
NO. 11-15132

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY KORAB, et al.,
Plaintiffs-Appellees,

v.

PATRICIA McMANAMAN, in her official capacity as Director of the State of Hawai‘i, Department of Human Services and
KENNETH FINK, in his official capacity as State of Hawai‘i, Department of Human Services, Med-QUEST Division Administrator,
Defendants-Appellants.

AMICI CURIAE BRIEF OF THE JAPANESE AMERICAN CITIZENS LEAGUE-HONOLULU CHAPTER, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE-HONOLULU BRANCH AND KOKUA KALIHI VALLEY COMPREHENSIVE FAMILY SERVICES IN SUPPORT OF PLAINTIFFS-APPELLEES

On Appeal from the Interlocutory Order Granting a Preliminary Injunction of the United States District Court for the District of Hawai‘i,
Case No. D.C. No. 1:10-cv-00483-JMS-KSC

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INTEREST OF AMICI

The Japanese American Citizens League-Honolulu Chapter (JACL Honolulu), a civil rights organization, draws from the legacy of the unjust incarceration of Japanese Americans during World War II and strives to protect the civil and human rights of all. As an Asian Pacific American organization with concern for the fair treatment of Pacific Islanders, the JACL Honolulu stands alongside the Micronesian people to help ensure their unique relationships with the United States and the State of Hawai‘i are honored.

The National Association for the Advancement of Colored People (NAACP), a non-profit and non-partisan organization, is the nation’s oldest and largest civil rights organization. From the ballot box to the classroom, the NAACP works collaboratively with other civil rights organizations to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.

Kokua Kalihi Valley Comprehensive Family Services (KKV) is a non-profit community health center serving the residents of Kalihi Valley, Honolulu. Formed in 1972 in response to the absence of accessible and appropriate health services for the valley’s growing Asian and Pacific Island immigrant populations, KKV provides comprehensive medical and community health services to 10,000

residents of diverse ancestry, including a fast-growing Micronesian patient population.[1]

[1] Pursuant to Circuit Rule 29, all parties have consented to the filing of this brief. 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, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

This case is unique. It is not about state benefits for immigrants. Nor is it about welfare for those in need. Rather, it is about repairing the persisting damage of injustice uniquely suffered by the people of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI) and the Republic of Palau (Palau)[2] – people with whom the United States and State of Hawai‘i have a long-standing special relationship.

As trustee for the Trust Territory of the Pacific Islands, the United States in the late 1940s and 1950s lethally pursued its own interest by testing nuclear bombs on select Pacific islands, devastating not only the Marshallese homelands but also the health of the Marshallese and Micronesian people for ensuing decades. The U.S. also breached its acknowledged trust duty by failing to promote Micronesian self-sufficiency and independence and, instead, by fostering economic and healthcare dependency on the U.S. in order to secure Micronesian acquiescence to continued U.S. military and nuclear presence on the islands. One consequence of these breaches: the need of Micronesians to migrate to Hawai‘i and elsewhere in search of desperately needed health care for severe medical conditions.

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[2] This brief uses “Micronesian,” “COFA residents” or “COFA migrants” to include all COFA nation migrants, including peoples from the FSM, RMI and Palau. It also focuses primarily on the FSM and RMI; while Palauans are also affected by the State’s actions, there are fewer Palauans impacted by the issues addressed.

In recognition of these injustices, as part of its Compacts of Free Association (COFA) with the Micronesian governments in 1986, the United States committed to repair the persisting damage, including allowing Micronesian people to "establish residence" in Hawai'i and other states and territories "as non-immigrants." And many have traveled to these places to receive, among other things, needed medical care. But in 1996 the U.S. perpetuated the injustices by terminating Medicaid funding for Micronesian people.

The State of Hawai'i, as a constituent member of the U.S., bears joint responsibility for Micronesians in Hawai'i (who are not immigrants) for often life-or-death medical care. The State's responsibility stands on two legs.

First, the State's responsibility lies in its acceptance of federal funds partially for Micronesian health care as part of the United States' justice commitment to the Micronesian people. To its credit, when the federal government terminated Medicaid coverage for Micronesian people, the State initially stepped up to assure the promised and needed medical care. Hawai'i received over $74 million since 2003 in part as compensation for costs of health care for Micronesians. It continues to receive federal funds (even though those funds do not fully cover health costs). Like most of the rest of us, many Micronesians in Hawai'i pay State taxes and productively contribute to the State's economy. The State thus bears joint responsibility to provide a meaningful level of

health care coverage, particularly for those with life-threatening cancer, advanced diabetes, kidney failure and heart disease. More specifically, and directly relevant to the instant case, the State bears the responsibility not to exclude Micronesian migrants – and only Micronesian migrants – from needed health care coverage in Hawai‘i.

Second, the moral grounding for the State's joint responsibility to Micronesians lies in the State's commitment through law to the idea that "each person is important to every other person for [our] collective existence." *See* Haw. Rev. Stat. § 5-7.5 (a), (b) (2010). That commitment emerges out of the Hawai‘i legislature's directive to judges, legislators and government administrators that "[i]n exercising their power on behalf of the people and in fulfillment of their responsibilities" they contemplate the idea of "Aloha" and act to promote "the essence of relationships in which each person is important to every other person for collective existence." *Id.* Hawai‘i law thus instructs decisionmakers to embrace the value that our "collective existence" as an island community depends upon our fair treatment of "each person" among us. And this applies with force to Micronesians in Hawai‘i seeking badly needed medical care that is partly attributable to acknowledged injustice.

This State commitment is an extension of the South African concept of "ubuntu" that guided the Truth and Reconciliation Commission's efforts to heal the

persisting wounds of apartheid: no one can be healthy when any in the community are sick – "Ubuntu says I am human only because you are human. If I undermine your humanity, I dehumanise myself." *See* Eric K. Yamamoto, *Race Apologies*, 1 J. Gender Race & Just. 47, 52 (1997) (citation omitted). Ubuntu thus "characterizes justice as community restoration – the rebuilding of the community to [heal] those harmed" and to include those "formerly excluded." *Id.* *See also* *State v. Makwanyane*, 1995 (6) BCLR 665 (CC), at para. 225 (S. Afr.) ("an outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity. . . . [T]he life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept.").

This expressed commitment of the State of Hawai'i, as a constituent member of the United States, along with its receipt of federal funds, provide legal and moral cornerstones for both: (a) the State's obligation to continue medical care coverage to Micronesian people among us in order to partially repair the damage of pervasive and longstanding injustices, and (b) the determination that the third and fourth preliminary injunction factors – the balancing of equities and the public interest – tilt sharply in favor of affirming the district court's preliminary injunction.

I. Since World War II, Micronesians Suffered Grave Injustices That Have Decimated Key Parts of the Social and Economic Structure of Their Homelands, Significantly Damaged the Health of Many and Compelled Their Migration to Hawai'i in Search of Adequate Healthcare.

The COFA residents who were disenrolled from their State health benefits programs and moved to the Basic Health Hawaii (BHH) plan are not "ordinary" immigrants. In fact, they are not "immigrants" at all. The people transferred to the new (and significantly inadequate) healthcare plan are migrants from three island nations in the Pacific Ocean, the FSM, RMI and Palau. Unlike the usual push-pull factors driving other immigrants to the United States, Micronesians were essentially forced to the U.S. after decades of failed U.S. trusteeship and botched oversight that continued well after the enactment of the 1986 COFA agreements. The Hawai'i state healthcare struggles represent the failure of the long-stated and self-declared U.S. obligation of promoting and supporting Micronesian independence and self-sufficiency. And the State cuts to life-saving healthcare symbolize the government's failure to fulfill this obligation.

The Marshallese, in particular, suffered the gravest injustices. For twelve years, from 1946 to 1958, the United States exploded 67 atomic and hydrogen bombs on Bikini and Enewetak atolls. Nine islands were completely or partially vaporized. *See* Hearing Before the Subcomm. on Asia, the Pacific and the Global Environment of the H. Comm. on Foreign Affairs, 111th Cong. (2010) (statement of Jonathan M. Weisgall, Legal Counsel for the People of Bikini), at 3-4 ("Weisgall testimony"). The most powerful test was "Bravo," a fifteen megaton device – equivalent to 1,000 Hiroshima bombs – detonated in 1954 at Bikini atoll

that threw radioactive fallout over nearly 50,000 square miles. *Id.* at 2; Nuclear Claims Tribunal, Republic of the Marshall Islands, http://www.nuclearclaimstribunal.com (last visited Jul. 29, 2011) ("Nuclear Claims Tribunal"). Radioactive ash fell on other Northern atolls, including Rongelap and Utrik, where it entered the islanders' lungs, stuck to the coconut oil on their skin, and was played with and ingested by children. Holly M. Barker, *Bravo for the Marshallese: Regaining Control in a Post-Nuclear, Post-Colonial World* 21 (2004). At the time, the Marshall Islands were part of a United Nations Trust Territory administered by the United States, which, as sole trustee, "had pledged to the United Nations to 'protect the inhabitants against the loss of their land and resources.'" Weisgall testimony, *supra* at 3.

Horrific health effects, including thyroid and other cancers, are linked directly to the nuclear testing program. *See* Nuclear Claims Tribunal, *supra*. The most harrowing and psychologically damaging health effects were the birth defects caused by the testing, particularly in women on Rongelap. Barker, *supra* at 53. These included stillborn babies and babies born without recognizable human shapes – with shocking deformities like an extra head or a lack of bones in the body – which the people call "jelly-fish babies." *See* Zohl dé Ishtar, *A Survivor's Warning on Nuclear Contamination*, 13 Pac. Ecologist 50, 50 (2006-07). And, as of 2004, "[a]bout 40% of the thyroid cancers and more than one-half of cancers to

the other organs (at all atolls) are yet to develop or to be diagnosed. Hence, most of the radiation excess is projected to occur in the coming years." National Cancer Institute, et al., Estimation of the Baseline Number of Cancers Among Marshallese and the Number of Cancers Attributable to Exposure to Fallout from Nuclear Weapons Testing Conducted in the Marshall Islands 17 (2004).

The stark illnesses are only one kind of damage to the Marshallese. Just as important is the loss, indeed destruction, of their homelands. The islanders were forcibly removed from their resource-rich homes to barren atolls that could not support them. *See* Barker, *supra* at 21. The depletion and disappearance of resources needed for subsistence and survival exacted a profound physical and psychological toll. Darlene Keju-Johnson, *For the Good of Mankind,* 2 Seattle J. Soc. Just. 309, 309-10 (2003). With no sheltered fishing grounds, the people's fishing and ocean skills "were rendered useless." *See* Weisgall testimony, *supra* at 3. This inability to self-subsist continues to the present – relocated Marshallese living on the northern and other islands are entirely reliant on outside, mostly processed, foods. Keju-Johnson, *supra* at 312-13.

The Marshallese were also forced to sever ties to the land that defined their relationships to each other. *See* Barker, *supra* at 64. The Marshallese have an inseparable social, cultural and spiritual connection to their land. The decimation of that land and their forced relocation to other atolls thus inflicted deep emotional

and psychological wounds – not just on earlier generations, but also on present and future generations who are unable to return to ancestral homelands because radiation still renders them uninhabitable. *See* Weisgall testimony, *supra* at 3-4; Barker, *supra* at 10.

These widespread and long-lasting health effects are not limited to the Marshall Islands and are not confined to direct radiation injuries. Physician Seiji Yamada, who treats and studies the health care challenges of COFA residents in Hawai‘i, assessed that, “Given the megatonnage of nuclear testing that the U.S. conducted in the Pacific, it appears plausible that excess cancer would have occurred in areas of Micronesia other than the Marshall Islands.” Seiji Yamada, M.D., *Cancer, Reproductive Abnormalities, and Diabetes in Micronesia: The Effect of Nuclear Testing*, 11 Pac. Health Dialog 216, 219 (2004). Also, “[w]hile diabetes is not a radiogenic disease, and other cancers are generally less radiogenic than leukemia or thyroid cancer, the social and cultural effects of nuclear testing specifically, and the strategic uses to which Micronesia has been put generally, have each had a role in the social production of disease.” *Id.* at 220. In part because of these effects, as of 2008, an estimated 12,215 Micronesians have legally traveled to Hawai‘i to obtain, among other things, needed health care. *See* U.S. Census Bureau, Final Report, 2008 Estimates of Compact of Free Association (COFA) Migrants, April 2009, at 3.

II. The Multifaceted Damages to COFA Residents Are Exacerbated By the United States' Breach of its Duty to Promote Micronesian Self-Sufficiency and By its Continuing Failure to Discharge its Acknowledged Responsibility to Repair the Damage.

A. The COFA Residents' Poor Health is Linked to the United States' Breach of its Trust and Compact Duties to Promote Micronesian Welfare and Advancement, and to the Micronesians' Resulting Economic Dependency and Acquiescence to a Damaging United States Military and Nuclear Presence That Serves U.S. Interests.

In 1947, under the newly formed United Nations, the Micronesian islands region became the Trust Territory of the Pacific Islands, part of an International Trusteeship System established to help former colonies move towards independence. The goal of the trusteeship was to promote the political, economic, social and educational "advancement of the inhabitants," their "self-sufficiency" and "health," and their "development . . . toward self-government or independence." Trusteeship Agreement for the Former Japanese Mandated Islands, art. 6, July 18, 1947, 61 Stat. 3301 ("Trusteeship Agreement"). The United States became the Administering Authority over the Micronesian Trust region under this mandate. Along with these aspirational goals, the Trust gave the U.S. "full powers of administration, legislation, and jurisdiction over the Territory" including sweeping military control. Trusteeship Agreement, art. 3, art. 5. The U.S. authority was unique and revealing in two ways. First, the Micronesian Trust region came under the United Nations' only Strategic Trusteeship, "a designation which clearly underlines the importance of the islands as a strategic military area."

Patsy T. Mink, *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L.F. 181, 182 (1970-71). Second, demonstrating the United States' tight control over the region, the trusteeship was established by the U.N. Security Council "rather than the General Assembly where all other trusts were approved," which meant the U.S. had "a permanent veto over any change in the status." *Id.*

As World War II ended and the Cold War began, the U.S. Navy renewed its interest in the Micronesian Islands. The importance of atomic weapons was obvious worldwide after Hiroshima, but the U.S. military still had much to learn about the effects of the bomb on human beings, infrastructure and the environment. Because the Marshall Islands were isolated, lightly populated and already under military control, U.S. leaders viewed them as an ideal place for the U.S. Navy to conduct tests without much international scrutiny. Barker, *supra* at 19.

The following decades witnessed significant U.S. military build-up in the Micronesian region – including twelve years of devastating nuclear testing in the Marshall Islands – but very little movement towards self-governance or economic development for the inhabitants. Despite a mandate of promoting "independence," and with little effort devoted to developing the inhabitants' self-governance, the military entrenchment in the islands continued alongside the islands' growing dependence on U.S. funding. *See* Matthew Eilenberg, *American Policy in Micronesia*, 17 J. of Pac. Hist. 62, 62 (1982).

Economic dependency was not an accidental byproduct of good faith U.S. administrative decisions as trustee. That dependency flowed from U.S. recognition that "[a]s long as Micronesia remains economically dependent on the United States, the United States laws and policies [would] be influential." Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 San Diego L. Rev. 437, 505 (2002) (citing John B. Metelski, *Micronesia and Free Association: Can Federalism Save Them?*, 5 Cal. W. Int'l L.J. 162, 183 (1975)). A report commissioned by the Kennedy Administration "outline[d] a strategy for furthering American interests in Micronesia, in part by intentionally fostering economic dependence on the United States." *Id.* at 479 (citing U.S. Government Survey Mission to the Trust Territory of the Pacific Islands: Report to the President (A. Solomon, Oct. 9, 1963)). "The thrust of The Solomon Report [was] that by increasing United States financial aid, loyalty of the Trust Territory will be assured via the resultant economic dependency." *Id.* at 505. Indeed, the Report "clearly laid out a strategy[:] The U.S. would pump large amounts of money into Micronesia, build a community-service infrastructure, establish a host of development programs and a dependency upon cash, hold a plebescite at the point at which the Micronesians' hopes had been raised, and then pull back support as the various development programs failed

to succeed." Catherine Lutz, *The Compact of Free Association, Micronesian Non-Independence, and U.S. Policy*, 18 Bull. of Concerned Asian Sch. 21, 21 (1986).

These events spurred U.S. Representative Patsy T. Mink to publish a scathing critique of the United States' "colonial"-like presence in Micronesia in 1971. Many of the problems identified by Representative Mink remain today, forty years later and twenty-five years after the islands' "independence." She detailed over two decades of "neglect of trustee obligations" and chastised the United States for failing to make good on its Trust promises to "promote the economic advancement and self-sufficiency of the inhabitants" and "protect the inhabitants against the loss of their lands and resources." Mink, *supra* at 183-84. Instead, "after winning the right to control Micronesia, [the U.S.] proceeded to allow the islands to stagnate and decay through indifference and lack of assistance." *Id.* at 184. Thus, "the people are still largely impoverished and lacking in all of the basic amenities which we consider essential – adequate education, housing, good health standards, modern sanitation facilities." *Id.* Mink also described specific ways in which the U.S. exerted its will in creating this situation. This "deliberate" role included the U.S. manipulation of trade regulations making "the islanders . . . dependent on the government"; a U.S.-imposed tariff that "frustrated any hopes of creating a sizable offshore fishery"; and limiting any promise of a tourism industry because of U.S. military

restrictions. *Id.* at 192-94.[3] Former U.S. Ambassador to the United Nations Donald McHenry also acknowledged that: "We in a sense almost made them [the Micronesians] a welfare state. . . . We created a dependency." 137 Cong. Rec. E871, E872, 102nd Cong. (daily ed. Mar. 11, 1991) (statement of Hon. Eni F. H. Falemavaega) (citing McHenry).

Even in the move towards self-determination in the 1970s and 1980s, Mink's themes of "classic military colonialism" and "contrived dependent relationship" resonated. During initial negotiations with the United States, "American thinking . . . distinctly placed military considerations above humanitarian considerations, despite international trusteeship obligations." Donald F. McHenry, *Micronesia: Trust Betrayed – Altruism vs. Self Interest in American Foreign Policy* 85 (1975). For U.S. Secretary of Defense James Schlessinger and the U.S. military, "the impetus for the negotiations was not an effort by the Micronesians to exercise their right to self-determination but 'international and political' considerations." *Id.* at 86. "American officials rationalized . . . that the small, powerless and poverty-stricken Micronesian population had to sacrifice its

[3] In 1961, a United Nations Mission to Micronesia was also "sharply critical of American administration in almost every area: poor transportation; failure to settle war damage claims; failure to adequately compensate for land taken for military purposes; poor living conditions[;] inadequate economic development; inadequate education programs; and almost nonexistent medical care." McHenry, *supra* at 13.

right to decide its own future to the greater good as perceived by the United States." *Id.*

By the mid-1980s, the FSM, RMI and Palau entered into Compacts of Free Association with the United States. Compact of Free Association, U.S.-Micronesia & Marshall Islands, Pub. L. No. 99-239, 99 Stat. 1770 (1986); Compact of Free Association, U.S.-Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986). Among other things, the Compacts recognized the damages suffered by the Micronesian people, including health care needs, and committed the U.S. to repairing that damage. It gave complete military control over the region to the U.S. in exchange for the islands' peoples' nearly unrestricted travel to the U.S. states and territories to "establish residence." P.L. 99-239, §§ 141(a)(3); 311 (a), (b).

The Compacts' stated goals were, and continue to be, to: "(1) secure self-government for each country; (2) assure certain national security rights for the FSM, the RMI, and the United States; and (3) assist the FSM and the RMI in their efforts to advance economic self-sufficiency." U.S. Gov't Accountability Office, T-NSIAD/RCED-00-227, U.S. Funds to Two Micronesian Nations Had Little Impact on Economic Development and Accountability Over Funds Was Limited 3 (2000). These goals echoed the earlier Trust agreement. But little changed in U.S. practices in the region. The orchestrated dependency on federal monies continued through the 1980s, "but at greatly reduced federal funding levels as a result of the

re-negotiated relationship with the U.S. under the Compact of Free Association[.]" Ann M. Pobutsky et al., *Micronesian Migrant Health Issues in Hawaii: Part 2: An Assessment of Health, Language and Key Social Determinants of Health*, 7 Cal. J. of Health Promotion 32, 33 (2009). As a result, "Micronesians have moved away from their home islands to places like the U.S. Territory of Guam, the CNMI and Hawaii." *Id.*

The 1986 Compact with the FSM and RMI committed the United States to compensation for decades of damage from nuclear testing in the Marshall Islands. The U.S. explicitly "accept[ed] the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands[.]" P.L. 99-239, § 177(a). The United States agreed to this compensation "[i]n recognition of . . . the expressed desire of the Government of the Marshall Islands to create and maintain, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program, [and i]n recognition of contributions and sacrifices made by the people of the Marshall Islands in regard to the Nuclear Testing Program[.]" Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation

of Section 177 of the Compact of Free Association, Preamble ("Section 177 Agreement"). The U.S. also agreed to provide "special medical care and logistical support" for the people of Rongelap and Utrik who were exposed to radiation from the 1954 thermonuclear "Bravo" test. 48 U.S.C. § 1903(h)(1).

At nearly every turn, the United States failed to discharge these responsibilities. For this reason, the Marshallese filed several lawsuits against the U.S. seeking compensation for, among other things, property loss and personal injuries. The U.S. forestalled the court suits in part through the creation of a Nuclear Claims Tribunal, *see* Section 177 Agreement, Art II § 6(c); Art. IV § 1(a), which some Marshallese unsuccessfully challenged. *See People of Enewetak v. United States,* 864 F.2d 134, 136 (Fed. Cir. 1988); *Juda v. U.S.*, 13 Cl. Ct. 677, 690 (1987).

After pursuing their claims before the Tribunal for nineteen years, the Marshallese received Tribunal awards of more than $2.2 billion in compensatory damages. But the U.S. paid only $3.9 million, "which represents less than 2/10 of 1% of its awards." Weisgall testimony, *supra* at 2. When the Marshallese returned to federal court to enforce the awards, their claims were dismissed. *People of Bikini v. U.S.,* 77 Fed. Cl. 744, 788 (2007), *aff'd*, 554 F.3d 996 (Fed. Cir. 2009).[4]

[4] Members of the nuclear-affected atolls also filed a "changed circumstances" petition under Section 177 of the COFA, but the U.S. opposed it. *See* 156 Cong.

Despite urging by the Marshall Islands government, the United States continues to resist further compensation claims for the injustices. *See* 156 Cong. Rec. S5401, 111th Cong. (daily ed. Jan. 20, 2010) (statement of Sen. Jeff Bingaman) (noting the U.S.'s 2005 "opposition to further financial compensation because the 1985 settlement was 'full and final'").

Although the United States claimed the necessity of nuclear testing in the Marshall Islands for "the good of all mankind," the Marshallese people continue to suffer and "die of radioactivity-related cancers at horrific rates." Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. Haw. L. Rev. 113, 133 (2008). And the United States still operates the U.S. Army Ronald Reagan Ballistic Missile Defense Test Site on Kwajalein Atoll. As the U.S. Government Accountability Office (GAO) recently recognized, the region continues to play a crucial role in supporting the United States' strategic military interests. *See* U.S. Gov't Accountability Office, GAO-02-119, Kwajalein Atoll Is the Key U.S. Defense Interest in Two Micronesian Nations 3 (2002).[5]

Rec. S2941, 111th Cong. (daily ed. Jan. 20, 2010) (statement of Sen. Jeff Bingaman).

[5] The U.S. military recently signed an agreement to operate the Ballistic Missile Defense Test Site on Kwajalein Atoll until 2066. *U.S. Missile Test Deal Offers Hope to Marshalls Slum*, AGENCE FRANCE PRESSE, May 11, 2011,

The U.S.'s military-driven actions – for the benefit of the U.S. – thus resulted in severe past and continuing harms to the health of Marshallese and all Micronesians.

B. Through the COFA, the United States has Partially Attempted to Repair the Damage, But It Has Failed to Discharge This Responsibility and In Some Ways Its Partial Ameliorative Efforts Have Worsened the Situation for Micronesians in Their Homelands, Causing Their Migration to Hawai'i in Search of Health Care.

Twenty-five years after the Compact's initiation, the United States still has failed to discharge its responsibility to the Micronesian people – this is generally acknowledged by the GAO – and the dire situation in the Micronesians' homelands has compelled ever-increasing migration to Hawai'i.

In 2003 the GAO reported that after fifteen years, the Compact had failed to achieve its major goal of assisting the FSM and RMI to become economically self-sufficient. U.S. Gov't Accountability Office, GAO-03-1007T, An Assessment of the Amended Compacts and Related Agreements 3 (2003). Another GAO report singled out health care in the FSM and RMI as "inadequate to meet the needs of the population, providing incentive to travel or move to the United States in order to receive appropriate health care." U.S. Gov't Accountability Office, GAO-02-40, Migration From Micronesian Nations Has Had Significant Impact on Guam, Hawaii, and the Commonwealth of the Northern Mariana Islands 18 (2001).

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http://www.thefreelibrary.com/US+missile+test+deal+o.ffers+hope+to+Marshalls+slum-a01612459692.

Bureaucratic fighting among the Departments of State, Interior and Defense contributed to these failures. *See* GAO Report RCED-00-227, *supra* at 12.

The future outlook is grim. United States economic support under the Compact is designed to decline by two-thirds between 1987 and 2023 (through the end of the amended Compact period). A 2006 GAO report warned that the design of the Compact trust fund that will replace direct U.S. economic assistance at the end of the Compact period may not be sustainable or support the existing infrastructure. U.S. Gov't Accountability Office, GAO-06-590, Development Prospects Remain Limited for Micronesia and Marshall Islands 13 (2006).

Largely because of the insufficient health care systems, inadequate employment and educational opportunities, a limited economic base, and displacement because of U.S. nuclear testing, COFA citizens have migrated to other places, including Hawai'i, for needed medical care and other services that do not exist in their homelands. Approximately 15,000 to 17,000 COFA migrants now live in Hawai'i. Sheldon Riklon, M.D. et al., *The "Compact Impact" in Hawai'i: Focus on Health Care*, 69 Hawai'i Med. J. 7, 8 (June 2010). In a survey of 2,522 Micronesians in Hawai'i, the most frequently cited reason for migrating to Hawai'i was health care (34.7%). Pobutsky et al., *supra,* at 44-45. Indeed, COFA migrants to Hawai'i reflect the poor health conditions of their home countries. Alongside infectious diseases like tuberculosis and Hansen's disease, COFA

migrants also appear to have high rates of diabetes, cancers (including radiation induced cancers), obesity and cardiovascular disease. *Id.* at 34-35. Yet under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, all COFA migrants became ineligible for Medicaid and other federal welfare programs when they were re-categorized as "non-qualified aliens." 8 U.S.C. § 1612(b); *id.* § 1611. And unlike other legal immigrants, they are prohibited from becoming eligible for benefits even after the five-year wait period applicable to legal permanent residents.

III. As a Constituent Member of the United States, and As Recipient of Substantial Federal Dollars to Cover the Impacts of COFA Residents (Including Health Needs), the State of Hawai'i Bears Joint Responsibility for Micronesians in Hawai'i for Desperately Needed, Often Life-Or-Death Medical Care.

The State bears an important degree of joint responsibility to COFA residents in Hawai'i for desperately needed, often life-or-death medical care. First, the State assumes part of the federal government's obligation through its acceptance of partial reimbursement for COFA residents' health care. Hawai'i received $74,655,000 federal dollars since 2003 as reimbursement for costs of the impacts of people from Compact countries (including health needs). *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 8. The Compacts provide for a permanent appropriation of $30,000,000 per year that is apportioned among Hawai'i, Guam, CNMI and American Samoa to "aid in defraying costs incurred . . . as a result of

increased demands placed on health, educational, social, or public safety services or infrastructure related to such services due to the residence . . . of qualified nonimmigrants from the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau." Compact of Free Association with Micronesia and the Marshall Islands, Pub. L. No. 108-188, §104 (e)(3), 117 Stat. 2739 (2003) codified as amended 48 U.S.C. § 1921. The State thus collects $11,229,000 a year from the federal government to cover impacts (including health), *see* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 8, and Hawai'i may seek additional funds for reimbursement and services provided to COFA residents. P.L. 108-188, § 104(e)(10), 117 Stat. 2742. Although those funds do not completely cover impact costs, COFA residents deserve equal health care treatment because many Micronesians also pay Hawai'i State taxes and productively contribute to the State's economy.

Second, the State, through its legislatively created Attorney General Task Force, acknowledges that, rather than dramatically cutting COFA residents' health care, it should increase efforts to help COFA migrants to access and receive better health services in Hawai'i. *See* State of Hawai'i Department of the Attorney General, Final Report of the Compacts of Free Association Task Force 9-10 (2008). Instead, in response to budgetary limitations, the State disenrolled non-pregnant COFA residents who were 19 years or older from their State health

benefits programs and put them into BHH, a limited and drastically inferior plan. BHH provides minimal health care coverage, "such as limited inpatient and outpatient physician visits and four prescription drugs per month." Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 2. As a result, "[p]atients with chronic or serious illnesses, with disabilities, and those requiring numerous prescription medications are deprived of critical, potentially life-sustaining care." *Id.*

The limited BHH program has no special provisions for cancer treatments, and those treatments are not covered as an emergency service. *Id.* at 10. Moreover, "[d]ialysis patients typically take approximately 10 to12 prescription medications per month," far more than BHH's four prescription per month limit. Declaration of Dr. Wilfred Alik ("Dr. Alik Decl.") ¶ 8. In addition, most COFA residents in need of transplants will be unable to access the State of Hawaii Organ and Tissue Transplant program. Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 12. Because BHH caps statewide enrollment at 7,000 people, many who need even its minimal coverage will be left without any health care plan. *Id.* at 2-3.

As a result, many COFA residents with serious illnesses will be unable to receive preventative care, life-saving treatment, and an adequate supply of prescription medications, and many others will not have *any* health care apart from emergency room services. Health care practitioners recognize the stark outcome: "Patients needing care for conditions such as renal failure and cancer will suffer,

because chemotherapy and hemodialysis are life-sustaining treatments for many patients. Taking away these crucial treatments will result in death." Aaron Saunders et al., *Health as a Human Right: Who is Eligible?,* 69 Hawai'i Med. J. 4, 5 (June 2010). Disabled people "enrolled in BHH or without a health plan will be forced into a state of deteriorating health . . . which . . . will lead to exacerbation of their chronic advanced illnesses progressing to terminal stages. The only alternatives would be to become bedridden and neglected or to seek hospital medical care." Declaration of Dr. Ritabelle Fernandes ("Dr. Fernandes Decl.") ¶ 31. *See also* Dr. Alik Decl. ¶ 16 ("Under BHH, there is a very high risk that patients who are unable to receive the care they need will end up being hospitalized or will otherwise experience severe health problems or even death.").

For this reason, two recent Hawai'i statewide reports conclude that the State should "increase efforts to help the COFA migrant[s] access and receive better health services in Hawai'i." Riklon, M.D. et al., *supra*, at 9 (citing Hawai'i Uninsured Project, Hawai'i Institute for Public Affairs, Impacts of the Compacts of Free Association on Hawai'i's Health Care System (2004); State of Hawai'i Department of the Attorney General, Final Report of the Compacts of Free Association Task Force (2008)). The Attorney General's Task Force Report (which was prepared pursuant to a Hawai'i Senate resolution) further recommends

that the State should proactively "increase all human services to the people of the COFA nations in a more organized, prevention-based and strategic way." *Id.* at 9.[6]

IV. In Light of the State's Broader Commitment to Repairing Unjust Damage to Community Members for the Benefit of All, the State Bears a Moral As Well As Legal Responsibility to Continue a Meaningful Level of Medical Care Coverage for Micronesians.

A. Providing Financial Support for COFA Residents' Medical Care is a Moral Obligation that Furthers Hawai'i's Commitment to Justice for Community Members.

Providing financial support for COFA residents' medical care is a justice issue – repairing the damage of long-standing injustice to COFA residents for which the United States has direct responsibility and for which Hawai'i is partly reimbursed. Indeed, Hawai'i has often acted with justice and compassion toward those in need. The State's commitment emerges out of Hawai'i statutory language that instructs lawmakers to contemplate "Aloha . . . the essence of relationships in which each person is important to every other person for collective existence" – to repair the harms to community members for the benefit of all. *See* Haw. Rev. Stat. § 5-7.5 (a), (b). It is also in the public interest: taking care of COFA residents'

[6] In 2011 the legislature did not pass a bill requiring Hawai'i's Department of Human Services "to provide medical assistance for dialysis, chemotherapy and other cancer treatments, inpatient and outpatient physician visits, and drug prescriptions," for COFA migrants. Chad Blair, *Hawaii Congressional Reps to Feds: Help Us Curb Micronesians*, Hon. Civil Beat, May 24, 2011, http://www.civilbeat.com/articles/2011/05/24/11115-hawaii-congressional-reps-to-feds-help-us-curb-micronesians/.

health care needs reduces the cost of truly expensive uninsured medical care for Micronesians in Hawai‘i (who have a right to travel here under the Compact).

Until recently, COFA migrants “have been treated as part of humanity in Hawai‘i.” Saunders et al., *supra at* 5. Indeed, the State expressly committed itself to embrace the value that our “collective existence” as an island community depends upon our fair treatment of “each person” among us. Now that the State is facing difficult financial stress, “Micronesians are being told that they are no longer part of the family, that they can take their broken bodies and go home to die.” *Id.* If many or most COFA residents are deprived of health care, they will suffer in a way that no other group in Hawai‘i suffers. This is not only unequal treatment, it is inhumane.

No one is accusing the State of intending that inhumane result. At the same time, the State has not proposed any kind of other plan to adequately assist COFA residents most in need. Of course, budgetary limitations are real, and the federal government has the ultimate duty to fulfill its promises to the Micronesian peoples.

But even considering the State’s fiscal limitation, the State as a matter of moral as well as legal obligation needs to stop excluding COFA residents – and only COFA residents among us – from access to medical care for serious illnesses. It needs to provide a fair and adequate level of medical care for Micronesians who are legally present as members and taxpayers of the Hawai‘i community in part as

a result of the persisting effects of past injustices. This reflects Hawai‘i’s commitment that its peoples’ “collective existence” depends in part on genuine efforts to repair the persisting damage of longstanding injustice suffered by those most in need. And it reflects the “ubuntu” notion that no one can be healthy when members of the community are seriously sick and suffering. *See* Yamamoto, *supra* at 52.

B. Discharging the State’s Responsibility Will Properly Balance the Equities in Favor of the Micronesian People and Will Further the Public Interest.

Economic considerations point the same way. “Efforts to save money by reducing health coverage to Micronesians will likely result in increasing utilization of the emergency department for late stage disease which tends to be a very costly and non-cost effective strategy to provide care. Leaving vulnerable populations without access to adequate healthcare increases the burden and cost to everyone.” Riklon, M.D. et al., *supra* at 10. This is echoed by physician Neal A. Palafox, who treats COFA residents in Hawai‘i and who served on two Hawai‘i statewide committees that studied health care challenges for COFA residents: uninsured patients “will be forced to go to the hospital emergency room,” which “will lead to much higher costs for the State of Hawai‘i.” Declaration of Dr. Neal A. Palafox (“Dr. Palafox Decl.”) ¶¶ 12, 13. In addition, “The State[’]s projection of financial savings in Statewide healthcare expenditures by instituting BHH has not been

supported by any State healthcare economic analysis." *Id.* ¶ 13. *See also* Dr. Alik Decl. ¶ 15 ("Many COFA Residents will be forced to go to hospital emergency rooms. . . . [E]mergency room visits are expensive and do not solve or replace good primary and preventative medicine or provide regular or long-term care. Thus, BHH will only serve to increase the costs of treating COFA Residents, not decrease it."); Saunders et al., *supra* at 5 ("the cost of one [hospital] admission for acute renal failure can easily exceed the cost of many regular dialysis sessions").

While covering adequate levels of health care for migrants who are legally and rightfully in the State will likely mean some initial financial stress during difficult economic times, if health coverage is not restored to a meaningful level, the eventual fiscal and moral costs in terms of at least partially preventable human suffering and additional widespread late stage emergency health care may well be exorbitant. As Dr. Palafox averred, allowing COFA residents to experience severe health problems or even death "which BHH is likely to do, is unethical, inhumane and unnecessary especially here in the United States, where we are capable of treating and preventing such conditions effectively." Dr. Palafox Decl. ¶ 14.

For all of these reasons, the balance of equities tips sharply in the Micronesian Appellees' favor. *See Indep. Living Ctr. of S. California, Inc. v. Maxwell-Jolly,* 572 F.3d 644, 659 (9th Cir. 2009) (recognizing that health and

social welfare concerns, as well as fiscal ones, are part of the balance of equities calculus).

The public interest also weighs heavily in favor of a preliminary injunction because taking care of COFA residents' health care needs reduces the cost of truly expensive uninsured medical care for COFA residents in Hawai‘i. Moreover, for migrants from recently "independent" nations with highly dependent political "associations" with the U.S., more is at stake than the commonly recognized immigrant struggles in the United States. The Hawai‘i healthcare showdown has re-ignited long simmering issues related to the complex relationship between the U.S. and the Micronesian nations that comprise the Compact of Free Association nations. As a moral matter, the State's interest in our "collective existence" lies in serving justice by continuing to help heal the persisting and indeed intensifying wounds of the subjects of long-standing injustice. As a group of physicians poignantly observes, "We are bound together by a common and sometimes unfortunate web of thermonuclear weapons testing, treaties, and promises of economic development that have not come to fruition . . . . A great state and nation is one that has the ability and know how to protect and assist the vulnerable and those in greatest need." Riklon, M.D. et al., *supra at* 11.

CONCLUSION

Amici respectfully request that the Court affirm the district court's order granting plaintiffs' motion for preliminary injunction.

DATED: August 9, 2011

By: /s/ Susan K. Serrano
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I, Susan Serrano, counsel for Amici Curiae the Japanese American Citizens League-Honolulu Chapter, the National Association for the Advancement of Colored People-Honolulu Branch and Kokua Kalihi Valley Comprehensive Family Services certify that the brief to which this certificate is attached is set in 14-point Times New Roman, a proportionately-spaced typeface. According to the word processing system used to prepare it, the brief to which the certificate is attached contains a total of 6,944 words, exclusive of the table of contents, table of authorities and this certificate. Pursuant to Rule 29(d), Amici's brief is one-half the permissible length of the 14,000 words for the Brief of Appellees under Circuit Rule 32(a)(7)(B).

/s/ Susan K. Serrano
Susan K. Serrano
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on August 9, 2011, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Electronic Case Files (CM/ECF) system.

All participants in the case that are registered CM/ECF users will be served by the CM/ECF system.

The following party is not a registered CM/ECF user. I have mailed the foregoing document by First Class Mail, postage prepaid to the following:

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