No. 15-15636

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff - Appellant,

v.

THE UNITED STATES OF AMERICA; PRESIDENT BARACK OBAMA, THE PRESIDENT OF THE UNITED STATES OF AMERICA; THE DEPARTMENT OF DEFENSE; SECRETARY ASHTON CARTER, THE SECRETARY OF DEFENSE; THE DEPARTMENT OF ENERGY; SECRETARY ERNEST MONIZ, THE SECRETARY OF ENERGY; AND THE NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants - Appellees.

On Appeal from the United States District Court for the
Northern District of California: No. C 14-01885 JSW
The Honorable Jeffrey S. White

BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

This case arises under The Treaty on the Non-Proliferation of Nuclear Weapons, dated July 1, 1968 (hereinafter the "NPT" or "Treaty"). 729 U.N.T.S. 161. Addendum 10. The Marshall Islands, an NPT party, alleges that the United States Executive is violating the most important provision of the Treaty.[1] The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *See also* Excerpts of Record ("ER") 53 (¶¶ 22-24). The district court granted the Executive's motion to dismiss and entered judgment for the Executive on February 3, 2015. ER 4-13. The Marshall Islands timely filed a Notice of Appeal on April 2, 2015. ER 20-21; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR REVIEW

Political Question

1. **Textual Commitment:** The Constitution in Article II, Section 2 commits to the Executive the power to make treaties, and in Article III, Section 2 extends the judicial power to *all cases* arising under such treaties. Addendum 5, 7. The Executive stipulates that NPT Article VI is a legal obligation. ER 45 (lines 8-9). Does the Executive power *to make* treaties override the judicial mandate to

[1] The Marshall Islands refers to all defendants collectively as the "Executive."

determine cases arising under such treaties, so as to deprive the Court of jurisdiction in this case arising under the NPT?

2. **Judicially Discoverable and Manageable Standards:** NPT Article VI obligates the Executive to negotiate in "good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament." Addendum 13. Courts regularly apply the legal standard of good faith to determine whether parties, including governments, have negotiated in good faith. Is there even one judicially manageable standard to determine whether the Executive has breached NPT Article VI?

Standing

3. **Injury-in-Fact:** NPT history confirms that the Article VI obligation exists to lessen the grave risks caused by nuclear weapons proliferation. The Marshall Islands alleges that the Executive has breached Article VI by refusing to participate in the required negotiations and engaging in vertical proliferation. ER 67-70 (¶¶ 78, 80, 82, 85, 87), 61 (¶60), 79-81 (¶¶ 12, 20, 25), 83 (¶32).

   a. Is denial of the Marshall Islands' entitlement to the Executive's participation in disarmament negotiations a sufficient injury-in-fact for Article III standing?

   b. Is a measurable increase in current risk from nuclear weapons vertical proliferation a sufficient injury-in-fact for Article III standing?

4. **Redressability:** The United States owns roughly 50% of all deployed nuclear weapons worldwide and is the only country to have used nuclear weapons in warfare against civilians. ER 55 (¶33), 42, 41, 11 (accepting ER 41). Its failure to meet its Article VI obligations creates a hurdle to negotiations.

   a. Would compelling the Executive to participate in NPT Article VI negotiations redress the first injury the Marshall Islands pleaded, which is the denial of its right to Executive participation in such negotiations?

   b. Alternatively, would compelling the Executive to participate in NPT Article VI negotiations provide a sufficient incremental step to redress the second injury the Marshall Islands pleaded, which is the grave, real, and increased risk from vertical nuclear proliferation?

   c. Do absent parties preclude incremental relief to the Marshall Islands, where the Executive has never named an essential, absent party and the Marshall Islands disputes that there are absent, essential parties for the claims it pleaded?

   d. If the NPT is valid, does a court possess the authority to order Executive compliance with Article VI?

Declaratory Relief

5. Separate from injunctive relief, does a court have jurisdiction to interpret the NPT and determine whether the Executive has breached it?

III. STATEMENT OF THE CASE

Beginning in the 1960s, negotiations commenced that culminated in the NPT. ER 56 (¶36). The Treaty opened for signatures in 1968 and entered into force in 1970. ER 56 (¶37). President Johnson signed the Treaty and the Senate, following debate, consented to its ratification; President Nixon then ratified it. *Id.* The United States is one of five "nuclear-weapon State[s]" defined in the NPT, along with Russia, the United Kingdom ("U.K."), France, and China. ER 56 (¶36). Of the five, only the United States, the U.K., and Russia were parties to the NPT in 1970; France and China joined in 1992. The Marshall Islands acceded to the Treaty in 1995, and like the remainder of the Treaty signatories, is a "non-nuclear weapon" state Treaty party. ER 50 (¶13).

Underpinning the NPT is the so-called "grand bargain": the non-nuclear weapon states parties agree not to acquire nuclear weapons and the nuclear-weapon states parties agree to negotiate their elimination. ER 56 (¶38). Article VI of the Treaty represents the linchpin of that "grand bargain" and it provides:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Addendum 13. In addition, the NPT Preamble confirms that the NPT obligations are to facilitate:

> the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.

Addendum 11.

In acceding to the NPT, the Marshall Islands thus bargained for the Executive's duty to negotiate for the elimination of nuclear weapons. ER 56 (¶38), 64 (¶70). And the Marshall Islands, for its part, has complied with its NPT obligations. ER 71 (¶92).

The Executive admits that it is obligated under NPT Article VI, and makes no claim that the NPT has been abrogated. ER 45 (lines 8-9). In 2010, moreover, the Executive recommitted unequivocally to comply with Article VI. ER 59 (¶52). In short, NPT Article VI indisputably remains the "law of the land" as well as an international obligation of the United States. Furthermore, Article VI, by its express terms, is not discretionary; the United States *must* engage in good-faith negotiations. Addendum 13. The drafting history of the NPT and the legislative history regarding United States ratification both confirm the mandatory legal nature of Article VI. All international interpretive authorities also confirm this.

The United States is not complying with Article VI, however. The Executive is not engaging in good-faith negotiations, as required. ER 68 (¶80), 70 (¶87), 61 (¶60), 81 (¶25), 83 (¶32). Instead, in 2013 the Executive refused to

attend multilateral meetings to develop proposals for multilateral nuclear disarmament negotiations. ER 67 (¶78). Of 182 voting countries, the United States was one of four that voted against even commencing those meetings, and it declared, before the meetings even started, that it would not support any outcome of the meetings. *Id*. The United States also rejected proposals for a Nuclear Weapons Convention, to ban nuclear weapons in ways similar to other weapons of mass destruction, such as chemical and biological weapons. ER 65-66 (¶73).

The Executive has stated that compliance with NPT Article VI is now conditioned on improved nonproliferation results by nations that are not NPT parties. ER 69 (¶84). United States officials also stated in 2013 that nuclear disarmament is "aspirational" and "not something that could happen in today's world." ER 68-69 (¶82). In addition, as the holder of roughly 50% of all deployed nuclear warheads worldwide, ER 42, 41, 11(accepting ER 41), the Executive in 2013 initiated new nuclear weapons vertical proliferation plans. ER 55 (¶30), 61 (¶60), 80 (¶20).[2] The Executive's breach of NPT Article VI causes increased nuclear weapons proliferation. ER 63 (¶¶ 67, 69), 71 (¶88). The increased risks to

[2] Executive nuclear weapons vertical proliferation occurs in three labs—one in Livermore, California. ER 54-55. The Marshall Islands named as defendants the agencies responsible for the Executive's vertical proliferation at Livermore Lab. *Id.*, ER 52. Other than federal court, no other legal venue exists for resolution of this dispute. ER 55.

the Marshall Islands associated with that proliferation are grave, real, and measurable. ER 71 (¶¶ 88-89, 91-92), 115 Cong. Rec. 6198, 6204 (1969).

The Marshall Islands, in particular, has suffered the grim legacy of the United States nuclear weapons program and has acutely suffered the dire consequences of nuclear weapons. ER 50 (¶13), 56 (¶35). Prior to the Marshall Islands' sovereignty, the United States detonated *sixty-seven* nuclear weapons in the Marshall Islands. *Id*. As the Marshall Islands has suffered horrific and multi-generational consequences from nuclear proliferation, the questions presented here are not merely academic.

The Marshall Islands seeks (i) judicial interpretation of NPT Article VI; (ii) a determination of whether the Executive's conduct violates it; and (iii) an order requiring Executive compliance with it, provided the Executive does not abrogate the NPT. ER 72-76. The Marshall Islands supported its allegations with the expert Declaration of Burns H. Weston. ER 61 (¶60), 77. The Executive submitted no declarations.

Following oral argument on January 16, 2015, the district court granted the Executive's motion to dismiss and entered judgment on February 3, 2015. ER 4-13. Despite the Constitution's express extension of judicial power to *all cases* arising under treaties, the district court found a textually demonstrable constitutional commitment to the Executive of the issues in this case. ER 9-11.

Although courts regularly judge the legal standard of "good-faith negotiations", the district court held that no judicially discoverable and manageable standards exist here. ER 11. Finally, although the Marshall Islands is an NPT party, the district court found it lacked standing to allege the Executive's breach of it. ER 8-9.

IV. SUMMARY OF ARGUMENT

This case concerns whether the Executive is above the law, and the law here is NPT Article VI. The dismissal should be reversed and the case remanded to require the Executive to answer the Complaint. In key areas, the district court misapplied the law, misconstrued the harm alleged and relief sought by the Marshall Islands, and inappropriately construed inferences in the Executive's favor.

As documented in Section VI.A herein, the NPT Article VI obligation to engage in good-faith negotiations for nuclear disarmament and to cease the nuclear arms race is a "bargained for," "inescapable," "binding," "unqualified," "unequivocal," "legal" "commitment" that compels the Executive to act, and which, upon ratification, "certainly" became the law of the land. Prior to consenting to the NPT, the Senate debated what the United States "might be compelled to do by the treaty and what [United States] options might be in the absence of the treaty."

Though this case is unusual, precedent confirms it "is emphatically the duty" of the federal courts to interpret the NPT, and, because it is a valid law, the Executive "must" be ordered to comply with it. The judicial duty to decide cases cannot be shirked simply because a claim involves "the conduct of this Nation's foreign relations." And the NPT, like any valid treaty, "must be obeyed or its obligation denied." To be clear: the NPT remains the law – a commitment already undertaken by the political branches – and the Marshall Islands seeks only an interpretation and enforcement of that law.

The district court dismissed the case on two grounds: the political question doctrine and standing. On political question grounds, the district court found that two of the factors from *Baker v. Carr*, 369 U.S. 186, 217 (1962), barred this case: first, a constitutional textual commitment of the matter to the Executive, and second, a lack of judicially discoverable and manageable standards to resolve the dispute. But the constitutional text relied upon by the district court grants the Executive the authority *to make* treaties; the NPT, however, is a treaty already made and properly ratified, that creates legal rights and obligations. Once a proper treaty exists, the Constitution expressly commits authority over cases arising under that treaty to the judiciary. As explained in Section VI.B.1, the Executive's authority to make a treaty does not transform legal compliance with that treaty into a non-legal value determination.

Neither does the second *Baker* factor bar this case. A case may not be held nonjusticiable absent *an exhaustive search* for applicable standards. The mandated exhaustive search reveals that this factor supports the justiciability of the Marshall Islands' claims. As explained in Section VI.B.2, courts routinely analyze whether parties have engaged in good-faith negotiations—which is the required procedure under NPT Article VI. For example, courts decide whether the federal government negotiated in good faith with a state; whether a state negotiated in good faith with an Indian Tribe; whether an employer negotiated in good faith with a union; and whether nations negotiated in good faith with each other. Good-faith standards are discoverable and manageable. Objectively, good-faith negotiations require a party to at least attend negotiations, make proposals to achieve the aim, and refrain from taking steps contrary to the aim. The Marshall Islands pleaded the Executive's breach of these objective requirements.

Finally, none of the other *Baker* factors turn this legal dispute into a political question. As summarized in Section VI.B.3, this case does not require an initial policy determination – indeed, that policy determination was made when the United States ratified the NPT. Further, as explained in Section VI.B.4, the Executive concedes that this case does not present any sensitive foreign policy issue, and it is therefore not barred by prudential concerns.

On standing, as an NPT party, the Marshall Islands properly pleaded two injuries, each of which constitutes a constitutionally sufficient injury: denial of its bargained-for right to Executive participation in negotiations, and a measurable increased risk of grave danger from increased vertical proliferation of nuclear weapons. The Marshall Islands supports these claimed harms with the expert declaration of Professor Weston, Senate history, NPT history, and by reference to opinions of noted experts. Section VI.C.1 explains why each injury satisfies constitutional standing requirements.

The district court held that even if the Marshall Islands properly pleaded injury, such injury could not be redressed. ER 8-9. As addressed in Section VI.C.2, however, the Marshall Islands' pleading satisfies redressability requirements for several reasons. *First,* requiring Executive compliance with NPT Article VI precisely redresses the Marshall Islands' first alleged injury—denial of its right to Executive participation in negotiations. Additionally, this injury is a procedural injury for which normal standards of "redressability and immediacy" need never be met. *Second,* even a small incremental step toward reduction of the second harm—the grave risks from nuclear weapons vertical proliferation—satisfies redressability requirements.

The district court, however, erroneously presumed that unidentified absent parties preclude redress. ER 9, 11. But the actual harm alleged by the Marshall

Islands is based on Executive conduct and the Executive identified no absent necessary parties. In addition, the sole case that the district court cited to rule that it could not order specific performance is inapposite. Separately, while the district court focused on the injunction that the Marshall Islands seeks in Count III, even denial of injunctive relief would not eliminate jurisdiction over the declaratory relief sought in Counts I and II.

In sum, the political question doctrine does not bar this case because the Executive power to make treaties does not override the judiciary's obligation to decide legal disputes arising under existing treaties. The standard of good-faith negotiations, furthermore, is a discoverable and manageable legal standard, routinely judged by courts. And when the actual harm alleged and relief sought in this action are properly framed at this pleading stage, the Marshall Islands has standing.

V. STANDARD OF REVIEW

A dismissal based on the political question doctrine is reviewed *de novo*. *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005). A dismissal for lack of standing also is reviewed *de novo*. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008). For the Executive's challenge to jurisdiction, which is facial, the Court must construe the Complaint in the Marshall Islands' favor and must assume all well pleaded facts are true. *Leite v. Crane Co.*, 749 F.3d 1118,

1121 (9th Cir. 2014). The United States did not make a factual challenge to jurisdiction. Finally, for standing, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

VI. ARGUMENT

This Argument has six sections. Section A describes the NPT's history, confirming that NPT Article VI creates binding *legal* obligations. Section B demonstrates that the narrow political question doctrine does not bar this case. Section C confirms that the Marshall Islands properly pleaded standing. Independent of injunctive relief, Section D explains that the declaratory relief claims in Counts I and II are justiciable. Section E analyzes why the hypothetical treaty dispute postulated in the 1884 *Head Money* decision does not bar this case. Finally, Section F explains why venue is proper and this case is timely

A. Upon Ratification of the NPT, the United States Created and Assumed a Binding Legal Obligation Pursuant to Article VI.

The NPT reflects a grand bargain: the non-nuclear weapon states agreed not to acquire nuclear weapons and the states possessing nuclear weapons agreed to negotiate their elimination. ER 56 (¶38). The Executive negotiated the NPT and ratified it, following Senate consent, making it part of the supreme law of the land

in 1970. U.S. Const. art. VI, § 2; 115 Cong. Rec. at 6199 (noting in Senate debate that properly ratified, "[t]he treaty certainly becomes the law of the land."); ER 56 (¶37).

The NPT's legislative history reflects the Executive's intent to create an "*inescapable responsibility*" under Article VI. 115 Cong. Rec. at 6204 (emphasis added). The Senate Committee on Foreign Relations was "fully aware" that the NPT "commit[ed] all parties to pursue negotiations in good faith relating to a cessation of the arms race and to nuclear disarmament." S. Rep. No. 91-1, at 18 (1969); S. Rep. No. 90-2, at 7 (1968). The Senate debated what the United States "might be compelled to do by the treaty and what [the United States] options might be in the absence of the treaty," and Article VI is described as the "*potentially most important clause*" of the NPT because it "*commits*" the parties to negotiate nuclear disarmament. 115 Cong. Rec. at 6199, 6203-04 (emphasis added); ER 58 (¶45).

The international drafting history of the NPT is in accord.[3] The NPT's negotiation history reflects the parties' insistence that Article VI constitute a "legal obligation." *Id*. at ¶45 n.16, Edwin Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 Am.J.Int'l L. 711, 733 (1969) (analyzing Article VI drafting history). Furthermore, in periodic "Treaty Review Conferences," the NPT

[3] In construing a treaty, courts appropriately consider the negotiation and drafting history, and the postratification understanding of contracting parties. *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996).

contracting parties reaffirmed that the Article VI obligation represents an "unequivocal undertaking." ER 59 (¶49). And, in 2010, the Executive unequivocally renewed the NPT Article VI commitment to "accomplish the total elimination" of nuclear arsenals. ER 59 (¶52).

The International Court of Justice has confirmed that the language used in Article VI—the "undertaking" to pursue good-faith negotiations for disarmament—is mandatory:

> The ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties . . . . It is not merely hortatory or purposive. The undertaking is unqualified . . . .

See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia), Judgment, 2007 I.C.J. Reports 43, ¶ 162 (Feb. 26). In interpreting the NPT specifically, the ICJ held that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." ER 49-50 (¶9).

B. The Complaint Presents a Legal Question Regarding Legal Obligations, Not a Political Question.

The political question doctrine applies to the political branches' "policy choices" or "value determinations" that are *not* "legal in nature." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Whether the Executive is

violating a treaty is not a policy choice or value determination: it is a legal question. *See, e.g.*, *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979) (finding that whether the Executive violated a treaty with Canada was justiciable legal question, not a "foreign affairs prerogative"); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (finding that whether Executive's military tribunals breached the Geneva Conventions was justiciable legal question, not a foreign policy judgment).

NPT Article VI is part of the supreme law of the land, not the supreme policy of the land. U.S. Const. art. VI, § 2. Indeed, as applied to treaties, the political question doctrine has narrow confines, principally involving "the right of the executive to abrogate a treaty;" even then, the court "may determine whether or not an abrogation has been declared and may interpret the effect of an abrogation by the executive branch." *Decker*, 600 F.2d at 737 n.6.

The district court nevertheless held that two of the *Baker* factors barred this case as a political question. 369 U.S. at 217. The *Baker* factors are:

> [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.

Id. The district court held that the first two factors were present here: a textually demonstrable commitment of the issues to the Executive, and a lack of judicially discoverable and manageable standards to resolve this case.

This case is not barred by the narrow political question doctrine. As the Ninth Circuit emphasized, "[u]nless one of these [*Baker*] formulations is *inextricable* from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005) (internal quotation marks and citations omitted). Here, the Executive concedes that no "sensitive foreign policy issue" bars the claims. ER 32 (lines 8-17). This dispute, moreover, is constitutionally textually committed to the judiciary, not the Executive. And discoverable and manageable standards exist to resolve this case.

1. There Is a Textually Demonstrable Constitutional Commitment of This Case to the Judiciary.

a. The Executive's Authority To Make Treaties Does Not Override the Court's Power in Disputes Arising Under Existing Treaties.

As agreements between the United States and foreign nations, *all* properly ratified treaties obligate the Executive in matters of foreign relations, by definition. This differentiates treaties from other federal law generally. In its system of checks and balances, the Constitution addresses treaties in four places:

- The Executive has the power "to make Treaties," subject to Senate consent, pursuant to Article II, Section 2 (Addendum 5);
- The judicial power extends to "all cases" arising under such treaties, pursuant to Article III, Section 2 (Addendum 7);
- The rights and obligations under such treaties are part of the "supreme law of the land" pursuant to Article VI, clause 2 (Addendum 9); and
- The individual states cannot enter into treaties, as provided in Article I, Section 10.

Nowhere does the Constitution grant exclusive power to the Executive to interpret conclusively a treaty or determine whether the United States is in legal compliance with a treaty. Instead, where a treaty is constitutional (and there has been no claim otherwise here) that treaty "must be obeyed, or its obligation denied" and "no court [] can contest its obligation." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). In *Schooner Peggy*, the United States claimed a financial interest in a French vessel seized during hostilities between the United States and France. Interpreting and enforcing a treaty ratified subsequent to the seizure, the Supreme Court held that the United States' claim to the vessel violated the treaty, and ordered the restoration of the vessel to the French. In the words of Chief Justice Marshall, the Court was "as much bound as the [E]xecutive to take notice of [the] treaty." *Id.* at 103.

The Court echoed this axiom in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006), emphasizing that interpreting treaties "is emphatically the province and duty of the judicial department," and again in *Japan Whaling*, 478 U.S. at 230, emphasizing that a court cannot shirk its constitutional role simply because a claim involves "the conduct of this Nation's foreign relations." The *Japan Whaling* Court held that the political question doctrine did not bar an action seeking to compel the Secretary of Commerce to certify Japan as being in violation of treaty. Such certification would have required the President to sanction Japan in contravention of Executive policy. *Id*. Noting that "significant political overtones" were present in the case, the Court confirmed that courts have authority to construe treaties and held that the challenge to the Executive's conduct presented a justiciable legal question. *Id*.

The Supreme Court clarified the political question doctrine further in *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012). In *Zivotofsky*, the Executive Branch refused to comply with a United States statute requiring it to stamp a child's birth certificate with "Israel." The child's parents sued on his behalf, seeking specific performance—an injunction directing the Secretary of State to comply with the law. The United States argued both that the statute was unconstitutional and that the claim presented a nonjusticiable political question because enjoining the Executive to comply with the law would impinge on the

Executive's exclusive province in foreign policy. In an 8-1 decision, the Court disagreed, holding that if a law is valid, the Executive "must be ordered" to comply and the "political question doctrine is not implicated." *Id.* at 1428. The Court remanded the case for a determination of whether the law was constitutional. *Id.*

Paralleling *Zivotofsky*, the Marshall Islands here asks the Court to say what NPT Article VI requires, accept the parties' agreement that the NPT is valid, and order the Executive to comply with it. Thus, the "political question doctrine is not implicated." *See id.*

b. This Court's *Earth Island* Decision Should Not Be Extended in a Manner Inconsistent with Supreme Court Precedent.

Not citing the 2012 Supreme Court *Zivotofsky* opinion, the district court instead extended *Earth Island Institute v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993), to hold that the Marshall Islands' claims "relate to 'the foreign affairs function, which rests with[sic] the exclusive province of the Executive Branch under Article II, section 2 of the United States Constitution.'" ER 10.

This holding stretches the Executive's authority too far – indeed, it defies the express warning in *Baker* against "sweeping statements that imply all questions involving foreign relations are political ones." *Alperin v. Vatican Bank*, 410 F.3d 532, 544-45 (9th Cir. 2005) (citations omitted); *see also Baker*, 369 U.S. at 211. The Article II, Section 2 text of the Constitution provides that the Executive "shall

have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ." U.S. Const. art II, § 2, cl. 2; Addendum 5. Interpreting this power, the *Earth Island* court relied upon the seminal decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). *Curtiss-Wright*, in turn, made clear that the power of the Executive in matters of foreign policy, "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Curtiss-Wright*, 299 U.S. at 320. The applicable provision of the Constitution here extends the judicial power to *all* cases arising under the treaties that the Executive ratified, following Senate consent. U.S. Const., art. III, § 2.

As a separate matter, the alleged exclusive province of the Executive in foreign affairs—quoted in *Earth Island*, originating in *Curtiss-Wright*, and relied upon by the district court—was expressly rejected by the Supreme Court in the recent, final *Zivotofsky* opinion. *Zivotofsky v. Kerry*, — S. Ct. —, No. 13-628, 2015 WL 2473281 (June 8, 2015). While finding the underlying statute unconstitutional, the Court specifically limited *Curtiss-Wright* to its facts—a case concerning congressional delegation of additional authority to the President. *Id.* at *12-13; *id.* at *39-40 (Roberts, C.J., dissenting). And nothing else in *Earth Island* compels the conclusion that where the Executive has *already entered into a legally binding treaty*, its authority to make treaties turns whether it is in legal compliance

with that treaty into a value determination, and overrides the judicial power to resolve disputes under that treaty.

Earth Island is also distinguishable factually. The statute there purported to require the Executive to negotiate and enter into treaties concerning sea turtles. *Earth Island*, 6 F.3d at 650, 652-53. When the President signed that statute, he disputed the Congressional directive to negotiate treaties, claiming that because Congress lacked the authority to mandate treaty negotiation, the President would view the mandate as advisory only.[4] The Ninth Circuit agreed that in the statute Congress had impermissibly intruded on the Executive's power, and thereby violated the separation of powers between Congress and the Executive.[5] *Id*. As later confirmed by the Supreme Court in 2012, such a holding means that the law is invalid, but the political question doctrine is not implicated. *Zivotofsky*, 132 S. Ct. at 1428. Notably, the *Earth Island* Court nowhere mentioned the political question doctrine.

Unlike the statute in *Earth Island*, NPT Article VI reflects the Executive's own bargained-for, legal obligation to negotiate, not an over-stepping

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[4] Presidential Statement on Signing the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, 1989 Pub. Papers 1570 (Nov. 21, 1989).

[5] The *Earth Island* Court, 6 F.3d at 653, also relied on *Jensen v. National Marine Fisheries Service*, 512 F.2d 1189 (9th Cir. 1975). But as the Ninth Circuit later explained in *Decker*, 600 F.2d at 737-38, whether the Executive has violated a treaty is not a "foreign affairs prerogative" barred by *Jensen*.

Congressional mandate disputed by the Executive.[6] Unlike the *Earth Island* statute, the Executive here has never claimed the NPT is unconstitutional. Treaties, unlike other laws, enjoy a presumption of constitutionality. *Wang*, 416 F.3d at 997. By ratifying the NPT, the United States converted what arguably may have been a policy issue subject to the Executive's discretion—whether to negotiate nuclear disarmament in the absence of a treaty—into an inescapable, unequivocal, and *legal* obligation. Put differently, prior to the NPT Article VI obligation, the decision to negotiate nuclear disarmament may have been for the political branches to make, but once the political branches legally committed the United States to negotiate in good faith pursuant to NPT Article VI, the interpretation of that obligation, as well as the Executive's compliance with it, was committed to the judicial branch. The NPT Article VI obligation "must be obeyed, or its obligation denied," *Schooner Peggy*, 5 U.S. (1 Cranch) at 110.

[6] The *Earth Island* Court, 6 F.3d at 653, distinguished justiciability in *Japan Whaling* by finding that the law at issue in *Japan Whaling* "did not direct the President to take any particular action" so the relief sought would not have directed "the actual conduct of foreign affairs." This is not entirely accurate. The law in *Japan Whaling*, if applied according to the relief sought by the plaintiff, *required* the Executive to sanction Japan. *Japan Whaling*, 478 U.S. at 226 (explaining that the Packwood Amendment would "mandate[] the imposition of economic sanctions against" Japan).

2. At Least One Judicially Manageable Standard Exists to Determine Whether the Executive Is in Breach of NPT Article VI.

Citing the second *Baker* factor, the district court held that it "lacks judicially discoverable and manageable standards for resolving the dispute raised by Plaintiff in this matter." ER 11. But Supreme Court and Ninth Circuit authority "counsels against holding a case nonjusticiable under the second *Baker* test without first undertaking *an exhaustive search for applicable standards*." *Alperin*, 410 F.3d at 552 (emphasis added); *Vieth v. Jubelirer*, 541 U.S. 267, 310 (2004) (Kennedy, J., concurring). NPT Article VI expressly requires "negotiations in good faith" so this standard is "discoverable." It is also manageable. *See*, *e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990) ("Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' . . . is capable of making the more prosaic judgments . . . .").

Both domestically and internationally, manageable objective criteria exist for judging whether a party has engaged in negotiations in good faith. Domestically, courts routinely apply this standard, including in evaluating:

- Whether the federal government negotiated in good faith with a state, *e.g.*, *Alabama v. United States*, 84 F.3d 410 (11th Cir. 1996);

- Whether a state negotiated in good faith with an Indian Tribe, *e.g.*, *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010); and
- Whether an employer negotiated in good faith with a union, *e.g.*, *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 687 (9th Cir. 1943).

International tribunals also apply "good-faith negotiation" standards to determine whether nations have negotiated in good faith with each other. *See*, *e.g.*, North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 47, at 3, ¶ 85 (Feb. 20); Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (Arb. Trib. 1957).[7]

Moreover, that "good faith" is not defined in laws that require good-faith negotiations does not stop courts from applying the legal standard. *See*, *e.g.*, *In re Indian Gaming Related Cases*, 147 F. Supp. 2d 1011, 1020–21 (N.D. Cal. 2001) ("Like IGRA, the NLRA imposes a duty to bargain in good faith, but does not expressly define 'good faith.' . . . [T]he Court considers the NLRA case law for guidance in interpreting a standard undefined by the IGRA."), *aff'd*, *Coyote Valley II*, 331 F.3d 1094 (9th Cir. 2003). Indeed, the Senate has called the good faith standard in government negotiations a "legal barometer," not a value judgment.

[7] The Marshall Islands supported the existence of objective standards for judging NPT Article VI with Professor Weston's Declaration. ER 61 (¶60), 79 (¶11).

S.Rep. No. 100-446 at 14 (1988) (reporting on the *Indian Gaming Regulatory Act*). Because the court possesses "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions,'" *Alperin*, 410 F.3d at 552, the second *Baker* factor does not bar this case. (Internal citations omitted); *see also L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) (holding that novel claims do not render nonjusticiable those standards that "are well developed, although they have not often been applied to these facts.").

We now review criteria that allow a court to resolve the Marshall Islands' claims, and conclude by explaining the district court's misconstruction of those claims.

a. To Meet an Obligation To Negotiate in Good Faith, a Party Must Attend Negotiations.

An obligation to negotiate in good faith restricts the freedom of those that are obligated. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941). A refusal to attend negotiations, or a failure to negotiate, constitutes a breach of the duty to negotiate in good faith. *N. Arapaho v. Wyoming*, 389 F.3d 1308, 1313 (10th Cir. 2004) (citing *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032-33 (2d Cir. 1990) ("[W]hen a state wholly fails to negotiate . . . it obviously cannot meet its burden of proof to show that it negotiated in good faith.")).

b. To Meet an Obligation To Negotiate in Good Faith, a Party Must Not Adopt a "Take It or Leave It" Stance, and Should Make Proposals To Achieve the Aim.

In a dispute between "two sovereigns," the Eleventh Circuit confirmed that a state could sue for the federal government's breach of its obligation to negotiate in good faith, and the court would judge whether the federal government acted reasonably. *Ala. v. United States*, 84 F.3d at 419 (interpreting the *Outer Continental Shelf Lands Act*). Acting reasonably and in good faith precludes a "take it or leave it" negotiating position. *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 485 (1960). It requires that no party "insists upon its own position without contemplating any modification of it." North Sea Continental Shelf, 1969 I.C.J. 47, at 3, ¶ 85(a). And, a party's failure to submit counter-proposals may be evidence of an unreasonable position. *Montgomery Ward & Co.*, 133 F.2d at 687.

c. To Meet an Obligation To Negotiate in Good Faith, a Party Must Not Take Steps Contrary to Its Commitment.

Parties obligated to negotiate in good faith must act "in such a manner that [a treaty's] purpose can be realized" and without abnormal delay in negotiations. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7, ¶ 142 (Sept. 25); *Lake Lanoux Arbitration (Fr. v. Spain)*, 12 R.I.A.A. 281 (Arb. Trib 1957). Thus, a party's refusal to discuss any timeframe whatsoever to achieve the aim is inconsistent with good-faith negotiations. Similarly, conduct that frustrates the aim of the obligation is contrary to good faith. ER 61 (¶60), 79

(¶12). Put differently, parties must not "accomplish acts which would defeat the object and purpose" of the obligation. Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 Eur. J. Int'l L. 564, 567 (1993).[8]

d. The District Court Misconstrued the Claims.

The Marshall Islands alleges that the Executive is not negotiating to cease the nuclear arms race at an early date,[9] and for nuclear disarmament, as legally required, and is instead engaging in nuclear weapons vertical proliferation. ER 67-70 (¶¶ 78, 80, 82, 85, 87), 61 (¶60), 79-81 (¶¶ 12, 20, 25), 83 (¶32). A court can apply the forgoing standards, among others, to weigh the Marshall Islands' claims. In *Zivotofsky*, the lower courts mistakenly found a political question because they misunderstood the issue and assumed that resolution of the claims would require the Judiciary "to define U.S. policy" and "decide how best to implement" it. *Zivotofsky*, 132 S. Ct. at 1427. The district court did likewise here. It misconstrued the Marshall Islands' claims when it held that "[r]equiring the Court to delve into and then monitor United States policies and decisions with regard to its nuclear programs and arsenal is an untenable request far beyond the purview of the federal courts." ER 9. The Complaint nowhere asks the Court to delve into and

[8] *Available at* http://www.ejil.org/pdfs/4/1/1219.pdf

[9] In 1812 a court applied a phrase similar to "at an early date" when it resolved a dispute under the Treaty of Paris involving the phrase "as soon as possible." *United States v. Laverty*, 26 F. Cas. 875 (D. La. 1812) (No. 15569A).

then monitor United States policy. Instead, it asks the Court to judge conduct, and primarily the absence of conduct.

The Marshall Islands' claims, as pleaded, concern the absence of good-faith negotiations—*e.g.*, that they have never taken place, ER 70 (¶¶ 85, 87); the Executive refuses to attend them, ER 67 (¶78); and the Court should order the Executive *to convene them* in accordance with its NPT Article VI obligation ER 75 (¶C.1). Independent of any Executive *policy*, objective criteria exist to evaluate whether Executive conduct complies with *the law*. That is, while a policy may give rise to conduct, the policy cannot transmute the question of whether that conduct complies with the law into a policy decision. Conceivably, some future case might challenge United States policy behind the subjective quality of the Executive's negotiations, were they to meet the objective legal criteria for good faith. But that is not this case.

Because the NPT Article VI standard of "negotiations in good faith" is judicially discoverable and manageable, the second *Baker* factor does not bar this case.

3. This Case Does Not Require the Court To Make an Initial, Nonjudicial, and Discretionary Policy Decision.

Though not labeled by the district court as such, this third *Baker* factor may underlie the district court's ruling on judicially discoverable standards, discussed in the previous section. But whether the Executive is in compliance with the law is a

legal decision, not a discretionary policy decision, and judging Executive compliance with applicable law is something courts "regularly" do. *See EEOC v. Peabody*, 400 F.3d 774, 784 (9th Cir. 2005). By ratifying the NPT, the United States already made the initial policy decision to legally obligate the Executive to negotiate in good faith for nuclear disarmament. *See supra* Section VI.A.

The Marshall Islands is not asking the Court to decide whether the NPT Article VI obligation is a good or a bad thing. *See Wang*, 416 F.3d at 996 (holding that the third *Baker* factor does not apply because the court need not "make an explicit or implicit policy determination that [the treaty obligation] is a good or a bad thing"). Because no initial, nonjudicial, discretionary policy decision is required of the Court, the third *Baker* factor does not change this legal dispute into a political question. *Baker*, 369 U.S. at 217.

4. The "Prudential" Baker Factors Do Not Bar This Case.

At oral argument before the district court, the Executive conceded that it is not arguing that this case presents "sensitive" foreign policy issues. ER 32 (lines 11-17). Thus, any prudential concerns should not rise to a level to strip the federal court of its jurisdiction. However, for the sake of completeness, the Marshall Islands briefly now addresses the last three *Baker* factors, which are referred to as the "prudential considerations." *Wang*, 416 F.3d at 996. These factors carry less weight – and were absent in the Supreme Court's 2012 *Zivotofsky* analysis. *See*

also Alperin, 410 F.3d at 545-46 (finding descending importance of *Baker* factors is "borne out" by subsequent cases).

This case does not (a) require the Court to express lack of respect to the Executive; (b) present an unusual need for unquestioning adherence to a political decision already made; or (c) require dismissal due to potential Executive embarrassment. Initially, as legal academics have explained, courts interpreting a treaty in conflict with the Executive "are not manifesting a lack of respect for the executive. Rather, they are exercising their constitutional power to decide cases in accordance with . . . Treaties."[10] Such courts are fulfilling a responsibility that the Supreme Court has instructed should not be shirked. *See Japan Whaling*, 478 U.S. at 230.

Nor does this case require dismissal due to amorphous concern with Executive embarrassment. The Supreme Court instructed in *Japan Whaling*, 478 U.S. at 229, that "the danger of embarrassment from multifarious pronouncements" by the judiciary versus the Executive does not convert a legal issue into a political question. (Internal quotations and citations omitted); *see also Wang*, 416 F.3d at 996 (holding that concern over the nation's ability to speak with one voice was overstated). Indeed, if Executive embarrassment alone were enough to deprive a

[10] D. Sloss and D. Jinks, *Is the President Bound by the Geneva Conventions*? 90 Cornell L. Rev. 97, 184 (2004) (internal quotations omitted), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2976&context=clr.

federal court of jurisdiction, the Supreme Court would not have ruled against Secretary Clinton and President Bush when they respectively invoked the political question doctrine in *Zivotofsky*, 132 S. Ct. 1421, and *Boumediene v. Bush*, 553 U.S. 723, 741, 745 (2008).[11] Rather, where United States conduct already generates allegations of international law violations, as it has here with respect to NPT Article VI, a judicial decision could help resolve such allegations, either by substantiating United States legal compliance or requiring it. *See D. Sloss*, *supra* n.10 at 185; ER 69 (¶83), 71 (¶¶ 90-91); *see also Hopson v. Kreps*, 622 F.2d 1375, 1377 (9th Cir. 1980) (reversing political question ruling even where uncontroverted government affidavit provided that "nation's efforts to develop international conservation would be damaged by" an adverse ruling).

To be sure, the Marshall Islands is not asking the Court to peer inside the Executive's mind, determine subjective beliefs and then judge them. Rather, as with other cases determining sovereign compliance with an obligation to negotiate in good faith, the Marshall Islands seeks the Court's analysis of objective criteria.

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[11] In its first 50 years, "the Supreme Court decided nineteen cases in which the U.S. government was a party, . . . one party raised a [treaty] claim or defense . . . and the Court decided the merits of that claim or defense. The U.S. government won fewer than twenty percent of these cases." D. Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 NYU Ann. Surv. Am. L. 497, 498-99 (2007), *available at* http://www.law.nyu.edu/sites/default/files/ecm_pro_064612.pdf
.

See supra Section VI.B.2. By way of example, in *Rincon Band*, 602 F.3d at 1041, the Ninth Circuit found that California breached its obligation to negotiate in good faith with the Rincon Indians. Although the law at issue did "not provide express guidance about whether good faith is to be evaluated objectively or subjectively," the Ninth Circuit instructed that "good faith should be evaluated objectively based on the record of negotiations." *Id.*; see also L. Damrosch *et al.*, *International Law: Cases and Materials* 1195 (4th ed. 2001) ("In the context of Article VI of the NPT, good faith imposes a standard of objective reasonableness.").

A subjective belief that one is acting in good faith does not change the evaluation of whether that party negotiated in good faith as a matter of law. *See Rincon Band*, 602 F.3d at 1041; *see also* Restatement (Second) of Contracts §205 cmt. d (1981) (explaining subjective belief is not relevant to determining good-faith performance).[12] Because the Executive's subjective belief and discretion are not at issue, a judicial decision is even less likely to cause the level of Executive embarrassment that could, based on prudential concerns alone, strip a federal court of its constitutionally committed jurisdiction. *See Lexmark, Inc. v. Static Control*, 134 S. Ct. 1377, 1386-88 (2014) (emphasizing that prudential concerns alone should not limit a court's "virtually unflagging" obligation to decide cases).

[12] If the Executive were to raise disputed subjective standards under NPT Article VI, and a court chose to consider them, the Marshall Islands respectfully would address those at that time.

Finally, the Ninth Circuit recently found a political question, relying on only the three prudential *Baker* factors. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552 (9th Cir. 2014). That case is distinguishable. The *Saldana* plaintiff sought a ruling that would have been tantamount to holding that the United States knowingly participated in war crimes, including murder, by funding the Colombian National Army. *Id.* That is fundamentally different than the issues here, where (i) criminal and tortious conduct are not alleged, and (ii) a ruling in the Marshall Islands' favor will impact *prospective* NPT Article VI negotiations. Similar cases regarding alleged wrongful deaths and the Executive's exclusive discretion to fund foreign nations likewise do not bar this case. *E.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-83 (9th Cir. 2007) (finding decision to provide military aid to Israel was discretionary and bulldozer purchases and ensuing civilian deaths already occurred).

C. The Marshall Islands Has Standing.

A treaty "is essentially a contract between" sovereigns, *Washington v. Wash. Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), and "[t]reaties customarily confer rights upon the States that are parties to them." *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 858 (9th Cir. 2007); *see also United States v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (explaining that rights created by a treaty belong to the signatory nations). The Marshall Islands, an NPT party with rights thereunder,

has standing to assert an NPT breach. *Jamaica v. United States*, 770 F. Supp. 627, 630 n.6 (M.D. Fla. 1991) ("As a contracting party to the treaty, Jamaica has standing to assert its claim that the treaty has been violated."); *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) ("[S]ignatory nations generally have standing to enforce treaty provisions . . . .").

The Executive admits that NPT Article VI is a legal obligation, but argues that its breach has no legal remedy. ER 45 (lines 8-9). This position contradicts fundamental legal precepts, for "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). As we show below, the Marshall Islands has met the three standing requirements: (1) an injury-in-fact that is concrete and particularized, and actual or imminent; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is likely to be redressed by a favorable ruling. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008). The Marshall Islands pleaded two injuries, and each constitutes a constitutionally sufficient injury-in-fact: denial of its bargained-for right to Executive participation in negotiations, and the increased risk of grave

danger from the vertical proliferation of nuclear weapons in contravention of the NPT Article VI obligation. A favorable ruling would redress each injury.[13]

We first describe these injuries and explain why each constitutes injury-in-fact for standing purposes. We then explain how a favorable ruling would redress each injury. Finally, we discuss why no absent parties preclude the Marshall Islands' standing at the pleading stage, and why the Court has the obligation to enforce NPT Article VI if it is a valid law.

1. The Marshall Islands Sufficiently Pleaded Injury-in-Fact.

Even a mere "identifiable trifle" is sufficient to establish injury-in-fact for standing. *Council of Ins. Agents & Brokers v. Molasky–Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (internal quotations and citations omitted). The purpose of the ''injury-in-fact'' requirement is to ensure that ''there is an advocate with a sufficient personal concern to effectively litigate the matter.'' *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) (internal quotations omitted). As an NPT party, and a nation suffering the grim legacy of United States nuclear weapons testing, the Marshall Islands has more than sufficient concern to effectively litigate this case. ER 50 (¶13), 56 (¶¶ 35, 38), 64 (¶70), 71 (¶92).

[13] That the alleged injuries are fairly traceable to United States conduct is not disputed here, where the Marshall Islands alleges the United States is not negotiating and is engaged in nuclear weapons vertical proliferation.

Moreover, each of the independent injuries that the Marshall Islands pleaded is beyond an identifiable trifle.

a. NPT Article VI Entitles the Marshall Islands to Executive Participation in Nuclear Disarmament Negotiations, and the Denial of That Entitlement Is at Least an Identifiable Trifle.

Plaintiff's harm is that of a party that has honored its NPT obligations but is not receiving the *quid pro quo* of good faith disarmament negotiations, promised by the Executive. ER 50 (¶38), 71 (¶92). The Executive admits that NPT Article VI currently obligates it to act. ER 45 (lines 8-9). And as the D.C. Circuit explained in Zivotofsky, "[w]hen a plaintiff is the 'object of [government] action (or forgone action) . . . . there is ordinarily little question that the action or inaction has caused him injury . . . ." *Zivotofsky v. Secretary of State*, 444 F.3d 614, 618-19 (D.C. Cir. 2006) (citing *Lujan*, 504 U.S. at 577).[14]

The denial of the Marshall Islands' legal right to Executive participation in good-faith negotiations under NPT Article VI—considered the single most important provision of the NPT—is concrete and actual, and at least an identifiable trifle that satisfies the injury-in-fact requirement. *See id.*; *see also* ER 58 (¶45); *Jamaica*, 770 F. Supp. at 630 n.6; *Tapia-Mendoza*, 41 F. Supp. 2d at 1253. Moreover, because the United States owns roughly 50% of all deployed nuclear

[14] The district court did not rule on injury-in-fact, but held that even if the Marshall Islands otherwise had standing, its claims cannot be redressed. ER 8.

weapons worldwide,[15] maintains many on high alert for immediate launch, and (according to certain experts), "is the decisive actor in setting the tone and agenda on nuclear weapons,"[16] the Executive's breach of its NPT Article VI obligation erects a hurdle to successful negotiations. That hurdle is at least an identifiable trifle.

b. The United States Breach of NPT Article VI Measurably Increases the Grave Threat Caused by Proliferation of Nuclear Weapons, Which Is at Least an Identifiable Trifle.

The district court characterized the increased threat from the proliferation of nuclear weapons a "generalized and speculative fear of the possibility of future use of nuclear weapons" that did "not constitute a concrete harm unique to Plaintiff required to establish standing." ER 8. But the harm from a current failure to reduce substantial risk, *when one is contractually obligated to reduce that very risk*, is current harm, not speculation. And Article III standing does not require harm unique to the Marshall Islands.

(i) The Increased Risk of Grave Danger Is Current Harm.

The Marshall Islands needed only to plead general factual allegations of injury to survive a motion to dismiss, because the district court was required to

[15] ER 42, 41, 11 (accepting ER 41).

[16] *See* Burroughs and Cabasso, *Nuclear Disorder or Cooperative Security*, Introduction p. 6 (2007), *available at* http://wmdreport.org/ndcs/online/NuclearDisorderIntroduction.pdf

presume that those general allegations embraced specific facts necessary to support the claim. *Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 867 (9th Cir. 2002). Meeting this burden, the Marshall Islands pleaded that the Executive's breach of Article VI "causes increased proliferation of nuclear weapons and measurable increased risks associated with such proliferation" and that the risks include "grave danger." ER 71 (¶¶ 88, 89, 92). The Marshall Islands also supported the claimed increase in United States vertical proliferation with, *inter alia*, Professor Weston's expert Declaration, and cited Senate history acknowledging the direct link between NPT Article VI and increased risk from vertical proliferation. ER 61 (¶60), 79 (¶12), 80 (¶20); 115 Cong. Rec. at 6204 ("The gravest threat to mankind's survival lies . . . in the dangers of 'vertical' proliferation of nuclear weapons systems in the possession mainly of the two super powers. Article VI not only points the way but it places upon us an inescapable responsibility.").[17] The Marshall Islands also supported its general factual allegations with opinions of noted experts. ER 66 (¶76), 68 (¶81), 70 (¶¶ 85-86), 71 (¶89) (stating that risks are "too real to ignore"). No more was required at the pleading stage, *see Bernhardt*, 279 F.3d at 867, because the Executive submitted no declarations.

[17] If harm from an Article VI breach were legally speculative as the district court found, the NPT would be at risk for failure of legal consideration.

In *Krottner v. Starbucks Corp.*, the Ninth Circuit held that a *credible threat* of real and immediate harm satisfied Article III's injury-in-fact requirement. 628 F.3d 1139, 1143 (9th Cir. 2010). The district court relied on *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1147 (2013), but the *Clapper* Court applied the "especially rigorous" standing inquiry for constitutional challenges to executive power. As subsequently reaffirmed by the Supreme Court in 2014, "[a]n allegation of future injury may suffice if . . . there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citing *Clapper*, 133 S. Ct. at 1150 n.5). Thus, even if a measurable increase in risk caused by a party contractually obligated to reduce that very risk did not *ipso facto* constitute an identifiable trifle for standing, the Marshall Islands sufficiently pleaded injury-in-fact because the risk it alleged is measurable, real, current and grave. ER 71-72 (¶¶ 88-89, 92); 115 Cong. Rec. at 6204.[18]

That the Marshall Islands bargained for the Executive's concrete Article VI obligation to reduce "[t]he gravest threat to mankind's survival" also distinguishes this case from *Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988), and *Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960), cited by the district court. In *Johnson*, the plaintiff alleged that a nuclear defense policy was unconstitutional

[18] The Marshall Islands can submit evidence at the appropriate time regarding the severity of the increased risk. *See Susan B. Anthony*, 134 S. Ct. at 2342 (confirming the evidentiary burden changes with successive litigation stages).

because allegedly error-prone government computer systems increased the risk of a mistaken nuclear launch, and thereby constituted a taking without just compensation. *Johnson*, 851 F.2d at 234. The Ninth Circuit found that the grievance was too generalized to support standing for a takings clause claim. *Id.* A grievance "pervasively shared" would have required just compensation to every person in the country. *Id.* Unlike the present case, no treaty was at issue and no Senate history directly linked an obligation to reduce the alleged risk in a specific, bargained-for agreement with the plaintiff.

Pauling is also dissimilar. There, 39 individuals sought an injunction against all United States nuclear testing, a declaration that nuclear tests were illegal, and damages from nuclear testing. *Pauling*, 278 F.2d at 253. Again, no Senate history directly linked an Executive legal obligation to reduce the alleged risk in a bargained-for agreement with the plaintiffs.[19] Further, as outlined in the following section, Supreme Court and Ninth Circuit authority confirm that standing is not defeated simply because an alleged harm is widely or even universally shared.

[19] Though not at issue here, 16 of the *Pauling* plaintiffs were Marshallese. Since the *Pauling* decision, an official claims tribunal awarded over $2 billion in damages to the Marshallese from United States nuclear tests. The majority of such awards remain unpaid and disputes are ongoing. *See* ER 50-51 (¶13 and Report of Rapporteur cited therein).

(ii) Article III Standing Does Not Require Harm Unique to the Marshall Islands.

As the Supreme Court cautioned, if harm "unique to Plaintiff" were required for standing purposes, "the most injurious and widespread Government actions could be questioned by nobody." *Massachusetts v. EPA*, 549 U.S. 497, 526 n.24 (2007) (citation and italics omitted). Thus, in the arena of climate change, a developed record of scientific declarations finding the risks are "widely shared" does not defeat standing. *Id*. at 521-22. Similarly, that virtually every American shares exposure to the "In God We Trust" motto on money does not bar an individual's standing to bring an Establishment Clause claim. *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010).

The Marshall Islands' harms arise under the NPT and are held by NPT parties who bargained for specific and concrete Article VI rights. ER 56 (¶38), 58 (¶45). The widespread nature of the risk from nuclear weapons vertical proliferation does not defeat standing for a Treaty party. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998) (holding that FOIA requester denied information to which he is legally entitled has standing where alleged injury applied to all voters); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (holding that standing is not defeated where alleged injury applied to all citizens).

2. The Marshall Islands Sufficiently Pleaded Redressability.

In holding that the Marshall Islands' claims could not be redressed, the district court confused the actual relief the Marshall Islands seek—Executive participation in negotiations (which can be ordered)—with the desired outcome of such negotiations—global nuclear disarmament (which cannot be ordered). In a labor union dispute, this would be like finding the union had no standing to claim that the employer refused to participate in negotiations, because ordering the employer to participate would not guarantee successful negotiations.

The Complaint satisfies the redressability requirement. First, requiring the Executive to comply with NPT Article VI precisely redresses the Marshall Islands' first alleged injury—denial of its right to Executive participation in negotiations. Second, even a small incremental step toward reducing the second harm—the risks from nuclear weapons vertical proliferation—satisfies the redressability standard.

a. Requiring the Executive To Comply with NPT Article VI Precisely Redresses the Marshall Islands' First Alleged Injury—Denial of Its Right to Executive Participation.

The way in which the Marshall Islands satisfies Article III redressability depends on how its harms are defined. The Marshall Islands pleaded that the Executive breach of NPT Article VI denies the Marshall Islands its legal right to the Executive's participation in good-faith negotiations for nuclear disarmament and to cease the nuclear arms race. ER 71-72 (¶92). Requiring Executive

compliance with NPT Article VI precisely redresses the denial of the Marshall Islands' legal right. *See Lujan*, 504 U.S. at 577.

If this did not unequivocally settle the issue of redress, the Marshall Islands' claim also can be framed reasonably as a violation of a procedural right. The procedure to which the United States committed in NPT Article VI is engagement in good-faith negotiations. The Marshall Islands pleaded that the Executive is in breach of that procedure. ER 71-72 (¶92), 61 (¶60), 83 (¶32). Thus, "normal standards for redressability and immediacy" are not required, because the injury is procedural in nature. *Massachusetts v. EPA*, 549 U.S. at 517-18. Instead, the Marshall Islands has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider." *Id*. (citing *Lujan*, 504 U.S. at 573, n.7); *see also Pub. Citizen*, 491 U.S. at 449 (providing that redress is met where ruling "might" provide a party with "potential gains"); *Salmon Spawning*, 545 F.3d at 1228 (holding that although it is "uncertain whether [required federal conduct] will ultimately benefit the" plaintiff, standing is not defeated where required federal conduct is "a forward-looking allegation").

Thus the Marshall Islands need not show that good-faith negotiations will yield any particular result, only that the negotiations are "connected to the substantive result." *See Massachusetts v. EPA*, 549 U.S. at 518 (citing *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) (holding that a

party alleging deprivation of procedural right "*never* has to prove that if he had received the procedure the substantive result would have been altered") (emphasis added)). That the procedure required by NPT Article VI is at least "connected" to the grave risks of nuclear weapons is beyond dispute.

b. Requiring the United States To Comply with Article VI Is at Least Sufficient Incremental Relief To Satisfy Redressability.

In *Massachusetts v. EPA*, 549 U.S. at 523, the EPA argued that Massachusetts lacked standing to seek an order requiring the EPA to regulate certain carbon emission standards because the emissions at issue contributed "so insignificantly" to the global warming harm alleged and regulating them had no "realistic possibility" of mitigating climate change. *Id.* This, the EPA argued, was particularly true because other countries such as China and India were increasing their more substantial carbon emissions, which would offset any effect of domestic regulation. The Supreme Court rejected that argument outright, because it was based "on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal" court. *Id*. at 524. Instead, the Court held that even though "a first step might be tentative [that] does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law." *Id*.

The Marshall Islands pleaded that the Executive's breach of NPT Article VI increases risk from the vertical proliferation of nuclear weapons. ER 71 (¶88). Under *Massachusetts v. EPA*, requiring the Executive to comply with NPT Article VI is at least a small incremental step toward reducing that risk. Indeed, Senate history confirms that this step of negotiations "not only points the way but it places upon [the United States] an inescapable responsibility" to reduce that grave threat. 115 Cong Rec. at 6204. In addition, because the United States: (i) owns roughly 50% of the deployed nuclear weapons in the world;[20] (ii) is the only country to have used nuclear weapons in warfare against civilians; and (iii) according to some experts "is the decisive actor in setting the tone and agenda on nuclear weapons,"[21] an order directing the Executive to comply with its NPT Article VI obligations indisputably provides the Marshall Islands at least an incremental benefit. That benefit includes removal of the hurdle created by the Executive's *absence* in negotiations. *See supra* Section VI.C.1.a.

Finally, due to its history as the deliberate United States testing ground for 67 nuclear weapons explosions over a twelve year period, the Marshallese know firsthand the devastating, multigenerational impacts of these weapons of mass destruction. ER 50-51 (¶13), 56 (¶35), 64-65 (¶70). No one can challenge—and

[20] *See supra* n. 15.
[21] *See supra* n. 16.

especially not at the pleading stage—the Marshall Islands' stake in the outcome of this litigation. *See, e.g.*, *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) ("[T]he potential for redress assures that the plaintiff's stake in the lawsuit's outcome remains high throughout the litigation.").

3. No Absent Necessary Parties Preclude the Marshall Islands' Standing at the Pleading Stage.

While the Executive never filed a Rule 19 motion or named a single absent necessary party in this case, the district court found that the relief requested by the Marshall Islands "does not account for the participation of all of the nuclear and non-nuclear states that are parties to the treaty but are not parties to this suit" and, as a factual matter, that "[t]he injury Plaintiff claims cannot be redressed by compelling the specific performance by only one nation to the Treaty." ER 9 (lines 9-11). This factual finding recognizes no incremental benefit from United States participation in negotiations, discussed in the previous section, or that the United States' absence erects a hurdle to negotiations.

The district court's finding is also contrary to the Complaint and the evidence presented by the Marshall Islands. For example, the Marshall Islands alleged that the vast majority of nations already have demonstrated through their official United Nations votes their willingness to participate in the nuclear disarmament negotiations required by NPT Article VI. ER 67 (¶78). In addition,

the United States made the decision to be bound by the NPT over twenty years before two known nuclear powers, France and China, joined it.

In sum, in deciding the Executive's *facial* challenge to standing, the district court erred by inferring the existence of absent necessary parties, when all inferences should have been drawn in favor of the Marshall Islands. *See supra* Section V. The proper vehicle for evaluating any absent parties (if actually identified by the Executive) is through Rule 19. Fed. R. Civ. P. 19 (2007), Addendum 32. That rule requires, among other things, a fact specific inquiry into the alleged absent parties and consideration of whether any alternative legal venue exists for consideration of a plaintiff's claims. *See, e.g., White v. U.C. Regents,* 765 F.3d 1010, 1026-28 (9th Cir. 2014); *see also supra* n.2 (explaining no alternative legal venue exists). But no Rule 19 motion was filed here, no discovery took place, and the district court conducted no analysis under Rule 19 in its Order. *See also* ER 23-25, 43.

Finally, neither *Greater Tampa Chamber v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980), nor *Gonzales*, 688 F.2d 1263, relied upon by the district court, strips the Marshall Islands of standing at the pleading stage. In *Gonzales*, the plaintiff alleged that the EPA wrongfully awarded grants authorized for water quality projects to non-water quality projects. The lower court ruled that the EPA's grants were proper. The Ninth Circuit affirmed, but by finding the plaintiff

lacked standing because even if the disputed grants could be refunded, the water planning plaintiff sought would not occur, and the evaluation period for such planning had passed. *Id.* at 1268. *Gonzales* in no way erodes the Marshall Islands' standing here.

In *Goldschmidt*, 627 F.2d at 258, the plaintiffs sought to invalidate an executive agreement between the United States and the U.K., which they alleged diminished their air service to and from the U.K. But invalidation of the executive agreement would not provide any improvement in plaintiffs' air service. Instead, improving plaintiffs' air service required the U.K. to enter into a new agreement and plaintiffs conceded that the U.K. was unwilling to do so. *Id.* at 263. In sharp contrast, here (i) the Marshall Islands' injury is the denial of its legal right to have the United States participate in nuclear disarmament negotiations, and (ii) United States compliance with its Article VI obligations directly redresses that injury. Moreover, while the *Goldschmidt* parties and the court identified the U.K. as an absent party that precluded any redress of plaintiffs' alleged injury, here the Executive has never identified any such absent necessary party. Instead the district court inferred that there were absent necessary parties, without the Executive identifying a single one, and without the Marshall Islands having the opportunity to respond to any specific, allegedly missing party. ER 23-25, 43.

Just as substantial greenhouse gases emitted by other nations not before the Court did not defeat standing based on the incremental increased risk of global warming caused by the United States in *Massachusetts v. EPA*, so too do the existence of other nuclear states not defeat standing here. *Massachusetts*, 549 U.S. at 526; *see also Vill. of Arlington v. Metro. Hous.*, 429 U.S. 252, 261 (1977) (affirming standing to challenge conduct, notwithstanding other uncertainties that still exist).[22]

4. The Court Has the Obligation To Order the Executive To Comply with a Valid Law.

In *Zivotofsky*, the Supreme Court confirmed that specific performance is not only available but necessary against the Executive: if a "law is valid," the Executive "*must* be ordered" to comply. 132 S. Ct. at 1427 (emphasis added). The Executive has never disputed that the NPT is valid and admits that it creates a legal obligation. ER 45 (lines 8-9). And the NPT, properly ratified, "certainly be[came] the law of the land." 115 Cong. Rec. at 6199.

[22] The district court also ruled that requiring the Executive to convene NPT Article VI negotiations within one year was an arbitrary timeframe. ER 11. However, whether one year is reasonable, if disputed by the Executive, should be the subject of discovery and evidence. If a longer timeframe were proven reasonable, the Marshall Islands' request for "such other, further, and different relief" would encompass that. ER 76 (Prayer for Relief ¶E).

The district court, however, singularly and mistakenly relied on *Canadian Lumber Trade Alliance v. United States*, 30 C.I.T. 391, 418-20 (Ct. Int'l Trade 2006), to conclude that it lacked authority to order specific performance. ER 8. There, the court held that Canada could not seek specific performance of NAFTA because it already elected a different remedy by proceeding before the World Trade Organization and "receiv[ed] compensation in accordance with the WTO decision." *Canadian Lumber*, 30 C.I.T. at 418-19. That decision does not support the district court's holding that specific performance is unavailable here. *Contra*, ER 8.

In addition, the case was appealed. *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008). The Federal Circuit, while finding Canada lacked standing under the injury-in-fact requirement, pointedly disapproved of the lower court's redressability analysis that the district court relied on here.[23] *Id.* Moreover, when other nations have sued the United States, the Court

[23] The Federal Circuit's injury analysis supports the Marshall Islands standing for three reasons. First, under NAFTA Canada had not surrendered any right to defend itself, but under the NPT the Marshall Islands did surrender any right to pursue nuclear weapons. *See id.* at 1337. Second, Canada failed to describe why denial of its NAFTA bargain was an injury. Denial of the Marshall Islands' right to Executive participation in nuclear disarmament negotiations creates a hurdle to successful negotiations. Finally, in *Canadian Lumber* another party, the lumber producers that were beneficiaries of the NAFTA provision, had standing to enforce the treaty; no such party exists here.

of International Trade has readily ordered the United States to comply with the law. *See, e.g.*, *Uzbekistan v. United States*, 25 C.I.T. 1084 (2001) (holding that the United States abused its discretion and failed to comply with the law, and remanding to require compliance); *Sri Lanka v. United States*, 18 C.I.T. 603 (1994) (entering judgment for plaintiff Sri Lanka and ordering the United States to revoke its countervailing duty order).

The Supreme Court settled long ago that a treaty "must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) 103, 110. This is consistent with the Ninth Circuit's ruling in *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006), where the Ninth Circuit explained that an Indian nation cannot force the United States to take specific action *unless* "a treaty . . . imposes, expressly or by implication, that duty." *Id.* An order directing United States compliance with NPT Article VI is not barred.

D. Independent of Injunctive Relief, the Court Has Jurisdiction over the Declaratory Relief Claims in Counts I and II.

The district court focused on whether it could enjoin the Executive to comply with NPT Article VI. However, independent of whether injunctive relief under Count III ultimately is available, Counts I and II are justiciable. Under the Declaratory Judgment Act, a court may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (Addendum 28); *see also, e.g.*, *Md. Cas. Co.*

v. Pac. Coal & Oil Co., 312 U.S. 270 (1941). Interpreting the NPT under Count I "is emphatically the province and duty of the judicial department." *Sanchez-Llamas*, 548 U.S. at 353-54; Restatement (Third) Foreign Relations § 326 (1987) n.3 ("courts have been clear . . . that interpretation of a treaty for purposes of a case before them is a legal and not a political question"). This is a crucial constitutional matter. For as experts have expressed, any "judicial recognition of an executive power to decide, by presidential fiat, that certain treaty interpretation issues are non-justiciable would destroy the balance between the executive and judicial branches . . . ." *See D. Sloss*, *supra* n.10 at 185.

Likewise, Executive compliance under Count II is justiciable. *See, e.g.*, *Hamdan*, 548 U.S. at 613 (holding that Executive breached "the four Geneva Conventions" and lower court abstention "was not appropriate."). Declaratory relief under Counts I and II requires "careful examination of the textual, structural, and historical evidence [that will be] put forward by the parties . . . . This is what courts do." *Zivotofsky*, 132 S. Ct. at 1430. Such relief would inform the rights of the parties and resolve their dispute over the legal interpretation of NPT Article VI, including what conduct is required—and forbidden—to satisfy it prospectively. *See L.A. County Bar*, 979 F.2d at 702 (emphasizing that court should consider whether declaratory relief would serve useful purpose in clarifying rights of the parties in a dispute of vital importance to them). In addition, if a court found the

Executive in breach of the NPT and the Executive failed to remedy the breach, it would provide a legal basis for potential withdrawal from the NPT by the Marshall Islands under NPT Article X. Addendum 14.

The district court did not address separately Counts I and II, or declaratory relief generally. Independent of the analysis of the injunctive relief requested in Count III, this Court should reverse the dismissal of Counts I and II.

E. No Doctrine from the Hypothetical 1884 *Head Money* Dispute Bars This Case.

In a footnote concluding its political question holding, the district court quoted *Medellin v. Texas*, 552 U.S. 491, 505 (2008), to hold that the NPT "ordinarily depends" for its enforcement on the honor of its parties and the courts "have nothing to do" with the matter if diplomacy fails.[24] ER 12. This *Medellin* language originated in the 1884 *Head Money* decision. *Edye v. Robinson*, 112 U.S. 580, 598 (1884) ("*Head Money*"). Three principal distinctions preclude extension of that language to bar this case.

First, the *Medellin* Court included "ordinarily" in front of the *Head Money* language. *Medellin*, 552 U.S. at 505. *Ordinarily* does not mean exclusively, and instead properly leaves room for other outcomes. This is consistent with the *Medellin* Court's explanation that just because an ICJ judgment is not enforceable

[24] The declaratory relief claims are not, by definition, "enforcement" actions so this language could not apply to Counts I and II.

domestically "does not mean the particular underlying treaty is not." *Medellin*, 552 U.S. at 520-21 (citing decisions enforcing treaties despite contrary state laws). This, in turn, is consistent with *Sanchez-Llamas*, 548 U.S. at 343, where the Court refused to adopt the Executive's argument for "a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts." (Citations omitted). For if diplomacy were the exclusive remedy for treaty breaches, all extradition treaty cases would be barred. *But see, e.g.*, *Jamaica*, 770 F. Supp. at 630 n.6.

Second, that sovereign nations do not ordinarily submit their treaty disputes to other nations' tribunals dates back to the antiquated doctrine of *par in parem non habet imperium*, which is to say that sovereigns historically perceived placing their conflicts before another sovereign's judiciary as degrading. *See* L. Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 Am. J. Int'l L. 697, 700 (1998), citing *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812). As Professor Damrosch explains, however:

> [T]hat doctrine never precluded any foreign state from voluntarily initiating suit or waiving immunity [and] . . . with the disintegration of the doctrine of absolute state immunity over the course of the twentieth century, foreign states are now often sued in U.S. courts regardless of consent. It would thus seem anomalous to shut the door to a foreign state plaintiff that voluntarily invokes a domestic forum to sue to enforce treaty rights.

Id. The Executive claimed no sovereign immunity here. *See Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) ("'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'") (citation omitted); *see also* ER 53 (¶¶ 23-24). And, the Supreme Court has long recognized that foreign nations are entitled to bring any civil claims in U.S. courts that domestic parties could bring. *Pfizer, Inc. v. India*, 434 U.S. 308, 318-19 (1978).

Third, the *Head Money* discussion concerned whether, in a hypothetical dispute between sovereigns, the Court would enforce a treaty that had been modified or repealed by overriding legislation. *Head Money*, 112 U.S. at 598-99. But the Executive has never claimed that legislation has modified or repealed NPT Article VI. On the contrary, the Executive claims current legal compliance with it.

In sum, the *Head Money* discussion does not bar this case.

F. Neither Venue, Statute of Limitations nor Laches Warrant Dismissal.

Below, the Executive raised venue, statute of limitations and laches arguments. None had merit.

On venue, all reasonable inferences must be drawn and factual conflicts resolved in the Marshall Islands' favor. *Murphy v. Schneider Nat'l*, 362 F.3d 1133, 1138 (9th Cir. 2003). Venue is proper in the Northern District of California under 28 U.S.C. § 1391(e)(1)(A), which provides that this case could be brought in any district in which "a defendant in the action resides." Addendum 30. Section

1391(c)(2) defines residency "[f]or all venue purposes" and provides that a legal entity "shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question . . . ." *Id.* Amended in 2011, this new definition "clearly includes Section 1391(e)." 14D Wright & Miller, Federal Practice and Procedure §3815 at p. 341. Personal jurisdiction is not disputed here, and therefore venue is proper under Section 1391(e)(1)(A). ER 52-55 (¶¶ 16-20, 27, 29).

Venue is *also* proper under Section 1391(e)(1)(B) because "a substantial part of the events or omissions giving rise to the claim occurred" in the Northern District of California. Addendum 30. The Executive carries out nuclear weapons modernization programs in only three labs, in breach of NPT Article VI, and one is in Livermore, California. ER 54-55 (¶¶ 29-30), 61 (¶60), 79 (¶12). The District thus bears a substantial connection to significant events material to this case. *See Gulf Ins. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005); *see also* 115 Cong. Rec. at 6204 (directly linking United States vertical nuclear weapons proliferation to NPT Article VI).[25]

[25] The Marshall Islands conceded that venue *also* was proper in the D.C. Circuit and that if the court found venue lacking in the Northern District of California, then venue transfer was the appropriate remedy, not dismissal. ER 35.

With respect to laches and the statute of limitations, the Executive bore the burden to factually prove a limitations or laches bar. *See Kingman Reef v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008); *Cedars Sinai v. Shalala*, 125 F.3d 765 (9th Cir. 1997). The Executive, however, proffered no facts and alleged no date on which these claims allegedly accrued. Moreover, in 2010 the Executive *renewed* its Article VI commitment. ER 59 (¶52). But since that time, among other things, it has opposed and refused to attend Article VI negotiations, and engaged in new vertical nuclear weapons proliferation. ER 55 (¶30), 67 (¶78), 61 (¶60), 80 (¶20). The Marshall Islands seeks current and prospective relief based on these facts; its claims are not time barred. *See Citizens Legal Enforcement v. Connor*, 540 F. App'x 587, 588 (9th Cir. 2013) (emphasizing that where a plaintiff alleges "failure to . . . operate on an ongoing basis in accordance with applicable law, and seeks prospective relief to correct such failures, its claims are not time-barred."); *see also Page v. United States*, 729 F.2d 818, 821 (D.C. Cir. 1984) (even prior knowledge of other facts cannot trigger time limitations based on conduct that has yet to occur).

A laches bar, finally, requires a factual finding that the Marshall Islands had knowledge, lacked diligence and delayed bringing suit, and that the delay prejudiced the Executive. *See Apache Survival v. United States*, 21 F.3d 895 (9th Cir. 1994). No facts substantiate any such finding.

VII. CONCLUSION

This Court should reverse the district court's dismissal and remand the case for further proceedings.[26] The Executive power *to make* treaties does not transmute legal compliance with the NPT—an existing treaty—into a non-legal question, nor does it override the constitutional extension of judicial power to all cases arising under treaties. Courts routinely judge government compliance with obligations to negotiate in good faith and no law renders that legal standard unmanageable. And, as an NPT party with bargained-for rights, the Marshall Islands properly pleaded standing. Finally, no other claims made by the Executive below bar this case.

RESPECTFULLY SUBMITTED this 13th day of July, 2015.

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[26] If the Court finds material any issue not briefed, the Marshall Islands respectfully requests briefing thereon pursuant to General Order 4.2.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal asks whether a district court can interpret a treaty (Count I), determine whether the Executive is in breach of it (Count II), and, if the treaty is valid, order the Executive to comply with it (Count III). A decision in this case has broad domestic and international legal implications concerning nuclear weapons. In addition, separate from the treaty at issue here (the NPT), this case has broad domestic and international legal implications for many other treaties, including whether the Executive is bound by them. Though it is rare for a foreign sovereign to consent to the jurisdiction of a United States court to resolve its dispute with the Executive, the Marshall Islands has done so. For all of the foregoing reasons, and pursuant to Federal Rule of Appellate Procedure 34(a)(1), the Marshall Islands respectfully requests oral argument in this appeal.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellant states that it is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,872 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

RESPECTFULLY SUBMITTED this 13th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 13, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this July 13, 2015.

/s/ Laurie B. Ashton
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