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
Case No. C 14-01885 JSW
Honorable Jeffrey S. White, District Court Judge

BRIEF OF *AMICI CURIAE* UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE); INTERNATIONAL COMMISSION FOR LABOR RIGHTS; AND LABOR AND EMPLOYMENT COMMITTEE OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PLAINTIFF-APPELLANT THE REPUBLIC OF THE MARSHALL ISLANDS

Counsel of Record for Amici:
Henry M. Willis, Esq. (82981)
SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
6300 Wilshire Boulevard
Suite 2000
Los Angeles, California 90048
Phone: (323) 655-4700

Additional Counsel for Amici:
Joseph Cohen, General Counsel
Margot Nikitas, Staff Attorney
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)
One Gateway Center – Suite 1400
Pittsburgh, PA 15222
Phone: (412) 471-8919

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *Amici* provide the following disclosures of corporate identity:

The United Electrical, Radio and Machine Workers of America (UE) and the Labor and Employment Committee of the National Lawyers Guild each certifies that: (1) it is a non-profit unincorporated association; (2) it does not offer stock; and (3) it has no parent corporation.

The International Commission for Labor Rights (ICLR) certifies that: (1) it is a non-profit corporation; (2) it does not offer stock; and (3) it has no parent corporation.

II. STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

III. CONSENT OF THE PARTIES

Counsel for the parties have consented to the filing of this brief.

IV. INTEREST OF THE *AMICI CURIAE*

Amici are a labor organization and trade unionist groups. United States labor law has long recognized employers' obligation to negotiate "in good faith" with

workers' bargaining representatives over terms and conditions of employment in many contexts. Courts and administrative agencies have developed a significant body of law interpreting "good faith" in negotiations. *Amici* and the workers they represent have a great interest in ensuring that the well-established, judicially manageable standards for good faith bargaining are protected.

The United Electrical, Radio and Machine Workers of America (UE) is an independent, rank-and-file union representing approximately 35,000 workers nationwide in a variety of private and public sector jobs. UE has been collectively bargaining wages, hours and other conditions of employment on behalf of its members in good faith since 1936.

The International Commission for Labor Rights, ICLR, is a 501(c)(3) non-profit corporation that is based in New York, and coordinates the pro bono work of a global network of lawyers and labor experts committed to advancing workers' rights through legal research, advocacy, cross-border collaboration, and the cutting-edge use of international and domestic legal mechanisms and advocacy.

The National Lawyers Guild was founded in 1937 as the first integrated national organization of lawyers in the United States. Based on the premise that the law should elevate human rights over property interests, the Guild currently consists of approximately 6,000 lawyers, legal workers and law students. Individually and on specific shared projects, members work nationally

and internationally on a wide range of legal concerns, especially those impacting people who are socially and politically marginalized and disenfranchised. Labor and employment issues have been a central focus of the Guild's mission during its over seventy five-year history. The Guild's Labor and Employment Committee has a long record of action on behalf of low wage and immigrant workers in particular, both as amicus and through strategic coordination, scholarship and advocacy. The close to 1000 members of the Labor and Employment Committee also provide direct representation to individual and organized workers in a variety of local, state, federal and international forums.

V. ARGUMENT

The bedrock of labor relations in the United States is that employers and unions will bargain in "good faith" to peacefully reach an agreement. Indeed, federal and state laws covering the vast majority of American workplaces affirmatively require employers and labor organizations to negotiate in good faith. "Good faith" is not merely an empty platitude; it means something.

For decades, courts and administrative agencies have been interpreting what constitutes good faith negotiations in U.S labor relations. This has resulted in a robust, well-defined understanding of good faith. Indeed more than 70 years ago, this court explained that the duty to bargain in good faith is an "obligation…to participate actively in the deliberations so as to indicate a present intention to find

a basis for agreement…." *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). This court went on to explain that such an obligation implies "an open mind and a sincere desire to reach an agreement" and "a sincere effort…to reach a common ground." *Id.* (internal quotations omitted). That profound standard has helped form the basis of labor-management relations in the United States, and it must be protected.

A. The District Court Erred in Finding that There Are No Judicially Discoverable and Manageable Standards for Determining Whether Defendants-Appellees Failed to Negotiate in Good Faith.

Despite the rich body of case law interpreting good faith in negotiations, the district court below determined that there were no "judicially discoverable and manageable standards" for determining whether, under Article VI of the Treaty for the Non-Proliferation of Nuclear Weapons (hereinafter "NPT" or "the Treaty"), the Executive failed to negotiate in "good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament." ER 11. As a result, the district court dismissed the present matter as a political question under the second factor in *Baker v. Carr*, 369 U.S. 186 (1962). ER 11-12.

In examining justiciability under the second *Baker* factor, this court has held that "[t]he crux of this inquiry is…not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a

ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)). "Instead of focusing on the logistical obstacles, we ask whether the courts are capable of granting relief in a reasoned fashion or, on the other hand, whether allowing the [claim] to go forward would merely provide 'hope' without a substantive legal basis for a ruling." *Alperin*, 410 F.3d at 553.

Contrary to the district court's finding, there are well-developed "legal tools to reach a ruling" regarding whether the Executive engaged in good faith negotiations under the NPT that are "principled, rational, and based upon reasoned distinctions." *Alperin* 410 F.3d at 552 (quoting *Vieth*, 541 U.S. at 278). Courts and administrative agencies have firmly established legal frameworks to determine whether an employer and labor union engaged in good faith negotiations during the course of a collective bargaining relationship. Indeed, adjudicative bodies routinely utilize judicially manageable standards to determine the good faith of parties negotiating a collective bargaining agreement.

1. Courts Regularly Determine Whether Parties Have Violated Federal and State Laws that Require Employers and Labor Unions to Bargain in Good Faith.

a. The National Labor Relations Act.

The National Labor Relations Act (hereinafter "NLRA"), enacted by the passage of the Wagner Act in 1935, recognized private sector employees'

unionization and collective bargaining rights and prohibited employer interference with those rights.[1] 29 U.S.C. § 151 *et seq.* (2012). The preamble to the Wagner Act made it the

> policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce…by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id. at § 151.

The Wagner Act did not explicitly require an employer to bargain in good faith, only that it bargain. However the National Labor Relations Board (hereinafter "NLRB"), which is empowered by Sections 10 and 11 of the NLRA to investigate, adjudicate and remedy unfair labor practices,[2] "almost immediately included the requirement that such bargaining be done in good faith, with a '*bona fide* intent to reach an agreement.'" *The Developing Labor Law* 827 (John E. Higgins, Jr., ed., ABA 5th ed., 2006) (citing NLRB 1937 Annual Report 82, 82-85 (1937); *Atlas Mills*, 3 NLRB 10 (1937)). Although the federal courts did not specifically adopt the good faith requirement when first faced with suits to enforce

[1] The Wagner Act contained no restrictions on unions. The Taft-Hartley Act of 1947 amended the NLRA and added restrictions on unions and guaranteed certain freedoms of speech and conduct to employers and individual employees. *See The Developing Labor Law* 41 (John E. Higgins, Jr., ed., ABA 5th ed., 2006).

[2] *See* 29 U.S.C. §§ 160-161 (2012).

NLRB orders, they did "require an employer to engage in sincere negotiations with an intent to settle differences and arrive at an arrangement." *Id.* (citing *NLRB v. Biles-Coleman Lumber Co.*, 98 F.2d 19 (9th Cir. 1938)). In *National Licorice Co. v. NLRB*, the U.S. Supreme Court adopted "good faith" as the standard for an employer's conduct. 309 U.S. 350 (1940).

Approving the judicial interpretations, Congress passed the Taft-Hartley Act of 1947, which specifically added language to the NLRA mandating that parties bargain in good faith. Section 8(d) of the NLRA explicitly requires an employer and a union that is the exclusive bargaining representative of the employer's employees to bargain in good faith over wages, hours and other terms and conditions of employment. 29 U.S.C. § 158(d) (2012). Section 8(d) states in relevant part:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in **good faith** with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession[.]

Id. (emphasis added). Sections 8(a)(5) and 8(b)(3) of the NLRA make it an unfair labor practice for an employer and a union, respectively, to refuse to bargain in good faith *Id.* at § 158(a)(5) and (b)(3).

The NLRB and the federal courts, including this court,[3] have established a massive body of case law interpreting what constitutes "good faith" negotiations under the NLRA.

b. The Railway Labor Act.

The Railway Labor Act of 1926 (hereinafter "RLA"), which actually predates the NLRA, governs labor relations in the railroad and airline industries. 45 U.S.C. § 151 *et seq*. (2012). Under the RLA, covered employers are required to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions…." 45 U.S.C. § 152, First. The U.S. Supreme Court has recognized this as the "heart of the Railway Labor Act,"

[3] *See, e.g., Frankl v. HTH Corp.*, 693 F.3d 1051 (9th Cir. 2012); *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992); *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employees' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987); *Financial Institution Employees of America, Local 1182 v. NLRB*, 738 F.2d 1038 (9th Cir. 1984); *Pittsburgh-Des Moines Corp. v. NLRB*, 663 F.2d 956 (1981); *Aaron Bros. Co. v. NLRB*, 661 F.2d 750 (9th Cir. 1981); *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995 (9th Cir. 1981); *NLRB v. Maywood Do-Nut Co., Inc.*, 659 F.2d 108 (9th Cir. 1981); *Seattle-First National Bank v. NLRB*, 638 F.2d 1221 (9th Cir. 1981); *NLRB v. Triumph Curing Center*, 571 F.2d 462 (9th Cir. 1978); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978); *Queen Mary Restaurants v. NLRB*, 560 F.2d 403 (9th Cir. 1977); *NLRB v. West Coast Casket Co., Inc.*, 469 F.2d 871 (9th Cir. 1972); *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717 (9th Cir. 1972); *NLRB v. Industrial Wire Prods. Corp.*, 455 F.2d 673 (9th Cir. 1972); *NLRB v. J.A. Terteling & Sons, Inc.*, 357 F.2d 661 (9th Cir. 1966); *NLRB v. Mrs. Fay's Pies*, 341 F.2d 489 (9th Cir. 1965); *NLRB v. Cascade Employers Association, Inc.*, 296 F.2d 42 (9th Cir. 1961); *NLRB v. Nesen*, 211 F.2d 559 (9th Cir. 1954); *NLRB v. Shannon*, 208 F.2d 545 (9th Cir. 1953); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969), and has determined that courts are empowered to enforce this bargaining standard. *Chicago & N.W. Railway v. UTU*, 402 U.S. 570, 576-77 (1971). This court has interpreted parties' duty to "exert every reasonable effort" as requiring at least the same level of good faith that is required by the NLRA. *AFA v. Horizon Air Industries*, 976 F.2d 541, 544 (9th Cir. 1993). As such, courts routinely adjudicate whether parties covered by the RLA have engaged in good faith bargaining. *See, e.g., id.* at 545-47.

c. The Federal Service Labor-Management Relations Statute.

The Federal Service Labor-Management Relations Statute (hereinafter "FSLMRS") governs labor relations between the federal government and labor organizations that represent certain federal employees. 5 U.S.C. § 7101 et seq. (2012). The FSLMRS specifically requires federal agencies and the unions that represent their employees to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. § 7114(a)(4) (2012). The FSLMRS declares a party's refusal to negotiate in good faith to be an unfair labor practice. 5 U.S.C. §§ 7116(a)(5), 7116(b)(5) (2012). Congress established a federal agency similar to the NLRB—the Federal Labor Relations Authority (hereinafter "FLRA")—to implement the FSLMRS "through the exercise of broad adjudicatory, policymaking, and rulemaking powers." *National Federation of*

Federal Employees, Local 1309 v. Dept. of the Interior, 526 U.S. 86 (1999). The FLRA and federal courts routinely issue decisions interpreting whether federal agencies or unions representing federal workers have violated their obligation to negotiate in good faith. *See, e.g.*, *Department of the Air Force, U.S. Air Force Academy,* 6 F.L.R.A. 548, 549 (1981), *enforced,* 717 F.2d 1314, 1315 (10th Cir.1983); *FLRA v. Office of Personnel Management*, 778 F.2d 844 (D.C. Cir. 1985).

d. State Laws.

At least 36 states, the District of Columbia and Puerto Rico have laws that explicitly require "good faith" negotiations between certain government employers and their workers' bargaining representatives.[4] Moreover, some local governments

[4] ***Alaska***: Alaska Stat. Ann. §§ 23.40.110(a)(5), 23.40.110 (c)(2) (West 2015).
California: Cal. Gov't Code Ann. §§ 3517, 3519(c), 3519.5(c), 3505, 3506.5(c), 3540.1(h), 3543.5(c), 3543.6(c), 3562(m) (West 2015).
Colorado: Co. Exec. Order No. D 028 07, Authorizing Partnership Agreements with State Employees (12/28/2007), §§II(G), III(D)
Connecticut: Conn. Gen. Stat. Ann. §§ 7-470(a)(4), 7-470(b)(2), 7-470(c), 5-272(a)(4), 5-272(b)(3), 5-272(c), 10-153e(b)(4), 10-153e(c)(4), 10-153e(d) (West 2015)
Delaware: Del. Code Ann. tit. 19, §§ 1302(e), 1307(a)(5), 1307(b)(2), 1602(e), 1607(a)(5), 1607(b)(2) (2015); Del. Code Ann. tit. 14, §§ 4002(e), 4007(a)(5), 4007(b)(2) (2015)
District of Columbia: D.C. Code Ann. §§ 1:617-01(c), 1:617-04(a)(5), 1:617-04(b)(3) (LexisNexis 2015)
Florida: Fla. Stat. Ann. §§ 447.203(14), 447.203(17), 447.309(1), 447.501(1)(c), 447.501(1)(f), 447.501(2)(c) (West 2015).
Hawaii: Haw. Rev. Stat. Ann. §§ 89-2, 89-9(a), 89-13(a)(5), 89-13(8)(2) (West 2015)

Idaho: Idaho Code Ann. §§ 33-1271(1), 33-1272(3), 44-1804 (2015).
Illinois: 5 Ill. Comp. Stat. Ann. §§ 315/7, 315/10(a)(4), 315/10(b)(4) (West 2015); 115 Ill. Comp. Stat. Ann. §§ 5/10, 5/14(a)(5), 5/14(b)(2) (West 2015).
Indiana: Ind. Code Ann. §§ 20-29-2-2, 20-29-6-1, 20-29-7-1, 20-29-7-2 (West 2015)
Iowa: Iowa Code Ann. §§ 20.9, 20.10(1) (West 2015)
Kansas: Kan. Stat. Ann. §§ 75-4322(m), 75-4333(b)(5), 75-4333(c)(3) (West 2015)
Kentucky: Ky. Rev. Stat. Ann. §§ 345.050(1)(e), 345.050(2)(b), 345.050(3), 67C.406(1)(e), 67C.406(2)(b), 67C.406(3), 67A.6904(1)(e), 67A.6904(2)(b), 67A.6904(3) (West 2015).
Maine: Me. Rev. Stat. Ann. tit. 26, §§1285(1), 1284(1)(e), 1284(2)(b), 979-D(1), 979-C(1)(e), 979-C(2)(b), 1026(1), 1027(1)(e), 1027(2)(b), 965(1), 964(1)(e), 2(b) (2014)
Maryland: Md. Code Ann., State Pers. & Pens. §§ 3-101(c), 3-306(a)(8), 3-306(b)(5), 3-501(b) (West 2015); Md. Code Ann., Educ. §§ 6-408(a), 6-510(a) (West 2015)
Massachusetts: Mass. Gen. Laws Ann. ch. 150E §§ 6, 10(a)(5), 10(b)(2) (West 2015)
Michigan: Mich. Comp. Laws Ann. § 423.215(1) (West 2015)
Minnesota: Minn. Sate Ann. §§ 179A.03(11), 179A.06(5), 179A.07(2), 179A.13(2)(5), 179A.13(3)(3) (West 2015).
Montana: Mont. Code Ann. §§ 39-31-305, 39-31-401(5), 39-31-402(2), 39-32-109(1)(d), 39-32-109(2)(c) (2014).
Nebraska: Neb. Rev. Stat. Ann. §§ 81-1377(1), 81-1386(1), 81-1386(2)(g), 81-1386(3)(d) (LexisNexis 2014).
Nevada: Nev. Rev. Stat. Ann. §§ 288.033, 288.150(1), 288.270(1)(e), 288.270(2)(b) (West 2014).
New Hampshire: N.H. Rev. Stat. Ann. §§ 273-A:3(I), 273-A:5(I)(e), 273-A:5(II)(d) (LexisNexis 2015).
New Jersey: N.J. Stat. Ann. §§ 34:13A-5.3, 34:13A-5.4(a)(5), 34:13A-5.4(b)(3), 34:13A-16(a)(1) (West 2015).
New Mexico: N.M. Stat. Ann. §§ 10-7E-17(A)(1), 10-7E-19(F), 10-7E-20(C) (West 2014).
New York: N.Y. Civ. Serv. Law §§ 204(3), 209-a(1)(d), 209-a(2)(b) (McKinney 2015)
North Dakota: N.D. Cent. Code § 15.1-16-13 (2015).
Ohio: Ohio Rev. Code Ann. §§ 4117.01(G), 4117.11(A)(5), 4117,11(B)(3) (West 2015).

also have laws requiring good faith negotiations between public employers and labor unions. *See, e.g.,* N.Y.C. Admin. Code tit. 12, §§ 12-306(4), 12-306(b)(2), 12-306(c), 12-307 (2015). Administrative agencies and state courts regularly determine whether public employers and labor organizations have bargained in good faith pursuant to these laws.

2. There Are Well-Established, Judicially Manageable Standards for Determining Whether Negotiations Were in Good Faith.

Contrary to the district court's decision, the massive body of federal and state labor law interpreting the obligation that employers and unions bargain in good faith firmly establishes that there are judicially manageable standards for determining whether negotiations under the NPT have been in good faith.

Oklahoma: Okla. Stat. Ann. tit. 70, § 509.6 (West 2015); Okla. Stat. Ann. tit. 11, §§51-102(5), 51-102(6a)(5), 51-105 (West 2015).
Oregon: Or. Rev. Stat. §§ 243.650(4), 243.672(1)(e), 243.672(2)(b) (2014)
Pennsylvania: 43 Pa. Cons. Stat. Ann. §§ 1101.701, 1101.1201(a)(5), 1101.1201(b)(3), 217.2 (West 2015).
Puerto Rico: P.R. Laws Ann. tit. 3, §§ 1451a(t), 1452a(b), 1452b(b) (2011).
Rhode Island: R.I. Gen. Laws Ann. §§ 36-11-7, 28-9.1-6, 28-9.2-6, 28-9.3-4, 28-9.4-5, 28-9.5-6, 28-9.6-6, 28-9.7-6 (West 2015).
South Dakota: S.D. Codified Laws §§ 3-18-2, 3-18-3.1(5), 3-18-3.2(4) (2015).
Vermont: Vt. Stat. Ann. tit. 21, §§ 1722(4), 1725(a), 1726(a)(5), 1726(b)(4) (2015); Vt. Stat. Ann. tit. 16, §§ 1981(2), 2001 (2015); Vt. Stat. Ann. tit. 3, § 1016 (2015)
Washington: Wash. Rev. Code Ann. §§ 41.56.030(4), 40.50.020(2), 28B.52.020(8) (West 2015)
Wisconsin: Wis. Stat. Ann. §§ 111.70(1)(a), 111.77, 111.81(1) (West 2015).
Wyoming: Wyo. Stat. Ann. § 27-10-104 (2015).

Courts and administrative agencies have been adjudicating whether parties have bargained in good faith for more than 70 years. From the earliest days, courts have recognized that good faith in negotiations requires a "common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason." *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941). A party violates its obligation to bargain in good faith if its actions "were captious and accompanied by an active purpose and intent to defeat or obstruct real bargaining." *Singer Mfg. Co. v. NLRB*, 119 F.2d 131, 134 (7th Cir. 1941), *cert. denied*, 313 U.S. 595 (1941). Any notion of good faith in negotiations "at least requires the [parties] to meet and confer…to listen to their complaints, [and] to make reasonable effort to compose differences." *Virginian Railway Co. v. Sys. Fed'n No. 40, Railway Employees* 300 U.S. 515, 548 (1937). Nothing in the good faith standard "compels either party to yield on its initial bargaining position," *Pease Co. v. NLRB*, 666 F.2d 1044, 1050 (6th Cir. 1981) (quoting *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979)), however, the parties have a duty to negotiate with a "sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960) (quoting *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939)). Good faith bargaining is "not simply an occasion for purely formal meetings…while each [party] maintains an attitude of 'take it or leave it'; it presupposes a desire to reach

ultimate agreement…." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Moreover, there is great significance to bargaining being in good faith because "[d]iscussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take." *Id.* at 488.

In determining whether a party has violated its obligation to negotiate in good faith, administrative agencies and the federal courts generally scrutinize the parties' conduct at and away from the bargaining table. The adjudicative bodies frequently assess the "totality of conduct" to assess whether a party has acted in good faith. *See*, *e.g.*, *General Electric Co.*, 150 NLRB 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). Relevant factors include "unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table." *Hardesty Co., Inc.*, 336 NLRB 258, 260 (2001). Another indicium of lack of good faith is "surface bargaining," or actions or words indicating an attempt to avoid agreement or that bargaining would be futile. *Id.* at 261. "In surface bargaining cases, the important issue is whether [a party's] approach to bargaining demonstrated an unyielding rigidity during negotiations that rendered collective bargaining a futility." *Prentice-Hall, Inc.*,

306 NLRB 31, 39 (1992) (quoting *K-B Res. dba Commercial Candy Vending Division*, 294 NLRB 908, 908 (1989)).

In addition, a party's insistence that it has no obligation to bargain is indicative of a lack of good faith. *See, e.g., Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993). Conditioning bargaining on another party's acceptance of an onerous or unreasonable condition also constitutes a lack of good faith. *See, e.g.*, *NLRB v. Hoppes Mfg. Co.*, 170 F.2d 962 (6th Cir. 1948) (refusal to negotiate unless union abandoned request for higher wages); *American Laundry Mach. Co.*, 76 NLRB. 981 (1948), *enforcement granted*, 174 F.2d 124 (6th Cir. 1949) (per curiam) (refusal to negotiate unless union withdrew unfair labor practice charge and abandoned strike); *General Electric Co.*, 163 NLRB 198 (1967) (conditioning further negotiations on the cessation of a strike). Any notion of "good faith" also requires parties to meet with the bargaining representatives chosen by the other side and to vest its own negotiators with sufficient authority to carry on meaningful bargaining. *See General Electric Co. v. NLRB*, 412 F.2d 512 (2nd Cir. 1969); *Valley Imported Cars*, 203 NLRB 873 (1973); *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), *enforced*, 313 F.2d 260 (2d Cir. 1961), *cert. denied*, 375 U.S. 834 (1963).

Certain categories of conduct are regarded as so egregious as to constitute per se violations of the duty to bargain in good faith. For example, unilateral

changes by an employer concerning matters that are mandatory subjects of bargaining under the NLRA usually are considered a per se violation of the obligation to bargain in good faith. *NLRB v. Katz*, 369 U.S. 736 (1962). Likewise, a party's refusal to confer in good faith about a mandatory subject or insistence to the point of impasse about a matter considered a permissive subject of bargaining under the NLRA are per se violations. *Id.*

In addition—and particularly relevant to the instant case—a party's refusal to meet at reasonable times and without unreasonable delays is a per se violation of the duty to bargain in good faith. *See, Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992) (employer unlawfully refused to bargain where it would only agree to short, intermittent bargaining sessions); *Professional Transportation, Inc.*, 362 NLRB No. 60 (2015) (employer unlawfully refused to bargain where it cancelled seven consecutive bargaining sessions scheduled over a two-month period); *Richard Mellow Elec. Contractors Corp.*, 327 NLRB 1112 (1999) (employer unlawfully refused to bargain where it rejected union's proposed meeting dates and failed to respond to union's request for meetings on at least three occasions).

Obviously, a failure to meet *at all* constitutes a violation of the obligation to negotiate in good faith. *C. & J. Camp, Inc.*, 107 NLRB 1068 (1954) (employer unlawfully failed to bargain in good faith where, even though the parties exchanged written contract proposals, it never actually met with the union). S*ee*

also Kuna Meat Co., 304 NLRB 1005 (1991), *enforced*, 966 F.2d 428 (8th Cir. 1992) (employer unlawfully imposed two-month limitation on bargaining and refused to bargain after that period expired).

In this case, U.S. labor law provides a legal framework for determining whether the Defendants-Appellees have violated their duty to negotiate in good faith that is clearly "judicially discoverable and manageable." *Baker*, 369 U.S. at 216. As demonstrated by decades of case law construing the obligation of unions and employers to bargain in good faith, this court has "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin*, 410 F.3d at 552 (quoting *Vieth*, 541 U.S. at 278). Indeed, the legal standards supplied by the NLRA, RLA, FSLMRS and state labor relations statutes constitute "sound bases for providing relief" in this matter. *See Alperin*, 410 F.3d at 553.

Generations of workers have sacrificed their jobs, their freedom, and even their lives to ensure that their bosses will sit down with them to negotiate the terms and conditions of their employment in good faith. Courts and administrative agencies have ensured that the obligation to bargain in good faith has meaning. The district court's failure to recognize the well-established, judicially manageable standard of good faith in negotiations could have a far-reaching and unintended impact on peaceful relations not just in the international community, but also in American workplaces.

VI. CONCLUSION

For all of the foregoing reasons, *Amici* respectfully request this court to reverse the district court's holding that there are no judicially discoverable and manageable standards to determine whether Defendants-Appellees have violated their obligation to bargain in "good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament" under the Treaty on the Non-Proliferation of Nuclear Weapons.

DATED: July 20, 2015

Respectfully Submitted,

By: /s/ Henry M. Willis /s/
Henry M. Willis, Esq. (82981)
SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
6300 Wilshire Boulevard
Suite 2000
Los Angeles, California 90048
Phone: (323) 655-4700
Fax: (323) 655-4488
Email: hmw@ssdslaw.com
Counsel of Record for the Amici

Additional Counsel:

Joseph Cohen, General Counsel
Margot Nikitas, Staff Attorney
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OFAMERICA (UE)

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6), because it is written in 14-pt Times New Roman font, and within the type-volume limitations of Fed. R. App. P. 29(d) and Ninth Circuit Rule 29-2(c), because it contains 4,151 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count is based on the word-count feature of Microsoft Word.

DATE: July 20, 2015 By: /s/ Henry M. Willis /s/
Henry M. Willis, Esq. (82981)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 20, 2015. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATE: July 20, 2015 By: /s/ Henry M. Willis /s/
Henry M. Willis, Esq. (82981)