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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (JULY 18, 2023)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JENNY SCHIEBER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Argued: January 10, 2023
Decided July 18, 2023

No. 22-5068

Consolidated with 22-5118, 22-5141, 22-5151, 22-5152, 22-5159, 22-5160, 22-5163

Appeals from the United States District Court for the District of Columbia (No. 1:21-cv-01371) (No. 1:20-cv-00263) (No. 1:20-cv-00266) (No. 1:20-cv-00260) (No. 1:20-cv-00265)

Before: MILLETT and KATSAS, Circuit Judges, and SENTELLE, Senior Circuit Judge.

KATSAS, *Circuit Judge*: The United States and the French Republic agreed to establish a fund for compen-

sating non-French nationals who were deported from France to concentration camps during the Holocaust. The Department of State, which administers the fund, denied compensation to the plaintiffs here. They seek judicial review under the Administrative Procedure Act. We hold that the political question doctrine does not bar review. But because administration of the fund is committed to agency discretion by law, the APA provides no cause of action.

I

A

During World War II, France's Vichy government collaborated with the Nazis to deport nearly 76,000 Jews to concentration camps. Most of them never returned. In the decades since, France has established several programs to compensate Holocaust victims and their families. One such program is the focus of this case.

In 2014, the United States and France reached an Agreement to settle all Holocaust deportation claims against France. France agreed to pay $60 million to establish a compensation fund to cover such claims. In return, the United States agreed to secure the dismissal of any pending or future Holocaust deportation claims against France in United States courts. The Agreement excludes claims of both French nationals, who receive other benefits, and non-French nationals eligible to receive compensation under other programs.

Article 6 of the Agreement governs distribution of the settlement fund. It requires the United States to distribute the fund "according to criteria which it

shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible." J.A. 18. At the same time, it requires the United States to consider the Agreement's objectives in formulating distribution criteria and to reject all excluded claims. In deciding whether these exclusions apply, the United States "shall rely" on a claimant's sworn declaration of nationality and ineligibility for other compensation programs, "as well as on any relevant information obtained under" an information-sharing provision. *Id.*

Article 8 of the Agreement governs the resolution of disputes. It states that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties"—*i.e.*, by diplomacy between the United States and France. J.A. 19.

The State and Treasury Departments are responsible for disbursing funds received from foreign governments to settle claims. A standing appropriation directs the Secretary of State to "determine the amounts due claimants" and then requires the Secretary of the Treasury to "pay the amounts so found to be due." 22 U.S.C. § 2668a. The State Department ultimately approved 386 of the 867 claims filed under the Agreement.

B

The plaintiffs are six of the unsuccessful claimants. Four plaintiffs (Jenny Schieber, Solange Faktor, Esther Gutrejman, and Simon Bywalski) filed claims on behalf of a parent or step-parent whose spouse was deported to Auschwitz and then killed. The State Department rejected these claims because, in its view, the plaintiffs had not adequately proven eligibility for compensation

under the Agreement. The other two plaintiffs (Louis Schneider and Regina English) filed claims on their own behalf. The State Department denied their claims after determining that they likely had been deported by Italian rather than French authorities.

The plaintiffs sued to challenge the denials under the APA. In separate actions, Schieber, Faktor, Gutrejman, and Bywalski argued that the Agreement required the State Department to credit their affidavits about their deceased parents' nationalities and ineligibility for other Holocaust compensation programs. In one lawsuit, Schneider and English challenged the Department's finding that Italy controlled the region from which they had been deported.

The government moved to dismiss the complaints for lack of jurisdiction and failure to state a claim. In *Gutrejman*, *Bywalski*, and *Schneider*, the courts held that the claims raise nonjusticiable political questions because the Agreement requires disputes to be resolved through diplomacy. *Gutrejman v. United States*, 596 F. Supp. 3d 1, 9-10 (D.D.C. 2022); *Bywalski v. United States*, No. 1:20-cv-265, 2022 WL 1521781, at *4-5 (D.D.C. May 13, 2022); *Schneider v. United States*, No. 1:20-cv-260, 2022 WL 1202427, at *4-5 (D.D.C. Apr. 22, 2022). In *Schieber* and *Faktor*, the courts skipped over the political question doctrine and dismissed the claims on the merits. These courts held that because the Agreement bars judicial review, the APA provides no cause of action. *Faktor v. United States*, 590 F. Supp. 3d 287, 292-94 (D.D.C. 2022); *Schieber v. United States*, No. 1:21-cv-1371, 2022 WL 227082, at *5-7 (D.D.C. Jan. 26, 2022).

II

Two of the district courts concluded that they could reserve judgment on whether the cases present nonjusticiable political questions. The other three concluded that the claims do present such questions. We disagree with both conclusions.

A

Start with the sequencing issue. This Court repeatedly has held that the political question doctrine implicates the subject-matter jurisdiction of Article III courts. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 7-8 (D.C. Cir. 2019). In contrast, the existence of a cause of action under the APA goes to the merits. *Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991); *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). The *Schieber* and *Faktor* courts thus skipped over a jurisdictional issue to rule on a merits one.

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court reaffirmed that a federal court must confirm its subject-matter jurisdiction before reaching the merits. *Id.* at 95. *Steel Co.* firmly rejected the doctrine of "hypothetical jurisdiction," under which a court would skip over difficult jurisdictional questions if it could more simply rule on the merits against the party invoking its jurisdiction. *See id.* at 93-94. As the Supreme Court explained, hypothetical jurisdiction "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion." *Id.* at 101; *see also Cross-Sound Ferry Servs. v. ICC*, 934 F.2d 327, 339-46 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the judgment).

The district courts in *Schieber* and *Faktor* bypassed the jurisdictional question because, in their view, a few of this Court's decisions skipped over the political question doctrine when it was easier to rule against plaintiffs on the merits. *See Schieber*, 2022 WL 227082, at *5 (citing *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 934 (D.C. Cir. 1988) and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985)); *Faktor*, 590 F. Supp. 3d at 292 (relying on *Schieber*). But these decisions predate *Steel Co.* and are premised on the same theory of hypothetical jurisdiction that *Steel Co.* repudiated. Under current law, they cannot justify skipping over jurisdiction to reach the merits.

The government suggests a different approach. It contends that we may skip over the political question issue because the cause-of-action question is "plainly insubstantial" within the meaning of *Norton v. Mathews*, 427 U.S. 524, 532 (1976). There, the Court skipped over a jurisdictional issue because the merits question—which was decided in a companion case—had become "no longer substantial in the jurisdictional sense." *See id.* at 530-31. *Steel Co.* preserved this exception for cases where existing precedent "foreordained" the merits. 523 U.S. at 98. And we have since applied the exception. *Sherrod v. Breitbart*, 720 F.3d 932, 936-37 (D.C. Cir. 2013). As explained below, we agree that the plaintiffs' claims lack merit. But because the claims cannot fairly be characterized as "plainly insubstantial," we must first resolve the political question issue.

B

The political question doctrine traces to the case-or-controversy requirement of Article III. *See Allen v. Wright*, 468 U.S. 737, 750 (1984). In its canonical formulation, the doctrine bars federal courts from exercising jurisdiction over claims that involve any of six different factors:

> [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.

Baker v. Carr, 369 U.S. 186, 217 (1962) (cleaned up). But in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012), the Supreme Court stressed the doctrine's "narrow" scope. *Id.* at 195. And it mentioned only the first two *Baker* factors, *id.*, despite separate opinions pointedly noting the omission of the final four, *see id.* at 202-07 (Sotomayor, J., concurring in part and concurring in the judgment); *id.* at 212 (Breyer, J., dissenting). We too have characterized the first two factors as "the most important" ones, *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008),

and the last four as merely "prudential," *Al-Tamimi*, 916 F.3d at 12.

Disputes involving foreign relations often raise political questions, but not always. Such disputes "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature." *Baker*, 369 U.S. at 211. Yet not every controversy that "touches foreign relations" has these characteristics. *Id.* So we must always consider "the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12.

Zivotofsky is a useful illustration. A statute allowed Americans born in Jerusalem to elect to have "Israel" listed as the country of birth on their passports. When a plaintiff sued to enforce the statute, the government argued that the lawsuit presented a nonjusticiable political question under Article III and that, at any rate, the statute unconstitutionally impinged on the President's Article II powers. 566 U.S. at 191-93. The Supreme Court rejected the former contention. It explained that the plaintiff had not asked the courts to decide "whether Jerusalem is the capital of Israel," but instead only "whether he may vindicate his statutory right." *Id.* at 195. The latter question turned on whether the statute was constitutional, and the Constitution did not textually commit that issue to the Executive Branch. *Id.* at 197. Moreover, the Article II question turned on "familiar" kinds of legal arguments about constitutional text, structure, history, and purpose. *Id.* at 197-

201. Thus, it did not "turn on standards that defy judicial application." *Id.* at 201 (quoting *Baker*, 369 U.S. at 211).

The claims here are likewise justiciable. To start, resolving these cases would not impinge on foreign relations matters constitutionally committed to the Executive Branch. Under the Agreement, France was obliged to make a lump-sum payment—with no reversionary interest—and to provide information that would help implement the program. That is all. No doubt, the Executive is responsible for managing this Nation's relationship with France. But reviewing the State Department's compensation decisions would say nothing about France or its performance under the Agreement. The only foreign-relations wrinkle is that the yardstick against which we would measure the Department's actions is an international agreement rather than a statute or regulation. But that is hardly enough to transform the legal and factual questions in these cases into political ones. After all, courts routinely interpret treaties and executive agreements, including those that involve the disposition of claims settlement funds. *See*, *e.g.*, *Medellín v. Texas*, 552 U.S. 491 (2008); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Mellon v. Orinoco Iron Co.*, 266 U.S. 121 (1924).

There are also judicially manageable standards for resolving the claims. These claims involve not the design, but the administration of a foreign claims settlement scheme set out in an international agreement. Four plaintiffs assert that the Agreement required the State Department to credit affidavits about their parents' ineligibility for other compensation.

They also contend that the Department arbitrarily accepted some affidavits but not others. Resolving these questions would require us to interpret the terms of a written legal instrument and to decide whether the Department treated like claims alike. Two plaintiffs claim that the Department erred in finding that they were likely deported by Italian rather than French or German officials. Resolving that contention would require us to assess whether an agency's finding of fact was adequately supported in an administrative record. There is nothing unusual or awkward about the courts resolving such questions.[1]

The claims here also tee up a host of threshold legal issues about the status of the Agreement under domestic law and about how the Agreement interacts with federal statutes. Is the Agreement self-executing? Does the APA provide a vehicle for enforcing a non-self-executing international agreement? To what extent does section 2668a execute the Agreement? Are the claims here unreviewable under the APA? To be sure, these questions arise in a foreign-policy context. But like the Article II question in *Zivotofsky*, they are legal ones—which turn on familiar legal considerations such as text, structure, and history. In short, the questions presented in these cases do not turn on standards that defy judicial application.

Finally, none of the prudential factors cuts the other way. These factors reflect a concern that the "Judiciary should be hesitant to conflict with the

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[1] We need not consider whether the political question doctrine would bar review of an Executive determination about which country has sovereignty over disputed territory during ongoing hostilities.

other two branches." *Al-Tamimi*, 916 F.3d at 12. Because these cases implicate foreign relations only at their outermost edges, adjudicating them would risk no interbranch conflict in that area. Furthermore, because the Executive Branch is best able "to understand the foreign policy ramifications of the court's resolution of a potential political question," its position is "highly relevant" to our consideration of the prudential factors, and its assessment of any specific foreign-policy harms would be "owed deference." *See id.* at 13. Here, the government's position has undergone a full shift: Despite urging application of the political question doctrine below, and despite remaining agnostic on that question in its brief in this Court, the government at oral argument affirmatively took the position that this case does *not* involve any political question. We must of course resolve that jurisdictional question for ourselves, *see Steel Co.*, 523 U.S. at 95, but we see no reason to disagree with the government's current position.

The district courts in *Gutrejman*, *Bywalski*, and *Schneider* concluded otherwise. They reasoned that the claims here are nonjusticiable because the Agreement requires any disputes to be resolved through diplomacy. *Gutrejman*, 596 F. Supp. 3d at 10; *Bywalski*, 2022 WL 1521781, at *5; *Schneider*, 2022 WL 1202427, at *5. For support, they invoked *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), which likewise involved an international agreement requiring disputes to be resolved through diplomacy. But our disposition in *Holmes* rested on considerations that are not present here.

Holmes involved a Status of Forces Agreement (SOFA) that allowed Germany to exercise criminal

jurisdiction over United States military personnel stationed there. After being convicted of attempted rape in Germany, two American soldiers sued to prevent the United States from transferring them back to Germany to serve their sentences. The soldiers argued that the United States had no transfer obligation because Germany had violated its obligation to afford certain procedural protections during their trials. 459 F.2d at 1214. We held that this claim was nonjusticiable because federal courts lack power to decide how the Executive Branch should respond to another sovereign's alleged failure to comply with a non-self-executing international agreement. *Id.* at 1220-22.

The district courts read *Holmes* to say that the soldiers' claim was nonjusticiable because the SOFA was not self-executing. That oversimplifies our reasoning. In concluding that the claim was nonjusticiable, we first explained that courts generally lack authority to determine whether another sovereign's failure to abide by the terms of an international agreement relieved the United States of any corresponding obligations. 459 F.2d at 1220-21. We then recognized a qualification—that courts must enforce self-executing treaties affecting individual rights. *Id.* at 1221-22. But, we continued, the qualification does not apply "when the corrective machinery specified in the treaty itself is nonjudicial." *Id.* at 1222; *see also id.* ("intervention by an American court . . . is foreclosed by the very terms of the document from which the rights insisted upon are said to spring"). *Holmes* nowhere suggests that courts lack jurisdiction to adjudicate any claims involving non-self-executing agreements. And as explained above, adjudicating the claims at

issue here would not require United States courts to pass judgment on the public acts of a foreign sovereign. Moreover, after *Holmes* was decided, we squarely held that the question of self-execution "does not present a jurisdictional issue regarding the court's power to hear a case" and instead relates to a merits question whether the "plaintiff has a cause of action." *Sluss v. U.S. Dep't of Justice, Int'l Prisoner Transfer Unit*, 898 F.3d 1242, 1248 (D.C. Cir. 2018). So if claims fail because an international agreement is not self-executing, the result should be a merits dismissal rather than application of the political question doctrine.

III

For their cause of action, the plaintiffs invoke the APA's judicial-review provisions, 5 U.S.C. §§ 701-06. Those provisions create a right of review for any person adversely affected by agency action, *id.* § 702, which extends to final agency action not otherwise reviewable, *id.* § 704. But this review is unavailable if "statutes preclude judicial review," *id.* § 701(a)(1), or if the action for which review is sought is "committed to agency discretion by law," *id.* § 701(a)(2). Because the latter exclusion applies to this case, the plaintiffs have no APA cause of action.

Section 701(a)(2) governs in two related circumstances. First, a matter is "committed to agency discretion by law" if the governing statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Second, section 701(a)(2) makes presumptively unre-

viewable certain decisions "traditionally left to agency discretion," such as decisions not to bring enforcement actions or not to grant reconsideration. *Id.* But even for traditionally unreviewable decisions, if Congress limits agency discretion "by putting restrictions in the operative statutes," the exception may not apply. *Id.* at 193; *see Chaney*, 470 U.S. at 833 (considering whether a statute "supplied sufficient standards to rebut the presumption of unreviewability").

In *Vigil*, the Supreme Court held that an agency's "allocation of funds from a lump-sum appropriation" is another kind of decision that section 701(a)(2) presumptively insulates from review. 508 U.S. at 192. As the Court explained, such allocations have been "traditionally regarded as committed to agency discretion," for "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." *Id.* The Court thus refused to review the Indian Health Service's decision to discontinue a regional healthcare program and reallocate the funding to a national one. *Id.* at 189. The Court noted that neither the relevant appropriations nor the substantive statutes even mentioned the discontinued program, much less circumscribed the agency's discretion to repurpose its funding. *Id.* at 193-94.

The State Department decisions rejecting the plaintiffs' claims are unreviewable for many of the same reasons. What law might constrain those decisions? Start with section 2668a, which governs the disbursement of settlement funds paid to the United States by foreign governments. Section 2668a provides that the Secretary of State "shall determine the amounts due

claimants" from such funds, and it prospectively makes appropriations to pay "the ascertained beneficiaries." It thus charges the Secretary with deciding how to allocate a fixed sum of appropriated money among claimants, and *Vigil* teaches that the "allocation of funds from a lump-sum appropriation" is presumptively "committed to agency discretion." 508 U.S. at 192. Nor does section 2668a overcome the presumption by restricting agency discretion. Nothing in it directs the Secretary to allocate funds in any particular way—it just requires him to "determine the amounts due."

Next consider the Agreement. Article 6 requires the United States to distribute the $60 million fund "according to criteria which it shall determine." J.A. 18. And Article 8 states that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between" France and the United States. J.A. 19. The Agreement thus is not self-executing. *See Medellín*, 552 U.S. at 508-09. And because it is not self-executing, it does not "function as binding federal law," and it "can only be enforced" domestically through implementing legislation. *Id.* at 504-05 (cleaned up). We recognized this basic point in *Citizens in Nicaragua*, which held that the APA "does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." 859 F.2d at 943.

The plaintiffs do not argue that the Agreement itself has domestic legal force. Instead, they contend that section 2668a incorporates the Agreement as binding domestic law. They invoke *Sluss*, where a statute directed an agency to look to a non-self-

executing treaty "for substantive direction." 898 F.3d at 1251. We held that the statute implemented and incorporated the treaty, thereby domesticating its provisions and making agency action under the treaty reviewable through the APA. *Id.* at 1251-52. We are skeptical that section 2668a does comparable work here. As discussed, it merely requires the Secretary of State to determine amounts due to claimants, authorizes the Secretary of the Treasury to disburse those amounts, and provides a standing appropriation. This implements the Agreement in the limited sense of allowing the United States to pay claimants consistent with the Appropriations Clause. *See* U.S. Const. art. I, § 9, cl. 7. But section 2668a neither requires the Secretary of State to apply the substantive standards of the Agreement nor itself provides any substantive standards.

In any event, domestication of the Agreement would not help the plaintiffs. They contend that Article 6, which requires the United States to "consider the objectives of this Agreement" and to "rely on the sworn statement[s]" of the claimants, would provide standards firm enough to support APA review. J.A. 18. We need not decide this question because the plaintiffs' theory would also domesticate Article 8, which requires interpretive and enforcement disputes to be "settled exclusively by way of consultation between the Parties." J.A. 19. In that case, the statute domesticating the Agreement would itself preclude review. *See* 5 U.S.C. § 701(a)(1). The plaintiffs object that Article 8 governs only disputes between the United States and France, as opposed to disputes between individual claimants and the State Department. But by its terms, Article 8 applies to

"[a]ny dispute arising out of the interpretation or performance of this Agreement." J.A. 19. And try as the plaintiffs might to characterize their claims as arising solely under the APA, the only possible source of substantive law for their claims is the Agreement itself, which bars judicial review expressly.

For these reasons, the APA gives the plaintiffs no cause of action to challenge the State Department's decisions rejecting their claims under the Agreement.

IV

The district courts in *Schieber* and *Faktor* correctly concluded that the plaintiffs there failed to state a claim. The district courts in *Gutrejman*, *Schneider*, and *Bywalski* erred in dismissing the claims at issue on jurisdictional grounds, but we affirm on the alternative ground that these plaintiffs failed to state a claim.[2]

Affirmed.

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[2] Because the government filed cross-appeals to support its merits arguments in these three cases, we need not consider whether this Court otherwise could have converted the jurisdictional rulings below into merits ones. *See Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1028-29 (D.C. Cir. 2020); *Sierra Club*, 648 F.3d at 854.

***Schieber v. United States*,**
No. 21-cv-1371
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS
(JANUARY 26, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNY SCHIEBER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 21-1371 (JDB)

Before: John D. BATES,
United States District Judge.

Plaintiff Jenny Schieber challenges a decision by the United States Secretary of State ("Secretary") denying her claim for compensation from the Holocaust Deportation Fund ("Fund"). The Fund is a sum of money held in trust by the Secretary pursuant to an executive agreement between the governments of the United States and France; it is intended to compensate certain qualifying individuals who survived deportation from France during the Holocaust, or their survivors. *See generally* Def.'s Mot. to Dismiss Pl.'s Compl. Ex.

A [ECF No. 6-2] ("Agreement" or "Ex. A").[1] Schieber claims that the Secretary's rejection of her claim was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. *See* Compl. [ECF No. 1] ¶¶ 1-3. The United States responds that the Court lacks subject-matter jurisdiction over Schieber's claims and that she has failed to state a claim upon which relief can be granted. *See* Mem. of P. & A. in Supp. of Def.'s Mot. to Dismiss [ECF No. 6-1] ("Mot. To Dismiss") at 8-9. For the reasons explained below, the Court will grant the government's motion to dismiss.

BACKGROUND

I. The United States-France Agreement and the Holocaust Deportation Fund

The United States and French governments entered into the Agreement on December 8, 2014. Ex. A at 3. France agreed to provide $60 million to create a fund—the Holocaust Deportation Fund—from which the United States government would "mak[e] payments," Agreement art. 4(1), to compensate "persons who survived deportation from France, their

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[1] The Agreement is attached as an exhibit to defendant's motion to dismiss, and it is available in the Treaties and Other International Acts Series and electronically. See Agreement Between the Government of the United States 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, Fr.-U.S., Dec. 8, 2014, T.I.A.S. 15-1101, https://www.state.gov/wp-content/uploads/2019/04/us_france_agreement.pdf. The Court will cite the Agreement's provisions as "Agreement art.#(#)" and prefatory materials as "Ex. A at #."

surviving spouses, or their assigns," *id.* art. 2(1). The Agreement required the United States to deposit the money received from France "in an interest-bearing account . . . until distribution, pursuant to a determination by the Secretary of State of the United States of America or his designee." *Id.* art. 4(4); *see also* 22 U.S.C. § 2668a (providing that the "Secretary of State shall determine the amounts due claimants" from "trust funds" consisting of "moneys received . . . from foreign governments . . . in trust for citizens of the United States or others"). In exchange for France's payment of money to establish the Fund, the United States agreed to recognize France's sovereign immunity, secure termination of suits pending against France in the United States concerning Holocaust deportation claims, and require future claimants to execute waivers of all rights against France. *See* Agreement art. 5.

The United States, through the Secretary of State, "shall distribute the [Fund] . . . according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible." Agreement art. 6(1); *see id.* art. 4(4). Notwithstanding that broad grant of discretion, the Agreement requires the Secretary to reject any claims by persons "who have received, or are eligible to receive, compensation under an international agreement concluded by the Government of the French Republic addressing Holocaust deportation," *id.* art. 3(2), or under "another State's program" for compensating Holocaust deportation victims, *id.* art. 3(4); accord *id.* art. 6(2)(b). To determine whether a person is eligible to receive a payment from the Fund, the Secretary "shall rely on the sworn statement of

nationality" to determine whether a claimant is a French national, and "sworn representations" that a claimant has not received compensation from other programs, "as well as on any relevant information" exchanged between the United States and French governments. *Id.* art. 6(2)(c).[2] Finally, the Agreement provides that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the parties." *Id.* art. 8. The Agreement "[e]ntered into force" on November 1, 2015. Ex. A at 3.

II. Factual Background

At the pleading stage, district courts must accept as true a plaintiff's factual allegations, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), so the Court will recite the facts as presented in the complaint. Jenny Schieber is a citizen and resident of Israel. Compl. ¶ 7. On July 31, 1943, Schieber's mother was deported to Auschwitz, where she was later killed; Schieber's father, on the other hand, "survived and passed away in Antwerp, Belgium on August 1, 1964." *Id.* ¶ 9. After the Agreement was signed, Schieber filed a claim for payment from the Fund "on behalf of the

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[2] The Annex to the Agreement ("Annex") is a "Form of Written Undertaking That Any Recipient of Compensation Must Execute Before Receiving Payment under This Agreement"—in other words, it is a template for the application that a claimant must submit to the Secretary to receive money from the Fund. Annex at 1. In the first paragraph of the form, a claimant must declare his or her nationality. *Id.* The claimant also must attach "a copy of government documentation establishing nationality" to the form, and must "declare under penalty of perjury" that he or she has not received, and will not claim, compensation under similar programs of France or any other nation. *Id.* at 2.

estate of her father, a surviving spouse." *Id.* ¶ 10. In her application, Schieber swore that her father was "stateless," *i.e.*, that he was not a citizen of any country. *Id.*; *see id.* ¶ 14.

On April 3, 2018, however, the Secretary denied her claim. Compl. ¶ 10. Although Schieber "swore that the information in [her] application, including the information that her father was stateless, was true and correct," *id.* ¶ 11, and although she "provided a second affidavit, again swearing that her father was stateless, that he passed away in 1964, and that she did not have a copy of his death certificate," *id.* ¶ 12, the Secretary allegedly took "the position that [Schieber] had provided no evidence of the fact that her father was stateless," instead "stating that [the Department of State] had been unable to find proof of statelessness," *id.* ¶ 10.[3]

Schieber filed her complaint on May 18, 2021. *See generally* Compl. She claims that the Secretary's denial of her claim based on the rejection of her

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[3] According to Schieber, nationals of five countries, including France and Belgium, "are excluded from the Agreement." Pl.'s Mem. in Opp'n to Mot. to Dismiss [ECF No. 9] ("Opp'n") at 1 n.1; see Agreement art. 3(1)-(2) (providing that the Agreement "shall not apply" to "French nationals" and "nationals of other countries who . . . are eligible to receive compensation under" other international agreements concluded by the French government); *see also* John Irish, France to Pay $60 Million for Holocaust Victims Deported by State Rail Firm, Reuters (Dec. 5, 2014, 12:26 PM), https://www.reuters.com/article/us-france-usa-holocaust/france-to-pay-60-million-for-holocaust-victims-deported-by-state-rail-firm-idUSKCN0JJ1TB20141205 ("The compensation deal . . . is open to people from all countries with the exception of . . . Belgium[,] which already ha[s] [a] bilateral agreement[] with France.").

"sworn affidavits of nationality" was "an exercise of discretion which [the Secretary] did not have" because the Agreement provides that the Secretary "shall rely on the sworn statement of nationality" in determining eligibility for compensation. *Id.* ¶ 11 (quoting Agreement art. 6(2)(c)); *see also id.* ¶¶ 18-19 (claiming that the Secretary's decision "was not a reasonable interpretation of the Agreement"). Schieber also alleges that "the claims of other claimants who provided no more than sworn statements in support of their claims were approved," rendering the Secretary's decision "arbitrary and capricious." *Id.* ¶ 11. Further, she claims that the Secretary "arbitrarily and capriciously refused to accept basic principles of evidence" and ignored the "difficulty involved in trying to prove statelessness" by denying her claim despite her sworn statements and affidavits about her father's statelessness and death. *Id.* ¶¶ 13-16.

Schieber asks the Court to declare, pursuant to the APA and the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., that the denial of her claim "was arbitrary and capricious and should be overturned" and that her claim "should be approved based on the evidence" she provided and "the failure of Defendant to honor the terms of the Agreement," Compl. at 7. She also seeks a declaration that she is entitled to receive compensation "in the amount that would otherwise be paid . . . had she been initially approved as eligible," as well as "supplemental payments paid to all eligible claimants" of the same status. *Id.*

III. Motion to Dismiss

On July 27, 2021, the United States moved to dismiss Schieber's complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See* Mot. to Dismiss at 1-2. The government contends that the Agreement creates no private right of action, *see id.* at 9, but instead provides for resolution of disputes only through consultation between the United States and France—a provision that, the government argues, creates a "limitation on judicial review," *id.* at 9-10 (citing 5 U.S.C. § 702), precludes judicial review, *id.* at 13 (citing 5 U.S.C. § 701(a)(1)), and commits eligibility determinations "to agency discretion by law," *id.* at 14 (citing 5 U.S.C. § 701(a)(2)). The government also argues that Schieber's claims "raise a non-justiciable political question" as to the Department of State's interpretation and implementation of an international agreement. *Id.* at 17. Lastly, because "the Declaratory Judgment Act is not an independent source of federal jurisdiction," the government contends that Schieber's claims under that statute cannot survive on their own. *Id.* at 25.

In her opposition, Schieber protests that the government's arguments are "red herrings" because "the only issue" raised in her complaint "is whether a unilateral, internal administrative decision by the State Department" was "arbitrary and capricious." Pl.'s Mem. in Opp'n to Mot. to Dismiss Am. Compl. [ECF No. 9] ("Opp'n") at 2-3.[4] She contends that she is not "asking the Court to . . . mandate a particular interpretation of the Agreement," *id.* at 3, and that

[4] The Court notes that Schieber has not moved to amend her complaint, nor has she filed an amended version.

her allegations "are not based on the Agreement" but instead "are limited entirely to the Department of State's" actions, *id.* at 6. Thus, she argues, the absence of a private cause of action in the Agreement cannot overcome the presumption of a right to sue under the APA. *Id.* at 3-4; *see id.* at 6-10. Further, Schieber claims that the Agreement is not a "law" by which a decision may be committed to an agency's discretion, *see id.* at 7, and she contends that the political question doctrine is "irrelevant" to her claims because she is only "seek[ing] to have the Defendant accept affidavits sworn to under penalty of perjury," *see id.* at 10-13. In its reply, the government argues that Schieber's claims are indeed based on the Agreement, which is both "the basis for [her] alleged right to compensation" and the document that the Secretary allegedly misinterpreted in denying her claim. Reply in Supp. of Mot. to Dismiss ("Reply") at 3 (citing Compl. ¶¶ 11, 19); *see id.* at 5-6. The government's motion to dismiss Schieber's complaint is now fully briefed and ripe for decision.

ANALYSIS

In considering a motion to dismiss under Rule 12, a court must accept all facts alleged in the complaint as true and make all reasonable inferences in the plaintiff's favor. *Humane Soc'y of U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). Courts need not, however, "accept inferences unsupported by facts or legal conclusions cast in the form of factual allegations." *City of Harper Woods Emps.' Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009). To survive a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), a plaintiff must

establish a court's jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the "complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Although a court may consider materials outside the pleadings to determine whether it has subject-matter jurisdiction over claims, *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005), a motion to dismiss for failure to state a claim must be decided only on the basis of "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [the court] may take judicial notice," *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). "Incorporation by reference can also amplify pleadings where the document is not attached by the plaintiff, but is 'referred to in the complaint and integral to the plaintiff's claim.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015) (cleaned up) (quoting *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). Thus, "[a] district court may consider a document that a complaint specifically references without converting the motion into one for summary judgment." *Id.*

I. Political Question Doctrine

The government's sole argument for dismissal for lack of subject-matter jurisdiction is that Schieber's claims present a nonjusticiable political question. *See* Mot. to Dismiss at 17. "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) (first quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962); and then quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). And although many foreign policy decisions fall into this category, the Supreme Court has cautioned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Instead, courts should undertake "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12.

To aid in this analysis, Supreme Court articulated six factors that are "[p]rominent on the surface" of any case involving a non-justiciable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking an 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 from multifarious pronouncements by various departments on the question.

Baker, 369 U.S. at 217. The first two factors are "the most important," *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), but only one factor need be present for a court to conclude that a case is nonjusticiable, *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

But despite the Supreme Court's enumeration of factors, the bounds of the political question doctrine remain "murky and unsettled." *Harbury*, 522 F.3d at 418 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring)). The D.C. Circuit has noted that "[n]o branch of the law of justiciability is in such disarray as the doctrine of the political question," and because "there is no workable definition of characteristics that distinguish political questions from justiciable questions," the doctrine "is 'more amenable to description by infinite itemization than by generalization.'" *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 933 (D.C. Cir. 1988) (quoting Charles Allen Wright, *The Law of Federal Courts* 74-75 (4th ed. 1983)). Thus, the D.C. Circuit has explained that "applying the political question doctrine . . . may not be the best approach" to resolving certain issues. *Id.* at 934.

In *Committee of U.S. Citizens Living in Nicaragua*, for example, plaintiffs sued the government on the ground that the United States' continued funding of the "Contras" in Nicaragua violated a judgment of

the International Court of Justice ("ICJ") and therefore violated the APA, the United Nations Charter, international law, and various constitutional provisions. *See* 859 F.2d at 932. Although the government sought to dismiss the suit on political question grounds, the D.C. Circuit held that the case "invite[d] dismissal for a reason more fundamental than the political question doctrine": none of the plaintiffs "ha[d] a cause of action in an American court." *Id.* at 934. Thus, the D.C. Circuit "d[id] not rest on the political question doctrine in rejecting the claims," and instead affirmed dismissal "on the ground that private parties have no cause of action in this court to enforce" an ICJ decision. *Id.*; *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (opting "not to resort to [the political question] doctrine for most of [plaintiffs' claims]" because there were "other bases for dismissing the suit . . . which do not expand [the court's] jurisdiction by resolving the assertedly political question on its merits")).

Cognizant of the marked difficulty in deciding "[j]ust where the non-justiciability line is drawn," and of "the D.C. Circuit's hesitance to apply the ill-defined and nebulous political question doctrine," another court in this District "decline[d] to apply the doctrine" in an analogous case and instead "address[ed] the other grounds for dismissal asserted by" the defendants. *Gonzalez-Vera v. Kissinger*, Civ. A. No. 02-02240 (HHK), 2004 WL 5584378, at *3-4 (D.D.C. Sept. 17, 2004) (collecting D.C. Circuit cases affirming dismissals on grounds other than the political question doctrine). Guided by the D.C. Circuit's preference to resolve a case on the basis of whether plaintiffs had "a cause of action in an American court" instead of

addressing the political question doctrine, *see Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d at 934, the Court will therefore reserve judgment on the government's political question argument and instead consider whether Schieber has a cause of action to raise her claims in this Court.

II. Private Right of Action

The government argues that, because the Agreement provides no private cause of action, it imposes a "limitation on judicial review" and leaves Schieber without a cause of action. Mot. to Dismiss at 9-10 (quoting 5 U.S.C. § 702). Schieber responds that the government's premise— that her claims "are based on the Agreement"—"is clearly wrong." Opp'n at 5. She argues instead that she "seeks a judgment against the [government] only for domestic wrongs committed by the Department of State," *id.* at 3-4, so her "right of action is specifically created by the APA subject only to specified exceptions," none of which are applicable in her case, *id.* at 6. The Court will first determine whether Schieber's claims are based on the Agreement, then decide whether the Agreement provides a private cause of action, and, if not, whether that is fatal to Schieber's claims.

A. Basis of Schieber's Claims

In her opposition to the government's motion to dismiss, Schieber contends that she is not "asking the Court to . . . mandate a particular interpretation of the Agreement," Opp'n at 3, or to "interpret any terms of the Agreement," *id.* at 4. Instead, she argues that she has "suffered financial injury only because of the internal acts of the Department of

State," which "rejected her claim based on conclusions of fact that lacked rational justification." *Id.*; *see also id.* at 6 ("Th[is] dispute has nothing to do with the terms of the Agreement."). She also claims that she "does not rely on the Agreement as the source of [her] cause of action against the State Department." *Id.* at 4-5.

But these arguments are inconsistent with the allegations in Schieber's complaint. Schieber alleged that the "language of the Agreement itself was a mandate" requiring the Secretary to accept sworn affidavits of nationality, and that it was the Secretary's "[f]ailure to treat [Schieber] in accordance with the terms of the Agreement" that rendered the Secretary's decision "arbitrary and capricious." Compl. ¶ 11 (emphases added). Furthermore, Schieber explicitly claimed that the Secretary's rejection of her claim "was not a reasonable interpretation of the Agreement," *id.* ¶ 19. Indeed, Schieber acknowledges the centrality of the Agreement in her opposition to the motion to dismiss: "To the extent that the Agreement is relevant to this suit, it is only because Plaintiff is asking the Defendant to adhere to the purpose and language of the Agreement." Opp'n at 12 (emphasis added).

Nor does Schieber raise any other source of law as the basis of her suit. Although she contends that the Secretary "arbitrarily and capriciously refused to accept basic principles of evidence," citing Federal Rules of Evidence 602, 803(10), and 1004(b),[5] Compl.

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[5] Federal Rule of Evidence 602 provides that a witness may testify only on a matter within his or her personal knowledge, and that "[e]vidence to prove personal knowledge may consist of the witness's own testimony." Rule 803(10) creates an exception to the general rule against hearsay for testimony "that a

¶ 13, she does not explain why those rules, which only "apply to proceedings in United States courts," Fed. R. Evid. 101(a), are relevant to the Secretary's decision. Schieber also contends that the Secretary "ignore[d] internationally accepted guidelines on the definition and treatment of stateless persons," Opp'n at 2 & n.2; *see* Compl. ¶¶ 14-16, but those guidelines are not a legal basis for claims against the Secretary under the APA. The Court concludes that Schieber's claims are based on the Agreement and will thus consider whether the Agreement provides a private right of action and, if not, whether it imposes a "limitation on judicial review" under the APA.

B. Limitation on Judicial Review

A person who is "suffering a legal wrong because of agency action . . . is entitled to judicial review thereof," 5 U.S.C. § 702, and the Court must "set aside agency action" that is "arbitrary, capricious, . . . or otherwise not in accordance with law," *id.* § 706(2)(A). But nothing in the APA "(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action . . . on any other appropriate legal or equitable ground; or (2) confers authority to grant

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diligent search failed to disclose a public record," if that testimony is admitted to prove that "the record . . . does not exist" or that the "matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind." Finally, Rule 1004(b) provides that a non-original writing is admissible if "an original cannot be obtained by any available judicial process." Drawing from these rules, Schieber argues that the Secretary should have considered her "personal knowledge of the date of her father's death" and her sworn statement that she has been unable to locate a death certificate for over 55 years. Compl. ¶ 13.

relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* § 702. Although treaties and executive agreements have the force of law, violations of them are "subject to review under the APA" only "when a private right of action is afforded." *De la Torre v. United States*, Nos. C 02-1942 CRB, C 01-0892-CRB, C 02-1943-CRB, C 02-1944-CRB, 2004 WL 3710194, at *8-9 (N.D. Cal. Apr. 14, 2004); *cf. McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89, 491 (D.C. Cir. 2008) (although Treaty of Amity between United States and Afghanistan had the force of law, plaintiff could not bring suit for alleged violation because treaty lacked "a textual invitation to judicial participation"). Thus, whether a treaty or executive agreement carries the force of law is a separate issue from whether it affords a private right of action. *See McKesson Corp.*, 539 F.3d at 488-89 ("[W]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies." (quoting Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h (Am. Law Inst. 1986))).

There is a presumption that international agreements do not create private causes of action. *See Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008); *McKesson Corp.*, 539 F.3d at 488-89; *Mora v. New York*, 524 F.3d 183, 201 & n.25 (2d Cir. 2008) (collecting cases). This presumption may "be overcome only if the agreement itself reflects an intent to create judicially enforceable private rights." *United States v. Sum of $70,990,605*, 234 F. Supp. 3d 212, 237-38 (D.D.C. 2017) (citing Restatement (Third) of Foreign Relations Law of the United States § 907

cmt. a (Am. Law Inst. 1986)); *accord* Restatement (Fourth) of Foreign Relations Law of the United States § 311 cmt. b (Am. Law Inst. 2018). Without a "textual invitation to participation," therefore, a treaty or agreement is enforceable only "through bilateral interaction between its signatories" and not by the adjudication of private suits. *McKesson Corp.*, 539 F.3d at 491 (also giving "'great weight' to the fact that the United States shares this view" (quoting *Medellín*, 552 U.S. at 513)).

The government correctly notes that the Agreement "contains no express provisions creating judicially enforceable rights for claimants" and argues that the "Agreement's text and context" support the same conclusion. Mot. to Dismiss at 12. Textually, the Agreement provides that the United States shall distribute funds "according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible," Agreement art. 6(1) (emphasis added), and that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties," that is, between the United States and France, *id.* art. 8 (emphasis added).

As to context, although the Agreement was intended to benefit individual claimants—Holocaust survivors and their qualifying family members, *see* Agreement art. 2(1)—the relevant question is whether anything in the Agreement "indicate[s] an intent by its creators that any of [its] terms . . . would give rise to affirmative, judicially-enforceable obligations on behalf of" individual claimants. *De la Torre*, 2004 WL 3710194, at *10; *see also McKesson Corp.*, 539 F.3d

at 489 (concluding that treaty provided no private cause of action, even though it "directly benefit[ted]" the plaintiff, because it "le[ft] open the critical question of how [plaintiff] is to secure its due"). For instance, the court in *De la Torre* concluded that a series of agreements between the United States and Mexico, which were intended to improve working conditions for certain Mexican citizens in the United States, were not enforceable by the workers. *See* 2004 WL 3710194, at *1- 2. "[D]espite the multitude of provisions that provided protections to the [workers]," the court concluded that "nothing in the agreements expresses or allows the court to infer that" the purposes or objectives of the treaty "warrant[ed] a private right of action." *Id.* at *9. Instead, the court reasoned "that what was contemplated by the agreements were matters of states for the respective nations to enforce between them." *Id.* at *10. So too here. Although the Agreement's objectives include compensation for private parties, its text and context indicate that it is not intended to be enforceable by those parties. Thus, the Court concludes that the Agreement provides no private cause of action, so Schieber cannot state a claim under the APA for the Secretary's alleged violation of the Agreement.[6] This lack of a cause of

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[6] Without a viable claim under the APA, Schieber also cannot state a claim under the Declaratory Judgment Act. If a plaintiff fails to allege "a cognizable cause of action," she has "no basis upon which to seek declaratory relief because of the "well-established rule that the Declaratory Judgment Act is 'not an independent source of federal jurisdiction.'" *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (quoting *C & E Servs., Inc. of Washington v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002)).

action is an independent limitation on judicial review of the State Department's denial of Schieber's claim.

III. Preclusion of Review and Commitment to Agency Discretion

Even assuming that the Agreement did not operate as a limitation on judicial review under 5 U.S.C. § 702, the Court would still conclude that it precludes judicial review under § 701(a)(1). See Mot. to Dismiss at 13-14. Schieber urges that the Agreement's provision limiting dispute resolution to consultation between the United States and France does not apply to her claims, which are limited to the Secretary's actions, *see* Opp'n at 6, and she argues that the government has identified no law that "prohibit[s] review," *id.* at 7. The Court disagrees: the Agreement itself precludes judicial review.

The APA provides no cause of action for a person injured by allegedly unlawful agency action "to the extent that statutes preclude judicial review." 5 U.S.C. § 701(a)(1). "Executive agreements are not quite treaties," in that they do not require ratification by the Senate, but they do "carry the force of law as an exercise of the President's foreign policy powers." *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 724 F.3d 230, 232 (D.C. Cir. 2013).[7] In the context of the APA, courts have concluded that treaties, just like statutes, may preclude judicial

[7] Schieber argues that the Agreement is not "the equivalent of law," Opp'n at 7, but she neither cites any support for this position nor grapples with binding Circuit precedent to the contrary. *See Owner-Operator Indep. Driver's Ass'n*, 724 F.3d at 232; *cf. McKesson Corp.*, 539 F.3d at 488 (concluding that Treaty of Amity had the force of law).

review under § 701(a). *See United States v. Moloney (In re Price)*, 685 F.3d 1, 13-14 (1st Cir. 2012), *cert. denied*, 569 U.S. 942 (2013).

Under § 701(a)(1), the APA's presumption of reviewability of agency action "may be overcome by specific language" or by "inferences of intent drawn from the statutory scheme as a whole." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984); *see also Heckler v. Cheney*, 470 U.S. 821, 830 (1985) (Section 701(a)(1) applies "when Congress has expressed an intent to preclude judicial review"). Thus, "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from" its structure, objectives, history, and the nature of the agency action involved. *Block*, 467 U.S. at 345; *see also Moloney*, 685 F.3d at 13 (applying the same principle to an APA challenge under a mutual legal assistance treaty ("MLAT")).

For many of the reasons explained above, the Court concludes that the Agreement precludes judicial review of Schieber's claim. That claim is based on the Secretary's allegedly incorrect interpretation of the Agreement, *see*, *e.g.*, Compl. ¶ 19; Opp'n at 12, and the Agreement provides for exclusive resolution of "[a]ny dispute arising out of the interpretation or performance of the Agreement" by "consultation" between the United States and France, Agreement art. 8. That consultation-only provision operates as law precluding judicial review. *See Moloney*, 685 F.3d at 13-14. In *Moloney*, the First Circuit considered an APA challenge to the government's decision to subpoena information pursuant to an MLAT with the United Kingdom. *Id.* at 3, 13. Because the MLAT explicitly did "not give rise to a right on the part of any private person to . . .

impede the execution of a request [for legal assistance]," instead providing that the United States and United Kingdom would "consult promptly . . . concerning [its] implementation," *id.* at 10-11, and because its structure and objectives suggested the same, *id.* at 11-12, the court concluded that § 701(a)(1) "bar[red] federal court jurisdiction," *id.* at 13-14. So too here. Schieber resists this conclusion by arguing that her challenge is only directed at the Secretary's rejection of her claim and "has nothing to do with the terms of the Agreement." *See* Opp'n at 6. But, as explained above, the Court concludes that Schieber's claims are based on her disagreement with the Secretary's interpretation of the Agreement. *See Moloney*, 685 F.3d at 13 (rejecting an analogous argument that plaintiffs "s[ought] . . . merely to enforce the treaty requirements"). Because any dispute about the "interpretation" of the Agreement must be resolved by intra-party consultation, the consultation-only provision of the Agreement precludes judicial review in this case.

CONCLUSION

For the foregoing reasons, the Court will grant the government's motion to dismiss Schieber's complaint. An Order to that effect shall issue on this date.

/s/
John D. Bates
United States District Judge

Dated: January 26, 2022

***BYWALSKI V. UNITED STATES*, No. 20-cv-265**
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MAY 13, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON BYWALSKI,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 20-cv-265 (FYP)

Before: Florence Y. PAN,
United States District Judge.

Plaintiff Simon Bywalski submitted an application to the United States Department of State, seeking compensation for a Holocaust-related deportation on behalf of his mother's estate. Bywalski seeks a declaration that the State Department's denial of his application was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701,

et seq. Before the Court is the United States' Motion to Dismiss, which argues that this Court lacks subject matter jurisdiction, and that Plaintiff fails to state a claim. For the following reasons, the Court will grant the Motion to Dismiss.

BACKGROUND

I. Agreement between the United States and France to Compensate Victims of Holocaust-Related Deportations

In December of 2014, the United States and France entered into an agreement to establish a compensation fund for Holocaust victims who were deported from France to Nazi concentration camps during World War II. *See* ECF No. 24-2 ("Agreement").[1] Under the Agreement, France was to pay $60 million to the United States to establish the compensation fund. *Id.*, Article 4(1). In exchange, the United States agreed to "recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims." *Id.*, Article 2(2). The Agreement required the United States to deposit the money "in an interest-bearing account . . . until distribution, pursuant to a determination by the Secretary of State." *Id.*, Article 4(4).

The Agreement's objective is to "[p]rovide an exclusive mechanism for compensating" individuals

[1] The full name of the Agreement is the "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." *Id.*

(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 by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic to address Holocaust deportation claims." *Id.*, Article 2(1). Thus, the intended beneficiaries of the Agreement are non-French nationals who were deported from France and cannot receive compensation through another Holocaust compensation program. *See id.*, Article 3.[2] The Agreement is intended to provide "an amicable, extra-judicial and non-contentious manner to address the issue of compensation for such persons." *Id.*, at ECF p. 7.

To receive compensation, applicants must execute a "Form of Written Undertaking." *Id.*, Annex; Article 5(4). The Form requires that applicants (1) declare their nationality; (2) attach a "copy of [the] government documentation establishing" their nationality; (3) waive any right to seek other compensation or relief from France or the United States for Holocaust deportation; and (4) declare "under penalty of perjury" that they have not received compensation from any other program related to Holocaust deportation. *Id.* Other criteria for distribution are determined by the United

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[2] Specifically, the groups that are not eligible for compensation under the Agreement are (1) French nationals; (2) nationals of other countries who "have received, or are eligible to receive, compensation under an international agreement;" (3) persons "who have received, or are eligible to receive, compensation" from the French compensation program; and (4) persons "who have received compensation under another State's program providing compensation specifically for Holocaust deportation." *Id.*, Article 3.

States "unilaterally, in its sole discretion." *Id.*, Article 6(1) ("The Government of the United States of America shall distribute the sum referred to in . . . this Agreement according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible."). In developing criteria for distribution, the United States must "consider the objectives of [the] Agreement;" and may rely on information in the Form of Written Undertaking, "as well as on any relevant information obtained" pursuant to information sharing between the United States and France. *Id.*, Article 6(2), 6(4). Notably, the Agreement provides that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties" to the Agreement — *i.e.*, the governments of the United States and France. *Id.*, Article 8.

II. Factual Background

Plaintiff Simon Bywalski's father was deported to Auschwitz on August 26, 1942, where he was killed. *See* ECF No. 21 (Amended Complaint), ¶ 9. His mother, Laja Fibich, survived and passed away in France in 1981. *Id.* Plaintiff filed a claim for compensation under the Agreement on behalf of the estate of his mother as a surviving spouse, asserting that she was stateless. *Id.*, ¶¶ 9-10. On April 11, 2018, the State Department rejected Plaintiff's application, finding that Bywalski had provided no evidence that his mother was stateless. *Id.* Bywalski alleges that the State Department exercised discretion it did not have when it rejected his claim. *Id.*, ¶ 11. He contends that the State Department was required to rely on

the sworn statements that he provided, which asserted that his mother was stateless. *Id.*[3]

According to Plaintiff, the State Department's rejection of his claim violates the Agreement and constitutes an arbitrary and capricious agency action under the APA. *Id.*, ¶¶ 17-18. Plaintiff seeks a judicial declaration that Defendant's action in denying his claim is arbitrary and capricious under the APA and the Declaratory Judgment Act ("DJA"). *Id.*, ¶ 1.[4]

III. Procedural History

Plaintiff filed his original complaint on January 31, 2020, seeking relief under the Federal Tort Claims Act. *See* ECF No. 1. The United States moved to dismiss the Complaint based on a lack of subject matter jurisdiction, arguing that Plaintiff failed to establish that the United States had waived its sovereign immunity. *See* ECF No. 12. The Court granted Defendant's Motion to Dismiss on March 19, 2021; but allowed Plaintiff to file an Amended Complaint pursuing relief under the APA. Plaintiff filed his Amended Complaint on March 30, 2021. *See* Am. Compl. Defendant's instant Motion to Dismiss the Amended Complaint asserts that this Court lacks subject matter jurisdiction because Plaintiff

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[3] Plaintiff provided a second statement, again swearing that his mother was stateless. *Id.*, ¶ 12. Plaintiff additionally provided a letter from his counsel, Stephen Rodd, attesting to the difficulty of trying to prove statelessness. *Id.*, ¶ 14.

[4] The Court focuses on Plaintiff's claim under the APA because "[t]he Declaratory Judgment Act, 28 U.S.C. § 2201, authorizes federal courts to grant declaratory relief as a remedy and is not, standing alone, a cause of action." *Malek v. Flagstar Bank*, 70 F. Supp. 3d 23, 28 (D.D.C. 2014).

raises a non-justiciable political question; and that, in any event, Plaintiff fails to state a claim for relief under the Agreement and the APA. *See* ECF No. 24 (Defendant's Motion to Dismiss the Amended Complaint). The Motion is now ripe for decision.

LEGAL STANDARD

I. 12(b)(1) Standard

When a defendant brings a Rule 12(b)(1) motion to dismiss, the plaintiff must demonstrate by a preponderance of the evidence that the court has subject-matter jurisdiction to hear his claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). "Because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). As a result, "the plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 13-14 (cleaned up).

In policing its jurisdictional bounds, the court must scrutinize the complaint, treating its factual allegations as true and granting the plaintiff the benefit of all reasonable inferences that can be derived from the alleged facts. *See Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The court, however, need not rely "on the complaint

standing alone," as it may also look to undisputed facts in the record or resolve disputed ones. *See Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992) (citations omitted). By considering documents outside the pleadings on a Rule 12(b)(1) motion, a court does not convert the motion into one for summary judgment, as "the plain language of Rule 12(b) permits *only* a 12(b)(6) motion to be converted into a motion for summary judgment" when a court considers documents extraneous to the pleadings. *Haase v. Sessions*, 835 F.2d 902, 905 (D.C. Cir. 1987) (emphasis in original).

II. 12(b)(6) Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim upon which relief can be granted." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 552 (2007). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *id.* at 555, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

When considering a motion to dismiss, a court must construe a complaint liberally in the plaintiff's favor, "treat[ing] the complaint's factual allegations as true" and granting the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)); *accord Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Although a plaintiff may survive a

Rule 12(b)(6) motion even if "'recovery is very remote and unlikely,'" the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

ANALYSIS

Defendant argues that (1) there is no private right of action under the Agreement; (2) judicial review is precluded by the Agreement; (3) eligibility determinations under the Agreement are committed to agency discretion by law; and (4) Plaintiff presents a non-justiciable political question. *See generally* Def. Mot. The Court agrees that Plaintiff raises a political question that may not be reviewed by this Court. Moreover, Plaintiff fails to state a claim under the Agreement that he seeks to enforce: The Agreement does not confer a private right of action, as it commits the question of eligibility for compensation to the State Department, with any disputes to be resolved only through diplomatic channels.

I. Plaintiffs Raise a Non-Justiciable Question

Defendant argues that this case is non-justiciable because Plaintiff asks the Court "to oversee the [State] Department's interpretation and implementation of an international agreement that the executive negotiated, and second-guess the Department's determination thereunder as to whether individual claimants are eligible." *Id.* at 22. According to Defendant, these foreign policy concerns must be addressed by the executive branch, not by the judiciary. *Id.* at 17. Plaintiff responds that there is no justiciability issue because he seeks only a determination that the

decision to deny his request for compensation — made internally by the State Department — was arbitrary and capricious; and the Court therefore need not wade into the murky waters of foreign affairs. *See* ECF No. 26 (Plaintiff's Opposition) at 10-12.

"[T]he 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)). Because the political question doctrine is a jurisdictional defense, the Court "must address it '*before* proceeding to the merits.'" *Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017) (emphasis in original) (quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005)); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

"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) (internal citations and quotation marks omitted); *see also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (stating the political question doctrine is "designed to restrain the Judiciary from inappropriate interference in the business of other branches"). The Supreme Court has identified six hallmarks of non-justiciable political questions:

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

Baker v. Carr, 369 U.S. 186, 217 (1962). The Court need only "conclude that one factor is present" to find that a non-justiciable political question is raised. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). While not every case that "touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, the Court "must respect the constitutional bounds of the separation of powers." *Gutrejman v. United States*, No. 20-cv-266, 2022 WL 856384, at *6 (D.D.C. Mar. 22, 2022) (RDM).

Here, the Court can resolve the justiciability question by determining whether the Agreement creates any judicially enforceable rights. If it does not, then entertaining Plaintiff's claim "risks not only intruding in the field of foreign affairs . . . but it risks aggrandizing the role of the judiciary, which can only enforce the law as prescribed by the Constitution and the political branches." *Id.* When

agreements contain "dispute resolution provisions" that are committed "solely to diplomatic channels," courts have found such agreements not enforceable in federal courts. *See United States v. Sum of $70,990,605 ("$70 Million")*, 234 F. Supp. 3d 212, 235 (D.D.C. 2017); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (stating that "when the corrective machinery specified in the [agreement] itself is nonjudicial," the courts are without power to act).

Careful review of the Agreement reveals that it does not confer any judicially enforceable rights, and Plaintiff therefore presents this Court with a non-justiciable question. *See Gutrejman*, 2022 WL 856384, at *7. The Agreement contains an "exclusive[]" provision for resolving disputes "by way of consultation between the Parties," *i.e.*, between the governments of the United States and France. *See* Agreement, Article 8 (providing that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties") (emphasis added). Thus, it "could not be clearer" that disputes over the interpretation and application of the Agreement must occur through "diplomatic recourse" and not through litigation. *See $70 Million*, 234 F. Supp. 3d at 234; *accord Gutrejman*, 2022 WL 856384, at *7.

The Court is unpersuaded by Plaintiff's attempt to argue that his claim is just "about an affidavit" and that he is "not suing 'under the Agreement.'" *See* Pl. Opp. at 1-3; *see also id.* at 9 (arguing that Plaintiff merely asserts that Defendant arbitrarily and capriciously rejected his affidavits without explanation). To the contrary, the Amended Complaint alleges that the State Department's denial "was not

a reasonable interpretation of the Agreement." Am. Compl., ¶ 19 (emphasis added). Plaintiff further alleges that the "language of the Agreement itself was a mandate" and that the State Department failed to treat Plaintiff "in accordance with the terms of the Agreement." *Id.*, ¶ 11 (emphasis added). Thus, Plaintiff's challenge to the State Department's reason for rejecting his claim for compensation plainly presents a dispute that "arise[s] out of the interpretation or performance of [the] Agreement." *See* Agreement, Article 8; *see also* Pl. Opp. at 12 ("Plaintiff is asking the Defendant to adhere to the purpose and language of the Agreement.").

Because the governments of the United States and France expressly agreed that "any" disputes under the Agreement are "exclusively" to be resolved through a diplomatic process that does not involve the judiciary, Plaintiff's claim challenging the implementation of the Agreement presents a non-justiciable question that the Court lacks jurisdiction to consider.

II. The Agreement Precludes Judicial Review

Not only does Plaintiff raise a non-justiciable question, but Plaintiff also fails to state a claim under the Agreement itself and under the APA. Although Plaintiff attempts to enforce the Agreement as he understands it, the Agreement creates no private right of action. Treaties and executive agreements are "subject to review under the APA" only "when a private right of action is afforded." *Schieber v. United States*, No. 21-cv-1371, 2022 WL 227082, at *7 (D.D.C. Jan. 26, 2022) (JDB); *see also Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 942-43 (D.C. Cir 1988) (finding that treaty

violations are subject to APA review if actionable by private citizens); *De la Torre v. United States*, No. C 02-1942 CRB, 2004 WL 3710194, at *8-9 (N.D. Cal. Apr. 14, 2004) (stating that treaties and executive agreements are only reviewable under the APA "when a private right of action is afforded"). International agreements presumptively do not create a private right of action, *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008), and do so only when the "agreement itself reflects an intent to create judicially enforceable private rights." *$70,000 Million*, 234 F. Supp. 3d at 237-38; *see also United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987) (finding that a treaty may create a private right of action "if it indicates the intention to establish direct, affirmative, and judicially enforceable rights") (internal quotations and citations omitted). Even international agreements that "directly benefit[] private persons," such as the one at issue here, "generally do not create private rights." *Medellin*, 552 U.S. at 506 n.3 (quoting Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a (1986)); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (stating that a treaty that "only set[s] forth substantive rules of conduct and state[s] that compensation shall be paid for certain wrongs . . . do[es] not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

As noted, the instant Agreement expressly commits evaluation of claims and payment of compensation to the sole discretion of the State Department. *See* Agreement, Article 6. It further provides that any dispute arising under the Agreement must be settled

by way of consultation between the parties to the Agreement — *i.e.*, the governments of France and the United States. *Id.*, Article 8. Moreover, the Agreement explicitly states that its intent is to provide "an amicable, extra-judicial and non-contentious manner to address the issue of compensation" for eligible claimants. *Id.*, at ECF p. 7 (emphasis added). The text of the Agreement thus unequivocally disavows any "intent" to "give rise to affirmative, judicially-enforceable obligations" to any individuals. *See De la Torre*, 2004 WL 3710194, at *10; *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008) (stating that "[t]o determine whether a treaty creates a cause of action," courts should look to the text); *see also id.* at 489 (concluding that a treaty provided no private cause of action even though it "directly benefit[ed]" the plaintiff). Because the Agreement creates no private right of action, Plaintiff fails to state a claim under the APA. *See Schieber*, 2022 WL 227082, at *7.

This Court's conclusion is consistent with that of other courts in this jurisdiction, which have dismissed similar claims under the Agreement after determining that it does not confer a private right of action on claimants who are denied compensation by the State Department. *See Schieber*, 2022 WL 227082, at *7 (dismissing suit brought by claimant under the Agreement because the Agreement "provides no private cause of action" and precludes judicial review); *Faktor v. United States*, No. 20-cv-263, 2022 WL 715217, at *6 (D.D.C. Mar. 10, 2022) (CKK) (dismissing suit brought by claimant under the Agreement because the "lack of a private cause of action serves as an independent limitation on the Court's review of the

government's denial of Plaintiff's claim"); *Gutrejman*, 2022 WL 856384, at *8 (dismissing suit brought by claimant under the Agreement because case raised a non-justiciable political question and because the Agreement "does not bestow any private rights on Fund applicants"). The Court is unaware of any precedent to the contrary.

CONCLUSION

For the foregoing reasons, the Court will grant Defendant's Motion to Dismiss. A separate Order will issue this day.

/s/ Florence Y. Pan
United States District Judge

Date: May 13, 2022

***Schneider, Et Al. v. United States*,**
No. 20-cv-260
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (APRIL 22, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS SCHNEIDER, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 20-260 (FYP)

Before: Florence Y. PAN,
United States District Judge.

MEMORANDUM OPINION

Plaintiffs Louis Schneider and Regina English bring this lawsuit challenging a decision by the United States Department of State to deny their applications for compensation pursuant to the Agreement between the United States and France on

Compensation for Certain Victims of Holocaust-Related Deportations. Plaintiffs contend that the denial of their applications was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.* Before the Court is the United States' Motion to Dismiss, which argues that this Court lacks subject matter jurisdiction, and that Plaintiffs fail to state a claim. For the following reasons, the Court will grant the Motion to Dismiss.

BACKGROUND

I. Agreement between the United States and France to Compensate Victims of Holocaust-Related Deportations

In December of 2014, the United States and France entered into an agreement to establish a compensation fund for Holocaust victims who were deported from France to Nazi concentration camps during World War II. *See* ECF No. 27-2 ("Agreement").[1] Under the Agreement, France was to pay $60 million to the United States to establish the compensation fund. *Id.*, Article 4(1). In exchange, the United States agreed to "recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims." *Id.*, Article 2(2). The Agreement required the United States to deposit the money "in an interest-bearing account . . . until distribution,

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[1] The full name of the Agreement is the "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." *Id.*

pursuant to a determination by the Secretary of State." *Id.*, Article 4(4).

The Agreement's objective is to "[p]rovide 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 by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic to address Holocaust deportation claims." *Id.*, Article 2(1). Thus, the intended beneficiaries of the Agreement are non-French nationals who were deported from France and cannot receive compensation through another Holocaust compensation program. *See id.*, Article 3.[2] The Agreement is intended to provide "an amicable, extra-judicial and non-contentious manner to address the issue of compensation for such persons." *Id.*, at ECF p. 7.

To receive compensation, applicants must execute a "Form of Written Undertaking." *Id.*, Annex; Article 5(4). The Form requires that applicants (1) declare their nationality; (2) attach a "copy of [the] government documentation establishing" their nationality; (3) waive any right to seek other compensation or relief from

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[2] Specifically, the groups that are not eligible for compensation under the Agreement are (1) French nationals; (2) nationals of other countries who "have received, or are eligible to receive, compensation under an international agreement;" (3) persons "who have received, or are eligible to receive, compensation" from the French compensation program; and (4) persons "who have received compensation under another State's program providing compensation specifically for Holocaust deportation." *Id.*, Article 3.

France or the United States for Holocaust deportation; and (4) declare "under penalty of perjury" that they have not received compensation from any other program related to Holocaust deportation. *Id.* Other criteria for distribution are determined by the United States "unilaterally, in its sole discretion." *Id.*, Article 6(1) ("The Government of the United States of America shall distribute the sum referred to in . . . this Agreement according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible."). In developing criteria for distribution, the United States must "consider the objectives of [the] Agreement;" and may rely on information in the Form of Written Undertaking, "as well as on any relevant information obtained" pursuant to information sharing between the United States and France. *Id.*, Article 6(2), 6(4). Notably, the Agreement provides that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties" to the Agreement — *i.e.*, the governments of the United States and France. *Id.*, Article 8.

II. Factual Background

In 2016, Plaintiffs Louis Schneider and his sister, Regina English, each filed claims with the State Department to obtain compensation pursuant to the Agreement. *See* ECF No. 23 (Second Amended Complaint), ¶ 8. Both Schneider and English were arrested in and deported from France, and then sent to a Nazi concentration camp in 1943. *Id.* They allege that they were arrested and deported by French or German authorities targeting Jews in the St. Gervais

area in the Haute Savoie region of southeastern France. *Id.*

On March 28, 2018, the State Department rejected Plaintiffs' applications for compensation. *Id.*, ¶ 10. The State Department determined that St. Gervais was under Italian control at the relevant time, and that Plaintiffs therefore were not deported from France. *Id.*, ¶ 11. The State Department further found that because the Haute Savoie region was in an area occupied by Italy, Plaintiffs must have been deported by Italian authorities, rather than by French or German authorities. *Id.*, ¶ 12.

Plaintiffs allege that the State Department's denial of their requests for compensation was arbitrary and capricious, and contrary to established facts and international law. *Id.*, ¶ 13. They allege that the State Department's findings are unsupported by historical facts and do not fall within the bounds of reasonable decision-making. *Id.*, ¶ 15. Plaintiffs seek a judicial declaration that the denial of their claims should be overturned under the APA and the Declaratory Judgment Act ("DJA"). *Id.*, ¶ 1.[3]

III. Procedural History

Plaintiffs filed their original complaint on January 31, 2020, seeking relief under the Federal Tort Claims Act. *See* ECF No. 1 (Complaint). On February 14, 2020, Plaintiffs filed an Amended Complaint that attached a copy of the State Department's denial of

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[3] "The Declaratory Judgment Act, 28 U.S.C. § 2201, authorizes federal courts to grant declaratory relief as a remedy and is not, standing alone, a cause of action." *Malek v. Flagstar Bank*, 70 F. Supp. 3d 23, 28 (D.D.C. 2014).

their applications for compensation. *Compare* ECF No. 5 (Amended Complaint), *with* Compl. The United States moved to dismiss the Amended Complaint based on a lack of subject matter jurisdiction, arguing that Plaintiffs failed to establish that the United States had waived its sovereign immunity. *See* ECF No. 13 (Defendant's Motion to Dismiss). The Court granted Defendant's Motion to Dismiss on March 1, 2021; but allowed Plaintiffs to file a Second Amended Complaint pursuing relief under the APA. Plaintiffs filed their Second Amended Complaint on March 22, 2021. *See* Sec. Am. Compl. Defendant's instant Motion to Dismiss the Second Amended Complaint asserts that this Court lacks subject matter jurisdiction over Plaintiffs' claim under the political question doctrine, and that in any event, Plaintiffs fail to state a claim for relief under the Agreement and the APA. *See* ECF No. 27 (Defendant's Motion to Dismiss Second Amended Complaint). The Motion is now ripe for decision.

LEGAL STANDARD

I. 12(b)(1) Standard

When a defendant moves to dismiss under Rule 12(b)(1), the plaintiff must demonstrate by a preponderance of the evidence that the court has subject matter jurisdiction to hear his claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *U.S. Ecology, Inc. v. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). "Because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand*

Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). As a result, "the plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 13-14 (cleaned up).

In policing its jurisdictional bounds, the court must scrutinize the complaint, treating its factual allegations as true and granting the plaintiff the benefit of all reasonable inferences that can be derived from the alleged facts. *See Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The court, however, need not rely "on the complaint standing alone," as it may also look to undisputed facts in the record or resolve disputed ones. *See Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992) (citations omitted). By considering documents outside the pleadings on a Rule 12(b)(1) motion, a court does not convert the motion into one for summary judgment, as "the plain language of Rule 12(b) permits *only* a 12(b)(6) motion to be converted into a motion for summary judgment" when a court considers documents extraneous to the pleadings. *Haase v. Sessions*, 835 F.2d 902, 905 (D.C. Cir. 1987) (emphasis in original).

II. 12(b)(6) Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim upon which relief can be granted." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 552 (2007). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *id.* at 555, "a complaint must contain sufficient factual matter, accepted as true, to 'state a

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Analysis

Defendant argues that (1) there is no private right of action under the Agreement; (2) judicial review is precluded by the Agreement; (3) eligibility determinations under the Agreement are committed to agency discretion by law; and (4) Plaintiffs present a non-justiciable political question. *See generally* Def. Mot. The Court agrees that Plaintiffs raise a political question that may not be reviewed by this Court. Moreover, Plaintiffs fail to state a claim under the Agreement that they seek to enforce: The Agreement does not confer a private right of action, as it commits the question of eligibility for compensation to the State Department, with any disputes to be resolved only through diplomatic channels.

I. Plaintiffs Raise a Non-Justiciable Question

Defendant argues that this case is non-justiciable because Plaintiffs ask the Court "to oversee the [State] Department's interpretation and implementation of an international agreement that the executive negotiated, and second-guess the Department's determination thereunder as to whether individual claimants are eligible." *Id.* at 22-23. According to Defendant, these are foreign policy concerns that fall within the purview of the executive, not the judiciary. *Id.* at 17. Plaintiffs respond that there is no justiciability issue because they seek only a determination that the decision to deny their request for compensation — made internally by the State Department — was arbitrary and capricious; and the Court therefore need not wade into the murky waters of foreign affairs. *See* Pl. Opp. at 9-11.

"[T]he 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)). Because the political question doctrine is a jurisdictional defense, the Court "must address it 'before proceeding to the merits.'" *Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017) (emphasis in original) (quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005)); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

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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) (internal citations and quotation marks omitted); *see also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (stating the political question doctrine is "designed to restrain the Judiciary from inappropriate interference in the business of other branches"). The Supreme Court has identified six hallmarks of non-justiciable political questions:

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

Baker v. Carr, 369 U.S. 186, 217 (1962). The Court need only "conclude that one factor is present" to find that a non-justiciable political question is raised. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). While not every case that "touches foreign relations lies beyond judicial cognizance," *Baker*, 369

U.S. at 211, the Court "must respect the constitutional bounds of the separation of powers." *Gutrejman v. United States*, No. 20-cv-266, 2022 WL 856384, at *6 (D.D.C. Mar. 22, 2022) (RDM).

Here, the Court can resolve the justiciability question by determining whether the Agreement creates any judicially enforceable rights. If it does not, then entertaining Plaintiffs' claim "risks not only intruding in the field of foreign affairs . . . but it risks aggrandizing the role of the judiciary, which can only enforce the law as prescribed by the Constitution and the political branches." *Id.* When agreements contain "dispute resolution provisions" that are committed "solely to diplomatic channels," courts have found such agreements not enforceable in U.S. courts. *See United States v. Sum of $70,990,605 ("$70 Million")*, 234 F. Supp. 3d 212, 235 (D.D.C. 2017); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (stating that "when the corrective machinery specified in the [agreement] itself is nonjudicial" the U.S. courts are without power to act).

Careful review of the Agreement reveals that it does not confer any judicially enforceable rights, and Plaintiffs therefore present this Court with a non-justiciable question. *See Gutrejman*, 2022 WL 856384, at *7. The Agreement contains an "exclusive[]" provision for resolving disputes "by way of consultation between the Parties," *i.e.*, between the governments of the United States and France. *See* Agreement, Article 8 (providing that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties") (emphasis added). Thus, it "could not be clearer" that disputes over the interpretation and

application of the Agreement must occur through "diplomatic recourse" and not through litigation. *See $70 Million*, 234 F. Supp. 3d at 234; *accord Gutrejman*, 2022 WL 856384, at *7.

The Court is unpersuaded by Plaintiffs' attempt to argue that their claim does not take issue with the "implementation" of the Agreement, but instead alleges that Defendant failed to use reasonable decision-making in denying Plaintiffs' requests for compensation. *See* Pl. Opp. at 9-11. The Second Amended Complaint alleges that the State Department's denial "was not a reasonable interpretation of the Agreement." Sec. Am. Compl., ¶ 16 (emphasis added). Plaintiffs further allege that they should not be "disqualified under the terms of the Agreement based purely on the [State Department's] conclusion." *Id.*, ¶ 15 (emphasis added). Thus, Plaintiffs present a dispute that "arise[s] out of the interpretation or performance of [the] Agreement." *See* Agreement, Article 8; *see also* Pl. Opp. at 11 ("Plaintiffs are asking the Defendant to adhere to the purpose and language of the Agreement."); *Id.* at 4 ("Plaintiffs here are seeking compensation from the Fund[.]").

Because the governments of the United States and France expressly agreed that "any" disputes under the Agreement are "exclusively" to be resolved through a diplomatic process that does not involve the judiciary, Plaintiffs' claims stemming from the Agreement present non-justiciable questions that the Court lacks jurisdiction to consider.

II. The Agreement Precludes Judicial Review

Not only do Plaintiffs raise a non-justiciable question, but Plaintiffs also fail to state a claim under

the Agreement itself and under the APA. Although Plaintiffs attempt to enforce the Agreement as they understand it, the Agreement creates no private right of action. Treaties and executive agreements are "subject to review under the APA" only "when a private right of action is afforded." *Schieber v. United States*, No. 21-cv-1371, 2022 WL 227082, at *7 (D.D.C. Jan. 26, 2022) (JDB); *see also Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 942-43 (D.C. Cir 1988) (finding that treaty violations are subject to APA review if actionable by private citizens); *De la Torre v. United States*, No. C 02-1942 CRB, 2004 WL 3710194, at *8-9 (N.D. Cal. Apr. 14, 2004) (stating that treaties and executive agreements are only reviewable under the APA "when a private right of action is afforded"). International agreements presumptively do not create a private right of action, *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008), and do so only when the "agreement itself reflects an intent to create judicially enforceable private rights." *$70,000 Million*, 234 F. Supp. 3d at 237-38; *see also United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987) (finding that a treaty may create a private right of action "if it indicates the intention to establish direct, affirmative, and judicially enforceable rights") (internal quotations and citations omitted). Even international agreements that "directly benefit[] private persons," such as the one at issue here, "generally do not create private rights." *Medellin*, 552 U.S. at 506 n.3 (quoting Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a (1986)); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (stating that a treaty that "only set[s] forth substantive rules of conduct and state[s] that compensation shall

be paid for certain wrongs . . . do[es] not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

As noted, the instant Agreement expressly commits evaluation of claims and payment of compensation to the sole discretion of the State Department. *See* Agreement, Article 6. It further provides that any dispute arising under the Agreement must be settled by way of consultation between the parties to the Agreement — *i.e.*, the governments of France and the United States. *Id.*, Article 8. Moreover, the Agreement explicitly states that its intent is to provide "an amicable, extra-judicial and non-contentious manner to address the issue of compensation" for eligible claimants. *Id.*, at ECF p. 7 (emphasis added). The text of the Agreement thus unequivocally disavows any "intent" to "give rise to affirmative, judicially-enforceable obligations" to any individuals. *See De la Torre*, 2004 WL 3710194, at *10; *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008) (stating that "[t]o determine whether a treaty creates a cause of action," courts should look to the text); *see also id.* at 489 (concluding that a treaty provided no private cause of action even though it "directly benefit[ed]" the plaintiff). Because the Agreement creates no private right of action, Plaintiffs fail to state a claim under the APA. *See Schieber*, 2022 WL 227082, at *7.

This Court's conclusion is consistent with that of other courts in this jurisdiction, which have dismissed similar claims under the Agreement after determining that it does not confer a private right of action on claimants who are denied compensation by the State

Department. *See Schieber*, 2022 WL 227082, at *7 (dismissing suit brought by claimant under the Agreement because the Agreement "provides no private cause of action" and precludes judicial review); *Faktor v. United States*, No. 20-cv-263, 2022 WL 715217, at *6 (D.D.C. Mar. 10, 2022) (CKK) (dismissing suit brought by claimant under the Agreement because the "lack of a private cause of action serves as an independent limitation on the Court's review of the government's denial of Plaintiff's claim"); *Gutrejman*, 2022 WL 856384, at *8 (dismissing suit brought by claimant under the Agreement because case raised a non-justiciable political question and because the Agreement "does not bestow any private rights on Fund applicants"). The Court is unaware of any precedent to the contrary.

CONCLUSION

For the foregoing reasons, the Court will grant Defendant's Motion to Dismiss. A separate Order will issue this day.

/s/ Florence Y. Pan
United States District Judge

Date: April 22, 2022

Gutrejman v. United States
No. 20-cv-266
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MARCH 22, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTHER GUTREJMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 20-266 (RDM)

Before: Randolph D. MOSS,
United States District Judge.

This case concerns the Court's power to interpret and enforce an international agreement that, by its terms, commits disputes over its interpretation and enforcement to the exclusive province of diplomatic consultation. In 2014, the United States and the French Republic executed an agreement (the "Agreement") under which France would provide $60 million to the United States for a fund (the "Fund")

to compensate individuals who were deported from France to concentration camps during the Holocaust, as well as their surviving spouses and their estates and representatives.[1] *See* Dkt. 23-2 at 9 (Agreement art. 4). In exchange, the United States agreed to seek the termination of any pending and future lawsuits filed against France in U.S. courts that raised claims related to Holocaust deportation. *Id.* at 10 (Agreement art. 5).

Plaintiff Esther Gutrejman, as trustee for the estate of her deceased husband Albert Gutrejman, challenges the State Department's denial of her husband's claim for compensation from the Fund. Plaintiff initially filed this lawsuit against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, alleging that the Department negligently rejected her husband's compensation claim. The Court dismissed Plaintiff's FTCA claim on the ground that it fell beyond the scope of the FTCA's limited waiver of sovereign immunity. *See* Dkt. 20 at 13. The Court, however, granted Plaintiff leave to amend her complaint to assert a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. Plaintiff filed her Amended Complaint on April 16, 2021, alleging that the Department's denial of her husband's claim was arbitrary and capricious in violation of the APA, 5 U.S.C. § 701 *et seq*. The Department now moves to dismiss Plaintiff's APA claim.

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[1] *See* 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, Fr.-U.S., Dec. 8, 2014, T.I.A.S. No. 15-1101.

For the following reasons, the Court will GRANT the Department's motion and will DISMISS Plaintiff's Amended Complaint for lack of jurisdiction.

I. Background

On December 8, 2014, the United States and the French Republic entered into an executive agreement to establish a compensation fund for Holocaust victims who were deported from France to concentration camps. *See* Dkt. 21 at 1-2 (Compl. ¶¶ 1-2); Dkt. 23-2 (Agreement). Under the Agreement, France agreed to pay $60 million to the United States to establish the Fund. Dkt. 23-2 at 9 (Agreement art. 4 § 1). 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." *Id.* at 10 (Agreement art. 5 § 2). The Agreement entered into force on November 1, 2015. *Id.* at 4.

One of the Agreement's stated objectives was to "[p]rovide 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 by the French Republic for French nationals, or by international agreements concluded by the French Republic to address Holocaust deportation claims." *Id.* at 8 (Agreement art. 2 § 1). Consistent with that objective, the Agreement provides that French nationals are ineligible for compensation, *id.* at 8 (Agreement art. 3 § 1), as are beneficiaries of

any other program designed to compensate victims of Holocaust deportation from France, *id.* at 8-9 (Agreement art. 3 §§ 2-4). Attached to the Agreement as an Annex is a "Form of Written Undertaking" that applicants for compensation must execute. *Id.* at 14-15 (Agreement Annex). The Form requires applicants to declare their nationality and to attach "a copy of government documentation establishing [that] nationality." *Id.* at 14. The Form also requires applicants to "declare under penalty of perjury" that they have not received—and will not receive—compensation from any other program related to Holocaust deportation. *Id.* at 15 (Agreement Annex §§ 5-6). In addition to requiring that applicants execute the Form, the Agreement provides that the United States and France "shall exchange information helpful to implementation of this Agreement, including information required to ensure that no claimant receives an inadmissible payment." *Id.* at 12 (Agreement art. 6 § 6).

Under the Agreement, the United States is required to distribute the Fund "according to criteria which it shall determine unilaterally, in its sole discretion." *Id.* at 11 (Agreement art. 6 § 1). Notwithstanding that discretion, the Agreement requires 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," (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. *Id.* at

11 (Agreement art. 6 § 2(c)). Significantly, the Agreement also includes a dispute resolution provision: "Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the parties." *Id.* at 12 (Agreement art. 8).

In 2016, Albert Gutrejman, who is now deceased, filed a claim for compensation from the Fund. Dkt. 21 at 1 (Am. Compl. ¶ 1). Albert Gutrejman's mother, Estera, was "deported to Auschwitz on September 18, 1942, where she was killed." *Id.* at 3 (Am. Compl. ¶ 9). Estera's spouse and Albert Gutrejman's stepfather, Henri Gutrejman, died in 1976. *Id.* When Albert Gutrejman filed a claim for compensation, he did so as Henri Gutrejman's sole heir. *Id.* (Am. Compl. ¶ 10); *see id.* at 4-5 (Am. Compl. ¶ 14). As part of his application, Albert Gutrejman submitted a sworn affidavit that his stepfather was Romanian (and, thus, not French) and was married to his mother. *Id.* at 3-4 (Am. Compl. ¶¶ 11-12).

The State Department rejected Albert Gutrejman's claim, finding that he was ineligible for compensation because he had not provided "documentary evidence of the fact that his stepfather was Romanian." *Id.* at 3 (Am. Compl. ¶ 10). In rejecting the claim, the Department did not determine that Henri Gutrejman was a citizen of France; it noted only that Albert Gutrejman had failed to proffer adequate proof of Henri Gutrejman's nationality. *Id.*

The State Department premised its decision on a second rationale as well: Albert Gutrejman was "unable to provide a marriage certificate" for his stepfather to his mother. *Id.* at 4 (Am. Compl. ¶ 12). In lieu of a marriage certificate, Albert Gutrejman

submitted what he characterizes as "a credible sworn statement about the marriage," which provided "the name of the rabbi" who performed the marriage ceremony "and the location of the shul" where the ceremony took place. *Id.* He also provided the Department with an affidavit from his attorney "attesting to the fact that she had searched genealogical [sources] and contacted appropriate archives in France for evidence of the marriage" with no success. *Id.* (Am. Compl. ¶ 13). According to the attorney, "after the destruction [resulting from] World War II and the passing of more than 80 years, no such documents could be found." *Id.*

On January 31, 2020, Plaintiff Esther Gutrejman, as trustee of Albert Gutrejman's estate, filed this lawsuit against the United States under the FTCA. Dkt. 1. The Complaint alleged that the Department's rejection of Albert Gutrejman's claim was "a wrongful act." *Id.* at 6 (Compl. ¶ 23). The United States moved to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). Dkt. 12. After briefing on the motion concluded, Plaintiff filed a sur-reply in which she requested "the opportunity to amend [her] Complaint to supplement [her] allegations and to include a cause of action under the Administrative Procedure Act." Dkt. 18 at 3 n.2. On March 19, 2021, the Court granted the United States' motion to dismiss on the ground that Plaintiff's FTCA claim fell outside the scope of the FTCA's limited waiver of sovereign immunity. *See* Dkt. 20 at 13. The Court, however, granted Plaintiff leave to amend her complaint to raise a claim under the APA, 5 U.S.C. § 551 *et seq.* *Id.*

On April 16, 2021, Plaintiff filed her Amended Complaint, in which she alleges that the State Department's denial of Albert Gutrejman's claim was arbitrary and capricious in violation of the APA and "in violation of due process." Dkt. 21 at 5-6 (Am. Compl. ¶¶ 17, 20). Plaintiff now alleges that the Agreement "states that a declaration on one's honor as to nationality is sufficient to satisfy the requirements regarding citizenship," *id.* at 2 (Am. Compl. ¶ 2), and that the Department's rejection of Albert Gutrejman's claim for failure to provide "proof that [his stepfather] was a citizen of Romania" was "an exercise of discretion [that State] did not have," *id.* at 3 (Am. Compl. ¶ 10-11). According to Plaintiff, "[t]he language of the Agreement itself was a mandate: for questions of nationality, the United States 'shall rely on the sworn statement of nationality.'" *Id.* at 3-4 (Am. Compl. ¶ 11). Thus, "[t]he affidavit which he signed and provided [was] in the form specifically required in accordance with the terms of the Agreement." *Id.* at 4 (Am. Compl. ¶ 11). In addition, Plaintiff alleges that "[the Department] has also arbitrarily and capriciously refused to accept basic principles of evidence" because "the Federal Rules of Evidence permit the admissibility of sworn affidavits by persons having personal knowledge of the facts." *Id.* at 5 (Am. Compl. ¶ 16). Plaintiff seeks to have the Department's decision "overturned" and for the Court to "declare[] [Plaintiff] eligible to receive compensation from the Holocaust Deportation Fund." *Id.* at 6 (Am. Compl. ¶¶ 20, 23).

The United States moves to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). For

the following reasons, the Court will GRANT the United States' motion and will DISMISS Plaintiff's Amended Complaint for lack of subject-matter jurisdiction.

II. Legal Standard

The government's motion to dismiss implicates two legal standards. First, a motion to dismiss under Rule 12(b)(1) challenges the Court's subject-matter jurisdiction to hear the claim. The plaintiff bears the burden of establishing jurisdiction, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and "subject matter jurisdiction may not be waived," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) (quotation marks omitted). Where, as here, a defendant contends that the jurisdictional allegations in the complaint are inadequate, the Court must "accept all well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor" but does not "assume the truth of legal conclusions." *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (quotation marks omitted). In this sense, the Court must resolve the motion in a manner similar to a motion to dismiss under Rule 12(b)(6). *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In evaluating a Rule 12(b)(6) motion, the Court "must first 'tak[e] note of the elements a plaintiff must plead to state [the] claim to relief,' and then determine

whether the plaintiff has pleaded those elements with adequate factual support to 'state a claim to relief that is plausible on its face.'" *Blue v. District of Columbia*, 811 F.3d 14, 20 (D.C. Cir. 2015) (alterations in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 678 (2009)). The complaint, however, need not include "detailed factual allegations" to withstand a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff may survive a Rule 12(b)(6) motion even if "recovery is . . . unlikely," so long as the facts alleged in the complaint are "enough to raise a right to relief above the speculative level." *Id.* at 555-56 (quotation marks omitted).

For purposes of both Rule 12(b)(1) and Rule 12(b)(6), the Court may consider the Agreement, which forms a cornerstone of the Amended Complaint, is undisputed, and, in any event, is subject to judicial notice. *See E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625 & n.3 (D.C. Cir. 1997).

III. Discussion

The government raises four arguments in support of its motion to dismiss, all of which posit that the State Department's interpretation and enforcement of the Agreement are not subject to judicial challenge. Although a common thread runs through each of the government's arguments, they turn on distinct doctrines and implicate different juridical considerations.

First, the government contends that Plaintiff's APA claim "raise[s] a non-justiciable political question." Dkt. 23-1 at 23. As Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the

executive, can never be made in this court," *id.* at 170. In the government's view, Plaintiff's APA claim is "political" in nature because it asks the Court to "oversee the [State] Department's interpretation and implementation of an international agreement" that is not self-executing and would, thus, "clearly involve[]" the Court in determinations of foreign policy. Dkt. 23-1 at 28-29. By doing so, the government continues, the Court would not only intrude on a field constitutionally committed to the political branches but would also "express a lack of respect for the Executive's foreign policy determination that the Holocaust deportation claims should be resolved extrajudicially." *Id.*

Second, the government argues that the Agreement itself precludes judicial review under the APA. Although the APA "suppl[ies] a generic cause of action in favor of persons aggrieved by agency action," *Md. Dep't of Human Res. v. Dep't of Health & Hum. Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985), courts lack jurisdiction to hear APA claims "to the extent . . . statutes preclude judicial review." 5 U.S.C. § 701(a); *see also Webster v. Doe*, 486 U.S. 592, 599 (1988) ("Section 701(a) . . . limits application of the entire APA to situations in which judicial review is not precluded by statute."). According to the government, the Agreement's requirement that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled *exclusively* by way of consultation between the parties" prevents the Court from hearing Plaintiff's APA claim. Dkt. 23-2 at 12 (Agreement art. 8) (emphasis added); *see also* Dkt. 23 at 19-20.

Third, on the merits, the government argues that "the Agreement does not create a private cause of action" because it "contains no express provisions creating judicially enforceable rights." Dkt. 23-1 at 15-18. Although the APA provides a cause of action to challenge final agency actions, the government maintains that more is needed when a plaintiff seeks to enforce an executive agreement—the Agreement itself must create a private cause of action. *Id.* at 16 (citing *De La Torre v. United States*, Civ. Action No. 02-1942, 2004 WL 3710194, at *8-9 (N.D. Cal. 2004)). The government argues that the Agreement does not create "judicially enforceable rights" because it is "not self-executing," and, "even if [it] were self-executing, there is no private right of action" because there is no "evidence that [the Agreement] was intended to be privately enforceable." *Id.* at 16 n.4, 17.

Finally, and again on the merits, the government argues that the Department's denial of Albert Gutrejman's application constitutes "agency action . . . committed to agency discretion by law" and is thus unreviewable under the APA, 5 U.S.C. § 701 (a)(2). Dkt. 23-1 at 20-23. In cases where "no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for abuse of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, because the Agreement provides that the United States "shall distribute the [Fund] according to criteria which it shall determine unilaterally, in its sole discretion," Dkt. 23-2 at 11 (Agreement art. 6 § 1), the government maintains that there are no judicially manageable standards for the Court to apply in determining whether the Depart-

ment's action was arbitrary and capricious, Dkt. 23-1 at 21.

Because the Agreement is non-self-executing and limits dispute resolution to the diplomatic process, the Court has little difficulty concluding that the Amended Complaint must be dismissed. The difficulty, however, lies in determining whether the Court should dismiss the action for lack of jurisdiction or on the merits. It is, of course, a bedrock principle that Article III courts must, except under unusual circumstances, resolve jurisdictional defenses before turning to the merits of a dispute. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). But applying that principle here is no easy task.

The Court starts with the government's Section 701(a)(1) argument, which is arguably jurisdictional. Section 701(a)(1) renders the APA applicable, "except to the extent that . . . a statute precludes judicial review." 5 U.S.C. § 701(a)(1). But, as the D.C. Circuit has stressed, "the APA does not confer jurisdiction," *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006); rather, in most APA cases, jurisdiction is conferred on the federal courts under 28 U.S.C. § 1331. To be sure, when another, more specific statute precludes judicial review—thus narrowing the scope of Section 1331—that limitation is typically jurisdictional. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984); *Amador Cnty. v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011). The Court is unpersuaded, however, that a sole executive agreement can divest federal courts of federal-question jurisdiction or that Section 701(a)(1) confers such jurisdiction-limiting authority on the executive. To start, it goes without saying that a sole executive agreement cannot amend a statute,

and thus the Agreement at issue in this case cannot narrow the scope of Section 1331, thereby divesting Article III courts of federal-question jurisdiction. And, consistent with the understanding that only Congress can amend a jurisdiction-conferring statute, Section 701(a)(1) applies only if "a *statute* precludes judicial review." 5 U.S.C. § 701(a)(1) (emphasis added).

Because the government's only other jurisdictional defense rests on the political question doctrine, *see Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017) (explaining that the political question doctrine is jurisdictional and thus, "the Court must address it *before* proceeding to the merits" (quotation marks omitted)); *Al-Tamimi v. Adelson*, 916 F.3d 1, 7-8 (D.C. Cir. 2019) (same), the Court must confront the "'nebulous'" question of "[j]ust where the non-justiciability line is drawn," *Schieber v. United States*, Civil Action No. 21-1371, 2022 WL 227082, at *5 (D.D.C. Jan. 26, 2022) (alteration in original) (quoting *Gonzalez-Vera v. Kissinger*, Civil Action No. 02-2240, 2004 WL 5584378, at *3-4 (D.D.C. Sept. 17, 2004)); *see also Faktor v. United States*, Civil Action No. 20-263, 2022 WL 715217 at *4 (D.D.C. Mar. 10, 2022). Application of that doctrine is further complicated in this case because application of the (jurisdictional) political question doctrine defense overlaps with the government's (non-jurisdictional) merits defenses. That problem, however, is addressed by the Supreme Court's recent observations (1) that "the 'merits and jurisdiction will sometimes come intertwined,'" and (2) that, when the merits and jurisdiction overlap, a court may resolve the merits of a dispute "in resolving a jurisdictional question, or vice versa." *Brownback v. King*, 141 S. Ct. 740, 749 (2021) (quoting *Bolivarian*

Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017))). When that happens, moreover, "a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits." *Id.* This, then, leads the Court full circle; the Court must resolve a jurisdictional defense (the government's political question doctrine defense) before resolving the two merits defenses (the government's lack of a private cause of action and committed to agency discretion defenses), but the Court's resolution of that jurisdictional defense will require the Court to address the merits as well.

The political question doctrine, as its name suggests, is "designed to restrain the Judiciary from inappropriate interference in the business of other branches"—that is, the so-called "political" branches. *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). In *Baker v. Carr*, the Supreme Court identified six hallmarks of nonjusticiable political questions:

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

> multifarious pronouncements by various departments on one question.

369 U.S. 186, 2017 (1962). Although "to find a [non-justiciable] political question" the Court "need only conclude that one factor is present," *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), the government maintains that "decid[ing] Plaintiff's claim would . . . implicate the first, second, fourth, and sixth *Baker* factors." Dkt. 23-1 at 29 (emphasis omitted). In particular, according to the government, resolution of Plaintiff's APA claim would involve the Court in "foreign policy" judgments that are "committed to the executive;" "it would express a lack of respect for the Executive's foreign policy determination that the Holocaust deportation claims should be resolved extra-judicially using solely the executive mechanism of the claims process established under the Agreement;" it "would interfere with the foreign policy objectives of providing an expeditious, non-judicial, exclusive process to address certain Holocaust-deportation related claims;" it "could undermine the President's conduct of foreign affairs" and could "lead to differing pronouncements from the various branches on the same question;" and it "could impact future claim settlement agreements if it appears that the executive branch does not have the final word on claim settlement." *Id.* at 29-30.

As the Supreme Court has cautioned, "it is error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. But, by the same token, "[t]he political question doctrine is essentially a function of the separation of powers," *El-Shifa Pharet. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C.

Cir 2010) (internal quotations omitted), and the Court must respect the constitutional bounds of the separation of powers. In the present context, moreover, those bounds coincide with the bounds of the Agreement and the question whether it creates any judicially enforceable rights. If it does not, then the Court risks not only intruding in the field of foreign affairs, which is entrusted to the political branches, but it risks aggrandizing the role of the judiciary, which can only enforce the law as prescribed by the Constitution and the political branches.

The concept of non-self-execution, like the political question doctrine, asks whether the Agreement "addresses itself to the political, *not* the judicial department." *Medellín v. Texas*, 552 U.S. 491, 516 (2008) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 317 (1829)). By the same token, the APA's judicial review provisions, although statutory in nature, call upon the Court to consider whether the Agreement contemplates judicial resolution of disputes and sets standards "against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. The jurisdictional and merits questions presented in this case thus both turn on a single inquiry: whether the Agreement is judicially enforceable or whether its interpretation and enforcement are committed to the diplomatic process—in which courts play no part. As the Ninth Circuit explained in resolving a similar dispute, "[w]hether examined under the rubric of treaty self-execution . . . or the political question doctrine, the analysis stems from the same separation-ofpowers principle—enforcement of [a non-self-executing agreement] is not committed to the judicial

branch." *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017).[2]

The Court concludes that the Agreement is not judicially enforceable and that Plaintiff's claims are thus nonjusticiable. For that conclusion, the Court need only look to its recent decision in *United States v. Sum of $70,990,605* ("*$70 Million*"), 234 F. Supp. 3d 212 (D.D.C. 2017). There, the Court considered whether an executive agreement—the Bilateral Security Agreement between Afghanistan and the United States—was judicially enforceable in the context of an *in rem* action seeking forfeiture of assets held at U.S. banks. *Id.* at 216-17. The Afghanistan-U.S. agreement contained a dispute resolution provision stating: "Any divergence in views or dispute regarding the interpretation or application of this Agreement shall be resolved through consultations between the Parties and shall not be referred to any national or international court, tribunal or other similar body, or any third party for settlement." *Id.* at 233. The Court held that the agreement was not enforceable in U.S. courts because the "dispute resolution

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[2] In that case, the Marshall Islands sued the United States, seeking a declaratory judgment that the United States was in breach of certain treaty obligations and an order requiring that the United States take certain steps to attain compliance. *Republic of Marshall Islands*, 865 F.3d at 1190. In moving to dismiss the case, the government argued (1) that Plaintiff lacked Article III standing, (2) that the case raised nonjusticiable political questions, and (3) that Article VI of the treaty was not self-executing and thus "not directly enforceable in domestic courts." *Id.* at 1191. The district court granted the motion on the first two grounds. *Id.* On appeal, the Ninth Circuit affirmed without confining itself to one doctrinal category, merely holding that the claims were nonjusticiable. *Id.* at 1192.

provision . . . commit[ted] any dispute 'regarding the interpretation or application' of the agreement solely to diplomatic channels." *Id.* at 235. In so holding, the Court applied the principle set forth in *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), that "'when the corrective machinery specified in the [agreement] itself is nonjudicial,' the U.S. courts are without power to act." *$70 Million*, 234 F. Supp. 3d at 235 (quoting *Holmes*, 459 F.2d at 1222).

Applying that principle here, the Court concludes that the France-U.S. Agreement is not judicially enforceable. Article 8 of the Agreement provides that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled *exclusively* by way of consultation between the parties." Dkt. 23-2 at 12 (Agreement art. 8) (emphasis added). That provision closely resembles the dispute resolution provision that the Court considered in *$70 Million*. To be sure, the two dispute resolution provisions differ in that the Afghanistan-U.S. agreement made specific reference to courts, while the Agreement in this case does not. But Article 8 of the France-U.S. Agreement treats diplomatic consultation as the "exclusive[]" mechanism for resolving any disputes arising out of the Agreement's interpretation or performance. Thus, like the agreement at issue in *$70 Million*, the France-U.S. Agreement "could not be clearer:" any dispute regarding "the interpretation . . . of [the] Agreement" must occur through "diplomatic recourse." *$70 Million*, 234 F. Supp. 3d at 235 (quoting *Holmes*, 459 F.2d at 1222). Plaintiff's challenge to the State Department's interpretation (or enforcement) of the Agreement's requirements for

determining Fund eligibility is such a dispute. Plaintiff's claims are, accordingly, nonjusticiable.

In an effort to avoid this logic, Plaintiff argues in her opposition brief that she is not "ask[ing] the Court to change or interpret any terms of the Agreement." Dkt. 24 at 4. To the contrary, according to Plaintiff, "all [she] is seeking" is "to have the Defendant accept affidavits sworn under penalty of perjury." *Id.* at 12. Among other difficulties, this characterization of Plaintiff's claims is belied by her own allegations. In the Amended Complaint, Plaintiff asks the Court to interpret the Agreement and to determine whether the State Department acted contrary to its terms. Dkt. 21 at 3-4, 6 (Am. Compl. ¶¶ 11, 17). The crux of Plaintiff's claim is as follows:

> When the State Department rejected Mr. Gutrejman's sworn affidavits of nationality, it was an exercise of discretion which it did not have. The language of the Agreement itself was a mandate: for questions of nationality, the United States "shall" rely on the sworn statement of nationality." The use of the word "shall" instead of "may" makes clear that it is not a discretionary decision whether an affidavit will be accepted. . . . In the original claim form, Albert Gutrejman swore that the information in the application, including the information that his stepfather was Romanian, was true and correct. The affidavit which he signed and provided is in the form specifically required in accordance with the terms of the Agreement.
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> * * *

> The Agreement requires that [a] claimant's statements of nationality in declarations of honor be accepted. Sworn affidavits provided by Mr. Gutrejman are sufficient to satisfy those requirements. The Agreement also requires State to take in to account the objectives of the Agreement, including in the first instance providing expeditious compensation to Holocaust deportation victims and families. State's apparent determination that it simply does not believe Albert Gutrejman's sworn statements without any evidence to impeach his assertions, violates both the spirit and the language of the Agreement. For these reasons, the denial of Albert Gutrejman's claim is arbitrary and capricious and violates due process owed to him.

Id. (emphasis added). The issue raised in the operative complaint, accordingly, is whether the Agreement, by its terms, required the Department to accept the evidence submitted with Albert Gutrejman's claim for compensation from the Fund and to approve his application. It is, in other words, a "dispute arising out of the interpretation or performance of th[e] Agreement," Dkt. 23-2 at 12 (Agreement art. 8), and the Agreement reserves resolution of such a dispute to diplomatic consultation between France and the United States.

Nor could Plaintiff avoid this difficulty by amending her complaint for a second time. The scope of the provision reserving dispute resolution to diplomatic channels sweeps as broadly as the compensation program itself; it requires the parties—

that is, the United States and the French Republic—to resolve any and all disputes "arising out of the interpretation or performance of [the] Agreement" through "consultation between the Parties." Dkt. 23-2 at 12 (Agreement art. 8). Thus, even accepting Plaintiff's re-characterization of her complaint as merely challenging the form of evidence that the State Department was willing to consider, her claim, at the very least, arises out of the performance of the Agreement.

Moreover, even if the Agreement did not expressly commit dispute resolution to the diplomatic process, Plaintiff would encounter a related hurdle: the Agreement does not bestow any private rights on Fund applicants. As the Supreme Court has emphasized, there is a "background presumption" that "international agreements, even those directly benefiting private persons, generally do not create private rights." *Medellín*, 552 U.S. at 506 n.3 (quoting Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a (Am. L. Inst. 1986)); *see also $70 Million*, 234 F. Supp. 3d at 237-38. Absent "express language to the contrary," that background presumption precludes individuals from seeking to enforce international agreements in court. *Medellín*, 552 U.S. at 506 n.3. Here, there is no basis to conclude that the Agreement creates private rights. To the contrary, the Agreement makes clear that the United States shall distribute the Fund "in its sole discretion" according to "criteria which it shall determine unilaterally." *Id.* at 11 (Agreement art. 6 § 1). As a result, even if the Agreement were judicially enforceable, Plaintiff's claims would fail. To conclude otherwise would require the Court to ignore the

choice made by the U.S. executive branch and France to enter an agreement that is non-self-executing and that does not so much as hint at the creation of privately enforceable rights.

Plaintiff counters that her claims are justiciable because she brings them under the APA, rather than under the Agreement itself. Dkt. 24 at 3. Citing to the APA's generic cause of action, *see* 5 U.S.C. § 702, Plaintiff maintains that "the basic presumption of judicial review" under the APA applies unless the United States can identify "a particular statute preclud[ing] review or . . . agency action is committed to agency discretion by law" under the APA § 701(a). Dkt. 24 at 7. According to Plaintiff, "Defendant has not identified any such law—either to prohibit review or to grant unfettered discretion." *Id.* The Agreement, says Plaintiff, "is not a statute enacted by the legislative branch[;] it is not even a treaty." *Id.* Rather, "it is an executive agreement and no provision of that document precludes judicial review." *Id.*

The Court cannot agree with the premise that the presumption of judicial review applies whenever a plaintiff files an APA claim to enforce an international agreement. If an agreement is not judicially enforceable—if, in other words, its enforcement is committed to the exclusive province of the political branches—then the Court lacks the power to hear claims arising out of the agreement, irrespective of the statutory vehicle that a plaintiff relies upon to bring a cause of action. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842-43 (D.C. Cir. 2010) (en banc) ("[A] statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political

questions."). Were it otherwise, the APA would present a convenient workaround for presenting claims in court that would, in the absence of an APA claim, be nonjusticiable under one of the doctrines discussed above.

The D.C. Circuit rejected Plaintiff's very argument in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). There, the plaintiffs claimed that the United States' funding of the Nicaraguan Contras violated a judgment of the International Court of Justice ("ICJ"), *id.* at 932, and they asserted, among other things, a cause of action under the APA, *id.* at 942. The D.C. Circuit, however, held that the international law governing ICJ judgments (incorporated by reference into the U.N. Charter) did not "vest citizens . . . with authority to enforce an ICJ decision against their own government," and, therefore, the plaintiffs' claims were not "cognizable in domestic courts." *Id.* at 938. Recognizing that the plaintiffs also brought claims under the APA, the D.C. Circuit rejected those claims for the same reasons, holding that the plaintiffs' arguments were "foreclosed both by the nature of ICJ judgments and by the scope of the APA." *Id.* at 942. As the D.C. Circuit explained, "[i]n theory, a law such as the APA could supersede these limitations in the [U.N. Charter], transforming ICJ decisions into legal standards for domestic judicial review." *Id.* at 942-43. But "the APA does not possess such generative capacity." *Id.* at 943. Accordingly, the D.C. Circuit concluded that "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." *Id.*

The Court is bound to apply the D.C. Circuit's reasoning here: because the Agreement is not "an operative part of domestic law," Plaintiff cannot rely upon the APA to "supersede [its] limitations." *Id.* at 942-–43. That principle, moreover, resolves both the threshold jurisdictional question and the merits. The Agreement does not contemplate a role for the federal courts but, rather, adopts a diplomatic solution to a controversy between nations. It did not create any enforceable domestic law, and it expressly eschewed a judicial remedy. The Court would violate the separation of powers—and thus the political question doctrine—to introduce a role for the courts, and it would bestow a non-existent right by recognizing a private right of action to enforce the Agreement in U.S. courts. In the field of foreign affairs, the political branches are allowed (subject to constitutional limitations not implicated here) to adopt purely diplomatic solutions for international disputes, and the courts must respect those decisions.

The Court will, accordingly, dismiss the Amended Complaint for lack of jurisdiction.[3]

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that the United States' motion to dismiss, Dkt. 23, is

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[3] Plaintiff also alleges that the State Department's denial of Albert Gutrejman's claim violated "due process." Dkt. 21 at 6 (Am. Compl. ¶¶ 17, 20). The nature of Plaintiff's due process claim is not entirely clear from the face of the Amended Complaint, and Plaintiff does not address it in her opposition brief. The Court concludes, nonetheless, that Plaintiff's due process claim, to the extent she pursues one, falls short for failure to allege a cognizable liberty or property interest.

GRANTED and that Plaintiff's Amended Complaint is DISMISSED without prejudice.

A separate order will issue.

/s/ Randolph D. Moss
United States District Judge

Date: March 22, 2022

***Gutrejman v. United States*,**
No. 20-cv-266
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS ORIGINAL COMPLAINT, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MARCH 19, 2021)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTHER GUTREJMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 20-266 (RDM)

Before: Randolph D. MOSS,
United States District Judge.

In 2014, the United States and France executed an Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs (the "Agreement"). Dkt. 12-2 at 5. Under the Agreement, France provided $60 million for a compensation fund (the "Fund") to be administered by the Department of State (the "Department"), which would provide

benefits to individuals who were deported from France to concentration camps during the Holocaust, as well as those individuals' eligible family members. In return, the United States agreed to ask domestic courts to dismiss any lawsuits against the French government and the state-owned entity responsible for the transportation.

Albert Gutrejman, whose mother was deported from France and died at Auschwitz, filed a claim with the Department pursuant to the Agreement. The Department denied the claim. Esther Gutrejman, Albert Gutrejman's surviving wife, then filed this lawsuit against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, alleging that the Department negligently rejected Albert Gutrejman's claim. Pending before the Court is the United States' motion to dismiss on the ground that Plaintiff's claim falls outside the scope of the FTCA's limited wavier of sovereign immunity. Dkt. 12. Because the FTCA waives sovereign immunity only where state law would make a private person liable in tort, and because Plaintiff has not shown a state-law analogue for the tort she alleges, the Court will dismiss Plaintiff's complaint. The Court will, however, give Plaintiff an opportunity to file an amended complaint that repleads her claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*

I. Background

In 2014, the United States and France signed the Agreement to establish a compensation fund for holocaust victims who were deported from France to concentration camps. Dkt. 1 at 2 (Compl. ¶¶ 1-2);

Dkt. 12-2. In recognition of France's "responsibility in the process of deportation of [Holocaust] victims and an imprescriptible debt toward them," Dkt. 12-2 at 6, the Agreement aimed to create "an exclusive mechanism for compensating persons who survived deportation from France, their surviving spouses, or their assigns," if those victims were not already eligible for existing compensation programs, *id.* at 8 (Agreement § 2.1). Under the Agreement, France paid $60 million to the United States to establish the Fund. *Id.* at 9 (Agreement § 4.1). In exchange, the United States agreed to "secure, with the assistance of the Government of [France] 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." *Id.* at 10 (Agreement § 5.2).

Based on the terms of the Agreement, eligible beneficiaries of the Fund "are the actual survivors of trains which deported victims from France to concentration camps such as Auschwitz or Buchenwald, or their surviving spouses." Dkt. 1 at 2 (Compl. ¶ 2); *see also* Dkt. 12-2 at 8 (Agreement § 2.1). If either the Holocaust survivor or the surviving spouse died after 1948, then their children, as assigns, are eligible to make a claim. Dkt. 1 at 2 (Compl. ¶ 2). The Agreement further provides, however, that neither French nationals, Dkt. 12-2 at 8 (Agreement § 3.1), nor beneficiaries of any other program designed to compensate victims of Holocaust deportation, *id.* at 8-9, are eligible to receive compensation from the Fund. Attached to the Agreement as an Annex is a "Form of Written Undertaking" that applicants to

the Fund must execute. *Id.* at 14-15 (Agreement Annex). The applicant must provide "documentation establishing nationality" and "declare under penalty of perjury" that she has not received (and will not receive) compensation from any other program related to Holocaust deportation. *Id.* Beyond those restrictions, the Agreement gives the United States the "sole discretion" to distribute the funds "according to criteria which it shall determine unilaterally." *Id.* at 11 (Agreement § 6.1).

In 2016, Albert Gutrejman, who is now deceased, filed a claim with the Department. Dkt. 1 at 2 (Compl. ¶ 1). Albert Gutrejman's mother, "Estera[,] was deported from France on September 18, 1942 and died at Auschwitz." *Id.* (Compl. ¶ 3). Albert Gutrejman's stepfather, Henri Gutrejman, who would have been eligible to make a claim under the Fund, died in 1976. *Id.* Albert Gutrejman thus filed his claim as the sole heir of Henri Gutrejman. *Id.* As part of his claim, Albert Gutrejman provided a sworn affidavit that his stepfather was Romanian (and, thus, not French) and was married to his mother. *Id.* at 5 (Compl. ¶ 15).

The Department rejected Albert Gutrejman's claim, finding that he was ineligible because he had provided insufficient evidence of his stepfather's nationality. *Id.* (Compl. ¶ 14). Albert Gutrejman then provided an additional affidavit attesting that his stepfather was Romanian and died in 1976, but that he did not have a copy of his stepfather's death certificate. *Id.* (Compl. ¶ 16). In a third affidavit, he attested that, as a child, he had attended the wedding of his mother and stepfather by Rabbi Pinkus in Paris, and, in a fourth affidavit, his counsel attested

that she had searched for "evidence of the marriage, but that after the destruction of World War II and the passing of more than 79 years, no such documents could be found." *Id.* (Compl. ¶ 17-18). In rejecting Albert Gutrejman's claim, the Department did not assert that Henri Gutrejman was a citizen of France, only that Albert Gutrejman had failed to provide adequate proof of Henri Gutrejman's nationality. *Id.* at 5-6 (Compl. ¶¶ 14, 20).

On January 31, 2020, Plaintiff Esther Gutrejman, as trustee of Albert Gutrejman's estate, filed this lawsuit against the United States. Dkt. 1. The complaint alleges that the Department's rejection of Albert Gutrejman's claim was "a wrongful act." *Id.* at 6 (Compl. ¶ 23). The United States moves to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). Dkt. 12. Plaintiff filed her opposition to the motion, Dkt. 14; the United States filed its reply, Dkt. 16; Plaintiff then filed a sur-reply brief, Dkt. 18; and, finally, the United States filed a notice of supplemental authority on March 8, 2021, Dkt. 19. The motion to dismiss is now fully briefed and ripe for decision.

II. Legal Standard

Federal courts are courts of limited subject-matter jurisdiction that "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of an action for lack of subject-matter jurisdiction. When a defendant files a motion to dismiss for lack of subject-matter jurisdiction, the plaintiff bears the burden of establishing jurisdiction.

Id.; *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Where, as here, a defendant contends that the jurisdictional allegations in the complaint are inadequate, the Court must "accept all well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor" but does not "assume the truth of legal conclusions." *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (internal quotation marks omitted). In this sense, the Court must resolve the motion in a manner similar to a motion to dismiss under Rule 12(b)(6). *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).

III. Discussion

Under the doctrine of sovereign immunity, the United States may not be sued without its consent. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Waivers of sovereign immunity must be "'unequivocally expressed'" and "'strictly construed, in terms of [their] scope, in favor of the sovereign.'" *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003) (quoting *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)). Plaintiff's claim is predicated on the limited waiver of sovereign immunity contained in the FTCA. *See United States v. Orleans*, 425 U.S. 807, 813 (1976). The scope of the waiver of sovereign immunity under the FTCA is "coextensive" with the Court's subject-matter jurisdiction. *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 512 (D.C. Cir. 2009); *see Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). The party bringing the suit "bears the burden of proving that the government has unequivocally waived its immunity." *Tri-State Hosp. Supply*, 341 F.3d at 575.

The FTCA permits tort suits for "money damages" against the United States by those who suffer "injury . . . caused by the negligent or wrongful act or omission of any employee of the [g]overnment while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The waiver of sovereign immunity extends, however, only to those "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.* Sovereign immunity is thus waived only under circumstances where local law would make a private person liable in tort. *United States v. Olson*, 546 U.S. 43, 44 (2005) (internal quotation marks omitted). The Court must, accordingly, consider whether Plaintiff's claim is "analogous" to a claim arising "under local tort law," *Hornbeck Offshore Transp.*, 569 F.3d at 510 (internal quotation marks omitted)—here, the law of the District of Columbia.

The United States argues that the Court lacks subject-matter jurisdiction over Plaintiff's claim because there is no tort under D.C. law that is analogous to the allegedly unlawful administration of a fund created by an international agreement. Dkt. 12-1 at 3. The government contends that Plaintiff's claims lack a private analogue for two reasons. First, the complaint fails to allege a tort analogous to a private tort because, inherently, "any alleged duties created by an international agreement are not predicated on state law as the FTCA requires." *Id.* at 5. Second, Plaintiff has not alleged facts that, if asserted against a private party, would state a claim for negligence

under D.C. law. *Id.* at 4; Dkt. 16 at 3.[1] In her opposition, Plaintiff asserts that her complaint alleges that the Department performed "negligently, wrongly, and capriciously" when rejecting her late husband's claim. Dkt. 14 at 3.

It is well-established "that the violation of a federal statute or regulation by government officials does not of itself create a cause of action under the FTCA" and that a plaintiff who "bas[es] [her] negligence claim entirely on violation of federal duties . . . fails to consider that the FTCA waives the immunity of the United States only to the extent that a private person in like circumstances could be found liable in tort under *local* law." *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (emphasis added). As such, when a plaintiff premises her FTCA claim on the violation of a federal statute (or, as here, an international agreement), "[t]he pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under local tort law," *id.* at 1158; *see also FDIC*, 510 U.S. at 477. In *Art Metal*, for example, the D.C. Circuit affirmed the dismissal of an FTCA negligence suit brought by an office-furniture supplier against the United States, after the government declined to award the company several contracts even though the company was the

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[1] In the alternative, the government argues that, even if such a private analogue did exist, the claim would fall under the discretionary function exception to the FTCA. Dkt. 12-1 at 3; *see also* 28 U.S.C. § 2680(a). Because the Court concludes that Plaintiff has failed to demonstrate that a private analogue for her claim exists under D.C. law, the Court need not reach this alternative argument about the discretionary function exception.

lowest bidder. 753 F.2d at 1153. The Court concluded that there was no analogous local tort claim for such a dispute between the buyer and seller of goods. *Id.* at 1160-61. Similarly, in *Hornbeck Offshore*, the D.C. Circuit affirmed the dismissal of an FTCA claim against the U.S. Coast Guard for assigning the wrong "phase-out" date to an oil barge because the alleged violation was premised exclusively on a federal statute, and local tort law would provide no relief in the absence of the duty created by federal law. 569 F.3d at 509-10. The D.C. Circuit held that "[w]here a claim is wholly grounded on a duty created by a federal statute such that there is no local law that could support liability of a private party for similar actions, the FTCA does not apply." *Id.* at 510 (internal quotation marks omitted).

Here, Plaintiff claims that the Department "wrongfully" rejected her husband's claim for compensation. Dkt. 14 at 5. But, as Plaintiff seems to acknowledge, the Department's duty, if any, to pay the claim arose exclusively from federal law. *See*, *e.g.*, *id.* (Plaintiff's opposition brief referring to the "duties undertaken by [the Department] under the Agreement"). Unsurprisingly, Plaintiff fails to identify any D.C. law imposing liability on a private party for tortious administration of a benefits program created by international accord. Nor does she maintain that, in executing the Agreement, the United States assumed any duties under local tort law. *See Art Metal*, 753 F.2d at 1159 n.15 (noting the difference between federal statutes that create "federal legal duties" and statutes that suggest "the government has assumed duties under local tort law"). Plaintiff thus impermissibly predicates her FTCA claim exclusively

on a unique federal duty. *See Hornbeck Offshore*, 569 F.3d at 512.

The Court is unpersuaded by any of Plaintiff's efforts to avoid this conclusion. First, she attempts to distinguish *Hornbeck Offshore*, on which the government relies, by asserting that the Department's adjudication of claims from Holocaust survivors under the Fund is not the sort of "highly technical regulatory agency conduct" under a "complex federal regulatory scheme" that was at issue in that case. Dkt. 14 at 5. But *Hornbeck Offshore* did not turn on whether the federal claim in question arose under a complex regulatory scheme—all that mattered was that the basis for the claim was "a federal statute, not any state or local law." 569 F.3d at 509.

Plaintiff is on slightly firmer ground in arguing that a private analogue can be found in the common law of negligence, but that contention ultimately fails as well. According to Plaintiff, her claim is analogous to local tort law because the duty the Department owed her husband is akin to the duty owed by a private claims administrator to a claimant. Dkt. 14 at 5-6 (referring to the administration of the Fund as the "routine work of a claims administrator"). To the extent Plaintiff contends that an FTCA claim does not have to exist "entirely independently" from a federal statute, she is correct. *Hornbeck Offshore*, 569 F.3d at 510. An act of negligence in administering a federal duty can form the basis of an FTCA claim, but only if that same negligent act would be actionable under local law if committed by a private party. *See Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (holding that the United States could be held liable under the FTCA for negligence when,

while operating a lighthouse, the Coast Guard allowed a light bulb to go out and negligently failed to check on it for approximately a month).

To state a claim for negligence under D.C. law, a complaint must specify the negligent act and describe the duty that was breached. *See District of Columbia v. White,* 442 A.2d 159, 162 (D.C. 1982) (citing *Kelton v. District of Columbia,* 413 A.2d 919, 922 (D.C. 1980)). Plaintiffs must establish "that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the breach of duty proximately caused damage to the plaintiff." *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1098 (D.C. 1994); *see also Childs v. Purll*, 882 A.2d 227, 233 (D.C. 2005) (explaining that "the plaintiff must establish a duty of care, a deviation from that duty, and a causal relationship between that deviation and an injury sustained by the plaintiff" (internal quotation marks omitted)).

The problem with Plaintiff's argument is that she fails to identify a duty under D.C. tort law that is analogous to the proper administration of a fund established by international agreement between two sovereign states or any other analogous duty of care that the Department owed to her or her husband under D.C. law. To the extent that Plaintiff relies on the Agreement to establish the duty—by alleging that the Department's "wrongful act" was its failure to credit her husband's affidavits—D.C. law precludes tort liability based on failure to comply with a duty that arises from a contract. As the D.C. Court of Appeals has held, "the tort must exist in its own right independent of the contract, and any duty upon which the tort is based must flow from considerations

other than the contractual relationship." *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089 (D.C. 2008). That same logic applies with equal force to claims premised on a third-party-beneficiary theory of liability. *See Dun v. Transamerica Premier Life Ins. Co.*, 442 F. Supp. 3d 229, 240 (D.D.C. 2020) (citing *Whiting v. AARP*, 637 F.3d 355, 363 (D.C. Cir. 2011)). The breach of a duty arising from a contract thus cannot form the basis for tort liability under D.C. law and, therefore, it also cannot serve as the predicate for liability under the FTCA.

The economic loss doctrine also forecloses Plaintiff's claim.[2] Under D.C. law, the economic loss doctrine bars recovery "of purely economic losses in negligence, subject to only one limited exception where a special relationship exists." *Aguilar v. RP MPR Wash. Harbour LLC*, 98 A.3d 979, 985-86 (D.C. 2014). Where a "special relationship" exists, an independent duty of care is owed. *See Whitt v. Am. Prop. Const., P.C.*, 157 A.3d 196, 205 (D.C. 2017). Plaintiff argues that such a "special relationship" exists between claims administrators and claimants. Dkt. 18 at 2-4. And, because the Department was acting in a role analogous to that of a private claims administrator when adjudicating Albert Gutrejman's claim, the Department, Plaintiff argues, owed Albert Gutrejman a duty of care based on that special relationship. Dkt. 18 at 2-4.

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[2] Plaintiff seeks "the full amount that would otherwise be paid to her from the [Fund] had the claim initially been approved," which amounts to $81,361, to "be paid from the Fund or, if the Fund assets are insufficient, from funds of State or the U.S. Treasury." Dkt. 1 at 7 (Compl. Prayer for Relief). She alleges no other injuries aside from the loss of the money owed to her from the Fund, and her alleged loss is thus purely economic.

But Plaintiff fails to allege the existence of such a special relationship. She alleges no facts and offers no reasoning to support the notion that claims administrators and claimants have a special relationship. She rests, instead, on the conclusory assertion that "[a]s claims administrator, the Department owes a duty of care to the claimants with whom it has a special relationship." *Id.* at 4. But D.C. law does not support the assertion that there is a special relationship between private claims administrators and potential beneficiaries. *See, e.g.*, *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 798, 812 n.39 (D.C. 2011) (en banc) (special relationships include relationships involving "(1) carrier-passenger, (2) innkeeper-guest, invitor-invitee or possessor of land open to the public and one lawfully upon the premises; employer-employee, (5) school-student, (6) landlord-tenant, and (7) custodian-ward") (citing Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress,* 50 Ariz. L. Rev. 49, 54 (2008)); *Vassiliades v. Garfinckel's*, 492 A.2d 580, 592-93 (D.C. 1985) (special relationships include "persons who occupy a fiduciary relationship" as they "must scrupulously honor the trust and confidence reposed in them because of that special relationship"). None of these categories of special relationships that the D.C. Court of Appeals has recognized comes close to encompassing the relationship between the Department and Plaintiff in this case, because Plaintiff fails allege a unique obligation on the part of the United States to ensure Plaintiff's economic well-being. *See Aguilar*, 98 A.3d at 985. Indeed, Plaintiff acknowledges that no case decided by the D.C. courts has recognized a tort based on a private claims administrator's negligence

in settling claims. Dkt. 18 at 2 n.1. And, beyond that, she concedes that the one case she does cite—from the U.S. District Court for the Eastern District of Pennsylvania—merely allowed a claim against an administrator to go forward "without specific discussion regarding the negligence claim." *Id.* (citing *Oetting v. Heffler*, No. 11-cv-4757, 2015 WL 9190629 (E.D. Pa. 2015)); *see also Faktor v. United States*, No. 20-cv-263, 2021 WL 848686 at *4 n.6 (D.D.C. Mar. 4, 2021). Plaintiff bears the burden of establishing subject-matter jurisdiction, yet she fails to identify any meaningful support for her theory of analogous liability under D.C. law.

Even if Plaintiff could identify a D.C. tort for negligent claims administration (which she cannot), and even if D.C. law recognized a fiduciary duty running from claims administrators to claimants that could establish a special relationship (which it does not), the Court would remain unconvinced that a federal program established pursuant to an international agreement, like that at issue here, is analogous to a private agreement to settle claims. Some functions are so uniquely governmental that there is simply no sense in which the United States, "if a private person," could perform a similar action, much less be held liable for negligent performance of it. 28 U.S.C. § 1346(b)(1). The President's authority to enter executive agreements with foreign states resolving claims of U.S. citizens is such a function, which goes back to the earliest days of the Republic and is a product of both congressional acquiescence and the President's foreign affairs power. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-83 (1981) (discussing the historical practice of the United States

"repeatedly exercis[ing] its sovereign authority to settle the claims of its nationals against foreign countries," including a "longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) ("Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice," dating to "the early years of the Republic," with "the first example being as early as 1799"); *United States v. Pink*, 315 U.S. 203, 229 (1942) (referring to "settlement of claims of our nationals" as "a modest implied power of the President" necessary for "handling the delicate problems of foreign relations"). The exercise of that authority is not, by any stretch, analogous to the creation of a private claims-settlement process. And beyond that concern, a judicial decision that implies terms into an international executive agreement, including reading the agreement implicitly to create a duty of care owed by the United States to third parties, would at the very least raise a significant question of separation of powers.

For present purposes, however, it is sufficient for the Court to conclude that Plaintiff has failed to carry her burden of identifying a private analogue to the tort that she alleges. Her claim thus falls outside the FTCA's waiver of sovereign immunity. Confirming this conclusion, other judges in this district have recently dismissed nearly identical claims on the same grounds. *See Faktor*, 2021 WL 848686, at *6; *see also* Order, *Schneider v. United States*, No. 20-cv-260 (Dkt. 20) (D.D.C. Feb. 10, 2021). The Court, will, accordingly, grant the United States' motion to dismiss.

Perhaps sensing the weakness of her FTCA claim, Plaintiff in her sur-reply "respectfully request[ed]" that, "[i]n the event this Court should find that the [c]omplaint falls short in any allegations required to state a negligence claim," she be given "the opportunity to amend [her] [c]omplaint to supplement these allegations and to include a cause of action under the [APA]." Dkt. 18 at 3 n.2. The Court doubts the utility of supplementing Plaintiff's FTCA claim, but her claims against the Department would seem to fit more naturally under the APA. The Court will thus grant Plaintiff leave to amend her complaint to present claims under the APA.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that the United States' motion to dismiss, Dkt. 12, is GRANTED and that Plaintiff's complaint is DISMISSED without prejudice. Plaintiff may file an amended complaint pleading claims under the APA on or before April 16, 2021. If she fails to do so, the Court will enter final judgment in favor of the United States at that time.

SO ORDERED.

/s/ Randolph D. Moss
United States District Judge

Date: March 19, 2021

Faktor v. United States
No. 20-cv-263
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MARCH 10, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLANGE FAKTOR,

Plaintiff,

v.

UNITED STATES,

Defendant.

Civil Action No. 20-263 (CKK)

Before: Colleen KOLLAR-KOTELLY,
United States District Judge.

Plaintiff Solange Faktor brings this lawsuit challenging a decision by the United States Department of State to deny her claim for compensation pursuant to the Agreement between the United States and France on Compensation of Certain Victims of Holocaust-Related Deportations In her Amended Complaint, Plaintiff claims that the denial of her

claim was arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

Before the Court is the United States' [29] Motion to Dismiss to Plaintiff's Amended Complaint, in which the United States argues that the Court lacks subject matter jurisdiction and that Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted. Upon review of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court shall GRANT Defendant's Motion to Dismiss the Amended Complaint.

I. Background

A. Agreement between the United States and France to Compensate Victims of Holocaust-Related Deportations

In 2014, the United States and France executed an "Agreement for Compensation on Certain Victims of Holocaust-Related Deportations from France Who

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[1] The Court's consideration has focused on:

- Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss ("Def.'s Mot."), ECF No. 29-1;
- Plaintiff's Opposition to Defendant's Motion to Dismiss the Amended Complaint ("Pl.'s Opp'n"), ECF No. 30; and
- Defendant's Reply in Support of Motion to Dismiss ("Def.'s Reply"), ECF No. 31.

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

Are not Covered by French Programs."[2] *See* Def.'s Mot. Ex. A ("Agreement"), ECF No. 29-2. The Agreement was established to provide "an exclusive mechanism for compensating persons who survived deportation from France [during World War II], their surviving spouses, or their assigns." Agreement § 2(1). Pursuant to the Agreement, the French government transferred $60 million to the United States to create a fund for Holocaust deportation claims ("Fund"). *Id.* § 4(1). The United States has the "sole discretion" to administer the Fund, "according to criteria which it shall determine unilaterally" and "for which it shall be solely responsible." *Id.* § 6(1).

The Agreement carves out four categories of claimants who are ineligible to receive payments from the Fund for Holocaust deportation claims: (1) French nationals; (2) nationals of other countries who "have received or are eligible to receive" compensation under another international agreement made by France addressing Holocaust deportation claims; (3) persons who "have received or are eligible to receive" compen-

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[2] The Amended Complaint "specifically references" the Agreement, which is "central" to Plaintiff's claim, so the Court shall consider it without converting Defendant's motion into one for summary judgment. *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015); *Vanover v. Hantman,* 77 F. Supp. 2d 91, 98 (D.D.C. 1999), *aff'd,* 38 F. App'x. 4 (D.C. Cir. 2002) ("[W]here a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.") (citing *Greenberg v. The Life Ins. Co. of Va.,* 177 F.3d 507, 514 (6th Cir. 1999)); *see also Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (a court may consider "public records subject to judicial notice on a motion to dismiss").

sation under France's reparation measure for orphans whose parents died in deportation; and (4) persons who have received compensation under "another State's program providing compensation specifically for Holocaust deportation." *Id.* §§ 3(1)-(4), 6(2)(b). The Agreement requires the United States to "declare inadmissible" and "reject any . . . claim" from an individual within one of these four categories. *Id.* § 6(2)(b). Annexed to the Agreement is a "Form of Written Undertaking" ("Form") which a claimant must sign before receiving any payment from the Fund. *See* Agreement Annex. The Form requires the claimant to provide "documentation establishing nationality" and to declare under penalty of perjury that he or she had not received compensation related to a Holocaust deportation claim from any French programs or any other State's compensation program. *Id.* The Agreement directs that the United States "shall rely" on the sworn statements included in the Form to determine whether the claimant falls within one of the four categories not covered by the Agreement. Agreement § 6(2)(c). The Agreement provides that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the parties." *Id.* § 8 (emphasis added).

B. Plaintiff's Claims

Plaintiff Solange Faktor filed a claim with the U.S. Department of State to receive compensation from the Fund. Am. Compl. ¶ 10. Plaintiff's mother was deported to the Auschwitz concentration camp on July 31, 1943, where she was killed. *Id.* ¶ 9. Plaintiff's father survived and passed away in France in 1980. *Id.* Plaintiff filed the claim on behalf of her

father's estate. *Id.* ¶ 10. Although Plaintiff notes that her father died in France, she indicates that he was "stateless" when he died.[3] *Id.* ¶¶ 10, 12. Plaintiff does not have a death certificate for her father. *Id.* ¶¶ 12, 13.

On April 3, 2018, Plaintiff received notice that the State Department had rejected her claim. *Id.* ¶ 5. Plaintiff alleges that the State Department rejected her claim because she had not submitted documentary evidence that her father was "stateless" and because she did not submit a copy of his death certificate. *Id.* ¶ 10. Plaintiff filed with her original claim form a sworn affidavit "including the information that her father was stateless, and the date of his death, was true and correct." *Id.* ¶ 11. She later submitted a second affidavit, "again swearing that her father was stateless, that he passed away in 1980 and that she did not have a copy of his death certificate." *Id.* ¶ 12. Plaintiff contends that her affidavits were "in the form specifically required in accordance with the terms of the Agreement," and should have been sufficient to entitle her to compensation under the Agreement. *Id.* ¶ 11. She also notes that her counsel provided a letter to the State Department "regarding the difficulty in trying to prove statelessness." *Id.* ¶ 14. According to Plaintiff, the State Department's rejection of her claim—based on its rejection of her "sworn affidavit evidence"—"violates" the Agreement and constitutes an "arbitrary and capricious" agency action under the APA. *Id.* ¶¶ 17, 18.

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[3] Plaintiff does not indicate where her father was born, or with what country he was associated before he became stateless.

Plaintiff seeks an order pursuant to the APA and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, declaring that the United States failed to "honor the terms of the Agreement," that her claim "should be approved based on the evidence" she provided, and that its denial "was arbitrary and capricious and should be overturned." Am. Compl. at 6-7. She further seeks an order declaring that she is entitled to receive compensation "in the amount that would otherwise be paid . . . had she been initially approved as eligible," as well as "supplemental payments paid to all eligible claimants" of the same status. *Id.* at 7.

C. Procedural Background

Plaintiff filed her Original Complaint in this action on January 31, 2020. Compl., ECF No. 1. The Original Complaint asserted a claim under the Federal Tort Claims Act ("FTCA"), based on the same facts presented above. The United States moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction arguing that Plaintiff had failed to establish that the United States waived sovereign immunity for her claim under the FTCA. The Court granted Defendant's Motion to Dismiss. *See* Order, ECF No. 23; Mem. Op., ECF No. 24. However, consistent with other courts in this jurisdiction, the Court allowed Plaintiff to file a motion for leave to amend the complaint to assert an APA claim. *Id.* The United States consented to Plaintiff's motion to amend her complaint. *See* ECF No. 28.

The United States has again moved to dismiss the Amended Complaint, contending that the Court lacks subject matter jurisdiction and that the Complaint

fails to state a claim upon which relief may be granted. *See generally* Def.'s Mot. That motion is now ripe.

II. Legal Standard

A. Federal Rule of Civil Procedure 12(b)(1)

A court must dismiss a case when it lacks subject matter jurisdiction pursuant to Federal Rule of Civil procedure 12(b)(1). To determine whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F. 3d 193, 198 (D.C. Cir. 2003) (citations omitted); *see also Jerome Stevens Pharm., Inc. v. Food & Drug Admin.,*402 F.3d 1249, 1253 (D.C. Cir. 2005) ("[T]he district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.").

In reviewing a motion to dismiss pursuant to Rule 12(b)(1), courts must accept as true all factual allegations in the complaint and construe the complaint liberally, granting the plaintiff the benefit of all inferences that can be drawn from the facts alleged. *See Settles v. U.S. Parole Comm'n,* 429 F.3d 1098, 1106 (D.C. Cir. 2005). Despite the favorable inferences afforded to a plaintiff on a motion to dismiss, it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence. *Am. Farm Bureau v. Environmental Prot. Agency,* 121 F. Supp. 2d 84, 90 (D.D.C. 2000). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss

pursuant to Rule 12(b)(1), [a] plaintiff['s] factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (internal citations and quotation marks omitted) (quoting *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001), *aff'd*, 2008 WL 4068606 (D.C. Cir. Mar. 17, 2008)). A court need not accept as true "a legal conclusion couched as a factual allegation" or an inference "unsupported by the facts set out in the complaint." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (internal citation and quotation marks omitted).

B. Federal Rule of Civil Procedure 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint on the grounds that it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Rather, a complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Courts "do not accept as true, however, the plaintiff's legal conclusions or inferences that are

unsupported by the facts alleged." *Ralls Corp.*, 758 F.3d at 315.

III. Discussion

A. Political Question Doctrine

The United States argues that the Court lacks subject matter jurisdiction because Plaintiff's claim raises a nonjusticiable political question. *See* Def.'s Mot. at 16-23. Specifically, the United States contends that Plaintiff is "asking the Court to oversee the [State] Department's interpretation and implementation of an international agreement that the executive [branch] negotiated" and to "second-guess the Department's determination . . . as to whether individual claimants are eligible to receive compensation[.]" *Id.* at 22. Plaintiff responds that she is merely challenging Defendant's alleged "misapplication" of its own procedures in rejecting her claim. *See* Pl.'s Opp'n at 10.

"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." *EZ-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (internal citations and quotation marks omitted). "[A]lthough many foreign policy decisions fall into this category, the Supreme Court has cautioned that 'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Schieber v. United States*, Civil Action No. 21-1371 (JDB), 2022

WL 227082, at *4 (D.D.C. Jan. 26, 2022) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1986)).

Another court in this jurisdiction has recently confronted whether a case presenting virtually identical facts and claims as those raised here presents a nonjusticiable political question.[4] *See Schieber*, 2022 WL 227082, at *4-5. Observing that that the "bounds of the political question doctrine remain 'murky and unsettled,'" and relying on the "D.C. Circuit's preference to resolve a case on the basis of whether plaintiffs 'ha[d] a cause of action in an American court' instead of addressing the political question doctrine," the court in *Schieber* "reserve[d] judgment on the government's political question argument and instead consider[ed] whether [the plaintiff] has a cause of action to raise her claims in this Court." *Id.* at *5 (citing *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 U.S. 929, 933 (D.C. Cir. 1988)). Guided by this same precedent, the Court shall adopt the approach taken by the court in *Schieber* and shall move on to consider whether Plaintiff has a cause of action to raise her claims in this Court.

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[4] As in this case, the plaintiff in *Schieber* sought compensation from the Fund on behalf of the estate of her father, who was "stateless" at the time of his death. 2022 WL 2270982, at *2. That plaintiff also submitted two affidavits attesting to her father's status as "stateless" and swearing that she did not have a copy of his death certificate. *Id.* The State Department rejected that plaintiff's claim for compensation from the Fund based on its position that the plaintiff had "provided no evidence of the fact that her father was stateless," and that the State Department had "been unable to find proof of statelessness." *Id.* The plaintiff in that case brought the same APA claim, seeking the same relief as Plaintiff in this case.

B. Private Right of Action

The United States next argues that Plaintiff cannot assert a claim under the APA because the Agreement does not create a private cause of action. Def.'s Mot. at 9. According to the government, "[t]hat the Agreement does not create a private right of action operates as a limitation on judicial review under 5 U.S.C. § 702." *Id.* In response, Plaintiff argues that she "does not rely on the Agreement as the source of [her] cause of action against the State Department." Pl.'s Opp'n at 5. Instead, she contends that her claims involve "domestic wrongs committed" by the State Department in the course of processing her claim for compensation from the Fund, and that her "right of action is specifically created by the APA[.]" *Id.* at 3, 6.

Plaintiff's own allegations in the Complaint belie her argument that she does not "rely on the Agreement" as the source of her cause of action. For example, Plaintiff alleges that the "language of the Agreement itself was a mandate" requiring the State Department to accept sworn affidavits of nationality, and that it was the "[f]ailure to treat Plaintiff Faktor in accordance with the terms of the Agreement" that rendered the agency's decision "arbitrary and capricious." Am. Compl. ¶ 11 (emphases added). Plaintiff also alleges that the State Department's rejection of her claim was "not a reasonable interpretation of the Agreement." *Id.* ¶ 19 (emphasis added). Even in her Opposition to Defendant's Motion to Dismiss, Plaintiff acknowledges that she "is asking the Defendant to adhere to the purpose and language of the Agreement." Pl.'s Opp'n at 12 (emphasis added). In sum, Plaintiff's argument that her claims are not "based on the Agreement"

strains credulity based on her own claims and allegations in the Amended Complaint. As did the court in *Schieber*, the Court here finds that Plaintiff's claims are "based on the Agreement" and shall next consider "whether the Agreement provides a private right of action and, if not, whether it imposes a "limitation on judicial review" under the APA. 2022 WL 227082, at *6.

Under the APA, a person who is "suffering a legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. A court must "set aside agency action" that is "arbitrary, capricious, . . . or otherwise not in accordance with law," *id.* § 706(2)(A). However, nothing in the APA "(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action . . . on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* § 702.

As pertinent to this case, because treaties and executive agreements have "the force of law," they are "subject to review under the APA," but *only* "when a private right of action is afforded." *Schieber*, 2022 WL 227082, at *7 (citing *De la Torre v. United States*, Nos. C 02-1942 CRB, C 01-0892-CRB, C 02-1943-CRB, C 02-1944-CRB, 2004 WL 3710194, at *8-9 (N.D. Cal. Apr. 14, 2004); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89, 491 (D.C. Cir. 2008)). There is a presumption that international agreements *do not* create a private cause of action. *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008); *McKesson Corp.*, 539 F.3d at 488-89; *Mora v. New York*, 524 F.3d 183, 201 & n.25 (2d Cir. 2008)

(collecting cases). Overcoming this presumption requires that "the agreement itself reflects an intent to create judicially enforceable private rights." *United States v. Sum of $70,990,605*, 234 F. Supp. 3d 212, 237-38 (D.D.C. 2017) (citing Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a (Am. Law Inst. 1986)). In the absence of such a "textual invitation to participation," an international agreement is enforceable only "through bilateral interaction between its signatories," *McKesson Corp.*, 539 F.3d at 491, and "not by the adjudication of private suits," *Schieber*, 2022 WL 227082, at *7.

The Court agrees with the United States that the "text and context" of the Agreement demonstrate that it does not create any judicially enforceable right for any individual claimant seeking compensation from the Fund. Def.'s Mot. at 11. For example, the text of the Agreement itself directs that the United States shall distribute funds "according to criteria which it shall determine unilaterally, in its sole discretion" and for which it shall be "*solely* responsible." Agreement § 6(1) (emphases added). It further directs that "[a]ny dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties" (*i.e.*, the United States and France), *id.* § 8 (emphasis added). As to the "context" of the Agreement, although it was "intended to benefit individual claimants," the relevant inquiry is whether it "indicate[s] an intent by its creators than any of [its] terms . . . would give rise to affirmative, judicially-enforceable obligations on behalf of individual claimants." *Schieber*, 2022 WL 227082, at *7 (internal quotation marks omitted); *see also De la Torre*, 2004 WL 3710194, at *1-2 (concluding that

agreements between the United States and Mexico intended to improve conditions for Mexican citizens working in the United States were not enforceable by individual workers). The Court finds no evidence of the Agreement's intent to create such "judicially-enforceable obligations" on behalf of any individual claimant, including Plaintiff.

In sum, the Agreement's "text and context indicate that it is *not* intended to be enforceable" by individual claimants seeking compensation from the Fund. *Schieber*, 2022 WL 227082, at *7. Therefore, the Agreement provides no private cause of action, and so Plaintiff "cannot state a claim under the APA for the Secretary's alleged violation of the Agreement." *Id.* The lack of a private cause of action serves as an independent limitation on the Court's review of the government's denial of Plaintiff's claim. *See id.*

C. Preclusion of Judicial Review

The United States also argues that, even if the Agreement does not operate as a limitation on judicial review under APA § 702, it nonetheless precludes judicial review under § 701(a)(1). Def.'s Mot. at 12-13 The United States relies on the language in the Agreement limiting the resolution of any disputes arising therefrom to "consultation" between the United States and France. *Id.* at 13; *see* Agreement § 8 ("Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the parties."). The Court agrees that this provision precludes judicial review.

The APA does not provide a cause of action for a person injured by alleged unlawful agency action "to the extent that statutes preclude judicial review." 5

U.S.C. § 701(a)(1). As other courts have explained, treaties may preclude judicial review under this section of the APA. *See United States v. Moloney (In re Price)*, 685 F.3d 1, 13-14 (1st Cir. 2012), *cert. denied*, 569 U.S. 942 (2013). And although executive agreements—such as the Agreement in this case—are "not quite treaties," they do "carry the force of law as an exercise of the President's foreign policy powers." *Owner-Operator Indep. Drivers Ass'n v. Dep't of Transp.*, 724 F.3d 230, 232 (D.C. Cir. 2013). Plaintiff contends that the Agreement is "not a law," but she cites no legal authority nor provides and reasoning in support of this argument. *See* Pl.'s Opp'n at 3.

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language," *Block v. Comty. Nutrition Inst.*, 467 U.S. 340, 345 (1984), but also from "its structure, objectives, history, and the nature of the agency action involved." *Schieber*, 2022 WL 227082, at *8. The Court finds that the Agreement precludes judicial review of Plaintiff's claim under § 701(a)(1). In summary terms, Plaintiff claims that the State Department incorrectly interpreted the Agreement, resulting in the denial of her claim for compensation. *See* Am. Compl. ¶¶ 18, 19. But the Agreement provides an exclusive method for resolving any disputes arising from it: by "consultation" between the United States and France. Agreement § 8. "That consultation-only provision operates as law precluding judicial review." *Schieber*, 2022 WL 227082, at *8 (citing *Moloney*, 685 F.3d at 13-14). In response, Plaintiff contends that her claim focuses on the allegedly incorrect rejection of her claim by the State Department and "has

nothing to do with the terms of the Agreement" itself. Pl.'s Opp'n at 6. But, as the Court previously noted, her claims plainly pertain to the "interpretation" of the Agreement— and any disagreement about such "interpretation" must "be resolved" exclusively by "consultation" between the United States and France. The Agreement precludes judicial review in this case.

* * *

Because the Court concludes that the Agreement provides no private cause of action and, even if does, its exclusive "consultation" provision precludes judicial review, Plaintiff's Complaint fails to state a claim upon which relief may be granted and dismissal under Rule 12(b)(6) is appropriate. The Court, therefore, does not address the United States' final argument that eligibility determinations for compensation are committed to agency discretion by law. *See* Def.'s Mot. at 13-16. Moreover, a plaintiff who fails to allege a "cognizable cause of action" has "no basis upon which to seek declaratory relief" because of the "well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (internal citation and quotation marks omitted). Accordingly, without a viable APA claim, Plaintiff also cannot state a claim for relief under the Declaratory Judgment Act.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** the United States' Motion to Dismiss the Amended Complaint. An appropriate Order accompanies this Memorandum Opinion.

/s/ Colleen Kollar-Kotelly
United States District Judge

Date: March 10, 2022

***Faktor v. United States*,**
No. 20-cv-263
MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION TO DISMISS ORIGINAL COMPLAINT, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MARCH 4, 2021)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLANGE FAKTOR,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 1:20-cv-263 (CKK)

Before: Colleen KOLLAR-KOTELLY,
United States District Judge.

Plaintiff Solange Faktor brings this lawsuit under the Federal Tort Claims Act ("FTCA"), alleging that the U.S. Department of State erroneously denied her claim for compensation under the Agreement between the United States and France on Compensation of Certain Victims of Holocaust-Related Deportations *See* Compl., ECF No. 1. Before the Court is the United States' [15] Motion to Dismiss, in which the

United States argues that the Court lacks subject matter jurisdiction because Plaintiff has failed to demonstrate that a private party could be held liable based on her allegations, and therefore Plaintiff has failed to show that the FTCA's limited waiver of sovereign immunity applies to her claim. Upon its review of the pleadings,[1] the relevant legal authority, and the record as a whole, the Court concludes that it lacks subject matter jurisdiction to consider Plaintiff's FTCA claim. Accordingly, the Court GRANTS Defendant's Motion to Dismiss.

I. Background

A. Agreement between the United States and France to Compensate Victims of Holocaust-Related Deportations

In 2014, the United States and France executed an "Agreement for Compensation on Certain Victims of Holocaust-Related Deportations from France Who

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[1] The Court's consideration has focused on:

- Defendant's Motion to Dismiss Plaintiff's Complaint ("Def.'s Mot."), ECF No. 15;
- Plaintiff's Opposition to Defendant's Motion to Dismiss the Complaint ("Pl.'s Opp'n"), ECF No. 17;
- Defendant's Reply in Support of Motion to Dismiss ("Def.'s Reply"), ECF No. 19; and
- Plaintiff's Surreply in Opposition to Defendant's Motion to Dismiss the Complaint ("Pl.'s Surreply"), ECF No. 25.

Are not Covered by French Programs."[2] *See* Def.'s Mot. Ex. A ("Agreement"). The Agreement was established to provide "an exclusive mechanism for compensating persons who survived deportation from France [during World War II], their surviving spouses, or their assigns." Agreement § 2(1).

Pursuant to the Agreement, the French government transferred $60 million to the United States to create a fund for Holocaust deportation claims ("Fund"). *Id.* § 4(1). The United States has the "sole discretion" to administer the Fund, "according to criteria which it shall determine unilaterally" and "for which it shall be solely responsible." *Id.* § 6(1). The Agreement, however, carves out four categories of claimants who are ineligible to receive payments from the Fund for Holocaust deportation claims: (1) French nationals; (2) nationals of other countries who "have received or are eligible to receive" compensation under another international agreement made by France addressing Holocaust deportation claims; (3) persons who "have received or are eligible to receive" compen-

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[2] The Complaint "specifically references" the Agreement, which is "central" to Plaintiff's claim, so the Court shall consider it without converting Defendant's motion into one for summary judgment. *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015); *Vanover v. Hantman,* 77 F. Supp. 2d 91, 98 (D.D.C. 1999), *aff'd,* 38 F. App'x. 4 (D.C. Cir. 2002) ("[W]here a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.") (citing *Greenberg v. The Life Ins. Co. of Va.,* 177 F.3d 507, 514 (6th Cir. 1999)); *see also Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (a court may consider "public records subject to judicial notice on a motion to dismiss").

sation under France's reparation measure for orphans whose parents died in deportation; and (4) persons who have received compensation under "another State's program providing compensation specifically for Holocaust deportation." *Id.* §§ 3(1)-(4), 6(2)(b). The Agreement requires the United States to "declare inadmissible" and "reject any . . . claim" from an individual falling within one of these four categories. *Id.* § 6(2)(b).

Annexed to the Agreement is a "Form of Written Undertaking" ("Form") which a claimant must sign before receiving any payment from the Fund. *See* Agreement Annex. The Form requires the claimant to provide "documentation establishing nationality" and to declare under penalty of perjury that he or she had not received compensation related to a Holocaust deportation claim from any French programs or any other State's compensation program. *Id.* The Agreement directs that the United States "shall rely" on the sworn statements included in the Form to determine whether the claimant falls within one of the four categories not covered by the Agreement. Agreement § 6(2)(c).

B. Plaintiff's Complaint

In 2016, Plaintiff Solange Faktor filed a claim with the U.S. Department of State to receive compensation from the Fund. Compl. ¶ 1. Plaintiff's mother was deported to the Auschwitz concentration camp on July 31, 1943 and was killed. *Id.* ¶ 12. Plaintiff's father survived and passed away in France in 1980. *Id.* Plaintiff filed the claim on behalf of her father's estate. *Id.* ¶ 13. Although Plaintiff notes that her father died in France, she indicates that he was

"stateless" when he died.[3] *Id.* ¶¶ 12, 14. Plaintiff does not have a death certificate for her father. *Id.* ¶¶ 16, 19.

On April 11, 2018, Plaintiff received notice that the State Department had rejected her claim. *Id.* ¶ 13. Plaintiff alleges that the State Department rejected her claim because she had not submitted documentary evidence that her father was "stateless" and because she did not submit a copy of his death certificate. *Id.* ¶¶ 14, 16. Plaintiff filed with her original claim form a sworn affidavit "including the information that her father was stateless, and the date of his death, was true and correct." *Id.* ¶ 15. She later submitted a second affidavit, "again swearing that her father was stateless, that he passed away in 1980 and that she did not have a copy of his death certificate." *Id.* ¶ 16. Plaintiff contends that her affidavits were "in the form specifically required in accordance with the terms of the Agreement," and should have been sufficient to entitle her to compensation under the Agreement. *Id.* ¶¶ 4, 5, 15, 24. She also notes that her counsel provided a letter to the State Department "regarding the difficulty in trying to prove statelessness." *Id.* ¶ 20. According to Plaintiff, the State Department's rejection of her claim—based on its rejection of her "sworn affidavit evidence"—"violates" the Agreement and constitutes a "wrongful act" actionable under the FTCA. *Id.* ¶¶ 6, 23, 24. Plaintiff seeks declaratory judgment and money damages of $93,141.60, the amount she

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[3] Plaintiff does not indicate where her father was born, or with what country he was associated before he became stateless.

claims she should have received from the Fund had her claim been approved. *See id.* at 6.

The United States moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction arguing that Plaintiff has failed to establish that the United States waived sovereign immunity for her claim under the FTCA. Plaintiff opposed Defendant's motion, which is now ripe for the Court's consideration.

II. Legal Standard

A court must dismiss a case when it lacks subject matter jurisdiction pursuant to Federal Rule of Civil procedure 12(b)(1). To determine whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta,* 333 F. 3d 193, 198 (D.C. Cir. 2003) (citations omitted); *see also Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) ("[T]he district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.").

In reviewing a motion to dismiss pursuant to Rule 12(b)(1), courts must accept as true all factual allegations in the complaint and construe the complaint liberally, granting the plaintiff the benefit of all inferences that can be drawn from the facts alleged. *See Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005) ("At the motion to dismiss stage, counseled complaints as well as *pro se* complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on

allegations of fact."); *Koutny v. Martin*, 530 F. Supp. 2d 84, 87 (D.D.C. 2007) ("[A] court accepts as true all of the factual allegations contained in the complaint . . . and may also consider undisputed facts evidenced in the record." (internal citations and quotation marks omitted)).

Despite the favorable inferences afforded to a plaintiff on a motion to dismiss, it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence. *Am. Farm Bureau v. Envtl. Prot. Agency*, 121 F. Supp. 2d 84, 90 (D.D.C. 2000). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), [a] plaintiff['s] factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (internal citations and quotation marks omitted). A court need not accept as true "a legal conclusion couched as a factual allegation" or an inference "unsupported by the facts set out in the complaint." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (internal citation and quotation marks omitted).

III. Discussion

The United States moves to dismiss Plaintiff's claim, arguing that Plaintiff has failed to demonstrate a private analog for her FTCA claim under District of Columbia law. Def.'s Mot. at 3. As such, Plaintiff has not demonstrated that the United States has waived its sovereign immunity with respect to her claim and

therefore the Court lacks jurisdiction. *Id.* The Court agrees that Plaintiff has failed to establish that a private analog for her claim exists under D.C. law and therefore has failed to demonstrate that her claim is covered by the FTCA's limited waiver of sovereign immunity. Accordingly, the Court shall grant Defendant's motion and shall dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.[4]

In general, "the federal government, its agencies, and federal officials when sued in their official capacities, are absolutely shielded from tort actions for damages unless sovereign immunity has been waived." *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1316 (D.D.C. 1985) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). "The FTCA operates as a limited waiver of sovereign immunity, rendering the United States amenable to suit for certain, but not all, tort claims." *Rashad v. D.C. Cent. Det. Facility*, 570 F. Supp. 2d 20, 23 (D.D.C. 2008) (citing *Richards v. United States*, 369 U.S. 1, 6 (1962)).

The FTCA does not create a cause of action against the United States. *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 508 (D.C. Cir. 2009). Rather, it "allows the United States to be liable if a private party would be held liable under

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[4] Although the Court has conducted an independent review of Plaintiff's claims and legal arguments in this matter, as well as the relevant legal authority, its analysis in this section tracks, in large part, the thorough reasoning articulated by Judge Ketanji Brown Jackson during the March 1, 2021 hearing on the [20] Order granting the United States' motion to dismiss in *Schneider et al. v. United States*, 20-cv-260-KBJ (D.D.C.).

similar circumstances in the relevant jurisdiction." *Id.* Accordingly, the Court "look[s] to the law of the local jurisdiction—in this case, the District of Columbia—to determine whether there is a local private party analog to [the plaintiff's] claims." *Id.*; *see also Whittaker v. Court Servs. & Offender Supervision Agency for D.C.*, 401 F. Supp. 3d 170, 183 (D.D.C. 2019) ("[T]he Court must determine whether or not a private person can be sued under District of Columbia law for claims similar to those which Plaintiff alleges against Defendants."). "Subject matter jurisdiction is lacking . . . when no local law could reasonably apply to the government action alleged in the complaint." *Loughlin v. United States*, 230 F. Supp. 2d 26, 44 (D.D.C. 2002). The party bringing suit against the United States "bears the burden of proving that the government has unequivocally waived its immunity" for the type of claim involved. *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003).

Plaintiff has not carried her burden to demonstrate a private analog for her claim against the United States under District of Columbia law.[5] Plaintiff has not cited—and the Court has not identified—any District of Columbia law imposing liability on a private individual for negligent adjudication of individual claims made pursuant to an international agreement between the United States and a foreign

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[5] Though not explicit in her Complaint, Plaintiff concedes in her Opposition that the "wrongful act" she claims under the FTCA is the State Department's "negligent" failure to consider her sworn affidavit. *See* Pl,'s Opp'n at 3. Plaintiff argues, therefore, that the private analog for her FTCA claim lies in District of Columbia negligence law.

nation. Plaintiff instead analogizes the role of the State Department in administering the Fund to that "of a private claims administrator," suggesting that "the Agreement itself bears a striking resemblance to the settlement of a class action[.]"Pl.'s Opp'n at 5-6. Even assuming that the State Department's function in administering the Fund is similar to that of a class action claims administrator, Plaintiff still must demonstrate that "negligent administration" of such funds would give rise to tort liability under D.C. law.[6]

To maintain a negligence claim under District of Columbia law, a plaintiff must establish "a duty of care, a deviation from that duty, and a causal relationship between that deviation and an injury sustained by the plaintiff." *Childs v. Purll*, 882 A.2d 227, 233 (D.C. 2005) (quoting *Youssef v. 3636 Corp.*, 777 A.2d 787, 792 (D.C. 2001)); *see also Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011) ("It is well-established that a claim alleging the tort of negligence must show: (1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach."). The Court finds that Plaintiff's allegations

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[6] Plaintiff concedes that there is no District of Columbia case in which a class action claims administrator has been held liable in tort for negligent mishandling of a settlement fund. *See* Pl.'s Surreply at 2 n.1 Plaintiff cites only one unpublished out-of-circuit federal decision in which the court denied a motion to dismiss the plaintiff's claim that a settlement administrator negligently supervised its employees. *See Oetting v. Heffler*, 2015 WL 9190629, at *1 (E.D. Pa. Dec. 17, 2015). But even that case, as Plaintiff acknowledges, contained no "specific discussion regarding the negligence claim." Pl.'s Surreply at 2 n.1.

fails to support any "duty" owed to her by the United States, or any "breach" of that duty.

Plaintiff has not identified any analogous duty of care that would give rise to liability under District of Columbia law. Plaintiff's Complaint appears to rely on the Agreement as the source of the United States' duty; she alleges that the "wrongful act" committed by the United States was its purported failure to rely on her sworn affidavits—which Plaintiff contends violated the Agreement. *See* Compl. ¶¶ 4-5. The problem with this theory is that the District of Columbia law precludes *tort* liability for the failure to comply with a contract: "the tort must exist in its own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship." *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1089 (D.C. 2008) (emphasis added). "The tort must stand as a tort even if the contractual relationship did not exist." *Id.*; *see also Himmelstein v. Comcast of the Dist.*, 908 F. Supp. 23 49, 44 (D.D.C. 2012) ("A negligence claim based solely on a breach of the duty to fulfill one's obligations under a contract . . . is duplicative and unsustainable."). Here, Plaintiff's claim appears to rest on obligations created by the Agreement—namely, that the United States "shall rely" on sworn affidavits to determine eligibility for a payment from the Fund. *See* Compl. ¶¶ 3, 4, 6, 17, 23. Accordingly, any "duty" imposed on the United States to consider a claimant's affidavit arises from the Agreement and not from a stand-alone tort duty. Absent such contractual obligation created by the Agreement, it is not clear that the United States would owe any tort duty of care to Plaintiff.

Nonetheless, Plaintiff argues that the "duty" owed to her by the State Department does not arise from the Agreement, but instead arises from "special relationship" between "a service provider and a third party." Pl.'s Surreply at 3. In support of this "special relationship theory," Plaintiff relies on the D.C. Court of Appeals' decision in *Aguilar v. RP MRP Wash. Harbor, LLC*, 98 A.3d 979 (D.C. 2014). In that case, the court adopted the "economic loss rule," which holds that "a plaintiff who suffers only pecuniary injury as a result of the conduct of another cannot recover those losses in tort." *Id.* (quoting *Apollo Grp., Inc. v. Avnet, Inc.*, 58 F.3d 477, 479 (9th Cir. 1995)) (internal quotation marks omitted). The court held that this rule "bars recovery of purely economic losses in negligence, subject only to one limited exception where a special relationship exists." *Id.* at 986 (emphasis added). Applying this rule, the Court in *Aguilar* concluded that there was no "special relationship" between the owners of a retail complex and the employees of the complex's stores, who lost income when the stores closed after a flood. *Id.* at 980-81. The plaintiff-employees sued the owner-defendants for negligence and argued that because the owner-defendants had "sole control" over the property's flood walls, they owed the employees a duty of care to ensure the safety of the retail complex by raising the flood walls when warned of an impending storm. *Id.* at 981. The Court of Appeals disagreed, concluding that the plaintiffs failed to demonstrate a "special relationship" because there was "no obligation on the part of [the owners] to care for [the employees'] economic well-being. *Id.* at 985. In contrast, the D.C. Court of Appeals in *Whitt v. Am. Prop. Constr., P.C.*, 157 A.3d 196 (D.C. 2017), applying the economic loss

rule articulated in *Aguilar*, concluded that a special relationship did exist between the plaintiff, a hair salon owner, and the defendants, companies undertaking construction activities which disrupted the plaintiff's business. *Id.* at 199-200, 204-05. Specifically, the court noted that a permit authorizing the construction activities "recognized the impact that [defendants'] actions would have on [plaintiff's] business when it required that the construction 'not block access'" to the plaintiff's business entrance. *Id.* at 205. The court reasoned that these permit requirements provided evidence that defendants "undertook obligations that would 'implicate' [plaintiff's] economic expectancies.'" *Id.* (citing *Aguilar*, 98 A.3d at 985). Considering these permit requirements and the "extensive [construction] activity over a prolonged period," the court concluded that the parties were in a "special relationship," meaning that defendant owed plaintiff a duty of care—the breach of which would subject the defendant to tort liability. *Id.* at 205-06.

Here, Plaintiff offers *no* support for her claim that she and the United States had a "special relationship" giving rise to a duty of care. Her argument rests merely on the conclusory assertion that "there is a 'special relationship' between Plaintiff and Defendant." Pl.'s Surreply at 3; *see also id.* at 4 ("As a claims administrator, the State Department owes a duty of care to the claimants with whom it has a special relationship, as defined in *Aguilar*."). But she provides no reasoning or facts supporting this contention. Nor does she provide any legal authority in which a District of Columbia court has found a "special relationship" based on a similar relationship between a purported claims administrator and claim-

ant. *Id.* The Court, therefore, finds that Plaintiff has not demonstrated that she falls within the "special relationship" exception to the District of Columbia's economic loss rule precluding recovery in tort for pecuniary loss. Absent sufficient support for a "special relationship" between the parties, Plaintiff cannot demonstrate that the United States owed her any duty of care. Because this argument fails, Plaintiff has failed to carry her burden to demonstrate a private analog to her "negligence" claim under District of Columbia law. *See Gilbert v. Miodovnik*, 990 A.2d 983, 988 (D.C. 2010) ("Negligence is a breach of duty; if there is no duty, there can be no breach, and hence no negligence." (quoting *N.O.L. v. District of Columbia*, 674 A.2d 498, 499 n.2 (D.C. 1996))).

Even assuming *arguendo* that the United States owed Plaintiff a duty of care as a "claims administrator," the Court is unpersuaded that the alleged conduct of the State Department amounts to a "breach" of any duty under District of Columbia law. Plaintiff alleges that the State Department's "wrongful" act was its failure to consider her sworn affidavits attesting to her father's statelessness and death. *See* Compl. ¶¶ 15, 17, 24. Plaintiff argues that "[s]tate employees performed their work negligently, wrongly, and capriciously" and that "[t]he[ir] wrongful conduct included ignoring or arbitrarily rejecting evidence." Pl.'s Opp'n at 3, 4 (emphases added). These allegations sound in the "arbitrary and capricious" standard of review applied to agency action under the Administrative Procedure Act rather than a failure to exercise due care under common law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43

(explaining that an agency action would be "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency"). Accordingly, the Court finds that Plaintiff has failed to establish a "breach" of any duty supporting her theory of negligence.

Because Plaintiff has not demonstrated a private analog for her "negligence" claim against the United States, she has failed to carry her burden of proving that the FTCA's limited waiver of sovereign immunity applies to her claim.[7] *See Tri-State Hosp.*, 341 F.3d at 575. The Court shall, therefore, dismiss her FTCA claim for lack of subject matter jurisdiction. Plaintiff has indicated her intention to file an amended complaint asserting an APA claim. *See* Pl.'s Surreply at 4 n.2. If Plaintiff seeks to amend her complaint, she must file a motion in compliance with Local Civil Rules 7(i) and 15.1 by no later than March 26, 2021. If Plaintiff does not file a motion for leave to amend her complaint by that date, this case shall be dismissed with prejudice.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the United States' Motion to Dismiss for lack of

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[7] The United States also argues that even if Plaintiff's claim is actionable under the FTCA, it would fall within the "discretionary function" and/or "foreign country exceptions" to the FTCA. *See* Def.'s Mot. at 7-9. Because the Court finds that Plaintiff has failed to demonstrate that her claim is actionable under the FTCA, it does not reach the question of whether either of these exceptions applies.

subject matter jurisdiction and DISMISSES without prejudice Plaintiff's Complaint. Plaintiff may file a motion for leave to amend the complaint by March 26, 2021. If she does not do so, this case shall be dismissed with prejudice. An appropriate Order accompanies this Memorandum Opinion.

/s/ Colleen Kollar-Kotelly
United States District Judge

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND FRANCE, T.I.A.S. NO. 15-1101, CLAIMS AND DISPUTE RESOLUTION (DECEMBER 8, 2014)

CLAIMS AND DISPUTE RESOLUTION

Agreement Between the UNITED STATES OF AMERICA and FRANCE Signed at Washington December 8, 2014 *with* Annex *and* Exchange of Rectifying Notes

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

> " . . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

FRANCE

CLAIMS AND DISPUTE RESOLUTION

Agreement signed at Washington

December 8, 2014;

Entered into force November 1, 2015.

With annex and exchange of rectifying notes.

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

The Government of the United States of America,

And

The Government of the French Republic,

Hereinafter referred to jointly as "the Parties,"

Wishing to further develop the relations between their two countries in a spirit of friendship and cooperation and to resolve certain difficulties from the past,

Recognizing and condemning the horrors of the Holocaust, including the tragic deportation of Jewish individuals from France during the Second World War,

Noting that since 1946 the Government of the French Republic has implemented extensive measures to restore the property of and to provide compensation for victims of anti-Semitic persecution carried out during the Second World War by the German Occupation authorities or the Vichy Government, including a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans,

Noting that the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs,

Recalling that on July 16, 1995 the President of the French Republic solemnly recognized the State's responsibility in the process of deportation of those victims and an imprescriptible debt towards them,

Recognizing that some Holocaust victims deported from France, their surviving spouses and their assigns, were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic in this area,

Having held discussions in a spirit of friendship and cooperation with the shared aim of resolving through dialogue issues relating to the non-coverage of such persons,

Resolved by common consent and by way of an amicable, extra-judicial and non-contentious manner to address the issue of compensation for such persons,

Believing that it is in the interest of both Parties to guarantee the foreign sovereign immunity of France for Holocaust deportation claims and to provide through this Agreement a mechanism for providing compensation for any and all claims brought by such persons,

Recognizing that France, having agreed to provide fair and equitable compensation to such persons under this Agreement, should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere,

Noting that this Agreement constitutes the exclusive and final means for addressing those claims between the United States of America and France,

Noting the Parties' intent that this Agreement should, to the greatest extent possible, secure for

France an enduring legal peace regarding any claims. or initiatives related to the deportation of Holocaust victims from France,

Having both consulted with various stakeholders, including representatives of Jewish communities, claimants, and members of legislative bodies regarding Holocaust deportation,

Believing that this Agreement will provide as expeditious as possible the mechanism for making fair and speedy payments to now elderly victims,

Have agreed as follows:

Article 1

For purposes of this Agreement, and except as otherwise indicated by use of a specific term:

1. Reference to "France" means the French Republic, the Government of the French Republic, any current or past agency or instrumentality of the French Government (whether owned in whole or in majority by the French Republic), their successor entities under any status, and any official, employee, or agent of the French Republic acting within the scope of his or her office, employment, or agency.
2. Reference to "French nationals" means natural persons who, at the time this Agreement enters into force, are nationals of the French Republic.
3. Reference to "Holocaust deportation" means the transportation of an individual from France towards a location outside of France

during the Second World War as part of the anti-Semitic persecution carried out by the German Occupation authorities or the Vichy Government.

4. Reference to "Holocaust deportation claim" means a claim for compensatory or other relief in connection with Holocaust deportation.

Article 2

The objectives of this Agreement are to:

1. Provide an exclusive mechanism for compensating persons who survived deportation from France, their surviving spouses, or their assigns, who were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic to address Holocaust deportation claims;

2. Create a binding international obligation on the part of the United States of America to recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims and, consistent with its constitutional structure, to undertake all actions necessary to ensure an enduring legal peace at the federal, state, and local levels of the Government of the United States of America.

Article 3

1. This Agreement shall not apply to Holocaust deportation claims of French nationals.

2. This Agreement shall not apply to Holocaust deportation claims of nationals of other countries who have received, or are eligible to receive, compensation under an international agreement concluded by the Government of the French Republic addressing Holocaust deportation.

3. This Agreement shall not apply to persons who have received, or are eligible to receive, compensation under the Government of the French Republic's compensation program instituting a reparation measure for orphans whose parents died in deportation (Decree no. 2000-657 of 13 July 2000).

4. This Agreement shall not apply to Holocaust deportation claims of persons who have received compensation under another State's program providing compensation specifically for Holocaust deportation or who have received compensation under any program of any institution providing compensation specifically for Holocaust deportation.

Article 4

1. Within thirty (30) days of the date this Agreement enters into force, the Government of the French Republic shall transfer to the Government of the United States of America a payment of U.S. $60 million, to be used by the Government of the United States of

America for making payments under this Agreement, as provided for in Article 6.

2. The Parties agree that this payment constitutes the final, comprehensive, and exclusive manner for addressing, between the United States of America and France, all Holocaust deportation claims not covered by existing compensation programs, which have been or may be asserted against France in the United States of America or in France.

3. The Parties further agree that any payment to an individual under this Agreement shall constitute the final, comprehensive, and exclusive manner for addressing all Holocaust deportation claims by that individual not covered by existing compensation programs, which have been or may be asserted against France in any forum.

4. In accordance with the applicable domestic procedures of the United States, the Government of the United States of America will deposit amounts received from the Government of the French Republic in an interest-bearing account in the United States Treasury until distribution, pursuant to a determination by the Secretary of State of the United States of America or his designee.

Article 5

Upon payment of the sum referred to in Article 4 of this Agreement, the Government of the United States of America:

1. By this Agreement, confirms its recognition in connection with any Holocaust deportation claims of:

   (i) the sovereign immunity of France and the property of France; and

   (ii) the diplomatic, consular, or official immunity of French officials, employees, and agents and the property of each,

   as such sovereign, diplomatic, consular, and official immunities are normally recognized within the United States legal system for other foreign states, their agencies, instrumentalities, officials, employees, and agents, and the property of each.

2. Shall 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.

3. Shall, in a timely manner, and consistent with its constitutional structure, undertake all actions necessary to achieve the objectives of this Agreement, which include an enduring legal peace, at the federal, state, and local levels of government in the United States of America and shall avoid any action that:

   a. Contradicts the terms of the Agreement, and in particular challenges the sovereign immunity of France concerning any Holocaust deportation claim; or

b. Stands as an obstacle to the accomplishment and execution of the Agreement.

4. Shall require, before making any distribution payment to an eligible recipient under this Agreement, that the recipient execute a writing following the form of the Annex attached to this Agreement, including (i) a waiver of all of the recipient's rights to assert claims for compensatory or other relief in any forum against France concerning Holocaust deportation or pension programs related thereto; (ii) a declaration that the recipient has not received, and will not claim, any payment under French programs or an international agreement concluded by the Government of the French Republic relating to Holocaust deportation; and (iii) a declaration that the recipient has not received any payment under any other State's compensation program or under the compensation program of any foreign institution relating specifically to Holocaust deportation.

Article 6

1. The Government of the United States of America shall distribute the sum referred to in Article 4(1) of this Agreement according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible.

2. Notwithstanding the preceding paragraph:

a. In developing criteria for distributing the sum referred to in Article 4(1), the

United States shall consider the objectives of this Agreement set out in Article 2.

b. Any Holocaust deportation claim of a person within the scope of Articles 3(1), 3(2), 3(3), or 3(4) of this Agreement is not eligible for compensation under this Agreement, and the United States of America, upon determining that a claim comes within the scope of Articles 3(1), 3(2), 3(3), or 3(4), shall declare inadmissible and reject any such claim.

c. In determining whether a claim comes within the scope of Article 3(1), for administration of the distribution, the United States of America shall rely on the sworn statement of nationality appearing in the opening paragraph of the writing appearing as the Annex to this Agreement. In determining whether a claim comes within the scope of Article 3(2), 3(3), or 3(4), for administration of the distribution, the United States shall rely on the sworn representations numbered 5 and 6 in the writing appearing as the Annex to this Agreement, as well as on any relevant information obtained under Article 6(6) of this Agreement.

3. The Government of the United States of America or an entity designated by the Government of the United States of America shall have exclusive competence for distribution of the sum referred to in Article 4(1) of this Agreement, and the Government of

the French Republic shall have no rights related to such distribution.

4. The Government of the United States of America shall take reasonable steps to provide sufficient notice about the distribution of funds under this Agreement to persons who may qualify under the criteria determined by the Government of the United States of America pursuant to Article 6(1) of this Agreement.

5. In accordance with applicable domestic procedures of the United States of America, the Government of the United States of America shall provide an appropriate period of time for persons to submit a claim for compensation under this Agreement.

6. Subject to their respective applicable laws, the Parties shall exchange information helpful to implementation of this Agreement, including information required to ensure that no claimant receives an inadmissible payment pursuant to Article 6(2)(b) of this Agreement.

7. At the request of the Government of the French Republic, the Government of the United States of America shall each year provide a report on the implementation of this Agreement which shall include, at a minimum, statistical data related to payments and categories of beneficiaries. This obligation shall expire one year following the date on which the United States completes the distribution of the sum referred to in Article

4(1) of this Agreement as provided for in Article 6(1) of this Agreement.

Article 7

The Annex attached hereto forms an integral part of this Agreement.

Article 8

Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties.

Article 9

Each Party shall notify the other of completion of the national procedures required in order for this Agreement to enter into force, which shall occur on the first day of the second month following the day on which the later notification is received. The Parties recognize that, upon entry into force, this Agreement imposes binding international obligations.

Done at Washington, D.C., this 8th day of December, 2014, in duplicate, in the English and French languages, both texts being equally authentic.

/s/ Stuart E. Eizenstat
FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

/s/ {Illegible}
FOR THE GOVERNMENT OF
THE FRENCH REPUBLIC:

ANNEX

to the 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

Form of Written Undertaking That Any Recipient of Compensation Must Execute Before Receiving Payment under this Agreement

FORM

I, _____ a national of __[country]_____ (a copy of government documentation establishing nationality must be attached to the present written undertaking), hereby agree to receive an amount equal to _____ in full satisfaction and final settlement of any claim coming within the terms of the Agreement between the Government of the French Republic and the Government of the United States of America on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs ("the Agreement"), signed in [city] _____ on ___[date/month/year]___. ***Terms used in this written undertaking shall have the meaning prescribed in the Agreement.***

Upon receipt of the amount noted:

(1) I release and forever discharge France and any French national (including natural and juridical persons) from any liability of any kind for all claims relating to Holocaust deportation.

(2) I forever relinquish all claims, demands, rights of action, suits, and judgments, that I have ever had or will have, or which my heirs, executors, administrators, or assigns ever had or ever may have, relating to Holocaust deportation.

(3) I release and forever discharge the Government of the United States of America; its agencies or instrumentalities; and officials, employees, and agents of the Government of the United States of America or the United States' agencies and instrumentalities from any liability of any kind relating to Holocaust deportation, United States actions and policies affecting those claims, any associated litigation, and the United States' administration of those claims.

(4) I forever relinquish all claims, demands, rights of action, suits, and judgments, that I have ever had or will have, or which my heirs, executors, administrators, or assigns ever had or ever may have, relating to United States actions and policies affecting claims relating to Holocaust deportation, any associated litigation, and the United States' administration of those claims.

(5) I declare under penalty of perjury that I have not received, and will not at any time claim, any compensation under French programs relating to Holocaust deportation or under any international agreements concluded by the Government of the French Republic relating to Holocaust deportation.

(6) I declare under penalty of perjury that I have not received any compensation under any other State's compensation program relating specifically to Holocaust deportation or under the compensation

programs of any foreign institution relating specifically to Holocaust deportation.

_____
(signature)

Subscribed and sworn to before me the ___ day of _____, 20__.

_____
Notary Public
(seal or stamp must be affixed)

**STATE DEPARTMENT LETTER,
RE: DENIAL OF BYWALSKI COMPENSATION
(APRIL 11, 2018)**

UNITED STATES DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
SUITE 203, SOUTH BUILDING
2430 E STREET, NW
WASHINGTON, DC 20037-2800

Harriet Tamen, Esq.
Law Offices of Harriet Tamen, Esq.
212 East 39th Street
New York, NY 10016

Re: Holocaust Deportation Claim of Simon Bywalski

Dear Ms. Tamen:

The purpose of this letter is to inform you that the Holocaust Deportation Claims you filed with this office on May 26, 2016 for Simon Bywalski has been reviewed pursuant to the U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs (the "Agreement"). We regret to inform you that we are unable to compensate Mr. Bywalski in relation to this claim.

Articles 3(1) and 3(2) of the Agreement provide that the Agreement does not apply to nationals of certain countries, including Poland. The claims form and documentation you submitted allege that Laja Fibich, the person on whose behalf Mr. Bywalski has filed a claim, was stateless. However, your office has not provided any evidence of Ms. Fibich's stateless-

ness, and this office has been unable to locate any such evidence. Thus, the Holocaust Deportation Claims Program is unable to provide compensation for this claim.

The Department of State deeply regrets the suffering Mr. Bywalski and his loved ones endured as result of the Holocaust. Although the Department is unable to compensate Mr. Bywalski as part of the Holocaust Deportation Claims Program, we encourage him to explore other possible sources of compensation. The website of the Memorial de la Shoah, http://holocaust-compensation-france.memorialdelashoah.org/en/index_engl.html, contains information regarding other types of compensation available for Holocaust victims, including compensation for persons of French and certain other nationalities who were deported from or interned in France and persons of any nationality whose parent died while he or she was interned in France or during deportation. The Conference on Jewish Material Claims Against Germany website, http://www.claimscon.org/what-to-do/compensation/, provides details regarding compensation from Germany and Austria. We hope that these resources may be useful to Mr. Bywalski.

Sincerely,

/s/ Lisa J. Grosh
Assistant Legal Adviser
Office of International Claims
and Investment Disputes

STATE DEPARTMENT LETTER, RE: DENIAL OF GUTREJMAN COMPENSATION (APRIL 3, 2018)

UNITED STATES DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
SUITE 203, SOUTH BUILDING
2430 E STREET, NW
WASHINGTON, DC 20037-2800

Harriet Tamen, Esq.
Law Offices of Harriet Tamen, Esq.
212 East 39th Street
New York, NY 10016

Re: Holocaust Deportation Claim of Albert Gutrejman

Dear Ms. Tamen:

The purpose of this letter is to inform you that the Holocaust Deportation Claim you filed with this office on May 4, 2016 for Albert Gutrejman has been reviewed pursuant to the U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs (the "Agreement"). We regret to inform you that we are unable to compensate Mr. Gutrejman in relation to this claim.

Articles 3(1) and 3(2) of the Agreement provide that the Agreement does not apply to nationals of certain countries. The claims form and documentation you submitted allege that Henri Wasserman, the person on whose behalf Mr. Gutrejman has filed a claim, was Romanian. However, you have not provided

any evidence of Mr. Wasserman's Romanian nationality, and this office has been unable to locate any such evidence.

Further, Article 2(1) of the Agreement states that one of the Agreement's objectives is to provide compensation for certain persons who survived deportation from France, their surviving spouses, or their assigns. This claim was filed on behalf of the estate of Mr. Wasserman as the surviving spouse of Estera Gutrejman. However, you have not provided any evidence of Mr. Wasserman's marriage to Ms. Gutrejman, and this office has been unable to locate any such evidence.

Finally, you have not provided sufficient evidence that Mr. Gutrejman is the authorized estate representative of Mr. Wasserman's estate.

The Department of State deeply regrets the suffering Mr. Gutrejman and his loved ones endured as a result of the Holocaust. Although the Department is unable to compensate Mr. Gutrejman as part of the Holocaust Deportation Claims Program, we encourage him to explore other possible sources of compensation. The website of the Memorial de la Shoah, http://holocaust-compensation-france.memorialdelashoah.org/en/index_engl.html, contains information regarding other types of compensation available for Holocaust victims, including compensation for persons of French and certain other nationalities who were deported from or interned in France and persons of any nationality whose parent died while he or she was interned in France or during deportation. The Conference on Jewish Material Claims Against Germany website, http://www.claimscon.org/what-to-do/compensation/, provides details regarding compensation from Germany

and Austria. We hope that these resources may be useful to Mr. Gutrejman.

Sincerely,

/s/ Lisa J. Grosh
Assistant Legal Adviser
Office of International Claims
and Investment Disputes

**STATE DEPARTMENT LETTER,
RE: DENIAL OF SCHEIBER COMPENSATION
(APRIL 3, 2018)**

UNITED STATES DEPARTMENT OF STATE
OFFICE OF THE LEGAL ADVISER
SUITE 203, SOUTH BUILDING
2430 E STREET, NW
WASHINGTON, DC 20037-2800

Harriet Tamen, Esq.
Law Offices of Harriet Tamen, Esq.
212 East 39th Street
New York, NY 10016

Re: Holocaust Deportation Claim of Jenny Schieber

Dear Ms. Tamen:

The purpose of this letter is to inform you that the Holocaust Deportation Claim you filed with this office on May 31, 2016 for Jenny Schieber has been reviewed pursuant to the U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs (the "Agreement"). We regret to inform you that we are unable to compensate Ms. Schieber in relation to this claim.

Articles 3(1) and 3(2) of the Agreement provide that the Agreement does not apply to nationals of certain countries, including Belgium. The claims form and documentation you submitted allege that Leizer Schieber, the person on whose behalf Ms. Schiber has filed a claim, was stateless. However, your office has not provided any evidence of Mr. Schieber's stateless-

ness, and this office has been unable to locate any such evidence.

Further, you have not provided any evidence of Mr. Schieber's date of death, and this office has been unable to locate any such evidence. As the Holocaust Deportation Claims Program compensates the estates of surviving spouses whose deportee spouse died prior to 1948 based on the number of years that the spouse lived past 1948, we are unable to compensate claims where the claimant cannot provide evidence of the date of death of the surviving spouse.

[. . .]