No. 15-15636

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPUBLIC OF THE MARSHALL ISLANDS, a nonnuclear weapon State party to the Treaty on the Non Proliferation of Nuclear Weapons,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; BARACK OBAMA, The President of the United States of America; DEPARTMENT OF DEFENSE; ASHTON CARTER, Secretary, Department of Defense; DEPARTMENT OF ENERGY; ERNEST MONIZ, Secretary, Department of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Treaty:

Statutes:

Legislative Materials:

Other Authorities:

INTRODUCTION

For over two centuries, the Supreme Court has recognized that when sovereign nations disagree over the substance of their treaty obligations and their compliance with treaty provisions, those disputes become subject to international negotiations and other measures between the parties. The federal judiciary has nothing to do with such disputes, and can give no redress. *Head Money Cases*, 112 U.S. 580, 598 (1884). The Republic of the Marshall Islands, a fellow Party to the Treaty on the Non-Proliferation of Nuclear Weapons (Treaty or Non-Proliferation Treaty) and the plaintiff in this case, asks this Court to reject two centuries of precedent and resolve its treaty dispute with the United States in federal court.

Like the district court, this Court should deny plaintiff's request. Plaintiff characterizes this Court's task as a routine exercise in treaty interpretation within the Article III powers of the Court. However, plaintiff asks this Court to evaluate whether the United States has complied with its obligation under the Treaty to pursue negotiations in good faith on nuclear disarmament, to declare the United States in breach, and to compel

the President to call for and convene negotiations with other sovereign nations leading to nuclear disarmament and the cessation of the nuclear "arms race" within one year. Such relief would be unprecedented, and raises obvious justiciability problems.

The federal courts have consistently held that their Article III authority does not include the authority to command the United States to enter into international negotiations, even negotiations assertedly required by a treaty. *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889). The Constitution assigns to the President alone the power and responsibility "to speak or listen as a representative of the nation" in foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, even if plaintiff, as a foreign sovereign state, had standing to sue in U.S. courts, its challenge to the exercise of the President's foreign affairs responsibilities would lie outside the competence of the federal courts. Plaintiff must therefore pursue its goal of nuclear disarmament and an end to the claimed nuclear "arms race" by means other than judicial decree in a U.S. court.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under Article III of the U.S. Constitution and 28 U.S.C. 1331. Excerpts of Record (ER) 53 (Compl.). On February 3, 2015, the district court entered judgment in favor of the federal defendants. *See* ER 4 (Judgment); ER 5-13 (Order). Plaintiffs filed a timely notice of appeal on April 2, 2015. ER 20-21 (Notice). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Plaintiff alleges that the United States has breached its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons by failing to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race. At issue here are

1. Whether plaintiff, as a foreign sovereign state, has standing to bring this suit.

2. Whether plaintiff's claims, which involve issues of foreign policy and national security, are justiciable.

3. Whether Article VI is self-executing and is thus doemestically enforceable.

4. Whether plaintiff has a valid claim for declaratory relief.

STATEMENT OF THE CASE

Over 180 States, including plaintiff and the United States, are parties to the Treaty on the Non-Proliferation of Nuclear Weapons. Plaintiff brought suit for declaratory and injunctive relief against the United States, alleging that the United States breached its obligations under Article VI of the Treaty by failing to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race. After briefing and oral argument, the district court dismissed plaintiff's claims and entered judgment for the United States. The district court held that plaintiff did not have standing to sue because plaintiff had not identified a concrete harm that would be redressed by a favorable decision. Even if plaintiff did have standing, the court reasoned, plaintiff's claim raises a nonjusticiable political question that is textually committed for resolution to the Executive Branch, and that the court lacks manageable standards to resolve.

STATEMENT OF FACTS

A. THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS.

1. The United States and the Soviet Union led international negotiations on the Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, which entered into force on March 5, 1970. Article VI provides that "[e]ach 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." The Treaty does not include a dispute resolution clause or any other explicit mechanism for the Parties to address alleged violations. Nevertheless, because the Treaty is a legally binding instrument under international law, breaches of the Treaty may give rise to international legal remedies.

2. The Senate gave its advice and consent to ratification of the Treaty in 1969, and the President ratified the Treaty for the United States in that same year. During the course of the pre-ratification debate on the Treaty in

the U.S. Senate, the Chairman of the Senate Committee on Foreign Relations made clear that the Treaty would not give rise to any domestically enforceable obligations in U.S. courts. *See* 115 Cong. Rec. 6198, 6199 (1969) (statement of Sen. Fulbright); *id*. at 6204 ("A treaty may create certain obligations in the mind of a foreign country, but domestically it does not."); *accord* 136 Cong. Rec. 12723 (1990) (statement by Senator Boschwitz, sponsor of the resolution to reaffirm the objectives of Treaty, that "[t]he [Non-Proliferation Treaty] is not self-executing"). After ratification, Congress did not pass any legislation establishing any domestically enforceable rights, a point that plaintiff implicitly concedes by bringing this lawsuit under the Treaty itself.

3. Pursuant to 22 U.S.C. 2574(a), the Secretary of State has "primary responsibility" for the United States' participation in all international negotiations on arms control, nonproliferation, and disarmament, including negotiations involving the Non-Proliferation Treaty. The Secretary is also responsible for preparation of an annual report to Congress "on the status of United States policy and actions with respect to

arms control, nonproliferation, and disarmament." 22 U.S.C. 2593a(a). The 2015 report states that "[a]ll U.S. activities during the reporting period were consistent with the obligations set forth in the [Non-Proliferation Treaty]." U.S. Dep't of State, *2015 Report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments*, pt. I (June 5, 2015), http://www.state.gov/t/avc/rls/rpt/2015/243224.htm.

B. FACTS AND PRIOR PROCEEDINGS IN THIS CASE.

1. Plaintiff is a non-nuclear-weapon State that acceded to the Treaty in 1995, ER 50-51 (Compl. ¶13), after attaining independence.[1] In April 2014, plaintiff brought this suit for declaratory and injunctive relief against the United States, the President, and several departments, agencies and officials, alleging that the United States breached its obligation under Article VI of the Treaty by failing "to pursue negotiations in good faith" on effective measures relating to (i) cessation of the nuclear arms race "at an

[1] Plaintiff and its citizens have brought numerous unsuccessful suits against the United States with respect to nuclear weapons testing. *See, e.g.*, *People of Bikini v. United States*, 77 Fed. Cl. 744, 781-87 (2007), *aff'd*, 554 F.3d 996 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1048 (2010), and *cert. denied sub nom. John v. United States*, 559 U.S. 1048 (2010).

early date;" and (ii) nuclear disarmament. ER 61 (Compl. ¶62); ER 65 (Compl. ¶72). Plaintiff claimed that this alleged breach caused increased proliferation of nuclear weapons and increased risks associated with that proliferation, leaving plaintiff "exposed to the dangers of existing nuclear arsenals and the real probability that additional States will develop nuclear arms;" and denied plaintiff the benefit of its bargain as a Treaty party. ER 71-72 (Compl. ¶¶88-93).

Plaintiff sought (1) a declaration of the United States' Article VI obligations; (2) a declaration that the United States "is in continuing breach" of those obligations; (3) an injunction requiring the United States to comply with its obligations "within one year of the date of this Judgment, including by ***calling for and convening*** negotiations for nuclear disarmament in all its aspects;" (4) attorneys' fees and costs; and (5) "such other, further, and different relief" as may be deemed proper. ER 72-76 (Compl.) (emphasis in original).

The United States moved to dismiss plaintiff's suit on the grounds that (1) plaintiff lacked standing, (2) the political question doctrine barred

the declaratory and injunctive relief sought, (3) Article VI is not self-executing, and is thus not domestically enforceable, and accordingly cannot provide plaintiff with a cause of action, (4) venue is improper under 28 U.S.C. 1391(e)(1), and (5) the statute of limitations, laches, and the public interest preclude the relief requested.

2. The district court granted the government's motion to dismiss. ER 5-13 (Order). The district court examined the two injuries asserted by plaintiff, and concluded that they did not satisfy constitutional standards for an "injury in fact" that is (1) "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) "fairly traceable to the challenged action of the defendant," and (3) redressable by a favorable decision. ER 7 (Order) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The district court concluded that plaintiff's "generalized and speculative fear of the possibility of future use of nuclear weapons does not constitute a concrete harm unique to Plaintiff required to establish injury in fact." ER 8 (Order). The district court further found that plaintiff's failure

to obtain the result it allegedly bargained for in the Treaty—the United States' negotiation of effective measures leading to nuclear disarmament and cessation of the nuclear arms race—could not be redressed by compelling specific performance by only one Treaty party. ER 8-9 (Order). The court emphasized the multilateral nature of the Treaty, adding that "[t]he Treaty does not create, and the Court may not enforce, a bilateral obligation between the United States and the Marshall Islands." ER 9 (Order).

The district court concluded that even if plaintiff had standing, its claim implicated two of the six factors in *Baker v. Carr*, 369 U.S. 186, 217 (1962), which bear on whether a claim raises a nonjusticiable political question. ER 9-12 (Order). The court found that plaintiff's request "to have this Court interpret the Treaty to enforce an obligation for the Executive to initiate discussions with foreign nations" implicates "the foreign affairs function," which is constitutionally committed to the Executive Branch (*Baker* factor (1)). ER 10 (Order). "Requiring 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 (Order).

The district court also found that it lacked any "judicially discoverable and manageable standards" to fashion the injunctive relief plaintiff sought (*Baker* factor (2)). ER 11 (Order). The court reasoned that "[w]hat constitutes good faith efforts to pursue negotiations on effective measures relating to cessation of the nuclear arms race are determinations for the political branches to make, using the panoply of resources and expertise it has accumulated in the area of international security as well as diplomatic and military affairs." ER 11 (Order). The court also found that "[p]laintiff's request that such efforts be effectuated within one year is arbitrary and fails to take into consideration the activities and willingness of other nations which are also signatories to the Treaty." ER 11 (Order).

The district court found the issue of whether the Treaty provides a private right of action to be "irrelevant" to whether it can be enforced by a Treaty party. The court added, however, that because "the Treaty itself is silent as to the proper enforcement mechanism and does not contemplate

the participation of the federal courts, the Court finds that enforcement shall depend upon the interest and honor of the parties to the Treaty." ER 12 n.2 (Order).

Given these rulings, the district court found no need to reach the government's arguments about venue, statute of limitations, and laches. ER 12 (Order).

SUMMARY OF ARGUMENT

Plaintiff, a sovereign State and fellow party to the Treaty on the Non-Proliferation of Nuclear Weapons, brought suit against the United States, the President, and several departments, agencies and officials, alleging that the United States is in continuing breach of its Treaty obligation to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race. As relief, plaintiff seeks, *inter alia*, a declaration that the United States has breached the Treaty, and an order compelling the United States to call for and convene negotiations on nuclear disarmament within one year. Although plaintiff portrays the judiciary's task in this case as a

routine exercise of treaty interpretation, the relief sought is unprecedented and obviously inappropriate.

Plaintiff's claims raise insurmountable justiciability barriers that the opening brief does not overcome. On its face, plaintiff's asserted injury of an "increased risk of grave danger from increased vertical proliferation of nuclear weapons" (Pl.'s Br. 11) and "the real probability that additional States will develop nuclear arms" (ER 72 (Compl. ¶92)) is neither "concrete" and "particularized," nor "certainly impending," and relies on a "speculative chain of possibilities." *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147, 1150 (2013). Further, neither an Article III court nor the United States itself can compel the over 180 States party to the Treaty to "convene negotiations." This certainly cannot be redressed through a judicial order that forces the United States, alone, to the negotiating table. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

Plaintiff's claims also raise political questions outside the proper constitutional role of the federal judiciary. Plaintiff wants a court to review, and ultimately override, the strategic choices that the Executive Branch has made on the timing and pace of disarmament negotiations, in light of the available real-world foreign policy options. But the President alone has the constitutional power to negotiate these matters on behalf of the United States. While plaintiff may disagree with the President's choices, "[t]he courts can afford no redress." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). And the Supreme Court has made clear that the courts cannot compel the President to take action in the way that plaintiff envisions here. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499-501 (1866); *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality op.).

Either plaintiff's lack of standing or the fact that its claims raise political questions is sufficient to preclude review. *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988). But if this Court disagrees on these points, plaintiff's suit nonetheless fails because the Treaty is not self-executing, and is thus not domestically enforceable by the

judiciary. Accordingly, the Treaty cannot supply plaintiff with a cause of action in U.S. courts. Proper concern for the constitutional allocation of power over foreign affairs and national security, and for the President and the Senate's intent in ratifying the Treaty, requires this Court to decline to recognize this obviously improper suit.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal for lack of subject matter jurisdiction. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014) (political question doctrine); *see also Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015) (standing).

ARGUMENT

I. PLAINTIFF DOES NOT HAVE ARTICLE III STANDING.

A. Plaintiff Must Satisfy The Three Elements Of Standing.

To establish standing to sue in federal court, "[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377,

1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561.[2]

Even in the rare instances in which a foreign state may bring suit in federal court, that state's ability to sue "has been conditioned on the requirement that the foreign nation satisfy the usual standing requirements imposed on individuals or domestic corporations." *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 336 (1st Cir. 2000).

Plaintiff cites several cases for the proposition that foreign nations have standing to enforce all treaties to which they are a party. Br. 34-35. To the extent these cases involved court enforcement of self-executing extradition treaties, they are easily distinguishable, as courts have an indisputably critical role in adjudicating the potential removal of foreign nationals in furtherance of another State's domestic law criminal

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[2] *See also Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1194, 1201 (D. Nev. 2006) (finding no injury-in-fact to nonprofit organizations where relevant 1944 Treaty between United States and Mexico did not allow individuals to sue under the Treaty and organization therefore "[could not] assert rights under the Treaty").

proceeding. *E.g., Jamaica v. United States*, 770 F. Supp. 627 (M.D. Fla. 1991) (alleged violation of extradition treaty between Jamaica and the United States).

B. Fear Of The Future Use Of Nuclear Weapons Is Not A "Concrete And Particularized" Injury That Is "Certainly Impending."

Plaintiff attempts to recast the Treaty as a contract, under which an alleged breach can be litigated and remedied by the contracting parties as in any domestic commercial dispute. *But see* Restatement (Third) of Foreign Relations Law § 111 cmt. h (1987) (cautioning against interpreting international agreements by using analogies from domestic contract law). To that end, plaintiff asserts two injuries resulting from the United States' alleged contractual breach: (1) the "increased risk of grave danger from increased vertical proliferation of nuclear weapons" and the possibility "that additional States will develop nuclear arms;" and (2) the denial of plaintiff's bargained-for right to the participation of the United States in nuclear disarmament negotiations. Pl.'s Br. 2, 11, 35-36; ER 71-72 (Compl. ¶92).

1. Even if we assume, as did the district court, that "international agreements should be considered contracts" whose breach "confer[s] standing on parties to the contract," "[s]uch a generalized and speculative fear of the possibility of future use of nuclear weapons"—by an unknown State, which may or may not be a Party to the Treaty, on some unspecified date—"does not constitute a concrete harm unique to Plaintiff required to establish injury in fact." ER 8 (Order). At most, an "attenuated chain of inferences," involving "the unfettered choices made by independent actors not before the court," connects the United States' alleged vertical proliferation to the plaintiff's apprehension about the potential increased risk of nuclear war at some unknown (and unknowable) future date. *See generally Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1150 n.5 (2013).[3] This asserted injury is neither "concrete and particularized," nor "actual or imminent." *Lujan*, 504 U.S. at 560.

[3] Amicus Physicians for Social Responsibility provides a list of incidents that, in its view, "almost" resulted in nuclear war. Most occurred well before the Treaty entered into force; the most recent one took place 20 years ago, in 1995. Amicus Physicians for Social Responsibility Br. 8-15.

The district court's conclusion follows directly from the decisions of the Supreme Court and this Court. "[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Clapper*, 133 S. Ct. at 1147. Rejecting similar assertions of injury in a challenge to the implementation of the United States' strategic defense policy, this Court stated that "[i]nferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are, at best, speculative." *Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988). That is precisely why "[s]uch challenges are 'most appropriately addressed [to] * * * the representative branches [of federal government].'" *Id*. at 236 (second, third, fourth alterations in original).

2. Plaintiff contends that Article III does not require identification of a harm "unique to plaintiff," and that therefore, the widespread nature of the asserted risk posed by vertical proliferation should not defeat standing for a Treaty party. Pl.'s Br. 38, 42 (citing, *inter alia*, *Newdow v. Lefevre*, 598

F.3d 638 (9th Cir. 2010), *cert. denied*, 562 U.S. 1271 (2011); *FEC v. Akins*, 524 U.S. 11 (1998)).

The cases plaintiff cites are easily distinguished. This Court has confirmed that First Amendment and Establishment Clause challenges, such as *Newdow*, "present unique standing considerations" such that "the inquiry tilts dramatically toward a finding of standing." *Libertarian Party of Los Angeles Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013); *see also Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1250 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007). In *FEC v. Akins*, the plaintiffs brought suit under the Federal Election Campaign Act, which broadly authorizes suit by "[a]ny person who believes a violation of this Act * * * has occurred." 524 U.S. at 19 (alterations in original). *See also Public Citizen v. U.S. DOJ*, 491 U.S. 440, 449-50 (1989) (assessing standing under Federal Advisory Committee Act).

Massachusetts v. EPA, 549 U.S. 497 (2007) is likewise inapposite. In that case, the Supreme Court emphasized that Massachusetts' stake in protecting its "quasi-sovereign interests" entitled it to "special solicitude in our standing analysis." *Id*. at 520; *but see Canadian Lumber Trade All. v.*

United States, 517 F.3d 1319, 1337 (Fed. Cir. 2008) (rejecting argument that Canada, which did not surrender any sovereign prerogatives in negotiating trade treaty, was likewise entitled to "special solicitude" in the standing analysis).

None of these cases addresses the situation presented here, where the alleged harm is arguably shared not merely by a large group, but by all mankind. *See Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960) (per curiam) (plaintiffs, including Marshall Islands residents, lacked standing based on alleged injury that was shared with "all mankind" and "in common with people generally"), *cert. denied*, 364 U.S. 835 (1960).

In any event, plaintiff misses the point. The problem is not merely that the alleged harm is widely-shared, but also that it is abstract, lacking the "concrete specificity" that prevents a plaintiff "from obtaining what would, in effect, amount to an advisory opinion." *FEC v. Akins*, 524 U.S. at 24. "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand." *Id.*; *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015).

3. Plaintiff protests that it met its burden at the pleading stage simply by asserting that the United States' breach of Article VI caused increased nuclear proliferation and "measurable increased risks," and by supporting its assertions with an expert declaration and references to the opinions of other experts and pre-ratification statements about the Treaty in the Congressional Record. Pl.'s Br. 38-39 (citing, *inter alia*, 115 Cong. Rec. at 6204 (statement of Sen. Javits)). Cursory review of the plaintiff's Weston declaration (ER 77-83 (Weston Decl.)) reveals that this document, like the statements of public officials and the academic papers referenced in the complaint and the opening brief, consists of "sweeping legal conclusions cast in the form of factual allegations," *Pauling*, 278 F.2d at 254.

Moreover, these supporting materials do not render plaintiff's alleged injury less speculative. Senator Javits' statement in 1969 that vertical proliferation presents a grave threat to mankind's survival does not make the use of nuclear weapons "actual or imminent" (*Lujan*, 504 U.S. at 560) almost fifty years later. Although two amici assert that the United States is engaged in modernizing its nuclear arsenal, *see* Amicus W. States

Legal Found. Br. 6; Amicus Nuclear Watch N.M. Br. 20-25, the modernization of nuclear weapons does not make their use more "certainly impending" (*Clapper*, 133 S. Ct. at 1147), or even more likely. That plaintiff believes it contractually bargained for a reduction in the risk of nuclear warfare (Pl.'s Br. 38, 40-41) does not overcome this obvious flaw in plaintiff's suit. *See generally United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973) ("pleadings must be something more than an ingenious academic exercise in the conceivable").

C. Plaintiff's Asserted Injuries Are Not Redressable.

The district court further found that plaintiff's asserted injuries would not be redressed by a favorable decision. The court held that it could not order "the United States [to] negotiate in good faith on effective measures relating to nuclear disarmament," and even if it could, the requested relief "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." ER 8-9 (Order). The court pointed out that "[t]he Treaty does not create, and the Court may not enforce, a bilateral obligation between

the United States and the Marshall Islands," and "[t]he injury Plaintiff claims cannot be redressed by compelling the specific performance by only one nation to the Treaty." ER 9 (Order).

1. The district court's conclusion that the relief plaintiff seeks would not redress its injuries is correct. *See* ER 8-9 (Order) (citing *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980)). Even if the district court could compel the United States to initiate or participate in specific negotiations on nuclear disarmament and the cessation of the arms race, the United States cannot achieve the objectives of a multilateral treaty through unilateral action. It is pure conjecture whether a court order directing the United States to convene negotiations on nuclear disarmament would induce any other nuclear-weapon state or non-nuclear-weapon state to attend such negotiations, let alone whether other States would participate on the premises plaintiff demands.

Although plaintiff disputes that it would be "speculative" that other nations would participate in negotiations, the complaint asserts that, as a

group, the five nuclear-weapon States under the Treaty have refused to negotiate pursuant to Article VI. *See* ER 66, 68 (Compl.); Pl.'s Br. 6 (stating that three other countries, in addition to the United States, voted against U.N. General Assembly resolution establishing nuclear disarmament working group).

None of the other Treaty States Parties is a party to this suit and therefore none is bound by any resulting court order. "[T]here is no standing if, following a favorable decision, whether the injury would be redressed would still depend on 'the unfettered choices made by independent actors not before the courts.'" *Novak*, 795 F.3d at 1020; *see also Allen v. Wright*, 468 U.S. 737, 750 (1984). Thus, in *Greater Tampa Chamber of Commerce*, the D.C. Circuit held that the plaintiffs' injury was not redressable where the relief sought—invalidation of an air travel agreement between the United States and the United Kingdom—would not affect plaintiffs' circumstances because, *inter alia*, the United Kingdom would still "completely control[] landing rights within its boundaries." 627 F.2d at 263.

Plaintiff counters that in *Greater Tampa Chamber of Commerce*, the parties identified the United Kingdom as a party whose absence precluded redress, whereas here, the United States has never identified any party whose absence precludes complete relief. Pl.'s Br. 49; *see also* Pl.'s Br. 3, 11-12. Plaintiff argues that the United States should have filed a motion under Federal Rule of Civil Procedure 19 to require joinder of the absent nations, which the district court could then have decided following discovery and a fact-specific inquiry. Pl.'s Br. 47-48.

Plaintiff's suggestion is absurd. "Rule 19 cannot be applied in a vacuum." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 868 (2008). The other Treaty Parties are sovereign nations that are immune from suit in federal court unless an exception to the Foreign Sovereign Immunities Act applies. No such exception would apply here. Under the circumstances, an attempt to join them under Rule 19 would have been frivolous. *Id*. at 867 ("A case may not proceed when a required-entity sovereign is not amenable to suit.").

2. Plaintiff attempts to circumvent the redressability problem by framing its injury as the violation of its procedural right to have the United States engage in good-faith negotiations. Pl.'s Br. 44. Where the injury alleged is procedural in nature, plaintiff reasons, "normal standards for redressability and immediacy" are not required "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider." Pl.'s Br. 11, 44 (quoting *Massachusetts v. EPA*, 549 U.S. at 517-18).

But plaintiff does not identify a provision in the Treaty that confers anything remotely akin to a procedural right as described in *Lujan* and *Massachusetts v. EPA*. As the district court pointed out, the Non-Proliferation Treaty is a multi-lateral treaty, whose text does not speak to negotiations among any subset of Parties. In contrast, the statute at issue in *Massachusetts v. EPA* expressly provided that plaintiff with a "procedural right to challenge the rejection of [the plaintiff's] rulemaking petition as arbitrary and capricious." 549 U.S. at 520 (Clean Air Act); *accord Salmon*

Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220 (9th Cir. 2008) (Endangered Species Act and Administrative Procedure Act (APA)).

In any event, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also Sturgeon v. Masica*, 768 F.3d 1066, 1075 (9th Cir. 2014) ("[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements"), *cert. granted*, 2015 WL 1509604 (U.S. Oct. 1, 2015). Thus, plaintiff must show that the "procedure" of negotiation "[is] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Salmon Spawning & Recovery All.*, 545 F.3d at 1225.

Plaintiff's procedural injury argument therefore fails for the reasons already discussed: Plaintiff cannot demonstrate that this alleged right to the United States' participation in negotiations would, if exercised, protect the plaintiff's concrete interest in nuclear disarmament and the cessation of the nuclear arms race. *See generally Salmon Spawning & Recovery All.*, 545

F.3d at 1226. The problem is not, as plaintiff states (Pl.'s Br. 3, 11, 43, 45-47), that the effect of the United States' participation may be only incremental. It is that the effect is entirely speculative in light of the number of other States on whom any agreement regarding nuclear disarmament will ultimately depend—five nuclear-weapon States parties, as well as the other Parties to the Non-Proliferation Treaty and the States not party to the Treaty that possess nuclear weapons.

II. THE POLITICAL QUESTION DOCTRINE RENDERS PLAINTIFF'S CLAIMS NON-JUSTICIABLE.

A. *Baker v. Carr* Supplies The Standard For Determining Whether A Claim Raises A Political Question.

The district court concluded that even if plaintiff had standing to sue, its claim for relief raises "a fundamentally non-justiciable political question." ER 9 (Order). To determine whether a particular claim raises a political question, courts generally consider whether the claim involves

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack

> of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962) (the *Baker* factors). The justiciability inquiry involves a "case-by-case analysis" in which the various *Baker* tests "often collaps[e] into one another." *Alperin v. Vatican Bank*, 410 F.3d 532, 544-45 (9th Cir. 2005), *cert. denied sub nom. Order of Friars Minor v. Alperin*, 546 U.S. 1137 (2006), and *Instituto per le Opere di Religione v. Alperin*, 546 U.S. 1137 (2006). "To find a political question, we need only conclude that one factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006).

B. Plaintiff's Claims Involve Issues Textually Committed To The Political Branches.

1. Courts have consistently held that the propriety of the political branches' exercise of constitutionally enumerated powers over the "the conduct of foreign relations * * * is not open to judicial inquiry." *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *see Mingtai Fire & Marine Ins. Co. v.*

UPS, 177 F.3d 1142, 1144 (9th Cir.), *cert. denied*, 528 U.S. 951 (1999).

Executive decisions on foreign policy

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

2. The district court examined plaintiff's claims and concluded 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 (Order). That decision was correct. Plaintiff seeks, among other things, an order declaring that the United States has breached Article VI of the Treaty; and an order directing the United States to convene negotiations on nuclear disarmament within one year. *See* ER 74-75 (Compl.); Pl.'s Br. 3, 29. But issuing such orders would directly implicate the power to make and execute treaties, authority over the conduct of foreign policy, and authority

over national defense and security, all of which are textually committed to the political branches rather than the judiciary.

Although plaintiff denies that its claims would require the court to delve into and monitor the United States' policies (Pl.'s Br. 28-29), it is difficult to see how the court could otherwise assess the United States' compliance with Article VI and award effective relief. A determination of plaintiff's claims would require this Court to second-guess decisions made at the highest levels of the Executive Branch, by the President and the Secretaries of State, Defense, and Energy, about the United States' interpretation of the Treaty as well as its strategy and tactics for pursuing treaty implementation. Because "courts are unschooled in 'the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict,' the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government." *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (brackets in original), *cert. denied*, 522 U.S. 1045 (1998).

The district court's application of the political question doctrine is consistent with this Court's analysis in prior cases involving concerns about foreign affairs and national security. *E.g., Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552-55 (9th Cir. 2014) (claims against oil company for funding military brigade involved in human rights abuses were inextricably bound to inherently political question of the propriety of the United States' funding of the brigade); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (challenge to company's sale of bulldozers to Israel, which were used to demolish homes in Palestinian Territories, would necessarily implicate the propriety of the United States' selection and financing of the purchase); *Alperin v. Vatican Bank*, 410 F.3d at 559-62 (claims that foreign bank assisted pro-Nazi Ustasha regime's war objectives and profited from slave labor were political questions).

Applying the same analysis, the Fifth Circuit dismissed as nonjusticiable a class action against oil production companies, in which the plaintiffs alleged that national oil companies and subsidiaries conspired with Organization of Petroleum Exporting Countries member nations to fix

prices for crude oil and refined petroleum products. The court reasoned that "[b]y adjudicating this case, the panel would be reexamining critical foreign policy decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation." *Spectrum Stores Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 (5th Cir. 2011).[4]

The district court also correctly recognized that because the Constitution empowers the Executive Branch to negotiate with foreign nations, the judiciary cannot "require the Executive to initiate discussions with foreign nations over the reduction in its nuclear armaments or programs." ER 11 (Order). That conclusion is consistent with the conclusion that this Court reached in a separation-of-powers decision on which the district court relied, *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). There, this Court declined the appellants' request to order the Secretary of State to initiate treaty negotiations that were required by

[4] *Accord El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 839-45 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1178 (2011); *Schneider*, 412 F.3d at 194-98.

federal law. This Court held that such an order was not justiciable "in any federal court," because, *inter alia*, the appellants' claims related to the foreign affairs function, which rests within the exclusive province of the Executive Branch. *Id*. at 652-53. Plaintiff attempts to distinguish *Earth Island* on the factual grounds that (1) in that case, the President had claimed in his signing statement that the relevant law was unconstitutional, and (2) treaties, unlike laws, enjoy a presumption of constitutionality. Pl.'s Br. 22-23. These arguments are irrelevant, since plaintiff makes no constitutional claims.

3. In response, plaintiff argues that the treaty power does not override the judiciary's Article III obligation to decide legal disputes under existing treaties. Pl.'s Br. 1-2, 11-12, 15-20. Plaintiff insists that the political question doctrine only applies to those treaty cases concerning the Executive Branch's right to abrogate a treaty, and that "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.'" Pl.'s Br. 16 (quoting *United States v. Decker*, 600 F.2d 733, 737 n.6 (9th Cir.), *cert. denied*,

444 U.S. 855 (1979)). And plaintiff points to decisions in, *inter alia*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), and *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), as examples of cases against the United States in which the Supreme Court construed international treaties. Pl.'s Br. 18-20, 32; *see also* Pl.'s Br. 32 n.11.

In fact, both *Zivotofsky* and *Japan Whaling* involved the vindication by private individuals of statutory rights addressing private interests, not treaty rights. *See, e.g., Zivotofsky*, 132 S. Ct. at 1427-30 (political question doctrine did not bar review of plaintiffs' suit to enforce specific statutory right under the Foreign Relations Authorization Act, which directed Secretary of State to record Israel as the birthplace of U.S. citizens born in Jerusalem); *Japan Whaling Ass'n*, 478 U.S. at 229-30 (same, for consideration of whether Secretary of Commerce's refusal to certify that a nation's fishing practices violated an international whaling convention, violated amendments to the Fishermen's Protective Act). *Japan Whaling* actually reaffirmed that "[t]he political question doctrine excludes from judicial

review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id*. at 230.

In any event, the issue here is not whether the federal courts can interpret treaties that bear on civil disputes between private parties, or on criminal appeals. *See, e.g., Sanchez-Llamas*, 548 U.S. 331 (criminal defendants argued that Vienna Convention on Consular Relations implicitly authorized remedy of evidence suppression where state officials failed to notify consular officers of defendants' detention); *Decker*, 600 F.2d 733 (criminal defendants, prosecuted for violation of federal regulations, argued that United States' convention with Canada for protection of river system did not authorize United States to selectively approve regulations issued by commission established pursuant to the convention).[5] Of course they can.

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[5] This Court has subsequently read *Decker* as "merely" stressing that the *Baker* factors "should not be applied indiscriminately and without considering that a refusal to decide" for prudential reasons "could have the effect of allowing persons to suffer criminal penalties for refusing to obey

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The issue is whether federal courts should consider a suit by a foreign government to enforce its purported international law treaty rights against the United States. And plaintiff points to no case permitting such a suit. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), on which plaintiff relies (Pl.'s Br. 18), involved an *in rem* admiralty action against a French vessel that was captured for adjudication as a prize of war. France itself was not a party to that suit; the "claimant" to whom the vessel was ultimately restored was the ship's commander. Instead of permitting foreign states to enforce treaties against the United States, courts have consistently held that the judiciary's authority under Article III does not include the authority to command the United States to take action necessary to perform a treaty with another sovereign.

Thus, the Supreme Court held in *Botiller v. Dominguez* that it "ha[d] no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United

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an invalid regulation." *Hopson v. Kreps*, 622 F.2d 1375, 1379-80 (9th Cir. 1980).

States, as a sovereign power, chooses to disregard." 130 U.S. 238, 247 (1889) (ejectment action involving Mexican land grant); *accord Ex parte Republic of Peru*, 318 U.S. 578, 588-89 (1943) (seizure of foreign vessel); *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (exclusion law that violated treaty with China); *United States v. Ferreira*, 54 U.S. 40, 48 (1851) (failure to provide claims tribunal required by treaty with Spain); *see generally Holmes v. Laird*, 459 F.2d 1211, 1220 (D.C. Cir.) (citing cases), *cert. denied*, 409 U.S. 869 (1972); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940), *aff'd on other grounds*, 311 U.S. 470 (1941); *Kwan v. United States*, 84 F. Supp. 2d 613, 623 (E.D. Pa. 2000), *aff'd*, 272 F.3d 1360 (Fed. Cir. 2001); *Canadian Transp. Co. v. United States*, 430 F. Supp. 1168, 1172 n.3 (D.D.C. 1977), *aff'd in part, rev'd in part*, 663 F.2d 1081 (D.C. Cir. 1980).

In each of these cases, the courts reaffirmed that the foreign state's recourse was "to the political department of our government, which is alone competent to act upon the subject." *Chae Chan Ping*, 130 U.S. at 609. As the Second Circuit pointed out, "it would not do for the courts to

declare that an act is a breach of a treaty and results in this or that remedy," since "[t]he remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial branches of our own government." *George E. Warren Corp. v. United States*, 94 F.2d 597, 599 (2d Cir.), *cert. denied*, 304 U.S. 572 (1938).

C. No Manageable Standards Exist For Resolving Plaintiff's Claims.

The district court likewise correctly concluded that it lacked judicially manageable standards "by which to adjudicate the United States' alleged breach of the" Treaty (*Baker* factor (2)).[6] ER 9 (Order). "What constitutes good faith efforts to pursue negotiations on effective measures relating to * * * cessation of the nuclear arms race are determinations for the political branches to make, using the panoply of resources and expertise it has

[6] Plaintiff construes the district court's determination as also reflecting the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" (*Baker* factor (3)). Br. 29-30. Resolving this case would inevitably require a court to make such an initial policy determination, since a court could not conclude that the United States had breached its Article VI obligations without rendering a policy determination about, *inter alia*, the appropriate balancing of national security and disarmament concerns.

accumulated in the area of international security as well as diplomatic and military affairs." ER 11 (Order).

Federal law provides no standard by which to measure the United States' compliance with its Article VI obligation to "pursue negotiations in good faith on effective measures relating to" cessation of the nuclear arms race and nuclear disarmament. Applying the "good faith" standard to the United States' disarmament negotiations would require a court to make numerous policy judgments about what constitutes "pursuing negotiations," what constitutes a "good faith" effort to realize "effective measures" relating to the cessation of the nuclear arms race and nuclear disarmament, and, conversely, what policy positions or negotiation strategies might demonstrate a lack of good faith.

Plaintiff argues that to determine whether the United States has negotiated in good faith under Article VI, courts should borrow the standards from international adjudications of disputes involving maritime boundaries and hydroelectric projects, as well as federal cases construing, *inter alia*, the Indian Gaming Regulatory Act and the National Labor

Relations Act. Pl.'s Br. 10, 24-27, 33; *see also* Amicus United Electrical, Radio & Mach. Workers Br. 3-17 (arguing federal and state labor law provide manageable standard). From those cases, plaintiff extrapolates that in order to negotiate in good faith for purposes of Article VI, the United States must (1) attend negotiations, (2) make proposals and be willing to compromise, and (3) not take steps contrary to its commitment. Pl.'s Br. 26-27.

The cases on which plaintiff relies are inapposite. The Indian Gaming Regulatory Act, for instance, imposes a "good faith" standard on states in their negotiations with Indian tribes over gaming compacts, and specifies that certain conduct constitutes bad faith. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1029 (9th Cir. 2010), *cert. denied sub nom. Brown v. Rincon Band of Luiseno Mission Indians*, 131 S. Ct. 3055 (2011). The labor cases construe "good faith" as part of an employer's express statutory duty to bargain over terms and conditions of employment. No similar statutory framework applies here because the

President and the Senate did not make the Treaty self-executing. *See infra* pp. 46-54.

The international decisions cited by plaintiff are neither precedential nor persuasive in the instant case. Not surprisingly, the standards that plaintiff derives from these irrelevant domestic and international cases do not accommodate the more nuanced consideration of what would constitute good faith in the context of multilateral disarmament negotiations among sovereign nations, all of whom must balance their national security concerns against their desire for disarmament and an end to the arms race. *See generally El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1178 (2011) (political question doctrine barred adjudication of whether military attack on plant was mistaken because the court "could not decide this question without first fashioning out of whole cloth some standard for when military action is justified").[7]

[7] Amicus Global Justice Center urges that the steps outlined in the 2010 Review Conference Report supply the appropriate standard for

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D. The Prudential *Baker* Factors Further Weigh Against Adjudication.

"[F]or the sake of completeness," plaintiff also argues that the final three *Baker* factors do not bar this case. Pl.'s Br. 30-34. Because the district court did not address these factors, this Court need not consider them. Should this Court wish to do so, however, all three of these prudential factors weigh heavily against adjudication of plaintiff's claims. *See generally Saldana*, 774 F.3d at 552 (finding that under *Baker* factors (4), (5), and (6), plaintiffs' claims are "inextricably bound to an inherently political question—the propriety of the United States' decision" to fund foreign brigade that committed human rights abuses).

It is difficult to conceive how a court could adjudicate a claim that the United States had breached a multilateral disarmament and nonproliferation treaty, without embarrassing the Executive Branch and expressing a lack of respect for its exercise of constitutional authority to

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determining "good faith," but does not state how many of the specific actions a Party must take to be considered in compliance. Amicus Global Justice Ctr. Br. 5-7. In any event, nothing in the Report suggests that the Conference intended the document to constitute a measure of compliance with the terms of the Treaty itself.

interpret and implement the treaty (*Baker* factors (4), (6)). A court order declaring the United States in violation of Article VI would squarely contradict, and interfere with, the United States' position that it is "in compliance with all of its obligations under arms control, nonproliferation, and disarmament agreements and commitments." *See* U.S. Dep't of State, *2015 Report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments*, pt. I (June 5, 2015), http://www.state.gov/t/avc/rls/rpt/2015/243224.htm. In a state law preemption case, the Supreme Court invalidated a state law regulating the state government's business with Burma because the differences between the state law and governing federal statutes "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

In addition, determining whether the United States is currently in breach of its treaty obligations would require a court to question the propriety of long-term negotiation strategies and choices that have already

been made and may take time to bear fruit (*Baker* factor (5)). Judicial intervention into these sensitive political decisions could have unanticipated consequences for ongoing negotiations of which plaintiff and the court are necessarily unaware.

III. ARTICLE VI OF THE TREATY IS NOT SELF-EXECUTING AND THUS IS NOT ENFORCEABLE IN U.S. COURT.

"In addition to constitutional standing, a plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Gunpowder Riverkeeper v. FERC*, __F.3d__, 2015 WL 4450952, at *3 (D.C. Cir. July 21, 2015). Even if plaintiff's claims were justiciable, the Treaty, while certainly an *international* legal obligation, is non-self-executing as a matter of U.S. law. It accordingly is not domestically enforceable in U.S. court and therefore cannot supply plaintiff with a cause of action. Although the district court did not rest dismissal on this ground, this Court may affirm on any basis supported by the record. *Saldana*, 774 F.3d at 551; *see generally Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) (erroneous dismissal pursuant to Rule 12(b)(1) can be affirmed "if dismissal were otherwise proper based on failure to state a claim" under Rule 12(b)(6)).

A. Only Self-Executing Treaties Can Be Enforced In U.S. Courts.

The United States does not dispute that the Treaty constitutes a binding *international* legal obligation for States Parties. "But not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellín v. Texas*, 552 U.S. 491, 504 (2008).

The question of whether a treaty or treaty provision is non-self-executing is not a matter of international law; it is a matter of U.S. law. To determine whether a treaty or treaty provision is self-executing, and thus enforceable in U.S. court, courts may examine the intent of the President and the Senate, the text of the treaty, its negotiation and drafting history, and the post-ratification understanding of States Parties. *Medellín*, 552 U.S. at 507, 526; *see* Restatement (Third) of Foreign Relations Law § 111 cmt. h (giving primacy to the intent of the President and Senate: "[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.").

B. The Treaty's Text And Its Ratification History Confirm That The Treaty Is Not Self-Executing.

1. Plaintiff fails to identify any evidence in the ratification history that the President and the Senate contemplated domestic judicial enforcement of the Treaty. The limited evidence in the Congressional Record confirms that Senator Fulbright, the Chairman of the Senate Foreign Relations Committee, affirmatively represented to the Senate that the Treaty was *not* self-executing. *See* 115 Cong. Rec. 6198, 6199-6200, 6204-6205 (1969) (statement of Sen. Fulbright). Indeed, Senator Fulbright relied on the language of the Supreme Court's holding in the *Head Money Cases*, 112 U.S. 580, 598 (1884), in stating that violations of the Treaty must be resolved through diplomacy rather than resort to the federal courts. *See* 115 Cong. Rec. at 6204. In 1990, the sponsor of a concurrent resolution reaffirming support for the objectives of the Treaty likewise stated that '[t]he [Non-Proliferation Treaty] is not self-executing." 136 Cong. Rec. 12723 (1990).

2. The text of the Non-Proliferation Treaty generally, and of Article VI in particular, supports the Senate's understanding and contains no

language identifying the treaty as self-executing. Indeed, the Treaty contains no language that contemplates any domestic enforcement of the Treaty's provisions.

In addition, Article VI uses the phrase "undertakes to pursue negotiations" to set out the obligations of States Parties. "This is not the kind of promissory language that will create a judicially-enforceable right." *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (per curiam) (holding that Articles 55 and 56 of U.N. Charter are phrased in "broad generalities" and are therefore not self-executing). Indeed, the Supreme Court held that similar language in Article 94 of the U.N. Charter confirmed that "further action * * * was contemplated" and that Article 94 of the Charter thus did not create rights enforceable in U.S. courts. *Medellín*, 552 U.S. at 509 n.5 (construing "undertakes to comply").

The post entry-into-force history of the implementation of the Treaty similarly demonstrates that the States Parties did not intend Article VI to be enforced in any domestic court. In the 2010 Review Conference, the Conference specifically stated that "concerns over compliance with any

obligation under the Treaty by any State party should be pursued by diplomatic means." 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, pt. I, p. 3 ¶7, http://www.state.gov/t/isn/npt/2010revcon/index.htm (follow link under "Reports"). Not surprisingly, plaintiff does not identify any other State Party that has opened its courts to suits such as this one, and we are aware of none.

In short, there is no indication that the States Parties to the Treaty anticipated that the parties would enforce the treaty against each other in domestic courts. "[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one * * * through lawmaking of their own." *Medellín*, 552 U.S. at 513-14 (quoting *Sanchez-Llamas*, 548 U.S. at 347).

C. Under Supreme Court Precedent, Violations Of International Legal Obligation In Treaties Are The Subject Of Diplomatic Measures, Not Judicial Decree.

Because the Treaty is not self-executing, and Congress did not enact implementing legislation, the Treaty "depends for the enforcement of its

provisions on the interest and honor of the governments which are parties to it," with treaty disputes to be determined by "international negotiations and reclamations * * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Medellín*, 552 U.S. at 505 (ellipsis in original) (quoting *Head Money Cases*, 112 U.S. at 598). "No American court has wavered from this view in the subsequent century" after the *Head Money Cases*. *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936 (D.C. Cir. 1988).

Plaintiff argues that the Supreme Court's statement in *Medellín* that this is "ordinarily" the case "leaves room for other outcomes." Pl.'s Br. 54. However, those "other outcomes" involve treaties that are, in fact, determined to be self-executing or are otherwise implemented through domestic legislation—in which case, Congress *may* choose to provide a cause of action. This possibility is irrelevant given the absence of any indication that the President and the Senate, or the States Parties, intended the Treaty to be domestically enforceable.

Plaintiff relies on *Pfizer, Inc. v. India*, 434 U.S. 308 (1978), to argue that foreign nations can bring suit in federal court on any civil claim that domestic parties can bring. Br. 56. However, foreign nations can do so only to the extent that specific federal statutes—like the federal antitrust laws at issue in *Pfizer*—provide a cause of action. While Congress has authorized suit against the United States by "[c]itizens or subjects of any foreign government" that provides reciprocal rights in the foreign sovereign's own courts, 28 U.S.C. 2502, no federal statute provides a similar cause of action broadly for foreign nations like the plaintiff in this case.

D. The Administrative Procedure Act Does Not Provide A Cause Of Action Here.

Plaintiff identifies the APA as the applicable waiver of the United States' immunity from suit here (Br. 56), but does not point to the APA as an alternate basis for this cause of action. Even if plaintiff had done so, the APA cannot supply the basis for challenging the United States' compliance with its Article VI obligations under the Non-Proliferation Treaty. While the judicial review provisions of the APA provide "a limited cause of action for parties adversely affected by agency action," *Trudeau v. FTC*, 456

F.3d 178, 185 (D.C. Cir. 2006), "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." *Committee of U.S. Citizens Living in Nicaragua*, 859 F.2d at 943.

E. The Tucker Act Likewise Does Not Provide A Cause of Action For Plaintiff Here.

Plaintiff likewise cannot look to the Tucker Act, 28 U.S.C. 1491(a), which waives sovereign immunity for actions based upon "any express or implied contract with the United States," for its cause of action. While the district courts and the Court of Federal Claims share concurrent jurisdiction over civil actions against the United States "founded upon any express or implied contract with the United States," 28 U.S.C. 1346(a)(2), the Federal Circuit has exclusive jurisdiction over Tucker Act appeals, 28 U.S.C. 1295(a)(2).

In addition, the Tucker Act does not authorize the award of equitable relief, including specific performance, except in limited circumstances not at issue here. *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) (holding that Court of Federal Claims had no authority to order specific

performance of settlement agreement). As the Supreme Court observed, if Congress had intended to waive sovereign immunity for specific performance, "some provision would have been made for carrying into execution decrees for specific performance" against the government. *United States v. Jones*, 131 U.S. 1, 18 (1889). Plaintiff cites several cases for the proposition that specific performance is available in this case (Pl.'s Br. 50-52), none of which actually involves either specific performance or a contract dispute. *E.g., Zivotofsky*, 132 S. Ct. 1421 (2012) (suit challenging State Department action under Foreign Relations Authorization Act); *Uzbekistan v. United States*, 25 Ct. Int'l Trade 1084 (2001) (suit challenging Commerce Department countervailing duty order); *Sri Lanka v. United States*, 18 Ct. Int'l Trade 603 (1994) (same).

IV. PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF IS NON-JUSTICIABLE AND FAILS TO STATE A CAUSE OF ACTION.

Finally, plaintiff argues that the district court erred by entering judgment without separately addressing the justiciability of plaintiff's requests for declaratory relief in counts I and II of the complaint. Br. 3, 12, 52-54; *see generally* ER 72-75 (Compl. count I) (seeking declaration that the

Treaty obligates the United States to pursue negotiations in good faith on nuclear disarmament and cessation of the nuclear arms race at an early date); ER 73-75 (Compl. count II) (seeking declaration that the United States is in continuing breach of those obligations). Thus, plaintiff reasons, this Court should reverse the dismissal as to counts I and II. Pl.'s Br. 54. Plaintiff is mistaken.

The Declaratory Judgment Act gives a federal court the discretion to declare the rights of any interested party "[i]n a case of actual controversy within its jurisdiction." 28 U.S.C. 2201(a). The threshold inquiry of whether a controversy exists "is 'identical to Article III's constitutional case or controversy requirement.'" *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005). Moreover, the Act "does not create new substantive rights, but merely expands the remedies available in federal courts." *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014); *see also Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (Declaratory Judgment Act "is not an independent source of federal jurisdiction; the availability of such relief presupposes the existence of a

judicially remediable right") (citation omitted); *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (Declaratory Judgment Act does not provide a cause of action). Accordingly, if a plaintiff's claims are nonjusticiable or the plaintiff has no cause of action, then declaratory relief is unavailable.

As we have shown, *supra* pp. 15-46, the district court correctly concluded that plaintiff's claims are nonjusticiable because plaintiff lacks Article III standing and its claims present a political question. There is no meaningful difference between plaintiff's declaratory and injunctive claims with respect to the requirements of Article III. *See generally Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc) ("The limitations that Article III imposes upon federal court jurisdiction are not relaxed in the declaratory judgment context.").

Indeed, in cases in which a plaintiff has sought both declaratory and injunctive relief, this Court has consistently disposed of those claims with a single Article III analysis. *See, e.g., Munns v. Kerry*, 782 F.3d 402, 411 (9th Cir. 2015) (conducting single analysis to hold that plaintiffs "do[] not have standing to seek prospective declaratory and injunctive relief"); *Corrie*, 503

F.3d at 979-83 (conducting single political question analysis for claims for declaratory and injunctive relief).

Moreover, as we have also shown, *supra* pp. 46-54, the Treaty does not supply plaintiff with a cause of action. Absent a constitutional controversy or a cause of action, plaintiff's request for declaratory relief is no more than a request for an advisory opinion that plaintiff asserts "would provide a legal basis for [plaintiff's] potential withdrawal" from the Treaty under Article X, Pl.'s Br. 54.[8]

[8] The district court did not address the United States' alternate arguments of (1) improper venue in the Northern District of California; (2) time bar under 28 U.S.C. 2401(a); and (3) laches. Although plaintiff preemptively challenges these defenses on appeal (Pl.'s Br. 56-58), all three issues would require factual findings that the district court should make in the first instance. If this Court reverses the district court judgment, it should remand to the district court for further proceedings on these issues.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.[9]

Respectfully submitted,

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[9] The Department of Justice acknowledges the assistance of Andrew J. Hunter, a third-year law student, in the preparation of this brief.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,540 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Sushma Soni
SUSHMA SONI

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Defendants-Appellees are not aware of any related cases.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and served counsel via the appellate CM/ECF system.

/s/ Sushma Soni
SUSHMA SONI