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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In its Opening Brief, the Marshall Islands explains why this Court should reverse the district court's dismissal of this case on political question and standing grounds. Nothing in the Response Brief refutes that analysis.

Instead, the Response Brief opens with a broad misstatement of the law regarding treaty disputes between nations: the notion that the "federal judiciary has nothing to do with such disputes, and can give no redress." But this misstatement – and the bulk of the Response Brief – rests on cases where subsequent U.S. legislation overrode a prior treaty, such that the treaty was *no longer the law of the land*. It is unremarkable that, where a treaty is no longer the law of the land, recourse does not lie in the courts. But that law does not bar this case. Neither do the remaining sweeping quotations in the Response Brief, culled from equally inapposite settings.

The Defendants-Appellees (collectively, the "Executive") do not dispute the waiver of sovereign immunity for the claims at issue. Nor do they dispute that The Treaty on the Non-Proliferation of Nuclear Weapons ("NPT" or "Treaty") is part of the supreme law of the United States. 729 U.N.T.S. 161; Addendum 10. Instead, while admitting that NPT Article VI is at least "certainly an international legal obligation," the Executive asserts that the Treaty creates legal rights without any legal remedies. That is incorrect.

Indisputably, the Constitution allocates treaty responsibilities amongst the three branches of government in a system of checks and balances. The Executive has the power "to make Treaties"; the Senate must consent before a treaty becomes the law of the land; and the judicial authority extends to all cases arising under treaties. No law elevates the President's authority to make treaties above the judiciary's power to decide disputes arising under treaties that remain the law of the land. The Executive would have this Court make that law, despite the Supreme Court's admonition in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), that the President's power in foreign affairs is subordinate to all other constitutional provisions.

This is the cornerstone of political question doctrine: whether the Constitution commits the legal issues in this case exclusively to the Executive. The Marshall Islands submits that this Court should analyze the political question doctrine (and standing) according to the actual claims pleaded, not the Executive's mischaracterization of them. Properly framed, no constitutional text commits these claims to the Executive. Indeed, the Response Brief cites *no text* of the Constitution. And judicially manageable standards exist to determine the claims, properly framed. The Marshall Islands pleaded breaches of *objective* standards for good faith negotiations – which are well-developed legal standards – and not, as the Executive hypothesizes, breaches of good faith in the subjective sense.

On standing, the Executive again distorts the claims at issue, mischaracterizing the Marshall Islands' injury as mere "fear." The injuries the Marshall Islands actually pleaded are the denial of its contractual right to United States participation in negotiations and the increased risk from the United States' breach of NPT Article VI. Both harms are cognizable for purposes of standing.

The Executive's redressability arguments also blur the focus of this action: that the NPT is multilateral cannot preclude a claim against the United States to determine the NPT's legal meaning and address the United States' *own* conduct. To the extent the Executive claims the judiciary lacks authority to order the Executive to comply with the law, this assertion both contradicts precedent and ignores the separate remedy of declaratory relief. The Executive's claim that absent NPT parties preclude redress is likewise mistaken, as it never named any essential, absent party and the Marshall Islands disputes that any exist for the claims pleaded.

The Executive's remaining arguments also fail. The Opening Brief did not address self-execution because the district court rightly held that self-execution is irrelevant in this case between Treaty parties. The Executive's straw-man arguments on the Tucker Act and the Administrative Procedure Act likewise do not bar this case.

II. ARGUMENT

A. Structure.

This Argument has five sections. Sections B (political question), C (standing), and D (declaratory relief) correspond to the same topics, respectively, in sections B through D of the Opening Brief Argument. Section E addresses the Executive's argument that Article VI is not self-executing. Finally, Section F replies to the Executive's arguments regarding the Administrative Procedure and Tucker Acts.

B. No Law in the Executive's Response Bars this Case Under Political Question Doctrine.

The justiciability inquiry under the political question doctrine is limited to political *questions*; it does not bar political *cases*. *See Alperin v. Vatican Bank*, 410 F.3d 532, 537 (9th Cir. 2005). Before turning to the factors in *Baker v. Carr*, 369 U.S. 186, 216 (1962), we explain generally why the cases cited by the Executive are inapposite.

Fundamentally, the Executive relies upon sweeping language from cases concerning legislation overriding prior treaties.[1] Those cases reiterate that claims are non-justiciable—i.e., they do not constitute "cases"—when based on prior treaties that *are no longer the law of the land*. Recourse accordingly lies only in the

[1] *E.g.*, *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Edye v. Robertson* ("*Head Money*"), 112 U.S. 580, 598-99 (1884); *United States v. Ferreira*, 54 U.S. 40 (1851).

political realm. Broad-brush language from those cases simply does not apply here. The Executive does not claim that subsequent legislation overrides the NPT Article VI obligation. Instead, it claims the Treaty is a current legal obligation with which it currently complies.[2]

The remainder of the Executive's cases likewise concern inapposite claims involving: (i) judicial deference, pre-Tate Letter, to foreign sovereign immunity;[3] (ii) laws where judicial redress for treaty disputes is specifically excluded;[4] (iii) federal versus state authority under the Constitution;[5] (iv) challenges to the Presidential power to recognize or fund foreign regimes;[6] or (v) challenges to

[2] The Executive acknowledges that Title 22 currently requires it to report its conduct under the NPT to Congress. Response Brief ("RB") 6-7, citing 22 U.S.C. 2593a(a).

[3] *E.g.*, *Ex Parte Republic of Peru*, 318 U.S. 578 (1943).

[4] *E.g.*, *George E. Warren Corp. v. United States*, 94 F.2d 597, 599 (2d Cir.), *cert. denied*, 304 U.S. 572 (1938) (finding damages claim barred where Tucker Act specifically excludes jurisdiction over treaty disputes); *Holmes v. Laird*, 459 F.2d 1211, 1221 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (finding claim barred where treaty specifically provides for settlement of all disputes "by negotiation without recourse to any outside jurisdiction").

[5] *E.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding federal law preempts Massachusetts Burma law); *Medellín v. Texas*, 552 U.S. 491 (2008) (holding treaty requires implementing legislation to override Texas habeas limitations); *United States v. Pink*, 315 U.S. 203 (1942).

[6] *E.g.*, *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142 (9th Cir.), *cert. denied*, 528 U.S. 951 (1999).

military strikes or other discretionary conduct.[7] None of those cases turn this legal dispute between treaty parties into a political question.

We now address the *Baker* factors, noting that although the Executive claims that the "presence" of any factor bars this case, RB 30, only a factor "inextricable from the case" will erect a bar. *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005).

1. No Constitutional Text Commits this Case to the Executive.

The Executive offers no constitutional text supporting its claim to exclusive control over legal issues involving foreign relations. None. And the Response fails to distinguish the quintet of cases in the Opening Brief that hold otherwise: *Schooner Peggy*, *Curtiss-Wright*, *Hopson*, *Hamdan* and *Zivotofsky*.

First, the Executive's response to the Supreme Court's statement that a valid treaty "must be obeyed, or its obligation denied" is that only private parties were involved in *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801). That is incorrect. A private party does not have the power to deny a treaty obligation. Moreover, the United States—a named party—claimed a fifty percent financial interest in the seized schooner. *Id*. at 107.[8]

[7] *E.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1178 (2011).

[8] The Executive's attempt to distinguish *Japan Whaling* fails similarly. An adverse ruling therein would have required the Executive to sanction Japan. *See Franklin*

Second, broad statements regarding the Executive's role as the nation's representative in foreign relations—relied upon by the district court below, and quoted in *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993)—originated in *Curtiss-Wright*. But the Supreme Court also cautioned in *Curtiss-Wright* that Executive foreign affairs power "must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320. The Response Brief nowhere acknowledges this critical language. The applicable constitutional provision here—to which the Executive foreign affairs power is subordinate—is the Article III, Section 2 extension of judicial power to all cases arising under valid treaties. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), RB 31, is not to the contrary, for it concerns judicial review of discretionary Executive policy. NPT compliance is a legal matter, not a discretionary policy prerogative.

Third, the Executive nowhere acknowledges *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006), where the Court found justiciable the question of whether the Executive's military tribunals breached the Geneva Conventions. Additionally, *Hamdan* rejected the Executive's interpretation of that treaty and declared the Executive in breach. *Id.*[9]

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v. Massachusetts, 505 U.S. 788, 798-99 (1992) (plurality opinion); Opening Brief ("OB") 23 n.6.

[9] *See also infra* note 27 and accompanying text.

Fourth, the Executive fails to distinguish *Hopson v. Kreps*, 622 F.2d 1375, 1381-82 (9th Cir. 1980), which held that the scope of United States authority under the treaty at issue was justiciable, not subject to exclusive Executive discretion, and reviewable over the government's objection. Contrary to the Executive's argument, RB 37, *Hopson* explicitly rejected limiting *United States v. Decker*, 600 F.2d 733 (9th Cir. 1979), to criminal appeals. *Hopson*, 622 F.2d at 1379.

Fifth, the Executive fails to acknowledge the impact of *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). There the Court explained the lower courts' error in finding nonjusticiable the claim to vindicate a legal right and enjoin the Executive to comply with a law. *Id.* at 1428. *Zivotofsky* holds that the claim is justiciable and if the law is valid, the Executive must be ordered to comply, even in cases the judiciary would gladly avoid. *Id*. at 1427-28, 1431. Because the supremacy clause grants treaties equal status with other federal law, the judicial obligation to enforce the law against the Executive applies equally to treaties *that remain the law.* The decision in *Earth Island*, 6 F.3d at 652, must be read in light of *Zivotofsky*. Doing so confirms that while the statute in *Earth Island* may have been unenforceable because Congress had impinged on Presidential power, the claim was justiciable and the political question doctrine was not implicated. *See Zivotofsky*, 132 S. Ct. at 1428. The Executive, moreover, offers no response to the Supreme Court's recent

rejection of the Executive's claim of broad and exclusive province in foreign affairs. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2088 (2015).

Finally, the Executive unequivocally conceded to the district court that it does *not* claim this case involves any sensitive foreign policy issue. Counsel for the Executive confirmed the following:

> [O]ur objection here is not that the nuclear non-proliferation treaty is a sensitive foreign policy issue. We're not – we're not claiming that the court lacks jurisdiction because this case involves a treaty or this case involves a sensitive foreign policy issue.

ER 32, lines 11-17.

But the Response Brief implies the opposite. RB 32 (arguing entrustment of sensitive foreign policy to the political branches); RB 46 (arguing this case presents sensitive political decisions). As a general rule, this Court does "not consider an issue raised for the first time on appeal," *Bolker v. Comm'r.*, 760 F.2d 1039, 1042 (9th Cir. 1985), including new facts first submitted on appeal, *e.g.*, *Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003). Because parties cannot interject new disputed facts on appeal and raise arguments conceded below, no sensitive foreign policy concerns bar this case.

2. Future Subjective Discretion Cannot Override Current Objective Standards.

The Opening Brief explained that courts regularly apply manageable, objective standards to judge whether parties have negotiated in good faith. OB 24-

28. In response, the Executive asks this Court to ignore all domestic and international law regarding judicial evaluation of an obligation to negotiate in good faith and misconstrues the Marshall Islands' claims as requiring judicial inquiry into subjective considerations that might affect negotiations, were they to begin. According to the Executive, none of the objective standards, including those to which Professor Weston averred and the Amici cited, provides a single standard for which a court possesses any competence to judge NPT Article VI compliance. ER 79 (¶¶ 11-12). This is incorrect, for a court is competent to determine whether the United States (i) refuses to attend negotiations for complete nuclear disarmament; (ii) has ever offered a proposal to achieve complete nuclear disarmament; and (iii) is objectively acting contrary to NPT Article VI.

Further, citing no international decision regarding objective standards for good faith governmental negotiations, the Executive baldly alleges that no international law is persuasive. This disregard of international law is inappropriate. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006) (holding that courts should give respectful consideration to treaty interpretation by the International Court of Justice).[10]

[10] The Executive offers no response to objective standards regarding "effective measures" to achieve nuclear disarmament, outlined in the Lawyers Committee on Nuclear Policy ("LCNP") Amicus Brief, or objective standards in the Amicus Brief of the United Electrical, Radio, and Machine Workers of America, *et. al.* *See* Dkt. 24-1 at pp. 25-26; Dkt. 22. The Executive's response to the Global

To apply the objective criterion for good faith negotiations, a court need not "cut from whole cloth" any legal standards. *Contra* RB 43. Like other cases on which the Executive relies, *El-Shifa*, 607 F.3d 836, concerns wrongful death claims where plaintiffs ask the court to determine whether military action was negligent. None of the objective criterion for good faith negotiations require that. And Executive reliance on *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011), is likewise misplaced. *Spectrum* found nonjusticiable allegations of an illegal conspiracy implicating the Executive, but distinguished a situation that *is justiciable*: where the law is "codified in a treaty that [the court is] merely asked to interpret . . . [and then to] compel U.S. officials to act according to the law." *Id.* at 951.

Under the Executive's argument, no objective requirements apply because if negotiations began then the Executive's participation would involve discretionary strategies. That argument puts the cart (hypothetical discretion during negotiations) before the horse (initiation of negotiations and a proposal to achieve the goal). *See Alperin*, 410 F.3d at 539 (holding that the "spectre of difficulty down the road does not inform" justiciability at the "early stage in proceedings"). This Court should remain focused on the breach of objective standards that the Marshall Islands

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Justice Center Amicus Brief, setting forth standards from the 2010 Treaty Review Conference, is that it is uncertain how many standards it must meet to satisfy Article VI. RB 43-44 n.7. But that is a merits question.

actually pleaded, for which judicially manageable standards exist. The claims concern negotiations that have never taken place. ER 67 (¶ 78); ER 70 (¶¶ 85, 87). The Marshall Islands asks the Court to order the Executive to call for and participate in them, *not to monitor policy decisions during them or ensure that they ultimately are successful.*

3. Compliance With the Law Is Not a Policy Choice.

By ratifying the NPT, the United States legally obligated the Executive to negotiate. The Marshall Islands seeks no initial policy decision from the Court, OB 29-30, and the Executive conceded that no sensitive foreign policy bars this case, ER 32, lines 11-17.

4. "Prudential" Factors Do Not Bar this Case.

The Executive concedes that this Court "need not consider" the prudential *Baker* factors. RB 44. It nowhere disputes that these factors descend in order of importance and carry less weight than the other *Baker* factors. *See Alperin*, 410 F.3d at 545-46. But the Response Brief argues new, unsupported facts, including that there are "long-term negotiation strategies" and that "unanticipated consequences for ongoing" negotiations could ensue if this case proceeds. RB 45-46. The record does not support these allegations, and the Court should disregard them. These allegations also concern subjective strategies not relevant to the objective NPT breaches pleaded. Nevertheless, this Court has rejected similar

arguments even where supported by government affidavits. *Hopson*, 622 F.2d at 1377.[11]

As the Opening Brief explains, embarrassment from opposite conclusions by the Executive and judiciary does not convert legal issues into political questions. OB 31-33. And the Executive offers no support for its contention that the Constitution commits exclusive authority to interpret the NPT to the Executive. RB 44-45. *Crosby*, 530 U.S. 363, holds unremarkably that federal authority preempts state laws attempting to restrict Burmese relations. *Id.* at 373-74. *Crosby* does not diminish the judicial mandate to interpret and enforce *valid* law. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552 (9th Cir. 2014), like other wrongful death cases involving the President's exclusive discretion to provide foreign aid, is likewise inapposite. OB 34.

C. No Law in the Executive's Response Defeats the Marshall Islands' Standing.

To argue against standing the Executive relies primarily on inapposite cases applying higher standards on summary judgment and where the plaintiffs lacked privity of contract. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148-48 (2013) (applying summary judgment standard, party could "no longer" rest on

[11] The Executive's reliance on *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd on other grounds*, 311 U.S. 470 (1941), is misplaced. This Court rejected similar reasoning in *Hopson*, 622 F.2d at 1380-81.

"mere allegations"). The Executive questions whether a treaty "is essentially a contract between" sovereigns, as held in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979), but offers no response to *Cornejo v. County of San Diego*, 504 F.3d 853, 858 (9th Cir. 2007), which explained that treaties confer rights upon treaty parties. Likewise the Executive offers no response to *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999), which explained that signatory nations have standing to enforce treaties. And the Executive provides no sound distinction for why standing would exist for an extradition treaty party in *Jamaica v. United States*, 770 F. Supp. 627, 630 n.6 (M.D. Fla. 1991), but not for an NPT party here. Instead, the Response Brief conflates the standing of a treaty party with self-execution. RB 16-17.

This should end the standing inquiry here. Nonetheless, the Marshall Islands replies to the arguments that no legal harm exists and no redress is possible.

1. The Marshall Islands' Injuries Are Cognizable.

The Marshall Islands' injuries are the denial of its right to United States participation in negotiations, as well as measurable increased risk of nuclear danger, not mere "fear."

Denial of the Right to the United States Participation in Negotiations:

The Executive nowhere disputes that Article VI represents the linchpin of the NPT "Grand Bargain," in which the United States obligated itself to participate in good faith in negotiations. OB 4-5. Likewise, the Response Brief nowhere disputes that the obligation is an "inescapable," "binding," "unqualified," "unequivocal," "legal" "commitment" that "certainly" became the law of the land. OB 14-15. Where a party is the object of foregone government action "there is ordinarily little question that the action or inaction has caused him injury . . . ." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618-19 (D.C. Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). The Executive provides no response to this. Instead, it broadly claims that breach of the NPT Article VI obligation—denial of the very *quid pro quo* for the Marshall Islands' own NPT obligations—causes no cognizable harm. *See* ER 56 (¶ 38), 71 (¶ 92).[12]

The Executive admits that the Marshall Islands' right to United States participation in good-faith negotiations arises from at least "an international legal obligation" set forth in NPT Article VI. Accordingly, that right is concrete and particularized. Because the denial of that right is current—not a potential denial in the future—it is not conjectural. Additionally, only the 190 NPT parties hold that bargained-for right. It is thus neither abstract nor shared by all mankind. Finally, as

[12] The Executive also proffers a June 5, 2015 governmental report in which it concludes, after self-evaluation, that it acts consistently with the NPT. RB 7. The Court should disallow this attempt to interject disputed facts on appeal.

the Executive's breach of its NPT Article VI obligation erects a hurdle to successful negotiations, the Marshall Islands has a concrete and actual right as an NPT party to removal of that hurdle.

The Measurable, Increased Risk of Nuclear Danger:

On this second, independent harm, the Response Brief alleges new, disputed facts, asserting that modernization of nuclear forces does not make their use any more likely. RB 22. But it does, as the Marshall Islands pleaded, as Professor Weston averred, and as a matter of logic. ER 71-72 (¶¶ 88, 89, 92); ER 79-81 (¶¶ 12, 19-20).[13] As the U.S. nuclear arsenal ages out, weapons become unusable, meaning there is *zero* risk of their use. Modernization extends their useful life by decades, making the risk of their use *greater than* zero. *Id.*; *see also Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 867 (9th Cir. 2002) (explaining court must presume that general harm allegations embrace specific facts necessary to support allegations).

Standing does not require harm "unique" to the Marshall Islands. OB 42. The Executive argues, however, that cases refuting any requirement that harm be unique are limited to First Amendment and other claims in which standing is afforded latitude. RB 19. That is incorrect, as confirmed in *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). Thus the Executive is misguided in arguing

[13] The Executive proffered no declarations.

that because measurable, increased risks from vertical proliferation threaten all humankind, no one has cognizable harm. Moreover, the Marshall Islands bargained for negotiations to reduce that very risk, and only the NPT parties—not humankind—share that treaty right. The Executive ignores this distinguishing difference, compared to *Johnson* or *Pauling*, where no bargained-for exchange existed. *Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988); *Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960).

"Fear" and the Actions of Unknown Third Parties:

The Executive recasts the two legal harms analyzed above as mere "fear" of the conduct of unknown third parties and then dismantles that harm. But the Marshall Islands' standing rests on the Executive's conduct (not the conduct of third parties), which denies the Marshall Islands' its *quid pro quo* under the NPT. Senator Javitz' testimony, which the Executive misconstrues, RB 22, confirms not *just* the grave threat of United States nuclear vertical proliferation, but also that NPT Article VI creates the inescapable responsibility to remedy that risk. 115 Cong. Rec. at 6204. That connection is certain. Breach of NPT Article VI defeats the United States' obligation to NPT parties to reduce the acknowledged risk from vertical proliferation of nuclear weapons. In no sense is this harm mere fear.

In sum, each of the Marshall Islands' legal harms is current: (i) the current denial of the right to United States participation in negotiations; and (ii) the current

increased risk from United States vertical proliferation in violation of NPT Article VI. ER 71-72 (¶¶ 88-89, 92); 115 Cong. Rec. at 6204. Even if the second harm were characterized as an allegation of future injury (which is disputed), that still satisfies Article III standing at this procedural stage because the risk is substantial. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

2. The Marshall Islands' Claims Are Redressable.

The Marshall Islands replies here to Executive arguments that (i) the Court lacks authority to order the Executive to meet its legal obligation to negotiate; (ii) the Marshall Islands' right to negotiations is not a procedural right; and (iii) absent third parties preclude redress.

Ordering Executive Compliance with the Law:

Under *Zivotofsky v. Clinton*, 132 S. Ct. at 1427, if a law is valid—even a law impacting foreign relations—a court *must* order the Executive to comply with it. The Executive response—that *Zivotofsky* is distinguishable because it did not involve specific enforcement against the Executive—is simply incorrect. *Id.* at 1425-27; RB 54. If the Executive's argument is that specific enforcement of a treaty obligation is subject to a different standard than specific performance of a statutory obligation, it offers no support for that notion.

Similarly, the Executive's attempt to distinguish *Uzbekistan v. United States*, 25 C.I.T. 1084 (2001), and *Sri Lanka v. United States*, 18 C.I.T. 603 (1994), as

decisions ordering Executive compliance with international trade statutes and not treaties, also fails. First, properly ratified treaties like the NPT are part of the supreme law of the land and have equal status with federal trade statutes. Second, if the Constitution precluded the judiciary from enjoining the Executive to comply with the law in a suit brought by a foreign sovereign, only a constitutional amendment could remedy that preclusion, not international trade legislation. Finally, the Executive offers no response to this Court's holding that a nation cannot force the United States to take specific action *unless* a treaty imposes that action. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006).

In sum, the Executive fails to distinguish the law set forth in the Opening Brief and provides no law barring the judiciary from ordering Executive compliance with NPT Article VI.[14]

The Marshall Islands' NPT Article VI Procedural Right:

Separate from the redress described in the preceding section, the Marshall Islands argues alternatively that its right to United States participation in negotiations is a procedural right. If it is, normal standards for redress do not apply, because standing exists if a ruling "might" provide the Marshall Islands with "potential gains," and proof of a different substantive outcome is not required. *See*

[14] The Executive's unsupported assertion—that there already is a "timing and pace" to such "ongoing" negotiations—contradicts the pleading that negotiations have never taken place. RB 14, 46; ER 70 (¶¶ 85, 87).

Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 449 (1989); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).[15]

The Executive responds that the right to United States participation in negotiations is not remotely similar to a procedural right. RB 27. However, as the Opening Brief cases confirm, this Court describes an obligation to negotiate in good faith as procedural and analyzes violations thereof as procedural violations. *See, e.g.*, *In re Indian Gaming Related Cases* ("*Coyote Valley II*"), 331 F.3d 1094, 1109-10 (9th Cir. 2003) (explaining that allegation that California breached its obligation to negotiate in good faith with Indian Tribe is a procedural challenge); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 684 (9th Cir. 1943) (explaining that "[c]ollective bargaining, as contemplated by the Act, is a procedure").

The Executive, with consent of the Senate, obligated itself to the procedure of NPT Article VI negotiations. And the Marshall Islands' procedural right to United States participation in those negotiations is not "in a vacuum" as the Executive implies. Rather, it is a bargained-for legal right.

The Argument Regarding Absent Third Parties:

This Court's ruling on redress depends upon the characterization of the relief the Marshall Islands seeks. It does not ask the court to:

[15] Contrary to the Executive argument, *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008), supports standing here. OB 51 n.23.

- Enjoin the Executive to achieve domestic or global nuclear disarmament;
- Enjoin third parties to do anything; or
- Enjoin the Executive with respect to matters within its sole discretion.

Rather, the Marshall Islands seeks an injunction requiring the United States to call for and participate in NPT Article VI negotiations. ER 74 (¶ 103).

The Executive also suggests that because the NPT is multilateral, the United States cannot negotiate as required by Article VI because three other countries, out of 190, refuse to participate in negotiations. RB 24-25; ER 67 (¶ 78 n.37). That argument is specious. First, whether Executive compliance is conditioned on that of three other countries, or whether compliance is otherwise excused, is an affirmative defense disguised as a redressability argument.[16] Second, the Marshall Islands disputes factually that those three countries are necessary for negotiations with the United States and other NPT parties to begin. ER 23-25.[17] When a defense depends on disputed facts, dismissal at the pleading stage is improper. *Asarco v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004, 1009 (9th Cir. 2014). Finally, even a small incremental step to redress harm is sufficient to satisfy standing. *See Massachusetts v. EPA*, 549 U.S at 524.

[16] Under the Executive's reasoning, no NPT party has a legal right to United States participation in negotiations until every other party is at the negotiating table.

[17] The LCNP Amicus Brief, and the Amicus Brief of Nuclear Watch New Mexico, *et. al.*, analyzed why negotiations can occur without all other countries present. *See* Dkt. 24-1 at 33-34; Dkt. 39 at 41 *et seq.*

The Executive implies that other NPT parties are essential parties in this dispute, but labels a Rule 19 analysis "absurd" because those parties are sovereign. RB 26. That circular argument presupposes that those third parties are essential to relief, which is disputed. Rule 19(a) is designed to resolve such a dispute. Additionally, in *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863-64 (2008), on which the Executive relies, the parties *agreed* that an absent sovereign was a necessary party. No similar consensus exists here. Moreover, as *Republic of Philippines* confirms, if an absent necessary sovereign cannot be joined, then a court must analyze the Rule 19(b) factors before dismissal. On this issue—indeed on Rule 19(b)—the Executive is silent, offering no response to *White v. Univ. of Cal.*, 765 F.3d 1010, 1026-28 (9th Cir. 2014), which confirmed that courts must analyze Rule 19(b) factors. OB 48.

While disputed, the district court presumed in the Executive's favor that other NPT parties were necessary to resolve this dispute regarding interpretation of NPT Article VI and the United States' *own* conduct; and then the Court engaged in no Rule 19(b) analysis. ER 9, 23-25, 43. Because Executive compliance with NPT Article VI (i) removes the hurdle erected by the United States' refusal to attend negotiations; (ii) provides the Marshall Islands the benefit of its bargain with respect to the United States; and (iii) requires no order against, nor does it prejudice, other NPT parties, the redressability requirement is satisfied.

D. The Executive Misconstrues Jurisdiction for Declaratory Relief in Counts I and II.

The Executive argues that the Declaratory Judgment Act creates no new rights and that declaratory relief remains subject to standing and political question analysis. The Marshall Islands never argued otherwise. But the Declaratory Judgment Act does create a new remedy. *See Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014). As explained in *Shell Gulf*, a declaratory relief claim is justiciable if the alleged facts "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. Thus, Counts I and II are not barred even if injunctive relief were unavailable under Count III because declaratory relief can redress a legal dispute "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (Addendum 28).

Declaratory relief under Count I would redress the parties' existing dispute over the legal interpretation of NPT Article VI. Just as Justice O'Connor wrote in *Franklin*, 505 U.S. at 802-03, this Court can assume that the President would abide by a court's authoritative interpretation of the law, even if declaratory relief were against Cabinet Secretaries and not the President. Additionally, a court under Count II can declare the Executive in breach of the NPT without additional

injunctive relief. *See Hamdan*, 548 U.S. at 613 (declaring Executive breach of the Geneva Conventions).

When the district court ruled that it lacked authority to enjoin the Executive, it failed to analyze jurisdiction over Counts I and II. *But see Alperin*, 410 F.3d at 538 (scrutinizing each claim individually under political question doctrine). This Court should reverse dismissal of Counts I and II irrespective of any ruling on Count III.

E. The District Court Correctly Ruled That Whether the NPT Is Self-Executing Is Irrelevant.

The district court concluded that "the issue of whether the Treaty is self-executing or provides a private right of action is irrelevant to the enforcement by a state-party that is a signatory to the Treaty." ER 12 n.2. The Executive argues the opposite in its attempt to revive its self-execution argument. Just as below, the attempt fails because it misapplies self-execution doctrine and rests on inapposite authorities.

The interpretation of Article VI begins with its text. Because a treaty is also "an agreement among sovereign[s]," however, it is also appropriate to consider the NPT negotiating and drafting history, as well as "the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996). All of these sources support self-execution.

The Text:

The text of Article VI placed a legal obligation *upon the Executive* running to the *other NPT parties*. Thus, no further legislative act was necessary to make Article VI effective under U.S. law. *Cook v. United States*, 288 U.S. 102, 119 (1933) ("[T]he Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); *TWA, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). Indeed, the Supreme Court has specifically instructed that no magic words are required to make a treaty obligation self-executing. *Medellín*, 552 U.S. at 521 ("[N]either our approach nor our cases require that a treaty provide for self-execution in so many talismanic words . . . .").

Implementing legislation is only necessary if (a) the treaty "manifests an intention" that it is required; (b) the Senate requires it in giving consent; or (c) "implementing legislation is constitutionally required." Restatement (3d) Foreign Relations § 111(4). None of these apply here and the Executive offers no reason why implementing legislation purportedly was required to make Article VI effective.

Negotiation and Drafting History:

Legislative history also supports the self-executory nature of Article VI. The Executive claims that "Plaintiff fails to identify any evidence . . . that the President and the Senate contemplated domestic judicial enforcement of the Treaty." RB 48.

This is simply incorrect: Article VI's legislative and drafting history reflects the intent of the United States and the other NPT parties to create a binding legal obligation—an "*inescapable responsibility*."[18]

The reports of the Senate Committee on Foreign Relations indicate it was "fully aware of the mutual responsibilities the nuclear weapon states party to the treaty [] assumed" under Article VI, and that it "commit[ed] all parties to pursue negotiations in good faith relating to a cessation of the arms race and to nuclear disarmament."[19] Senate debates describe Article VI as the "potentially most important clause" of the NPT because it "commits" the nuclear powers to negotiations.[20] The drafting history of the NPT also reflects the drafting parties' intent that Article VI constitute a "legal obligation to negotiate" and a "tangible commitment."[21]

Postratification Understanding:

The NPT parties' postratification conduct likewise supports self-execution. In periodic "Treaty Review Conferences," the NPT parties called Article VI an

[18] 115 Cong. Rec. 6198, 6204 (1969) (emphasis added).
[19] S. Comm. on Foreign Relations, S. Rep. No. 91-1, at 18 (1969); S. Comm. on Foreign Relations, S. Rep. No. 90-2, at 7 (1968).
[20] *Supra* note 18 at 6203-04.
[21] M. Marion Bosch, *The Non-Proliferation Treaty and its Future, in International Law, The International Court of Justice and Nuclear Weapons* 375, 388 (L. Boisson de Chazournes and P. Sands, eds) (1999); E. Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 Am. J. Int'l L.. 711, 733 (1969).

"unequivocal undertaking."[22] And when the International Court of Justice interpreted the NPT, it held that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament . . . ." ER 49-50 (¶ 9).

The Executive, on the other hand, is mistaken about Article VI's legislative history and the postratification conduct of the parties, and relies on inapplicable cases.

First, the Executive misconstrues the legislative history. Senator Fulbright's 1969 testimony quoting the *Head Money* cases concerned hypothetical Congressional *repeal* of the NPT such that it was no longer the law of the land.[23] And the 1990 Senate Resolution cited by the Executive, RB 6, 48, proposed decades after the Treaty, concerns NPT Article III, which relates to nuclear materials verification. The focus, however, must be on Article VI because "[s]ome provisions of an international agreement may be self-executing and others non-self-executing." Restatement (3d) Foreign Relations § 111 cmt. h. Finally, the Executive's quotation from the 2010 NPT Review Conference Final Document, RB 49-50, is from the subsection for NPT Articles I and II; similar language is

[22] 2000 NPT Review Conference, NY, April 24-May 19, 2000, Final Document, U.N. Doc. NPT/Conf. 2000/28 (Vol. 1), p. 14; 2010 NPT Review Conference, NY, May 3-12, 2010, Final Document, U.N. Doc. NPT/Conf. 2010/50 (Vol. 1), pp. 13, 19-20.

[23] *Supra* note 18, at 6204.

absent in the subsection for Article VI.[24] In short, the Executive provides no legislative history or postratification conduct contradicting the self-execution of the *Article VI* obligation on the Executive.[25]

Second, the Executive relies upon inapposite cases to claim that Article VI does not create a "judicially-enforceable right." RB 49. But the cases concern third parties seeking redress for treaty breaches. A state-party's treaty rights, however, are fundamentally different than those of a third party. Because a treaty "is essentially a contract between two sovereign nations," *Washington*, 443 U.S. at 675, "treaty rights are the rights of the sovereign." *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980). Therefore, "it is up to the offended nations to determine whether a violation [] occurred and requires redress." *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). Here, the Marshall Islands claims direct rights under the Treaty and is entitled to enforce its rights. *See Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("every right, when withheld, must have a remedy, and every injury its proper redress").[26]

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[24] 2010 NPT Review Conference Final Document, *supra* note 22, at pp. 12-14.

[25] If the Executive's position is that NPT legislative history *writ large* demonstrates non-self-execution, then that would contradict the statute requiring the Executive to report on its compliance with the NPT obligations to Congress. *Cf. supra* note 2.

[26] *See also United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.) (collecting cases where the U.S. has sued on behalf of foreign nations to enforce treaty rights), *aff'd*, 450 F.2d 884 (2d Cir. 1971).

The Executive also cites *Frolova* and *Medellín* for the proposition that Article VI creates no legally enforceable rights. Both cases concerned *third party* claims under the UN Charter. Briefly, under the UN Charter nations undertake to comply with ICJ decisions. *Medellín*, 552 U.S. at 500. *Medellín* concerned whether that commitment allowed an ICJ decision to automatically provide third-party treaty rights that override contrary Texas criminal procedure remedies. The Court held it did not.[27] The Court did not hold the commitment limited vis-à-vis the contracting nations, as proffered by the Executive here. *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985), likewise concerned alleged third-party treaty rights, and confirmed there were already "quite a few decisions stating that the [UN] Charter is not self-executing." *Id.* at 374.

In sum, although analogous examples are few, no law bars this action between treaty parties.

F. "Strawman" Arguments Under the Administrative Procedure and Tucker Acts Cannot Bar this Case.

As the Executive acknowledges, the Marshall Islands has not brought an Administrative Procedure Act claim. Thus the argument that any such claim is barred is irrelevant. The same is true for the Executive's argument regarding Tucker Act claims, which concern monetary relief and not injunctive relief.

[27] Notably, this ruling flatly rejected the United States' interpretation of the President's authority under the treaty at issue. *Medellín*, 552 U.S. at 525.

Likewise, the Executive's reliance on *United States v. Jones*, 131 U.S. 1 (1889), is misplaced. It concerns Tucker Act claims and predates the undisputed waiver of sovereign immunity in this case.

III. CONCLUSION

Prior to the NPT Article VI obligation, the decision to negotiate for nuclear disarmament may have been for the political branches. But once the political branches ratified the NPT and thereby legally obligated the United States to negotiate in good faith, that obligation became part of the supreme law of the land. Interpretation of that obligation, as well as the Executive's compliance with it, is constitutionally committed to the judicial branch. Like any valid treaty, the NPT "must be obeyed or its obligation denied." The Executive's arguments would allow it to breach the NPT (i.e., not obey it) and simultaneously affirm it as a current legal obligation (i.e., not deny it). This the Executive cannot do.

This Court should reverse the district court's dismissal and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of December, 2015.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply 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 December 15, 2015.

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DATED this December 15, 2015.

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