action on individual applicants, he addressed the issue in the context of his political question analysis under Rule 12(b)(1) rather than 12(b)(6). *See also, infra*, fn. 20.

the court mistakenly characterized Plaintiffs' claims as arising under the Agreement, rather than as challenges to State Department final agency action under the APA, as Plaintiffs contended. Both in their complaints and in their briefs in opposition to the government's various motions to dismiss, as well as before this Court, Plaintiffs emphasize that they are relying upon the APA – *not the Agreement* – as the source of their right to judicial review.

While the State Department's source of authority to receive in trust and disburse monies from the Fund to individual applicants stems from the Agreement and 22 U.S.C. §2668a, Plaintiffs' right of action does not. Rather it emanates from and is solely grounded in the APA in that it challenges the manner in which the State Department carried out its administrative function in reviewing Plaintiffs' individual applications for compensation. That administrative function was an adjudication that falls squarely within the ambit of the APA.

The court below erred by conflating the source of the State Department's authority to receive and disburse the Fund with the execution of its administrative responsibilities under the APA and 22

U.S.C. §2668a. Plaintiffs did not, nor do they now, seek to enforce the Agreement.

This fundamental misunderstanding led to a series of errors that are the subject of the present appeal. *First*, in some of the cases below – based on the erroneous assumption that the Agreement was the source of the cause of action – the judges concluded that the Agreement does not create private rights of action and the claims, therefore, must be dismissed under Rule 12(b)(6). This conclusion is wrong because, again, Plaintiffs' claims arise under the APA, not the Agreement.

Next, three of the decisions being appealed from ruled that dismissal is appropriate under Rule 12(b)(1) because the cases involved a nonjusticiable political question, which, in this Circuit, is jurisdictional. This ruling is also wrong because the court was not asked to make any decisions whatsoever that could even remotely be considered a political question under applicable precedent. The court's error inhered in concentrating on the Agreement, instead of focusing on the APA. Plaintiffs asked the court to do what courts routinely do in an APA setting: assess the reasonableness of adjudicatory agency action.

Finally, two of the cases below dismissed on the grounds that the Agreement precluded judicial review under APA, 5 U.S.C. §701(a)(1). This conclusion is clearly wrong because, in the first instance, the Agreement is not a "statute" for purposes of Section 701(a)(1), as Judge Moss correctly concluded in *Gutrejman,* and second, because nothing in the Agreement, including the Art. 8 "consultation" provision, indicates that it was meant to preclude judicial review of administrative action by the State Department in processing the claims of individual applicants.

STANDING

Plaintiffs have standing to maintain their lawsuits because the State Department's denial of their applications has caused them harm which can only be redressed by a favorable court order. *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 612 (D.C. Cir. 2019) (Article III standing requires plaintiffs to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.").

STANDARD OF REVIEW

The appellate court reviews *de novo* the dismissal of a complaint for failure to state a claim under FRCP Rule 12(b)(6). *IMAPizza, LLC v. At Pizza Ltd.*, 965 F.3d 871 (D.C. Cir. 2020).

Appellate courts review *de novo* whether a case presents a nonjusticiable political question. *Starr Int'l Co., Inc. v. United States*, 910 F.3d 527 (D.C. Cir. 2018).

De novo review is also applicable to determine whether dismissal was warranted under 5 U.S.C. §701(a)(1). *Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 377 (D.C. Cir. 2011).

ARGUMENT

1. The district court erred by concluding that Plaintiffs failed to state a claim under FRCP 12(b)(6)

A. Plaintiffs' claims were brought under the APA, not the Agreement

Four out of the five district judges below concluded that because the Agreement does not create a private right of action, Plaintiffs could not maintain a claim under the APA. *Bywalski*, at *6; *Schieber*, at *7; *Schneider*, at *5 ("Agreement creates no private right of action"); *Faktor*,

at *6. These decisions erroneously held that Plaintiffs were making claims *under* the Agreement. *See*, for example, *Schieber*, at *6 (concluding that Plaintiff's claim sounds under the Agreement under which there is no private right of action).

In each instance, the judges below misconstrued Plaintiffs' claims. The operative complaints unequivocally asserted claims under the APA, challenging the government's administrative adjudications denying their request for compensation. The APA – not the Agreement – serves as the source of Plaintiffs' right to judicial review. The district court's attempts to shoehorn Plaintiffs' underlying lawsuits into claims "based on the Agreement" [*Schieber*, at *6] or to "enforce the Agreement" [*Schneider*, at *5] disregard the plain language of the Plaintiffs' allegations. *See Schieber* Complaint, ECF 1, ¶1 [JA 1] ("This is an action for declaratory relief under the Administrative Procedure Act […]"); *Schneider* Second Amended Complaint, ECF 23, ¶1 (same) [JA 105]; *Gutrejman* Amended Complaint, ECF 21, ¶1 [JA 77] (same); *Bywalski* Amended Complaint, ECF 21, ¶1 [JA 127] (same); *Faktor* Amended Complaint, ECF 27, ¶1 [JA 56] (same). Moreover, in the "Claim for Relief" section of their complaints, Plaintiffs asserted the elements of a conventional APA claim.

See, for example, *Schieber* Complaint, ECF 1, ¶¶20-24 [JA 6] (alleging government decision was arbitrary; was final; and no other adequate remedy at law exists). At this preliminary stage on motion to dismiss, the court should have resolved any doubts in favor of finding a cause of action under the APA. *See Bernhardt v. Islamic Republic of Iran*, __ F.4th __, 2022 WL 4074415, at *1 (D.C. Cir. Sept. 6, 2022) (at the motion to dismiss stage, court must draw all reasonable inferences in favor of the plaintiffs).

With the exception of *Schneider* (*see* below), the consolidated cases each required the district court to assess the adequacy of the State Department's determination that Plaintiffs' proffered evidence was insufficient to prove a negative proposition, namely: that Plaintiffs were *not* French nationals. Plaintiffs contend that the State Department failed to "articulate a rational connection between the facts found and the choice made." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (*per* Ruth Bader Ginsburg, J.), *cert. denied,* 519 U.S. 1077 (1997), *quoting Bowman Transp., Inc. v. Arkansas–Best Freight Sys.*

Inc., 419 U.S. 281, 285 (1974); 5 U.S.C. §706(2)(A).[10] For the majority of the applications, the district court was asked to assess the adequacy of the evidence submitted by Plaintiffs in support of their DS-7713 and whether the government acted arbitrarily and capriciously in finding that claimants failed to proffer proof of non-French nationality or statelessness. Federal courts routinely assess the propriety of agency adjudication in weighing the evidence before it. *See Archer W. Contractors, LLC v. United States Dep't of Transportation*, 45 F.4th 1 (D.C. Cir. 2022) (substantial evidence standard in APA review of federal agency determination); *Epsilon Elecs., Inc. v. United States Dep't of Treasury, Off. of Foreign Assets Control*, 857 F.3d 913 (D.C. Cir. 2017) (substantial evidence standard in APA review of OFAC-imposed penalties).

In the case of *Schneider*, the reviewing court was asked to assess whether the government's conclusions respecting the deportation history and legal status of the Haute Savoie region were supported by

[10] Plaintiffs do not concede that the government satisfies this standard when it denied their applications. That is a merits determination which should be made only after remand and the production of the Administrative Record.

substantial evidence.[11] This, too, is a classic example of judicial review with the APA context. *See also* chart above, at pg. 9-10.

Thus, the district court's holdings that the claims were brought *under* the Agreement or to *enforce* the Agreement is reversible error.[12]

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[11] The State Department's historical and legal conclusion concerning the status of the Haute Savoie region at the time of Plaintiffs' deportation is clearly erroneous. Of course, this is a merits issue that will be resolved upon remand from this Court, should Plaintiffs prevail.

[12] While the district court may look to the terms of the Agreement in making a merits determination, that does not transform the claim into an action to "enforce" the Agreement. The district court misunderstood the relationship between the Agreement, the APA and 22 U.S.C. §2668a. The Agreement envisions administrative action by the U.S. government such as maintaining a trust account, determining the merits of applications, etc. Nothing in the Agreement indicates that the government, in exercising its authority under the Agreement, is free to disregard basic principles of administrative law. *See Department of Homeland Security v. Regents of the University of California,* 140 S.Ct. 1891, 1934-1935 (2020) (Kavanaugh, J., concurring and dissenting). The APA does not provide the specific criteria by which the government is to adjudicate individual applications. Those guidelines are provided by the Agreement. *See* Agreement, §3. *See Sluss v. United States Dep't of Just., Int'l Prisoner Transfer Unit*, 898 F.3d 1242, 1251 (D.C. Cir. 2018) (concluding that non-self-executing international prisoner transfer treaty did not preclude judicial review under the APA and the Court could look to the treaty for substantive criteria).

B. The APA serves as an independent source of Plaintiffs' cause of action

The APA creates a right of action for persons aggrieved by arbitrary and capricious agency conduct even in the absence of a federal statute (or international agreement) creating a cause of action. 5 U.S.C. §704 ("[…] final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (stating that §704 provides a cause of action for all "final agency action for which there is no other adequate remedy in a court"); *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1445 n. 1 (D.C. Cir. 1985) ("The Supreme Court has clearly indicated that the Administrative Procedure Act itself, although it does not create subject-matter jurisdiction, does supply a generic cause of action in favor of persons aggrieved by agency action.")[13]; *See Karst Envtl. Educ. & Prot., Inc. v. Envtl. Prot. Agency*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("Because NEPA creates no private right of action, challenges to agency compliance with the statute must be brought pursuant to the Administrative Procedure Act […]"); *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017).

[13] *Citing Califano v. Sanders,* 430 U.S. 99 (1977) and *Block v. Community Nutrition Institute,* 467 U.S. 340, 345 (1984).

Indeed, as this Court has recognized, there is a strong presumption in favor of judicial review of agency action under the APA, unless a statute's language or structure precludes it. *Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896, 1902 (June 15, 2022); *Sluss*, 898 F.3d at 1251.

Plaintiffs submitted claims and evidence based on instructions and forms prescribed by the State Department. These claims were denied by agency adjudicatory action which Plaintiffs now challenge. The APA serves as Plaintiffs' private cause of action and their lawsuits fall squarely within the purview of the APA. Therefore, the district court was wrong to dismiss the complaints for failure to state a claim under FRCP 12(b)(6). That the Agreement creates no right of private enforcement or is otherwise non-self-executing is of no moment.

2. Plaintiffs' claims are not precluded by 5 U.S.C. §701(a)(1)

A. Section 701(a)(1) is inapplicable because the Agreement is not a congressional statute

Judicial review of agency action under the APA is inapplicable "to the extent that statutes preclude judicial review." 5 U.S.C. §701(a)(1). Two out of the five decisions below dismissed Plaintiffs' lawsuit based on

this provision, holding that the Agreement precludes judicial review under APA Section 701(a)(1). *Schieber*, at *8; *Faktor*, at *6.[14]

This conclusion is wrong for two reasons. *First*, as articulated by Judge Randolph Moss in *Gutrejman*, the Agreement – a "sole executive agreement" [*id.*, at 5] – cannot divest federal courts of federal question jurisdiction that it would otherwise have under 28 U.S.C. §1331. A non-self-executing executive agreement cannot amend a federal statute, particularly one that confers subject-matter jurisdiction on the federal courts under U.S. Constitution Art. III. *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) (suggesting President lacks authority to curtail federal jurisdiction under Art. III by executive order).

Second, Section 701(a)(1) applies only when *Congress*, by way of *statute*, precludes judicial review. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (Section 701(a)(1) applies when *Congress* has expressed an intent to preclude judicial review).

[14] The courts in *Bywalski* and *Schneider* also dismissed on the grounds that the Agreement precludes judicial review. However, these rulings were not based on 5 U.S.C. §701(a)(1). Rather, the district courts held that the Agreement does not create a private right of action. *Bywalski,* at *5; *Schneider*, at *5. We have addressed this issue above in Section 1.

The only authority cited by the courts in *Schieber* and *Faktor* is *United States v. Moloney* (*In re Request from United Kingdom Pursuant to Treaty Between Gov't of U.S. & Gov't of United Kingdom on Mut. Assistance in Crim. Matters in the Matter of Dolours Price*, 685 F.3d 1, 13 (1st Cir. 2012). Mutual Legal Assistance Treaties (MLATs), like the one at issue in *Moloney* are self-executing. *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 568 (9th Cir. 2011); *In re Erato*, 2 F.3d 11, 15 (2d Cir. 1993) (MLAT is self-executing). *See* Senate Exec. Report 110-13, "Mutual Legal Assistance Treaties with the European Union," Art. VI (Sept. 11, 2008)[15]. *See generally Medellin v. Texas,* 552 U.S. 491, 504-505 (2008) (discussing the difference between self-executing and non-self-executing treaties).[16] Thus, in contrast to the Agreement in the present case, the MLAT had the full force and effect of

[15] Available at: https://www.govinfo.gov/content/pkg/CRPT-110erpt13/html/CRPT-110erpt13.htm (last visited, Sept. 19, 2022).

[16] Although it appears that this Court has yet to address this issue, the district court in a case arising under the Freedom of Information Act, held that an MLAT is a "statute" for purposes of FOIA Exemption 3, because it was self-executing. *Dongkuk Int'l, Inc. v. U.S. Dep't of Just.*, 204 F. Supp. 3d 18, 25–26 (D.D.C. 2016)

a statute, sufficient to sufficient to bar judicial review under §701(a)(1). The lower court's reliance on *Moloney* to bring the Agreement within the ambit of §701(a)(1) was misplaced.

Since the Agreement is clearly not a "statute", §701(a)(1) is inapplicable on its face. Accordingly, the district court in *Schieber* and *Faktor* erred in applying §701(a)(1) to Plaintiffs' claims.

B. Nothing in the Agreement precludes judicial review

Even assuming, without conceding, that the Agreement should be treated as a "statute" for purposes of §701(a)(1), nothing in the Agreement precludes judicial review of individual denials by the government following establishment of the Fund. This Court has held that the failure of Congress (in the case of a statute) to provide a specific authorization for judicial review does not give rise to a presumption that judicial review is precluded. Rather the opposite assumption is true. *James Madison*, 82 F.3d at 1092:

> Rather, we assume just the opposite—that the Administrative Procedure Act authorizes federal district courts to review the [administrative action] […] unless another statute specifically precludes review or the action is committed by law to agency discretion […] Because of this presumption favoring judicial review,

> we require " 'clear and convincing evidence' of a legislative intention" to bar such review.

Accord, Safe Extension, Inc. v. F.A.A., 509 F.3d 593, 601 (D.C. Cir. 2007).

Thus, the fact that the Agreement does not specifically authorize judicial review of State Department actions does not bar such review. There must be clear and convincing evidence of a "legislative" intent to foreclose judicial scrutiny of agency action.

The decisions in *Schieber* and *Faktor* ruled that Article 8 of the Agreement, which provides the exclusive means for resolving any disputes concerning the interpretation or performance of the Agreement by way of consultation between the U.S. and France, "operates as law precluding judicial review." *Schieber,* at *8*; Faktor*, at *6 (citing *Schieber*). However, that provision has nothing to do with claims against the U.S. government concerning the manner in which it disposes of individual applications submitted to the State Department under its own instructions and adjudication and distribution of trust funds in accordance with 22 U.S.C. §2668a. Article 8, by its own unambiguous

terms, applies to disputes between the U.S. government and France in connection with the interpretation or performance of the Agreement.[17]

Nothing else in the Agreement even remotely indicates that the signatories intended to strip its ultimate beneficiaries – those victims and their families – of the right to challenge arbitrary and capricious agency adjudication of their claim applications under the APA.

Based on the language of the Agreement, it is clear that Article 8 contemplates disputes between the governmental signatories regarding the operation of the Agreement and its interpretation. Such disputes might arise, for example, where France believes that the U.S. government has not acted to protect France from suit in American courts.

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[17] *Moloney* – the sole authority relied upon by the courts in *Schieber* and *Faktor* – is inapposite. There, the issue was whether individual intervenors were entitled to challenge subpoenas issued on behalf of the United Kingdom pursuant to a MLAT. Although the MLAT included a "consultation" clause, the First Circuit did not rely on that provision in concluding that the individual intervenors were barred from invoking the treaty. Rather, the court relied on express language in the duly ratified and self-executing MLAT that disallowed private rights of individuals other than the parties to the Treaty. *Moloney*, 685 F.3d at 12. The Agreement here contains no such express language. The opposite is true: the Preamble to the Agreement clearly states that the ultimate beneficiaries of the Agreement are those victims and their families for the "horrors of the Holocaust, including the tragic deportation of Jewish individuals from France during the Second World War."

Or where the U.S. government claims that France has not fulfilled its financial commitments. Such examples implicate government-to-government concerns. By contrast, claims by an individual applicant, like those of the Plaintiffs, that the State Department has not carried out its ministerial functions in accordance with domestic United States law, do not implicate intergovernmental concerns, but rather solely raise issues under domestic federal law. In such cases, Article 8 has no relevance. Surely, Article 8 does not even approach this Court's high standard of "clear and convincing evidence" precluding judicial review under the APA.

The district court's dismissal under §701(a)(1) must, therefore, be reversed and the case remanded for further proceedings on the merits. *Safe Extension,* 509 F.3d at 601; *James Madison*, 82 F.3d at 1092.

3. Subject matter jurisdiction is not precluded by the political question doctrine

Three out of the five opinions below concluded that the complaints were non-justiciable under the political question doctrine. *Gutrejman*, at *7 ("[…] the Agreement is not judicially enforceable and […] Plaintiffs' claims are this nonjusticiable"); *Schneider*, at *5 (same); *Bywalski*, at *5

(same).[18] In this Circuit, the political question doctrine is jurisdictional. *bin Ali Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840–41 (D.C. Cir. 2010) (*en banc*); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006); *but see Al Tamimi v. Adelson,* 916 F.3d 1, 8 n.4 (D.C. Cir. 2019) (questioning the principle but adhering to Circuit precedent). Consequently, if Plaintiffs' complaints fall within the purview of the doctrine, subject matter jurisdiction would be lacking and dismissal under FRCP 12(b)(1) would be appropriate. However, as explained below, the present cases do not present non-justiciable political questions and the conclusions to the contrary below are erroneous.

A federal court has a responsibility to decide cases properly before it, even those "it would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012), *quoting Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (*per* Marshall, C.J.). For this reason, the political question doctrine is a "limited and narrow exception to federal court

[18] To be precise, the decisions in *Schieber* and *Faktor* reserved judgment on the political question matter and dismissed the claims on the grounds that Plaintiffs failed to state a cause of action. *Schieber*, at * 5; *Faktor*, at *4.

jurisdiction." *Starr Int'l Co.*, 910 F.3d at 533. Cases that involve "a political question [...] where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" [*Zivotofsky*, 566 U.S. at 194, *quoting Nixon v. United States*, 506 U.S. 224, 228 (1993)] are nonjusticiable political questions and courts lack jurisdiction to adjudicate them.

The Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962) identified six circumstances in which an issue might present a political question:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;

(2) a lack of judicially discoverable and manageable standards for resolving it;

(3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

(5) an unusual need for unquestioning adherence to a political decision already made; or

(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

This Court in *Al-Tamimi v. Adelson* set out the analytical framework for determining whether a case is non-justiciable under the political question doctrine. 916 F.3d at 8

> First, we identify the issues raised by the plaintiffs' complaint. Next, we use the six *Baker* factors to determine whether any issue presents a political question […]. Finally, we decide whether the plaintiffs' claims can be resolved without considering any political question, to the extent one or more is presented. Indeed, the political question doctrine mandates dismissal only if a political question is "inextricable from the case."

Here, the only issues raised by the Plaintiffs concern the State Department's adjudication of their DS-7713s and accompanying documentation to receive distributions from the Fund. On the face of it, no political question is involved. The complaints therefore only pose a question of administrative law: did the State Department act reasonably in processing and ultimately denying Plaintiffs' DS-7713s in the particular circumstances of each case.

Turning to the *Baker* factors, the government below contended that Plaintiffs' claims implicate the first, second, fourth and sixth *Baker* factors. *Gutrejman*, at *6. The judges who invoked the political question doctrine did not explicitly state under which *Baker* factor they were basing the dismissal,[19] but all three decisions came to the same conclusion: the Agreement does not confer judicially enforceable rights and Plaintiffs thus present the court with a nonjusticiable political question. *Gutrejman*, at *7; *Schneider*, at *5; *Bywalski*, at *5.

This conclusion is fundamentally flawed for essentially the same reasons articulated above in Section 1. *First*, as we have shown, Plaintiffs' claims are not based on the Agreement and do not seek to enforce the Agreement. Plaintiffs' claims are standard APA claims for arbitrary agency action in connection with the adjudication of their DS-7713s. Thus, it is irrelevant whether the Agreement confers any rights on Plaintiffs. Further, the district court's analysis confuses and conflates the non-existence of a right of action under the Agreement with the existence of a political question sufficient to preclude federal jurisdiction.

[19] That the court below failed to address the *Baker* factors may in itself constitute reversible error. *Al Tamimi*, 916 F.3d at 8.

The mere fact that Plaintiffs may not have a direct cause of action under an ostensibly non-self-executing international executive agreement does not render their cases non-justiciable as political questions.[20]

As the Supreme Court has observed, "not every matter touching on politics is a political question." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 229–30 (1986) (holding that federal courts have the authority to construe treaties and executive agreements even when it can have foreign affairs implications). What is more, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* (internal quotations omitted). As we have shown, Plaintiffs have a viable cause of action under the APA to challenge what they maintain was the State Department's "arbitrary and capricious" refusal to accept their applications for compensation. If Plaintiffs' claims touch upon the foreign relations of the United States,

[20] *See Sluss*, 898 F.3d at 1250. There, this Court made clear that a lack of private right of action is **not** a jurisdictional issue. Rather, it should be analyzed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *See supra*, fn. 9. In this Circuit, disposition of a claim under Rule 12(b)(6) is a merits determination which is inconsistent with political question analysis which is properly resolved under Rule 12(b)(1). The court below went astray by melding the existence or non-existence of a cause of action with the political question doctrine.

they do so tangentially, if at all. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004) (Holocaust legal peace agreement between Germany and U.S. did not preclude justiciability under the political question doctrine).

Second, the court's reliance on Article 8 of the Agreement – the consultation provision – is as misplaced in connection with the political question doctrine, as it is in respect of APA, §701(a)(1) discussed above. That provision is directed to the governmental parties to the Agreement, not individual applicants who submit requests for compensation to the Department of State after the Fund has been created.[21]

[21] The courts' reliance on *United States v. Sum of $70,990,605*, 234 F. Supp. 3d 212, 237 (D.D.C. 2017) does not support the decisions below. There the claimants did not challenge any administrative agency action under the APA. Rather, they sought to terminate the government's freezing of their bank accounts. Arguing that the United States lacked jurisdiction to initiate such *in rem* proceedings, claimants sought to *enforce* a dispute resolution and jurisdiction clause of the "Security and Defense Cooperation Agreement Between the Islamic Republic of Afghanistan and the United States of America." The court ultimately ruled that this issue was a nonjusticiable political question. Here, however, Plaintiffs do not seek to enforce the Agreement: they seek judicial review of arbitrary agency action.

Plaintiffs' APA claims are archetypical examples of conventional judicial review of agency action. Their complaints challenge the propriety of the government's denial of their claims for compensation based on their DS-7713 submissions, and affidavit and documentary evidence. As we have seen, the State Department adjudicated each application case-by-case, based on the evidence before it, and in accordance with criteria established by the Department. The role of a reviewing court is simply to determine whether the State Department acted rationally when it rejected the applications based on the relevant criteria, *i.e.*, whether the agency "articulate[d] a rational connection between the facts found and the choice made." *James Madison*, 82 F.3d at 1096. This is what courts routinely do and is a "familiar judicial exercise." *Zivotofsky*, 566 U.S. at 196. Nor does the fact that the reviewing court may have to refer to or even interpret a treaty or executive agreement implicate the political question doctrine. *Japan Whaling Ass'n*, 478 U.S. at 230 (noting in the context of political question analysis that "courts have the authority to construe treaties and executive agreements[…] ."); *Starr Int'l Co.*, 910 F.3d at 535 (reversing district court's dismissal under the political question doctrine even though the Court was called upon to construe an

international tax agreement); *Hourani v. Mirtchev*, 796 F.3d 1, 8 (D.C. Cir. 2015) (declining to find a case nonjusticiable under the political question doctrine where "the standards needed to resolve" the claims at issue were "the workaday tools for decision-making that courts routinely employ," even though the court's judgment "might implicate the actions of a foreign government").

In sum, under the principles of *Baker v. Carr*, its progeny, and the case law in this Circuit, the dismissal of Plaintiffs' complaints on the grounds of the political question doctrine constitutes reversible error.

CONCLUSION

For all the reasons above, the each of the orders below should be reversed, and the cases remanded for further proceedings on the merits, including the production of the Administrative Record by the government.

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Respectfully submitted,

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