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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT  
OAKLAND DIVISION**

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

Plaintiff,

v.

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

Defendants.

Civil Case No. 4:14-cv-01885-JSW

**BRIEF AMICUS CURIAE OF  
NUCLEAR WATCH NEW MEXICO  
IN SUPPORT OF PLAINTIFF AND IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS**

Hon. Jeffrey S. White  
Hearing Date: January 16, 2015  
Time: 9:00 A.M.  
Courtroom: Oakland Courthouse,  
Courtroom 5 – 2nd Floor,  
1301 Clay Street  
Oakland, CA 94612

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## SUMMARY OF ARGUMENT

1  
2 The United States claims to be in compliance with its Non-Proliferation Treaty  
3 (NPT) Article VI obligation to pursue negotiations on effective measures toward  
4 nuclear disarmament. This claim rests on its asserted reduction in the number of  
5 nuclear weapons in its stockpile. The U.S., however, and other nuclear weapons  
6 powers have not acted in good faith in even the initial step of pursuing the required  
7 negotiations, much less engaged in comprehensive disarmament measures. To the  
8 contrary, the U.S. is embarking upon an immense "modernization" program that will  
9 qualitatively improve its nuclear weapons stockpile, delivery systems, supporting  
10 research and production complex, that will likely cost more than a trillion dollars over  
11 thirty years. The operational lives of nuclear weapons will be extended for as long as  
12 six decades while endowing them with new military capabilities, despite government  
13 denials at the highest levels. Irreversible dismantlements have dramatically slowed  
14 and non-proliferation programs are being cut.

15 While some numerical reductions have recently been made to the declared  
16 "active" versus "reserve" stockpile, even that is fungible and thus is not evidence of  
17 "effective measures relating to... nuclear disarmament." New nuclear weapons  
18 production facilities are being built that are expected to be operational until 2075 and  
19 beyond. Despite quantitative reductions to the stockpile, qualitative improvements to  
20 existing nuclear weapons, their delivery systems, and the nuclear weapons research  
21 and production complex strongly indicate that the U.S. is not in compliance with its  
22 NPT Article VI obligation "to pursue negotiations **in good faith** on effective measures  
23 relating to cessation of the nuclear arms race at an early date and to nuclear  
24 disarmament." (Emphasis added.)

**INTEREST OF THE *AMICUS CURIAE***

1  
2 Amicus curiae, Nuclear Watch New Mexico (Nuclear Watch), is a not-for-profit  
3 organization devoted to educating the public on nuclear weapons and related  
4 environmental issues. Nuclear Watch promotes safety and environmental protection  
5 at regional nuclear facilities, in particular the Los Alamos National Laboratory  
6 (LANL). Declaration of Jay Coghlan, ¶¶ 1-2. Nuclear Watch's standing in the field of  
7 nuclear issues is evidenced by its fifteen-year history and its heavily trafficked  
8 website.<sup>1</sup> Declaration of Jay Coghlan, ¶¶ 1-2. The extensive experience of Nuclear  
9 Watch's Executive Director and staff reinforce the organization's standing. Declaration  
10 of Jay Coghlan, ¶¶ 1, 4-5, 7.

11 To accomplish its mission, Nuclear Watch rigorously complies, synthesizes,  
12 and analyzes information on nuclear issues. Nuclear Watch specializes in "connecting  
13 the dots" across voluminous, disparate documents, such as the Department of  
14 Energy's annual Congressional Budget Requests, the Stockpile Stewardship and  
15 Management Plans of its semi-autonomous nuclear weapons agency, the National  
16 Nuclear Security Administration (NNSA), the Government Accountability Office  
17 (GAO) audits, Department of Energy Inspector General reports, and many other kinds  
18 of documents. Declaration of Jay Coghlan, ¶¶ 1-3.

19 In addition to using its in-depth analysis to educate the public, Nuclear Watch  
20 engages key federal agencies and officials so as to positively influence government  
21 policy. Declaration of Jay Coghlan, ¶ 4. These key agencies and officials include the  
22 NNSA, the White House Office of Management and Budget, the GAO, the Defense  
23 Nuclear Facilities Safety Board, members and staff of the House and Senate Armed  
24 Services Committees and Appropriations Committees that authorize and fund the  
25 nation's nuclear weapons budget. Declaration of Jay Coghlan, ¶¶ 2-3. The Nuclear  
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27 <sup>1</sup> Nuclear Watch's web site, [www.nukewatch.org](http://www.nukewatch.org), receives approximately 1.1  
28 million hits a year. Declaration of Jay Coghlan, ¶¶ 2.

1 Watch Executive Director has also challenged the Department of Energy (DOE) over  
 2 major violations of the federal Clean Air Act through successful litigation. Declaration  
 3 of Jay Coghlan, ¶ 4.

4 The United States Government in various ways and venues claims it is in  
 5 compliance with the Treaty on the Non-Proliferation of Nuclear Weapons, (July 1,  
 6 1968) 21 U.S.T. 483, 729 U.N.T.S. 161.<sup>2</sup> Declaration of Jay Coghlan, ¶ 6-9, 11-14. Article  
 7 VI of the Treaty obliges the United States to pursue negotiations on effective measures  
 8 toward nuclear disarmament. The Government's claims of compliance, however, have  
 9 historically been and continue to be at odds with its actions. Declaration of Jay  
 10 Coghlan, ¶¶ 6-9, 11-14. Nuclear Watch and its staff gather and disseminate  
 11 information that exposes this dissonance. Declaration of Jay Coghlan, ¶¶ 6-7.

12 Nuclear Watch's fund of knowledge and experience engaging the public and  
 13 government officials on nuclear issues leads it to understand on a profound level the  
 14 dangerous consequences of the United States Government's failure to comply with the  
 15 Non-Proliferation Treaty. The world's most serious existential threats are nuclear war  
 16 between India and Pakistan and the acquisition of nuclear weapons by Al  
 17 Qaeda/Islamic State-inspired terrorists through possible Pakistani sources. Declaration  
 18 of Jay Coghlan, ¶ 8. The United States largely ignored Pakistan's clandestine nuclear  
 19 weapons programs while covertly fighting the Soviets in Afghanistan. It is commonly  
 20 believed that Pakistan and/or its agents subsequently proliferated nuclear weapons  
 21 technologies to North Korea, Libya and possibly Iran.<sup>3</sup> Declaration of Jay Coghlan,

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22  
 23 <sup>2</sup>This document is also available at [http://www.un.org/disarmament/WMD/  
 24 Nuclear/NPTtext?lang=en](http://www.un.org/disarmament/WMD/Nuclear/NPTtext?lang=en).

25 <sup>3</sup> "In 2004, the Bush administration chose not to press the Pakistani government  
 26 to punish the nuclear scientist A.Q. Khan for selling nuclear technology  
 27 (including a nuclear weapons design) to Iran, Libya, and North Korea." Library  
 28 of Congress, *Nuclear, Biological, and Chemical Weapons and Missiles: Status and  
 Trends*, Congressional Research Service (July 2, 2004), p. 3  
<http://fas.org/spp/starwars/crs/RL30699.pdf>.



¶ 8. A Pakistani-derived nuclear weapon in the hands of “terrorists” could now be our nation’s greatest threat. Declaration of Jay Coghlan, ¶8. Eliminating the threat to our national security created in part by the described actions of the United States can only be assured through the global abolition of nuclear weapons the Non-Proliferation Treaty contemplates,<sup>4</sup> and which the Republic of the Marshall Islands seeks to ensure through the instant action. Declaration of Jay Coghlan , ¶ 9.

Clearly, this case’s legal issues have significant impact far beyond the directly involved parties, impacting the entire world. Given its considerable expertise with the relevant issues, Nuclear Watch, through the instant amicus curiae brief seeks to provide insightful analysis and add broader practical context to this record evidence.

### DISCUSSION

As Plaintiff the Republic of the Marshall Islands explains, “The U.S. is in Continuing Breach of its Obligation to Pursue Negotiations in Good Faith on Effective Measures Relating to Nuclear Disarmament.” Complaint for Breach of the NPT, p. 14. Plaintiff also notes, “In the 2010 Treaty Review Conference Final Document, the parties resolved in Action 1 as follows: “All States parties commit to pursue policies that are fully compatible with the Treaty and the objective of achieving a world without nuclear weapons.” *Id.*, p. 12, ¶51.

Defendants’ Motion to Dismiss this action claims:

According to the Report accompanying the Senate’s resolution of advice and consent to ratification, the NPT’s “fundamental purpose is to slow the spread of nuclear weapons by prohibiting the nuclear weapon states which are party to the treaty from transferring nuclear weapons to

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<sup>4</sup> Global abolition must be universal and verifiable, which is no small task, one in which the U.S. nuclear weapons establishment could and should provide the necessary verification and monitoring technologies instead of stockpile “modernization.” Declaration of Jay Coghlan, ¶ 10.

1 others, and by barring the nonnuclear-weapon countries from receiving,  
2 manufacturing, or otherwise acquiring nuclear weapons.

3 Motion to Dismiss, p. 2.

4 Defendants also claim:

5 ...an order of this Court declaring the United States in violation of its  
6 international Treaty obligations would squarely contradict, and interfere  
7 with, the position of the United States that it is “in compliance” with all  
8 its obligations under arms control, nonproliferation, and disarmament  
9 agreements and commitments.

10 Motion to Dismiss, pp. 5-6.

11 Defendants contend, “This Court Cannot, And Should Not, Grant Plaintiff Its  
12 Requested Relief After Failing to Raise Its Claim in Federal Court for Almost Two  
13 Decades.” *Id.*, 12. Defendants further contend:

14 . . .the issuance of declaratory (and associated injunctive) relief would be  
15 contrary to the public interest, as it would risk interfering with the  
16 efforts of the Executive Branch in the foreign and military arenas, where  
17 discussions regarding the appropriate steps in support of nuclear  
18 disarmament are ongoing.

19 Motion to Dismiss, p. 12.

20 Each of the Defendants’ claims and contentions are without merit. First, the Motion  
21 to Dismiss fails to address the singular question that the Republic of the Marshall  
22 Islands brings to the Court: Has the United States honored the Non-Proliferation  
23 Treaty? The general contours of Government’s arguments are drawn with its  
24 invocation of the U.S. Senate’s interpretation that the fundamental purpose of the NPT  
25 is to bar non-weapons states from acquiring nuclear weapons.

26 The problem with that interpretation is that it is wholly inaccurate. As Plaintiff  
27 notes, “The Treaty reflects the grand bargain made by the parties to it: the non-nuclear  
28 weapon States agreed not to acquire nuclear weapons and the States possessing

1 nuclear weapons agreed to negotiate their elimination.” Complaint for Breach of the  
2 NPT, ¶ 38.

3 As Plaintiff correctly states, the Non-Proliferation Treaty is a two-sided bargain  
4 between nuclear weapons states and non-weapons states, and not even the U.S. Senate  
5 can change that straightforward meaning of the treaty. The mutual bargain requires  
6 all states to “pursue negotiations,” etc. The simple test of Defendants’ claim that the  
7 United States is in compliance with all non-proliferation agreements is the question,  
8 did the U.S. “pursue negotiations in good faith on effective measures relating to  
9 cessation of the nuclear arms race at an early date and to nuclear disarmament....” or  
10 not? The answer is clearly no. In simple fact, the nuclear weapons states have not  
11 shown good faith in even the beginning step, which is the pursuit of required  
12 negotiations. It therefore logically follows that the U.S. and other nuclear weapons  
13 states have not honored their solemn obligation under the NPT’s bargain, which  
14 Plaintiff seeks to rectify.

15 With respect to Defendants’ claim that there is some kind of statute of limitations  
16 that bars Plaintiff from pursuing its complaint, it should be noted that only in the last  
17 few years has the scope, extent and immense expense of U.S. modernization plans  
18 become clear.<sup>5</sup> Under these circumstances, Plaintiff’s complaint is well-timed indeed.

19 **I. DEFENDANTS’ CLAIM THAT PLAINTIFF’S COMPLAINT IS CONTRARY**  
20 **TO PUBLIC INTEREST IS SIMPLY WRONG.**

21 The remainder of this *amicus curiae* brief addresses Defendants’ claim that the relief  
22 sought by Plaintiff would be contrary to the public interest, “as it would risk  
23 interfering with the efforts of the Executive Branch in the foreign and military arenas,  
24 where discussions regarding the appropriate steps in support of nuclear disarmament  
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26 <sup>5</sup> See, for example, the congressionally-required Department of Energy, *Fiscal*  
27 *Year 2014 Stockpile Stewardship and Management Plan* (June 2013)  
28 [http://nnsa.energy.gov/sites/default/files/nnsa/06-13-inlinefiles/FY14SSMP\\_2.pdf](http://nnsa.energy.gov/sites/default/files/nnsa/06-13-inlinefiles/FY14SSMP_2.pdf),  
Sections 2.6, pp. 2-13 to 2-27.

1 are ongoing.” Defendants’ Motion to Dismiss, p. 13. Nuclear Watch’s extensive  
 2 research has not revealed any public documentation of such Executive Branch  
 3 deliberations, other than echoes of the President’s lofty but unfulfilled rhetoric. There  
 4 is certainly not any concrete movement toward genuine nuclear disarmament, despite  
 5 somewhat meaningless adjustments in the numbers of “active” versus “reserve”  
 6 nuclear weapons. As a litmus test of real progress toward genuine nuclear  
 7 disarmament, irreversible dismantlements of U.S. warheads have slowed to a crawl  
 8 under the Obama Administration, with only an estimated 309 warheads taken apart in  
 9 the last six years.<sup>6</sup>

10 On the other hand, extensive sources demonstrate that the U.S. has chosen not to  
 11 disarm its nuclear stockpile in the foreseeable future, but is instead “modernizing” the  
 12 arsenal and its supporting research and production complex for the long haul, as  
 13 explained below.

## 14 II. FUTURE FUNDING LEVELS FOR NUCLEAR WEAPONS

### 15 MODERNIZATION PROGRAMS INDICATE THAT THE U.S. IS NOT 16 COMMITTED TO ITS NPT OBLIGATION.

17 The United States is not committed to its NPT obligations. The first obvious  
 18 indicator is the level of funding the U.S. plans to spend on modernization of nuclear  
 19 weapons, their delivery systems, and research and production complex over the next  
 20 thirty years. Last December, the nonpartisan Congressional Budget Office (CBO)  
 21 released its study *Projected Costs of Nuclear Forces 2014 -2023*.<sup>7</sup> Its stunning conclusion  
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23  
 24 <sup>6</sup> See Kristensen, Hans, *US Nuclear Weapons Stockpile Number Declassified: Only 309*  
 25 *Warheads Cut By Obama Administration*, Federation of American Scientists (April  
 26 29, 2014) <http://fas.org/blogs/security/2014/04/nuclearstockpile/>. See also  
 Declaration of Jay Coghlan, ¶ 11.

27 <sup>7</sup>Congressional Budget Office, *Projected Costs of Nuclear Forces 2014 -2023*.  
 28 (December 19, 2013) [http://www.cbo.gov/sites/default/files/cbofiles/  
 attachments/12-19-2013-NuclearForces.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/12-19-2013-NuclearForces.pdf).

1 is that estimated costs for maintenance and modernization of the nuclear weapons  
2 stockpile, delivery systems, and research and production complex will total \$355  
3 billion over the next decade, which includes three new multi-billion dollar nuclear  
4 weapons production facilities expected to be operational until 2075.<sup>8</sup> The CBO also  
5 reported that costs after 2023 for the following two decades would increase yet more  
6 rapidly since modernization is only now beginning. From there it is reasonable to  
7 extrapolate that the U.S. will spend more than a trillion dollars over the next 30 years.<sup>9</sup>  
8 And, to make an obvious point, these “modernized” nuclear weapons and  
9 increasingly sophisticated (and expensive) delivery systems are clearly intended to  
10 last far beyond the 30 years of projected and extrapolated budgets.

11       Approximately two-thirds of modernization costs will be for new submarines,  
12 bombers, missiles that could be operational for the rest of this century, and their  
13 command and control. This is contrary to the Obama Administration’s rhetoric of a  
14 future world free of nuclear weapons. The remaining, and more imminent,  
15 expenditures will be for refurbished nuclear weapons and their supporting research  
16 and production complex, which includes the Los Alamos, Lawrence Livermore and  
17 Sandia National Laboratories.<sup>10</sup> These labs, run by for-profit corporations, plan a

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18  
19       <sup>8</sup> These three facilities are the Chemistry and Metallurgy Research Replacement  
20 Project at LANL (to support expanded plutonium pit production), the Uranium  
21 Processing Facility near Oak Ridge, TN (for production of nuclear weapons  
22 “secondaries,”) and the new Kansas City Plant for production/procurement of  
23 the thousands of types of non-nuclear parts (e.g. fuzes, guidance systems, radars,  
24 tritium reservoirs, etc.) that go into nuclear weapons.

25       <sup>9</sup> See, for example, Wolfstal, Lewis, and Quint, James Martin, *The Trillion Dollar  
26 Triad*, Center for Nonproliferation Studies (January 2014). p.2,  
27 [http://cns.miis.edu/opapers/pdfs/140107\\_trillion\\_dollar\\_nuclear\\_triad.pdf](http://cns.miis.edu/opapers/pdfs/140107_trillion_dollar_nuclear_triad.pdf).

28       <sup>10</sup> Congressional Budget Office, *Projected Costs of U.S. Nuclear Forces 2014 - 2023*,  
(December 2013), p. 2,  
[http://www.cbo.gov/sites/default/files/cbofiles/attachments/12-19-2013-Nuclear  
Forces.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/12-19-2013-Nuclear_Forces.pdf).

1 never-ending cycle of exorbitantly expensive “Life Extension Programs” that will  
 2 extend the service lives of existing nuclear weapons for decades while also endowing  
 3 them with new military capabilities (discussed below). This is illustrated by a  
 4 December 2009 Sandia Labs News article, whose title alone is instructive (*Program to*  
 5 *update W76 warhead is biggest weapon project in 20 years*). Among other things it states:

6 We changed out the whole arming, fuzing, and firing [AF&F] system....

7 The AF&F system includes critical components that ensure the safety of  
 8 the weapon as well as providing the detonation function at the correct  
 9 fuzing height... The integrated design provides packaging and  
 10 performance enhancements... The updated weapon, while incorporating  
 11 modern safety enhancements, extends the service life of the weapon  
 12 from 20 to 60 years.<sup>11</sup>

13 President Obama’s *Fiscal Year 2015 Congressional Budget Request* immediately  
 14 implements this planned long-term budget trend for modernization. It asks for a 7%  
 15 increase for NNSA’s nuclear weapons research and production programs. “Total  
 16 Weapons Activities” are slated to rise to \$8.3 billion in fiscal year (FY) 2015 and to \$9.7  
 17 billion by FY 2019 (24% above this current fiscal year 2014). Obama’s FY 2015 budget  
 18 request sets a new record for DOE nuclear weapons research and production  
 19 spending, exceeding even the Cold War high point in 1985 set under President  
 20 Reagan’s military buildup.<sup>12</sup>

21 While rebuilding nuclear weapons at exorbitant expense, the Obama  
 22 Administration proposes to slash dismantlements by 45%, from an already paltry  
 23

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24 <sup>11</sup>Sandia Labs, *Program to update W76 warhead is biggest weapon project in 20 years*,  
 25 Sandia Labs News, (December 4, 2009) [http://www.sandia.gov/LabNews/  
 26 091204.html#three](http://www.sandia.gov/LabNews/091204.html#three).

27 <sup>12</sup> Nuclear Watch New Mexico, *Analysis of the National Nuclear Administration FY*  
 28 *2015 Budget Request*, at fn. 5, [http://www.nukewatch.org/economics/  
 FY2015\\_NNSA\\_Budget\\_Print.pdf](http://www.nukewatch.org/economics/FY2015_NNSA_Budget_Print.pdf) (Last visited August 21, 2014.)

1 \$54.2 million in FY 2014 to \$30 million in FY 2015. Dismantlements are described as a  
2 “a workload leveler across all programs,” indicating that instead of being a prioritized  
3 step toward a future world free of nuclear weapons, it is merely filler work in between  
4 Life Extension Programs.<sup>13</sup>

5 Moreover, “retirement” of U.S. nuclear weapons is fungible, as the Government  
6 Accountability Office recently reported:

7       ...in our analysis of NNSA’s dismantlement schedule as of March 2013  
8       for weapons retired prior to fiscal year 2009, we found that  
9       approximately 9 percent of the weapons retired prior to fiscal year 2009  
10       are scheduled to be reinstated during fiscal year 2013 through fiscal year  
11       2022 or later.<sup>14</sup>

12 NNSA’s proposed FY 2015 budget slashes key non-proliferation programs  
13 designed to halt the spread of nuclear weapons by \$300 million (a decrease of 21%  
14 from fiscal year 2014),<sup>15</sup> despite the fact that both the Obama Administration and  
15 Congress recognize nuclear weapons as the greatest existential threat to the United  
16 States.

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23 <sup>13</sup>National Nuclear Security Administration, *Fiscal Year 2015 Budget Request*, p.  
24 109, [http://energy.gov/sites/prod/files/2014/04/f14/Volume%201 %20NNSA. pdf](http://energy.gov/sites/prod/files/2014/04/f14/Volume%201%20NNSA.pdf)  
(Lasted visited August 21, 2014.)

25 <sup>14</sup> General Accounting Office, *Nuclear Weapons: Actions Needed by NNSA to Clarify*  
26 *Dismantlement Performance Goal*, GAO-14-449 (April 2014), p. 25  
27 [www.gao.gov/assets/670/662840.pdf](http://www.gao.gov/assets/670/662840.pdf).

28 <sup>15</sup>*Id.* at p. 1.

1       **III.       THE UNITED STATES IS CREATING NEW MILITARY**  
2       **CAPABILITIES FOR U.S. NUCLEAR WEAPONS.**

3       At the plenary session of the 2010 NPT Review Conference at the United Nations,  
4 Ellen Tauscher the U.S. State Dept. Under-Secretary for Arms Control and  
5 International Security, Thomas D'Agostino who is the head of NNSA, and Secretary  
6 of State Hillary Clinton explicitly told the international delegations that the U.S.  
7 would never endow its existing nuclear weapons with new military capabilities.  
8 Declaration of Jay Coghlan, ¶ 13. This is also formally articulated in President  
9 Obama's 2010 Nuclear Posture Review, the U.S.'s top nuclear weapons policy  
10 document, which explicitly states, "Life Extension Programs...will not support new  
11 military missions or provide for new military capabilities."<sup>16</sup> The reality on the  
12 ground, however, is different from official claims made to the international  
13 community.

14       The last completely "new" nuclear weapon, the sub-launched W88 warhead, was  
15 produced up until July 1989, when a FBI raid investigating alleged environmental  
16 crimes shut down plutonium pit production at the Rocky Flats Plant near Denver.  
17 Since then, the U.S. has endowed existing nuclear weapons with new military  
18 capabilities, generally substituting more precisely targeted lower yield nuclear  
19 weapons for higher yield weapons. This is evidenced by the two cases.

20       The first case demonstrating new military capabilities for existing U.S. nuclear  
21 weapons is the NNSA's Life Extension Program. The NNSA is currently conducting a  
22 Life Extension Program for the single most common nuclear warhead in the U.S.  
23 stockpile, the sub-launched W76 Trident warhead. It is being retrofitted with a new-  
24 design fuze that is believed capable of selecting more precise heights-of-burst. In  
25 combination with the increased accuracy of the newer D5 Trident missile, this gives

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27       <sup>16</sup>U.S. Department of Defense, *Nuclear Posture Review* (April 2010) p. xiv,  
28       [http://www.defense.gov/npr/docs/2010%20nuclear%20posture%20review%20rep  
ort.pdf](http://www.defense.gov/npr/docs/2010%20nuclear%20posture%20review%20report.pdf).



1 the 100-kiloton W76 the hard target kill capability of the more powerful 450-kiloton  
2 W88 Trident warhead. As explained by Rear Admiral George “Pete” Nanos:<sup>17</sup>

3 The demonstrated capability of the D5 [the new Trident II missile] is  
4 excellent. Our capability for Mk 4 [the W76 reentry vehicle], however, is  
5 not very impressive by today’s standards, largely because the Mk 4 was  
6 never given a fuse that made it capable of placing the burst at the right  
7 height to hold other than urban industrial targets at risk. With the  
8 accuracy of D5 and Mk 4, **just by changing the fuze in the Mk 4 reentry**  
9 **body, you get a significant improvement.** The Mk 4, with a modified  
10 fuze and Trident II accuracy, can meet the original D5 hard target  
11 requirement. Why is this important? Because in the START II regime, of  
12 course, the ICBM hard target killers are going out of the inventory and  
13 that cuts back our ability to hold hard targets at risk.”<sup>18</sup> (Emphasis  
14 added.)

15 In other words, with a new fuze and increased missile accuracy, the military  
16 characteristics of the refurbished W76-1 are transformed from being a countervalue  
17 weapon of deterrence (“city buster”) into a counterforce weapon (“hard target killer”),  
18 which is a new military capability. The head of U.S. Navy Strategic Systems knew this  
19 in 1997. Government officials at the highest levels, however, having been telling the  
20 international community ever since then that the U. S. would never endow its existing  
21 nuclear weapons with military capabilities.

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24 <sup>17</sup> Then head of the Navy’s Strategic Systems, later to become LANL Director.

25 <sup>18</sup>Nanos, G. P., *Strategic Systems Update*, The Submarine Review (April 1997)  
26 <http://fas.org/wp-content/uploads/sites/4/W76nanos.pdf>.

27 “ICBM hard target killers are going out of the inventory” is a reference to the  
28 treaty-required retirement of land-based MX missiles heavily armed with up to  
10 independently targeted 300-kiloton W87 warheads.

1 To emphasize, dramatically increased accuracy is key to the W76's new military  
 2 capabilities. In a different but still applicable context, Richard Garwin, a prominent  
 3 scientist consultant to the government and ex-LANL nuclear weapons designer, noted  
 4 "An early entry into the RRW [Reliable Replacement Warheads] literature was the  
 5 2000 page paper by Steve Younger<sup>19</sup> who explained that the factor 5 improvement in  
 6 U.S. strategic ballistic missile accuracy would allow a factor 125 reduction in explosive  
 7 yield for destroying a hardened target such as a missile silo. So a 500 kt [kiloton]  
 8 warhead could be replaced by a 4-kt new-design warhead that could be deployed  
 9 without testing and that would be reliable and safe."<sup>20</sup>

10 It is important to understand that the accuracy of existing W76 warheads is being  
 11 improved in three dimensions, not just the 2 dimensions of a targeted flat plane.  
 12 Again, because of the previous quote by Nanos and other indicators, it is believed that  
 13 new-design fuzes will provide more precise heights of burst. This is militarily  
 14 significant because just the right blast height magnifies nuclear weapons destructive  
 15 effects through the "Mach stem" phenomena, where ground surface reflection of the  
 16 blast wave intersects with the original blast wave.<sup>21</sup> At the same time, higher altitude

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18 <sup>19</sup>RRW was a proposed new-design nuclear weapon called the Reliable  
 19 Replacement Warhead that Congress rejected in 2007, partially out of concern for  
 20 the adverse proliferation example, and partially out of the lack of clear need  
 21 given the Nuclear Watch NM-requested study that showed that plutonium pits  
 22 last more than twice as long as previously thought. Steven Younger was a  
 23 prominent LANL nuclear weapons designer and later director of the Nevada  
 24 Test Site.

24 <sup>20</sup>Garwin, Richard, *Replacement Warhead Without Testing* (March 23, 2006)  
 25 [http://www.nukewatch.org/importantdocs/resources/garwin/Replacement-warheads-without-testing\\_2006](http://www.nukewatch.org/importantdocs/resources/garwin/Replacement-warheads-without-testing_2006).

26 <sup>21</sup> See, for example, Nuclear Archives, *The Mach Stem*,  
 27 <http://www.atomicarchive.com/Effects/effects6.shtml> stating, "The overpressure  
 28 at the front of the Mach wave is generally about twice as great as that at the  
 direct blast wave front."

1 bursts have much less radioactive fallout compared to ground bursts, which is  
2 militarily and politically desirable for reduced collateral damage. Increased precision  
3 in burst height is the prerequisite for achieving just the right balance of blast effect  
4 (not too high) and reduced fallout (not too low).

5 The second case demonstrating new military capabilities for existing U.S. nuclear  
6 weapons is a planned ambitious Life Extension Program for the B61 bomb with a first  
7 production unit in 2020.<sup>22</sup> Each of the estimated 400 bombs will literally cost more than  
8 twice their weight in gold to refurbish.<sup>23</sup> In addition to extending the service life of the  
9 bomb by decades, this Life Extension Program will meld three tactical or "battlefield"  
10 variants and one strategic variant of the B61 bomb "family" together into one  
11 all-purpose "B61-12" nuclear bomb.<sup>24</sup> This will erase the long held distinction between  
12 tactical and strategic nuclear weapons, which is made possible by improved accuracy  
13 and lethality.<sup>25</sup> The LEP will also transform the B61 from a simple analogue bomb into  
14 a digital bomb that interfaces with future super stealthy fighter aircraft (the F-35 Joint  
15  
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17 <sup>22</sup>National Nuclear Security Administration, Life Extension Programs,  
18 [http://nnsa.energy.gov/ourmission/managingthestockpile/  
19 lifeextensionprograms](http://nnsa.energy.gov/ourmission/managingthestockpile/lifeextensionprograms).

20 <sup>23</sup>Sahay, Usha and Reif, Kingston, *Center for Arms Control Fact Sheet: The B61 Life  
21 Extension Program*, Center for Arms Control (August 2, 2013)  
22 [http://armscontrolcenter.org/publications/factsheets/fact\\_sheet\\_b61\\_life\\_extensio  
n\\_program/](http://armscontrolcenter.org/publications/factsheets/fact_sheet_b61_life_extension_program/).

23 <sup>24</sup>Donald Cook, *NNSA Deputy Administrator for Defense Programs, Statement on B61  
24 Life Extension Program and Future Stockpile Strategy before the House Armed Services  
25 Subcommittee on Strategic Forces* (Oct 30, 2013)  
26 [http://nnsa.energy.gov/sites/default/files/nnsa/2013-10-30%20HASC-SF%20Cook  
%20testimony\\_0.pdf](http://nnsa.energy.gov/sites/default/files/nnsa/2013-10-30%20HASC-SF%20Cook%20testimony_0.pdf).

27 <sup>25</sup>Kristensen, Hans and Norris, Robert, *The B61 family of nuclear bombs*, *Bulletin of  
28 the Atomic Scientists* (April 22, 2014) [http://fas.org/blogs/security/2014/04/  
b61family/](http://fas.org/blogs/security/2014/04/b61family/).

1 Strike Fighter).<sup>26</sup> A separate Air Force program for a new tail guidance kit.<sup>27</sup> will  
 2 transform the "dumb" B61 into the world's first nuclear smart bomb. Despite all this,  
 3 the U.S. government still denies that these are new military capabilities, which flies in  
 4 the face of common sense.

5 In January 2014 former Air Force Chief of Staff Norton Schwartz confirmed that  
 6 the pending B61-12 would have enhanced accuracy and a lower yield with less fallout  
 7 compared to previous modifications. Gravity bombs are relatively inaccurate  
 8 compared to missile warheads, consequently larger nuclear bombs are needed to  
 9 effectively impact a target. With its guided tail kit, the B61-12 will be accurate to  
 10 within 30 meters from a target and therefore only requires a 50-kiloton warhead.  
 11 Schwartz stated that greater accuracy would both improve the weapon and create a  
 12 different target set for it (which is in effect a new military capability). This is because  
 13 the lower-yield B61-12's greater accuracy will still put underground targets within its  
 14 destructive cratering impact.<sup>28</sup>

15 In sum, while there are ongoing modest quantitative reductions to the active  
 16 nuclear weapons stockpile, which is the U.S.'s proffered argument that it is complying

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18 <sup>26</sup>Statement of Mr. Andrew Weber Assistant Secretary of Defense for Nuclear,  
 19 Chemical, and Biological Defense Programs On Fiscal Year 2015 Budget Request  
 20 for Atomic Energy Defense Activities and Nuclear Forces Programs Before the  
 21 Strategic Forces Subcommittee Committee on Armed Services, U.S. House of  
 22 Representatives (April 8, 2014)  
[http://docs.house.gov/meetings/AS/AS29/20140408/102090/  
 HHRG-113-AS29-Wstate-WeberA-20140408.pdf](http://docs.house.gov/meetings/AS/AS29/20140408/102090/HHRG-113-AS29-Wstate-WeberA-20140408.pdf).

23 <sup>27</sup>National Nuclear Security Agency. *NNSA Reaches B61-12 Life Extension Program*  
 24 *Milestone: First Full-System Mechanical Environment Test Completed Successfully*,  
 25 Press Release (Feb 4, 2014) [http://nnsa.energy.gov/mediaroom/  
 pressreleases/b61lep](http://nnsa.energy.gov/mediaroom/pressreleases/b61lep).

26 <sup>28</sup>See Kristensen, Hans, *General Confirms Enhanced Targeting Capabilities of B61-12*  
 27 *Nuclear Bomb*, Federation of American Scientists (January 24, 2014)  
 28 <http://fas.org/blogs/security/2014/01/b61capability/>.

1 with the NPT, this is not a qualitative reduction leading to the NPT's goal of global  
 2 nuclear disarmament. In fact, it is precisely because nuclear weapons are being so  
 3 radically improved that nuclear war planners can live with numerical reductions.  
 4 Valuable enemy assets no longer need to be targeted by multiple incoming warheads  
 5 to guarantee destruction, leading to a quantitatively smaller but qualitatively  
 6 improved nuclear weapons stockpile.

### 7 CONCLUSION

8 Nuclear Watch New Mexico's perspective is uniquely different from Plaintiff's,  
 9 formed by its detailed analysis of U.S. nuclear weapons policies and budgets since  
 10 1999. Defendants' claims that Plaintiff's complaint is contrary to public interest and  
 11 that the U.S. is in compliance with its non-proliferation obligations are not valid or  
 12 credible. A government's stated position is one thing, while the facts are another.  
 13 Nuclear weapons modernization programs are expected to cost U.S. taxpayers more  
 14 than a trillion dollars over thirty years. Life Extension Programs arguably endow  
 15 nuclear weapons with new military capabilities. New nuclear weapons production  
 16 facilities are expected to be operational until approximately 2075. Dismantlement and  
 17 non-proliferation programs are being cut. These are very strong indicators that the  
 18 United States is in material breach of its Article VI obligation under the Non-  
 19 Proliferation Treaty "to pursue negotiations in good faith on effective measures  
 20 relating to cessation of the nuclear arms race at an early date and to nuclear  
 21 disarmament" (emphasis added). Any remotely similar conclusion by the Court  
 22 would be in the public and even global interest. Clearly the implications of this case go  
 23 far beyond just those of the directly involved parties, instead impacting the entire  
 24 world.

25 Dated: October 6, 2014

Respectfully submitted,

26 /s/ Andrea R. St. Julian  
 27 Andrea R. St. Julian  
 Attorney for Nuclear Watch  
 28 New Mexico