Case No. 15-15695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, TURTLE ISLAND RESTORATION NETWORK, JAPAN ENVIRONMENTAL LAWYERS FEDERATION, SAVE THE DUGONG FOUNDATION, ANNA SHIMABUKURO, TAKUMA HIGASHIONNA, and YOSHIKAZU MAKISHI,

Plaintiffs-Appellants,

v.

ASHTON CARTER, in his official capacity as Secretary of Defense; and the UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

The question before this Court is whether Plaintiffs' claim that the Department of Defense (DoD) failed to comply with the "take into account" procedure of the National Historic Preservation Act (NHPA) is justiciable. DoD argues that the claim is barred by the political question doctrine and endorses the district court's ruling that Plaintiffs lack standing because their harms are not redressable. As Plaintiffs demonstrate in their opening brief, the political question doctrine does not bar the district court from resolving Plaintiffs' NHPA claim on the merits and Plaintiffs have standing.

DoD's political question argument makes the common error of failing to distinguish between a political *case* and a political *question*. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). Although this case takes place in the context of the military alliance between the United States and Japan, Plaintiffs' claims are not barred by the political question doctrine. Adjudicating Plaintiffs' NHPA claims does not require this Court to second-guess or supplant political or national security decisions properly within the domain of the executive or legislative branches. Rather, the Court is asked only to apply clear statutory requirements to determine the legal sufficiency of the processes DoD used to gather and consider information to assess the effects of its actions on the Okinawa dugong. This straightforward act of statutory interpretation falls squarely within the jurisdiction

and responsibility of the courts to interpret and apply U.S. statutes – a responsibility that the Court "cannot shirk … merely because [its] decision[] may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229 (1986).

Nor does the relief Plaintiffs seek overstep the constitutional boundaries that the political question doctrine is intended to protect. Vacatur and remand to the agency for further action in compliance with the NHPA would not supplant DoD's policy decisions. Instead, it would require DoD itself to revisit its Findings after gathering the information and following the procedures required by the NHPA. Plaintiffs' request for injunctive relief also does not raise political question concerns. The standard for injunctive relief provides clear, judicially manageable standards for determining whether such relief is appropriate. The balance of harms and consideration of the public interest that the standard entails allows courts to exercise their equitable powers judiciously, while observing the principles underlying the separation of powers doctrine.

As Plaintiffs explain in their opening brief, the district court's standing decision misapplies this Court's standards for standing – particularly the redressability requirement – when a government agency fails to follow procedures required by law. DoD's failure to comply with the "take into account" requirements of section 402 of the NHPA causes a procedural injury that threatens

Plaintiffs' concrete interests in observing the dugong for cultural, educational, aesthetic, inspirational, conservation, and economic purposes. Plaintiffs' procedural harms would be redressed by an order vacating DoD's Findings and remanding to the agency for compliance with the section 402 "take-into-account" requirement. Reassessing the impacts of the Futenma Replacement Facility (FRF) on the dugong with the benefit of information provided by Plaintiffs and others through a procedurally sound "take into account" process will give DoD the opportunity to adjust the design and operation of the FRF that would mitigate harms to the dugong, thereby redressing Plaintiffs' injuries. These remedies are sufficient to confer standing on the Plaintiffs to bring their NHPA claims.

ARGUMENT

I. Political Question Doctrine Does Not Deprive the Courts of Jurisdiction to Decide Plaintiffs' Claim that DoD Has Not Followed the Procedures Required by the NHPA.

The district court correctly held that Plaintiffs' claim – that DoD has violated the NHPA – "presents a purely legal question of statutory application ... [and] does not warrant dismissal" on political question grounds, ER 22, but held that Plaintiffs' request for injunctive relief is barred under the political question doctrine. ER 32. DoD did not appeal the first part of that ruling, but nonetheless argues here that Plaintiffs' NHPA claim and their request for both statutory remedies (vacatur and remand pursuant to the Administrative Procedure Act, 5

U.S.C. § 706(2)) and injunctive relief are barred. That argument is based on the assertion that because this case concerns actions taken by the U.S. military in coordination with the Japanese government, Plaintiffs' claim raises political questions in the areas of foreign relations and national security that are not justiciable by this Court. Appellees' Br. 32-33. However, Plaintiffs' claim is not nearly as far-reaching as DoD suggests. Plaintiffs do not ask the district court to pass judgment on the decision to construct a new military base in partnership with Japan, but simply ask the court to determine whether DoD's "take-into-account" process and the resulting "Findings" comply with the requirements of section 402 of the NHPA. DoD makes the common error of failing to distinguish between a political *case* and a political *question*. *See Baker*, 369 U.S. at 217.

Adjudicating Plaintiffs' NHPA claim would not require the court to supplant political or national security decisions that are properly the domain of the executive branch with its own "unmoored determination of what United States policy should be." *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). Instead, it would simply require the application of clear statutory requirements, interpretable through sources familiar to this Court, to determine the legal sufficiency of the processes DoD used to gather and consider information allowing it to assess the effects of its actions on the Okinawa dugong. The relief Plaintiffs request does not ask this Court or the district court to determine the

impacts of the FRF on the dugong, or place before the courts the ultimate policy decision regarding where and how to construct the FRF and whether or how to avoid or mitigate any adverse effect. To the contrary, remanding to DoD would instead require DoD to revisit its decision, comply with proper procedures, and consider the required information. The decision surrounding whether and how to mitigate any adverse effects that the FRF may have on the dugong remains DoD's to make. For these reasons, Plaintiffs' claims do not trigger any of the factors identified by the Supreme Court in *Baker v. Carr* that would bar consideration of Plaintiffs' claims on political question grounds.

A. Resolution of Plaintiffs' NHPA claim is not "constitutionally committed" to the political branches.

The first *Baker* factor – a "textually demonstrable constitutional commitment of the issue to a coordinate political department" – does not bar consideration of Plaintiffs' NHPA claims. Plaintiffs do not contest that foreign policy and national defense fall within the competency of the political branches. However, the Supreme Court has made clear that not every case that touches on foreign affairs or national security presents a non-justiciable political question. *See, e.g.*, *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *El-Shifa Pharm. Inds. Co. v. United States*, 607 F.3d 836, 856 n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring and citing numerous relevant Supreme Court decisions)

("Indeed, from the time of John Marshall to the present, the [Supreme] Court has decided many sensitive and controversial cases that had enormous national security or foreign policy ramifications.").

> A court may not refuse to adjudicate a dispute merely because a decision "may have significant political overtones" or affect "the conduct of this Nation's foreign relations," *Japan Whaling*, 478 U.S. at 230. Nor may the courts decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches.

Zivotofsky, 132 S. Ct. at 1432 (Sotomayor, J., concurring in part and concurring in judgment); *see also id*. at 1428 (citing *INS v. Chadha,* 462 U.S. 919, 943 (1983)) ("[C]ourts cannot avoid their responsibility merely 'because the issues have political implications'").

DoD errs in conflating the political implications of a decision that it failed to comply with the requirements of the NHPA with the familiar judicial task of determining what those statutory requirements are and whether they have been met. DoD argues that "the declaratory relief that CBD seeks – a declaration that the Secretary's take-into-account process was unlawful and an order setting aside the Secretary's section 402 Findings – would, at a minimum, call into question the United States' ability to fulfill its commitments to the Government of Japan regarding the FRF." Appellees' Br. 37. Given the procedural nature of the NHPA, it is questionable whether an order vacating and remanding DoD's Findings for

compliance with the statute would in fact "call into question the United States' ability to fulfill its commitments." However, speculation about the political implications of such an order is precisely what the Supreme Court and this Court have made clear does *not* amount to a nonjusticiable political question. *See Zivotofsky*, 132 S. Ct. at 1428; *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011) ("[W]e understand the government's concern that national security issues require sensitivity. That being said, although the claims arise from political conduct and in a context that has been highly politicized, they present straightforward claims of statutory and constitutional rights, not political questions.").

DoD tries to argue that *Zivotofsky* "has no bearing on this case" because the statute at issue was ultimately declared unconstitutional, whereas Plaintiffs here raise statutory claims. Appellees' Br. 39-40. However, because statutory interpretation is as squarely within the powers of the courts as constitutional interpretation, that difference is meaningless. *See, e.g., Japan Whaling Ass'n*, 478 U.S. at 230 ("[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."); *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction.…").

Moreover, the question presented to the Supreme Court in *Zivotofsky* – whether Mr. Zivotofsky's claim that the State Department violated the passport statute (and his request for declaratory and injunctive relief) presented a nonjusticiable political question – is remarkably similar to the question before this Court: whether Plaintiffs' claim that DoD violated the NHPA (and their request for declaratory and injunctive relief) presents a nonjusticiable political question. In *Zivotofsky*, the Supreme Court reasoned that

> [t]he existence of a statutory right … is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, *the Judiciary must decide if Zivotofsky's interpretation of the statute is correct*, and whether the statute is constitutional. This is a familiar judicial exercise.

132 S. Ct. at 1427 (emphasis added). That reasoning is directly applicable here.

DoD argues that this case raises political issues because resolving Plaintiffs' claims would "cast doubt on the Secretary's ability to fulfill the United States' commitments regarding the FRF." Appellees' Br. 39. However, the only evidence that DoD presents in support of this contention are two declarations prepared in 2014 for this litigation: Declaration of Brigadier General Mark R. Wise (Sept. 26, 2014), and Declaration of James P. Zumwalt (Sept. 26, 2014). *Id.* (citing SER 6, 12-14). These declarations make general statements asserting that "a court order

setting aside DoD's findings with respect to the impact of the FRF on the dugong would … be damaging," SER 14, and that failure of the U.S. government to comply with "political commitments" such as the Roadmap and the decisions of the Joint Committee would be a "departure from the established norms of the relationship of the two governments," which would "undermine the strength of the U.S.-Japan alliance." SER 6. But the declarations do not explain how requiring DoD to revisit its "take-into-account" procedure to ensure compliance with domestic law would amount to such a failure. The minimal delay that remand might cause would be small compared to the various delays that have postponed construction between 2006 and the present,[1] which have not derailed the U.S.-Japan alliance.

DoD's assertion that compliance with the NHPA would be a "departure from the established norms of the relationship of the two governments," is belied by the fact that compliance with section 402 of the NHPA is encompassed in the

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[1] For example, the Japanese EIS and domestic permitting processes took more than eight years to complete due to legal procedures and political events in Japan. *See* CR 147 at 2-5 (noting "multiple roadblocks" to the FRF, including opposition by the Okinawa prefectural government). Further delays were caused when U.S. government concerns about cost led DoD to ask for Japanese recommendations for cheaper alternative locations. *See id.* at 4. Subsequently, in 2014 the Okinawa Governor revoked the reclamation permit, required under Japanese law for construction to begin. *See* Opening Br. 10-11. Although this revocation is the subject of ongoing litigation, neither uncertainty concerning the Japanese permitting litigation nor changing political circumstances in Japan have fatally undermined the alliance.

agreements governing the U.S.-Japan alliance. The Japan Environmental Governing Standards (JEGS), established "in accordance with DoD Instruction 4715.5 ('Management of Environmental Compliance at Overseas Installations'), the Status of Forces Agreement, and other applicable international agreements" govern environmental compliance on U.S. bases in Japan, and explicitly incorporate the "take-into-account" requirement of section 402. Department of Defense, Japan Environmental Governing Standards at *i* (Dec. 17, 2012);[2] *id.* at 152 ("Installation commanders shall take into account the effect of any action on any property listed on the World Heritage List or on the GoJ equivalent of the National Register of Historic Places for purposes of avoiding or mitigating any adverse effects."). In addition, the cover memo distributing the revised JEGS makes clear that "as environmental law continues to evolve, the JEGS may be amended in the future." Salvatorre A. Angelella, Commander U.S. Forces Japan, *Memorandum re. 2012 Japan Environmental Governing Standards,* (Dec. 17, 2012).[3] Therefore, compliance with the requirements of the NHPA would not, in

[2] Available at http://www.navfac.navy.mil/content/dam/navfac/NAVFAC%20Pacific/NAVFAC%20Far%20East/PDFs/PWD_Yokosuka_EVfiles/2012%20JEGS.pdf.

[3] Available with the JEGS at http://www.navfac.navy.mil/content/dam/navfac/NAVFAC%20Pacific/NAVFAC%20Far%20East/PDFs/PWD_Yokosuka_EVfiles/2012%20JEGS.pdf.

any meaningful way, violate or undermine the treaty arrangements or "political agreements" between the United States and Japan.

Moreover, as *Zivotofsky* makes clear, these concerns about the political implications of the decision are not enough to bar the court from resolving the legal question at issue in the case. Having determined that the central legal question at issue in *Zivotofsky* was not political in nature, the Supreme Court held that injunctive relief would be proper assuming success on the merits, despite the State Department's assertions of significant repercussions for foreign policy. 132 S. Ct. at 1428 ("If, on the other hand, the statute [is constitutional], then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated."); *id.* at 1440 (Breyer, J., dissenting) (requiring government to list Israel on passports of Americans born in Jerusalem would have "significant[] adverse foreign policy effects" because it "would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty" and "would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process" (citations to the State Department's brief omitted).). The fact that resolving a statutory claim and issuing the necessary relief – including injunctive relief – might have political implications does not render the statutory claim at the heart of the case nonjusticiable. *See also Japan Whaling*

Ass'n, 478 U.S. at 230 ("We are cognizant of the interplay between [the Pelly and Packwood-Magnuson] Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

B. Clear, judicially manageable standards are available to resolve Plaintiffs claims.

The second *Baker* factor – "lack of judicially discoverable and manageable standards for resolving" the issue – also does not bar Plaintiffs' NHPA claims. The National Historic Preservation Act provides clear standards for the district court to apply in reviewing whether DoD complied with the statutorily mandated "take into account" process. The district court[4] discerned manageable standards for evaluating whether DoD's actions conform to the "take-into-account" standard of section 402. *See* CR 119 at 31-32 (considering "textual, structural and historical evidence" and concluding that "[t]he plain language of section 402, combined with express legislative purpose, reveals clear Congressional intent regarding the basic

[4] To the best of Plaintiffs' knowledge, this case is the first to address the meaning of the "take-into-account" language in section 402 of the NHPA. There is currently another case pending that raises a section 402 claim, but the parties have not yet briefed the merits of that claim. *See Ctr. for Biological Diversity v. Export-Import Bank of the United States*, No. 12-cv-06325 (N.D. Cal. Filed Dec. 13, 2012).

components[5] of a take into account process"); [6] ER at 23-24 (no evidence that "the critical 'take-into-account' requirement of the NHPA is qualitatively different from the analysis of the adequacy of an environmental impact statement under NEPA or the quality of biological assessments under the Endangered Species Act").

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[5] The district court went on to describe those basic components as follows:

> The process, at a minimum, must include (1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects. The person charged with responsibility for this basic process is the person with jurisdiction over the undertaking, and compliance with the process must occur before the undertaking is approved. In addition, a federal agency does not complete the take into account process on its own, in isolation, but engages the host nation and other relevant private organizations and individuals in a cooperative partnership.

CR 119 at 32.

[6] DoD asserts that the district court's 2008 decision "has been superseded by the 2015 Order that is the subject of this appeal." Appellees' Br. 38. Plaintiffs contest this assertion. The district court cites the 2005 and 2008 decisions approvingly in the 2015 order. *See, e.g.,* ER 8 n.2, 36 n.20. The only issue that the district court ruled on in its 2015 order that was also addressed in the 2005 and 2008 decision is standing and the court was careful not to overrule the 2008 standing decision. ER 36 n.21 (distinguishing the 2008 holding on the grounds that it was "made in a far different procedural posture" and is therefore "not binding on this Court"). Regardless, to the extent that the earlier decisions interpret and apply section 402 of the NHPA, they are authoritative and illustrative of the availability of manageable standards.

Nonetheless, DoD argues that section 402 "provides no substantive standard by which to review either the procedures the Secretary used to consider the impacts of the FRF or the substance of his conclusion" because "neither section 402 nor any other provision of the NHPA defines the requirements of that take-into-account process for foreign undertakings." Appellees' Br. 43-44. However, familiar rules of statutory interpretation applied to the "take-into account" mandate provide "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).

"[I]n all cases involving statutory construction, 'our starting point must be the language employed by Congress,' ... and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). The district court's approach to interpreting the language of section 402 is thorough and well reasoned:

> On its face, the phrase "take into account" means consider, contemplate, study, and weigh. Webster's Int'l Dictionary of the English Language (3rd ed. 1976). This plain meaning of "take into account" is consistent with the purposes of the NHPA to "generat[e] information about the impact of federal actions on the environment," and to "require[] ... the relevant federal agency [to] *carefully consider* the information produced," *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) (emphasis added), and to "*weigh* effects in deciding whether to authorize" a federal undertaking, *Save Our Heritage v. Fed. Aviation Admin.*, 269 F.3d 49, 58 (1st Cir. 2001)

> (emphasis added). The statutory text also contains requirements relating to who, when, and what shall be taken into account, as well as why an accounting is necessary. The statute states that (1) "the head of a Federal agency having direct or indirect jurisdiction over such undertaking" shall be the person charged with the task of taking into account, (2) the accounting shall occur "prior to approval" of the undertaking, and (3) the accounting shall consider the "effects of the undertaking" on the protected property. 16 U.S.C. § 470a-2. Finally, the statute is clear regarding why the taking-into-account is required. It is conducted "for purposes of avoiding or mitigating any adverse effects." *Id*.

CR 119 at 30-31. Thus, the district court demonstrated the manageability of the "take-into-account" standard in the context of section 402.

Indeed, courts have been applying an almost identical "take-into-account" provision – section 106, 54 U.S.C. § 306108[7] – based on the plain language of the statute since it was passed in 1966. *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807-08 (9th Cir. 1999); *Pueblo of Sandia v. United States*, 50 F.3d 856, 859-63 (10th Cir. 1995); *Pub. Emps. for Envtl. Responsibility*

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[7] Section 106 provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, *shall take into account the effect of the undertaking on any historic property*. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306108 (emphasis added).

v. Beaudreau, 25 F. Supp. 3d 67, 119-21 (D.D.C. 2014); *Quechan Tribe of Fort Yuma Indian Reservation v. Dep't of Interior*, 755 F. Supp. 2d 1104, 1118-20 (S.D. Cal. 2010). And, because implementing regulations were only issued in 1979, courts have interpreted the "take into account" mandate without the assistance of implementing regulations. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971) (holding that Secretary of Transportation failed to comply with "take-into-account" requirements before approval of bridge project); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 453 F.2d 463 (2d Cir. 1971) (reviewing agency's assessment of impacts of hydroelectric project for compliance with section 106 "take-into-account" requirements); *Don't Tear It Down, Inc. v. Gen. Serv. Admin.*, 401 F. Supp. 1194 (D.D.C. 1975) (same); *Envtl. Def. Fund v. Tennessee Valley Auth.*, 371 F. Supp. 1004 (E.D. Tenn. 1973) (same). Thus, the absence of implementing regulations specific to section 402 does not prevent judicial review. Rather, if "Congress has not directly addressed the precise question at issue," and there has been no administrative interpretation, the court must construe the statute itself. *Chevron*, 467 U.S. at 842-43 (In reviewing an agency's construction of a statute, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, *as would be necessary in the absence of an administrative interpretation*.") (emphasis added).)" The extraterritorial context of section 402

does not alter the clear, judicially discoverable meaning of the same "take-into-account" standard.

Nor is the relief that Plaintiffs request barred due to a lack of judicially cognizable standards. As Plaintiffs demonstrate in their opening brief, the four-part standard for determining whether injunctive relief should issue is clear and manageable, even when foreign policy and national security interests are at stake. *See* Opening Br. 49-54 (reviewing inherent flexibility of standard for injunctive relief, allowing courts to give appropriate weight and deference to the government's national security and foreign policy interests; and reviewing cases in which the Supreme Court and other courts in fact weighed hardships and considered whether injunctive relief would be in the public interest, even when foreign affairs and national security considerations were involved).

DoD argues that a request for injunctive relief is nonjusticiable when foreign affairs or national security are at stake,[8] Appellees' Br. 41, and challenges

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[8] The three D.C. Circuit cases DoD cites in support of its argument that the four-part standard for injunctive relief is nonjusticiable in cases that touch on foreign affairs or national security are not on point, because none of them considers whether the political question doctrine bars the court from issuing injunctive relief. Instead, the court in these cases held that resolving the *merits* of the legal claims raised political questions. *See Bancoult v. McNamara*, 445 F.3d 427, 431 (D.C. Cir. 2006) (Alien Tort Claims Act suit asserting that forced removal of residents from Chagos Archipelago amounted to torture, racial discrimination, genocide and other torts under international law); *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) (Alien Tort Claims Act case alleging that U.S. actions in support of military coup in Chile constituted summary execution, torture, wrongful death

Plaintiffs to "proffer a substantive standard that the district court could use to decide whether the balance of harms and the public interest require that the Secretary be enjoined from carrying out 'any activities in furtherance of' the bilateral FRF project." Appellees' Br. 42-43. But no additional substantive standard is necessary; the balancing test itself provides the standard.

Inherent in the concept of "balancing" is the consideration and comparison of harms that would result if an injunction were to issue and the harms to Plaintiffs caused by DoD's failure to comply with the statute. If the harm that would result from an injunction outweighs the harm suffered by Plaintiffs, then the court would not issue an injunction. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 542 (1987)) ("[C]ourts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief'"). A *per se* rule that any request for injunctive relief is nonjusticiable when foreign affairs or national security are at stake would foreclose altogether any claims for injunctive relief against the Department of Defense, State Department, and perhaps other federal agencies. The many cases adjudicating such claims show the fallacy

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and other torts under international law); *El Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010) (Federal Tort Claims Act suit alleging that U.S. missile attack on a Sudanese pharmaceutical plant was "mistaken and not justified"). These tort-based challenges to the military decisions themselves are very different from Plaintiffs' statutory claim that DoD's "take-into-account" process does not meet the clear procedural requirements of the NHPA.

of this argument. *See, e.g.*, *Winter*, 555 U.S. at 20-31 (applying standard for injunctive relief in case challenging Navy's use of sonar in training exercises, where use of sonar was "essential to national security"); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 320, (1982) (in case seeking to enjoin Navy from carrying out training operations in Puerto Rico, "the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue"); *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 200-06 (4th Cir. 2005) (applying standard for injunctive relief in NEPA case against DoD concerning construction of aircraft landing field within five miles of national wildlife refuge, which implicated "national security matters"); *Ground Zero Ctr. for Nonviolent Action v. Dep't of Navy*, 918 F. Supp. 2d 1132, 1155-56 (W.D. Wash. 2013) (balancing harms and public interest in NEPA and ESA case seeking to enjoin Navy's construction of explosives-handling wharf to maintain submarines and service missiles).

The Supreme Court's decision in *Winter* demonstrates that application of the balancing test is possible in a case challenging the Navy's use of sonar in training exercises. There, the Court reviewed the evidence in the record concerning the various interests at stake and concluded that:

> the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing

> the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is "essential to national security."
>
> The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs.

555 U.S. at 26.

Although DoD cites *Winter* in support of its assertion that "under any conceivable standard, the United States' foreign policy and national security interests would trump CBD's claimed interests," Appellees' Br. 42 (citing *Winter*, 555 U.S. at 24-27), *Winter* explicitly holds that "military interests do not always trump other considerations, and we have not held that they do." 555 U.S. at 26. And DoD's own assertion that the United States' specific foreign policy and national security interests trump CBD's interests – which, although Plaintiffs disagree with the conclusion, is precisely the analysis their request for injunctive relief requires the district court to undertake –demonstrates that the relevant balancing is possible in this case. Plaintiffs' claims are not barred for want of clear and judicially manageable standards.

C. Resolving Plaintiffs' NHPA Claim Does Not Require the Court to Supplant DoD's Policy Decision.

None of the remaining *Baker* factors[9] bars the Court from fulfilling its constitutional responsibility to interpret statutes and decide cases properly before it. *See Zivotofsky*, 132 S. Ct. at 1427. As Plaintiffs have made clear, Opening Br. 41, 43, 47, resolving Plaintiffs' NHPA claims does not require the Court to pass judgment on the political decision to implement the FRF project. *See* CR 119 at 30-31, 34-35. In fact, granting Plaintiffs the relief they request would remand the case back to DoD to redo its own decision, according to the procedures required by the NHPA.

Even granting a temporary injunction on U.S. activities in furtherance of construction while DoD remedies the shortcomings in its "take into account" process would not overturn "the understanding reached by the two governments on the location and layout of the FRF" as DoD alleges. Appellees' Br. 47. An injunction staying any action by DoD that facilitates construction of the FRF until

[9] The remaining *Baker* factors are:

> [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.

369 U.S. at 217.

DoD completes a legally adequate "take-into-account" process would not prevent the United States from facilitating construction once it meets it obligations under the NHPA. Nothing in the SOFA, Security Treaty or 2006 Roadmap requires immediate action to construct the FRF and none of these agreement establish timelines for the United States or Japan to take action. There is therefore no danger that the Court would be expressing disrespect for DoD's ultimate policy decision or overturning a "political decision already made," and no risk of embarrassment from multifarious pronouncements of policy by various departments. *See Baker*, 369 U.S. at 217. Indeed, DoD's suggestion that the court does not have jurisdiction to engage in a routine exercise in statutory interpretation implementing the "take-into-account" provision of section 402 is contrary to the balance of power established in the Constitution, which assigns the judiciary the power to decide "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties." U.S. Const. Art. III, § 2, cl. 1. *See also W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l,* 493 U.S. 400, 409 (1990) ("Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."); *Japan Whaling Ass'n,* 478 U.S. at 229 ("under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones").

In *Japan Whaling*, the Supreme Court held that the interpretation of a statute did not present a nonjusticiable political question even though the relief requested would have directly contradicted an agreement the Executive Branch had made with Japan, as well as assurances given to the Japanese government by Executive branch officials. 478 U.S. at 221. In that case, Japan had refused to comply with international prohibitions on sperm whale hunting under the International Convention for the Regulation of Whaling. *Id.* at 227. The United States and Japan had subsequently agreed that Japan would limit the number of sperm whales it would allow its nationals to catch and the United States would not certify Japan under U.S. laws requiring certification – and consequent reduction in rights to fish in U.S. waters – of nations whose nationals are acting in way that diminished the effectiveness of the Whaling Convention. *Id.* Conservation groups then sued to compel the Secretary to certify Japan pursuant to the U.S. laws, for declaratory judgment that the failure to certify violated the U.S. laws, and an injunction prohibiting any executive agreement with Japan that would violate the statutory certification and sanction requirements. *Id.* at 228 n.3.

The Supreme Court considered arguments that the claims were not justiciable because a court cannot command the Executive Branch to repudiate an international agreement and the claims created a "danger of 'embarrassment from multifarious pronouncements by various departments on one question.'" 478 U.S.

at 229. The Court concluded that the claims were justiciable:

> [C]ourts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. … The Court must first determine the nature and scope of the duty imposed upon the Secretary by the [statutes requiring certification], a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these [statutes] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

Id.

Like in *Japan Whaling,* the central issue in the present case is one of statutory interpretation. In addition, as demonstrated above, there is no direct conflict between the relief requested and any agreement with Japan. Any of the indirect effects that DoD asserts, such as "cast[ing] doubt on the Secretary's ability to fulfill the United States' commitments regarding the FRF," Appellees' Br. 39, risk far less disrespect or embarrassment than in *Japan Whaling*. Fulfilling the court's obligation to decide cases and interpret statutes would not, in this case, require express disrespect for DoD's ultimate policy decision or overturn a "political decision already made." Separation of powers concerns do not prevent the court from resolving this case.

II. **Because Plaintiffs' Claim is Redressable, Plaintiffs have Standing.**

DoD argues that "while a court could in theory set aside the Secretary's allegedly flawed Findings and take-into-account process, a court cannot set aside the Secretary's decision to commit to the 2006 Roadmap, or order the Secretary to withdraw from the Roadmap." Appellees' Br. 53. Therefore, DoD concludes, "CBD cannot demonstrate that that procedural right, if exercised, could protect its concrete interest in protecting the dugong from the alleged impacts of the FRF." Appellees' Br. 54.

DoD's failure to comply with the "take into account" requirements of section 402 of the NHPA causes a procedural injury that threatens Plaintiffs' concrete interests in observing the dugong for cultural, educational, aesthetic, inspirational, conservation, and economic purposes. *See Pit River Tribe v. U.S. Forest Serv.,* 469 F.3d 768, 787 (9th Cir. 2006). At a minimum, Plaintiffs' harms would be redressed by an order from the court (1) declaring that DoD has failed to comply with the "take into account" requirement of section 402 of the NHPA, (2) vacating the Findings, and (3) remanding to DoD to reconsider whether the FRF would adversely affect the dugong following the procedures required by the NHPA. *See id.* at 779 (explaining that, in an NHPA case, a "'procedural injury would be redressed if the [agency] followed proper procedures'") (quoting *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1040 (9th Cir. 2006)).

Reassessing the impacts of the FRF on the dugong with the benefit of information provided by Plaintiffs and others through a procedurally sound "take into account" process will give DoD the opportunity to make adjustments to the design and operation of the FRF that would mitigate harms to the dugong, thereby redressing Plaintiffs' injuries. These remedies are sufficient to confer standing on the Plaintiffs to bring their NHPA claim.

DoD reiterates the district court's conclusion that there is no redressability because no matter what might arise in the course of the proper "take-into-account" process, DoD has already decided that it will not change any element of the FRF project to mitigate harms to the dugong and thus remedy Plaintiffs' injuries. ER 41-42 ("there is no likelihood that the United States government, in response to an adverse declaratory judgment, will voluntarily halt construction of the FRF"); Appellees' Br. 55. As Plaintiffs demonstrate in their opening brief, Opening Br. 30-34, the fact that the "take-into-account" process does not mandate a particular result does not undermine redressability for procedural injuries. On the contrary, this Court has repeatedly held that procedural injuries can be redressed by satisfactory completion of the procedure required by law, regardless of the result eventually reached. *E.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) ("For purposes of Article III standing, we do not require a plaintiff to demonstrate that a procedurally proper EIS will necessarily protect his or her

concrete interest....”); *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (“[W]e have held that to establish redressability plaintiffs asserting procedural standing need not demonstrate that the ultimate outcome following proper procedures will benefit them.”); *see also Ocean Advocates v. Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2004) (quoting *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001)) (“A plaintiff ... who asserts inadequacy of a government agency’s [procedural analysis] need not show that further analysis by the government would result in a different conclusion. It suffices that ... the [government’s] decision could be influenced by the environmental considerations that NEPA requires an agency to study.”).

Moreover, DoD does not have to decide to “voluntarily halt construction of the FRF” in order comply with the statutory obligation to “avoid or mitigate” adverse effects on the dugong, 54 U.S.C. § 307101(e), and remedy Plaintiffs’ injuries. As this Court held in *Tyler v. Cuomo*, “‘[I]t is impossible for us to know with any degree of certainty just what the end result of the NHPA process would be…. We find it inappropriate to pre-judge those results as being limited to the extremes of either maintaining the status quo or totally [abandoning the project].’” 236 F.3d 1124, 1134 (9th Cir. 2000) (quoting *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1446–47 (5th Cir. 1991)). The district court’s presumption that DoD will not change any element of the FRF

project to mitigate harms to the dugong regardless of the results of the "take-into-account" process violates this Court's holding that a district court "should not pre-judge the result of the NHPA process by concluding that no relief is possible." *Id.* The NHPA, like NEPA, is a "stop, look and listen" provision that "requires each federal agency to consider the effects of its programs." *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010). It would defeat the purpose of the NHPA (and NEPA) if an agency could defeat standing simply by announcing *a priori,* that regardless of the information generated through an EIS or consultation with stakeholders, it does not intend to alter its action in any way. The opportunity to persuade and the ability of the agency to change course are integral to the statute and sufficient to confer standing in cases of procedural harms.

CONCLUSION

For the foregoing reasons, and for the reasons contained in Plaintiffs' opening brief, the judgment of the district court dismissing Plaintiffs' NHPA claims should be vacated and the case remanded to the district court for consideration of the merits.

Dated: March 17, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(5) and (6) because it has been prepared in 14-point Times New Roman, 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)(ii) because it contains 6,929 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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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 March 17, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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