NO. 11-15132

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

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

REPLY BRIEF OF DEFENDANTS - APPELLANTS

DAVID M. LOUIE
Attorney General
State of Hawai'i

HEIDI M. RIAN
LEE ANN N.M. BREWER
JOHN F. MOLAY
Deputy Attorneys General
Department of the Attorney General
465 South King Street, Room 200
Honolulu, Hawai'i 96813
(808) 587-3050

Attorneys for Defendants - Appellant

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INTRODUCTION

Plaintiffs continue to gloss over key factual distinctions and misstate the facts, the law, and the State's arguments in this case. Contrary to the assertions of Plaintiffs and amici curiae,

- Medicaid is not a state program;
- The State does not have discretion to provide federal Medicaid benefits to aliens barred from participation by the Welfare Reform Act;
- It is not improper for this Court to consider the well-reasoned analyses of federal law by state courts, over factually inapposite federal cases;
- The State is not jointly liable for the federal government's failed trust and Compact of Free Association obligations to the Micronesian people; and
- The State "Aloha Spirit" statute does not create a legal obligation to provide state-funded health care to all needy COFA Residents.

The Plaintiffs' legal authority cannot support a finding of discrimination by the State in this case, and therefore the District Court's preliminary injunction should be reversed.

ARGUMENT

A. Plaintiffs' Suggestion that the Federal Medicaid Program is a State Public Benefit is Wrong.

The Plaintiffs acknowledge that COFA Residents are excluded from federal Medicaid by the Personal Responsibility and Work Opportunity Reconciliation Act

of 1996 (PRWORA, or Welfare Reform Act), Ans. Br. at 16-17,[1] and were thereafter provided with a state public benefit that provided the same level of benefits as the Medicaid program. The Welfare Reform Act bars COFA Residents from federal public benefits such as Medicaid, but gives the states discretion to provide state public benefits to COFA Residents. 8 U.S.C. § 1612(a)(1).

However, Plaintiffs attempt to blur the distinction between federal and state public benefits, by suggesting that Hawai'i's **federal** Medicaid program is the same as a "state-funded health care program" or "state healthcare benefit program." See, Ans. Br. at 11, emphasis added ("COFA Residents in Hawai'i participated on equal footing with other lawful residents of Hawai'i in *state-funded health care programs*" and "the State's actions in disenrolling COFA Residents from *state healthcare benefit programs* on the basis of alienage violated [equal protection]."); Ans. Br. at 20-21 (emphasizing that "the State failed to identify any particular State interest that was advanced by their decision to exclude COFA Residents *from the Hawai`i Medicaid Programs*."); Ans. Br. at 33, fn. 14 (defining the issue below as whether a state may choose to exclude certain groups from existing, state-funded programs based on alienage, when clearly Plaintiffs' complaint is that they are excluded from federal Medicaid).

[1] Page numbers of documents in the Ninth Circuit docket reflect the docket page numbers.

Plaintiffs make no distinction between Hawai'i's federal Medicaid program, which is a federal public benefit under the Welfare Reform Act, whose eligibility requirements are governed by **federal** law, and Hawai'i's state-funded medical assistance that used to provide COFA Residents with the same level of benefits as Medicaid, but funded entirely with state funds, which is a state public benefit under the Welfare Reform Act. This failure is necessary for Plaintiffs to support a finding of discrimination. There is no dispute that the State is **required** by **federal** law to exclude COFA Residents from federal Medicaid, as it has since COFA Residents were barred by Congress from Medicaid eligibility upon enactment of the Welfare Reform Act. Ans. Br. at 16. The fact that State moneys also contribute to the federal Medicaid program is irrelevant; the key point is that **federal** law dictates that COFA Residents are barred from the Medicaid program. That is what makes the federal Medicaid program **not** a State program**.**

Plaintiffs wrongly argue that the State's provision of federal Medicaid to citizens requires it to provide wholly optional state-funded medical assistance to aliens excluded from Medicaid by federal law. The State is under no constitutional obligation to make up for, or undo, the federal government's discrimination against COFA residents.

Thus, it makes no sense for plaintiffs to say that the removal of COFA Residents "from the Hawai'i [state-funded] programs" -- thereby simply restoring

the discriminatory situation created **solely** by the **federal** government -- is an alienage-based classification by the State, but concede, as they must, that "the State was [not] obligated to compensate for the federal government's permissible discrimination." Ans. Br. at 36. Any distinction based on alienage **by the State** must exist because citizens and certain qualified aliens are eligible for benefits that **the State** withholds from COFA Residents. In this case, the State only withholds from COFA Residents those federal Medicaid benefits from which COFA Residents are barred by the federal Welfare Reform Act.

Therefore, under Plaintiffs' theory, it is the State's participation in Medicaid that creates the discriminatory action. Plaintiffs seek to discount the federal government's involvement in Medicaid, concluding that "Medicaid is a voluntary, state-implemented, and largely state-funded program that provides for federal reimbursement of some of the expenditures that states incur." Ans. Br. at 13. In fact, states must comply with Title XIX requirements, which are extensive and complex, state Medicaid programs are subject to extensive federal oversight by the federal Centers for Medicare and Medicaid Services, and, while state fund expenditures for Medicaid are significant, the federal government pays the larger share of state Medicaid expenditures. See, Alaska Dept. of Health and Social Services v. Centers for Medicare and Medicaid Services, 424 F.3d 931, 934-35 (9th Cir. 2005) (Explaining that States must have a federally-approved State plan that

complies with a "laundry list of requirements," implemented pursuant to an "extensive body of federal regulations"); 14 U.S.C. § 1396d(b) (The federal contribution to a state for Medicaid cannot be lower than 50 percent or higher than 83 percent). And, as noted above, the key point is that the initial discrimination -- barring COFA Residents from receiving federal Medicaid benefits -- is solely as a result of **federal** law.

The federal Medicaid program is clearly a federal public benefit. 8 U.S.C. § 1611(c). It cannot be **State** discrimination when the State simply excludes COFA Residents from federal Medicaid in accordance with **federal** law -- i.e., the Welfare Reform Act. See, Hong Pham v. Starkowski, 16 A.3d 635, 649 (Conn. 2011) (hereafter "Hong Pham 2011").

B. Plaintiffs' Federal Authority Does Not Support a Finding of Discrimination by the State

1. The United States Supreme Court Decision in Graham Does Not Apply Because the State Did Not Impose Citizenship Requirements for Welfare Programs that Were Available to Citizens

Plaintiffs rely heavily on the U.S. Supreme Court's admonition that "while Congress has the power to establish a Uniform Rule of Naturalization . . . [a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for **federally supported welfare programs** would appear to contravene this explicit constitutional

requirement of uniformity." Ans. Br. at 28-29, quoting Graham v. Richardson, 403 U.S. 365, 382 (1971) (emphasis added).

However, Hawai'i did not adopt any laws on the subject of citizenship requirements for **federally supported** welfare programs. It was Congress that adopted the Welfare Reform Act, which required the State to exclude COFA Residents from federally supported Medicaid. And, the State's actions that are challenged by Plaintiffs were purely in regard to **state** supported health programs, none of which were available to citizens. Therefore, the State's action is not at all similar to that of Arizona and Pennsylvania in Graham. See, Brief of Appellants ("Open. Br.") at 55-57 (distinguishing Graham, a pre-Welfare Reform Act case in which Arizona limited eligibility for certain federally funded categorical assistance benefits to U.S. citizens or persons who met a 15 year residency requirement, and Pennsylvania limited eligibility for a state-funded welfare program to residents who were U.S. citizens or declared intent to become citizens.)

Thus, Graham does not apply to the facts of this case, since the federal public benefit program in Arizona and the state public benefit program in Pennsylvania were each **available to citizens,** and it was those states, and not the federal government, that imposed more restrictive eligibility requirements on aliens than they did on citizens. Open. Br. at 56-57, citing Graham, 403 U.S. at 366-69, 371.

2. *The Ninth Circuit's Opinion in Sudomir Does Not Require the State to Adopt More Liberal Eligibility Requirements for its State Alien-Only Program for Aliens Excluded From Federal Programs*

The Plaintiffs similarly rely on this Court's opinion in Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985). Sudomir involved California's denial of welfare benefits under the Aid to Families with Dependent Children (AFDC) program which, like Medicaid, is "a cooperative federal-state effort established by Congress . . .". Ans. Br. at 34, quoting Sudomir, 767 F.2d at 1457. The federal statute in question in Sudomir "**required** participating states 'not only to grant benefits to eligible aliens but also to **deny** benefits to aliens' who did not meet the federal eligibility requirements." Ans. Br. at 35. Therefore, the facts are similar to this case in that the Welfare Reform Act similarly **requires** participating states to grant federal benefits to certain eligible aliens and to deny federal benefits to COFA Residents.[2] 8 U.S.C. §§ 1611, 1612, 1613.

Plaintiffs argue that, although the Welfare Reform Act similarly **requires** participating states to **deny federal benefits** to COFA Residents, the discretion given by the Welfare Reform Act for states to optionally provide **state benefits** somehow nullifies the uniformity of the general rule. Ans. Br. 36. According to

[2] Sudomir predated the Welfare Reform Act, and therefore there was no issue of whether a state may optionally provide state-funded benefits for nonimmigrants, nor whether providing aliens who are excluded by federal law from AFDC may be provided with state-funded benefits that are less than the AFDC benefits.

Plaintiffs, therefore, states must always adopt the federal government's more liberal standards in the administration of state programs for only aliens who are excluded from federal programs. Ans. Br. at 33 (disagreeing with the court in Khrapunskiy v. Doar, 909 N.E.2d 70 (N.Y. 2009) that "the right to equal protection does not require the State to create a new public assistance program in order to guarantee equal outcomes" or "require the State to remediate the effects of [the Welfare Reform Act].") However, the Ninth Circuit panel in Sudomir specifically disagreed that "a state's refusal to adopt more liberal eligibility standards is a matter of state, not federal, policy," because "[t]o so hold would amount to compelling the states to adopt each and every more generous classification which, on its face, is not irrational." Sudomir, 767 F.2d at 1465-66.

C. Both Parties Relied on State Cases That Analyze Federal Law, and This Court May Give Credit – or Not – To That Analysis.

Plaintiffs seek to discredit the State's reliance on state law cases in the opening brief by characterizing them as "inapposite" and "foreign." Ans. Br. at 25, 33. Plaintiff's objection is meritless and hypocritical. It goes without saying that a federal court is not bound by a state court's interpretation of federal statutory or constitutional law. But Plaintiffs cite to no authority that a state court's ruling on a federal law issue must be entirely disregarded by the federal appeals court. And the State distinguished the U.S. Supreme Court and federal court decisions relied upon by the District Court in its opening brief.

On the other hand, the state cases cited in the opening brief contain well-reasoned analyses of the pertinent federal case law, particularly as applied to the facts of this case, which are distinguishable from the facts contained in the federal authority cited by Plaintiffs. It is certainly appropriate for the State to rely on those analyses, and for this Court to consider those analyses in making its decision.

In any case, it is hypocritical for Plaintiffs to criticize the State's reliance on state cases when Plaintiffs did the same in their Motion for Preliminary Injunction. CR/ER 10-1 at 25-27, in particular relying upon the Connecticut **trial** court's decision in Hong Pham v. Starkowski, 2009 WL 5698062 (Conn. Super. 2009) ("Hong Pham 2009"), which case was overturned by the Connecticut Supreme Court. See, Hong Pham 2011, 16 A.3d 635. Plaintiffs even added additional "foreign" authority to their answering brief in the form of Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262 (Mass. 2011). Ans. Br. at 31.

1. *The Connecticut Supreme Court's Reasoning in Hong Pham 2011 is Persuasive For the Proposition That There is No Classification Based on Alienage if the State Program Benefits Only Aliens.*

Although Plaintiffs and the District Court relied heavily on the Connecticut Superior Court's decision in Hong Pham 2009[3], CR/ER 10-1 at 26-27[4], CR/ER 30

[3] The District Court's Order Denying Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted as to COFA Residents was issued on November 10, 2010. CR/ER 30. The Connecticut Supreme Court overturned Hong Pham 2009 by decision dated April 5, 2011. See, Hong Pham 2011, 16 A.3d 635.

at 21, Plaintiffs dedicate several pages of their answering brief to discrediting the Connecticut Supreme Court's reversal of Hong Pham 2009. Ans. Br. at 25-30. Plaintiffs correctly summarize the holdings in Hong Pham 2011, but fail to apply the analysis to this case, concluding that Hong Pham 2011 would allow the State to create a limited medical benefits program for Asian Americans, and a superior medical benefits program for Caucasians, because "neither individual program provides a benefit to one race that it does not provide to individuals of the other race."[5] Ans. Br. at 27.

The example is nonsensical because it bears no resemblance to the facts of Hong Pham 2011 or this case. The reason why COFA Residents are excluded from Hawai'i's Medicaid program, and why qualified aliens who did not meet the federal five-year residency requirement were excluded from Connecticut's Medicaid program, was because **Congress** barred those classes of aliens from participation in Medicaid through the Welfare Reform Act, whereas the limited

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[4] Moreover, Hong Pham 2009 relies upon two other **state** cases, Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001) and Erlich v. Perez, 908 A.2d 1220 (Md. 2006), see, CR/ER 10-1 at 27, which were both clearly distinguished in the State's opening brief. Open. Br. at 33-36, 48-49.

[5] The State presumes that Plaintiffs' example describes two state – not federal – benefit programs. The issue of whether the State may discriminate between classes of aliens in state programs, in contrast to discrimination between aliens and citizens, was not an issue below and is not an issue in this appeal.

facts in Plaintiffs' example have the state, unilaterally and under no federal directive, excluding Asian Americans from the superior, and presumably state-funded, program offered to Caucasians.

In order to mirror the facts of Hong Pham 2011 and this case, the example must say that Congress excluded Asian Americans from participation in a federal medical benefits program for Caucasians. Of course, in that case, the Plaintiffs' argument falters, because excluding Asian Americans from the federal Caucasian program pursuant to a federal directive would not constitute discrimination **by the State**.[6]

Still, Plaintiffs insist that the State's provision of limited state-funded medical assistance benefits to COFA Residents – who are barred from federal Medicaid eligibility – while providing more comprehensive federal Medicaid benefits to citizens and certain qualified aliens who **are** eligible for federal Medicaid, is an unconstitutional classification based on alienage, even though it was Congress that excluded those aliens from eligibility for federal Medicaid. Ans. Br. at 36 (defining the issue as "whether the State's unilateral decision to remove COFA Residents from the Hawai'i Medicaid Programs … was an alienage-based classification.")

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[6] It is undisputed that the federal government's decision to discriminate based on alienage would be subject to rational review. See, Ans. Br. at 23, fn. 10.

If this is true, then the logical extension of this argument is that the State must correct the federal government's discrimination in excluding aliens from federal public benefits. Plaintiffs refuse to clearly state this conclusion, and in fact deny that this is the case. Ans. Br. at 36 (stating the issue "is not whether the State was obligated to compensate for the federal government's discrimination.") Blurring the distinction between optional state-funded benefits, and federal public benefits from which COFA Residents are barred by the federal Welfare Reform Act, cannot justify a requirement that the State remediate the federal government's discrimination.

2. *This Court Should Give Credit to the State's Analysis of Doe v. Comm'r of Transitional Assistance, Finch v. Commonwealth Health Ins. Connector Authority, and Khrapunskiy v. Doar*

Plaintiffs challenge the applicability of Doe v. Comm'r of Transitional Assistance, 773 N.E. 2d 404 (Mass. 2002). Ans. Br. at 30. The court in Doe found that the optional state-funded program for only qualified aliens did not discriminate against aliens in favor of citizens.

> It is undisputed that the Massachusetts Legislature was not required to establish the supplemental program. It is also undisputed that the supplemental program provides no benefits for citizens, and that the only persons eligible for its benefits are qualified aliens. It is therefore apparent that **the supplemental program itself does not discriminate against aliens and in favor of citizens**.

Doe, 773 N.E.2d at 411 (emphasis added). Because there was no such discrimination in favor of citizens against aliens, it was unnecessary to evaluate

whether strict scrutiny or rational basis review applied. As noted by Plaintiffs, the Doe court ultimately applied rational basis review with respect to the **residency** requirement, which discriminated between groups of qualified aliens, and not between aliens and citizens. Id.

In Finch, the Supreme Judicial Court of Massachusetts distinguished its earlier decision in Doe. Finch, 946 N.E.2d at 1274-75. The program in question – Commonwealth Care – was a **state** program designed specifically to provide health insurance coverage to both uninsured citizens and aliens. Id. at 1266. Congress did not limit eligibility for Commonwealth Care. Rather, it was the state of Massachusetts that chose to "import[] the eligibility criteria of [the Welfare Reform Act]." Finch, 946 N.E.2d at 1280. Therefore, when **Massachusetts** decided to exclude persons "who cannot receive federally-funded benefits under . . . [the Welfare Reform Act]" from Commonwealth Care, id. at 1267, **it** was making the discriminatory choice to apply the federal Welfare Reform Act's alienage classifications for "its own discriminatory purpose" by excluding aliens from benefits that the state made available to citizens. See, Sudomir, 767 F.2d at 1466, quoting Plyler v. Doe, 457 U.S. 202, 226 (1982). Hawai'i, on the other hand, has not discriminated against aliens in its program; it has simply not completely made up for the federal government's discrimination.

In any event, the Finch court was divided. Two justices would have followed the reasoning of Doe, because it would make "no sense" to say that "although Congress has the plenary power to deny public benefits to qualified aliens, the States are constitutionally required to use State funds to make up the difference . . . thereby nullifying the effect of the congressional decision except to shift expenditures from the Federal government to the state." Finch, 946 N.E.2d at 1287 (JJ. Gants and Cordy, concurring in part and dissenting in part)[7].

Unlike Massachusetts, the State of Hawai'i did not create a comprehensive medical assistance program for citizens and aliens, from which it later chose to exclude aliens. The State participates in the federal Medicaid program, and is therefore required by federal law to exclude COFA Residents from Medicaid. Following enactment of the Welfare Reform Act, the State did not choose to create a state program that excludes aliens but covers citizens. To the contrary, the state included **only aliens** in its state-funded medical assistance program and, unlike Massachusetts, did not choose to apply a discriminatory federal policy to its state program. The State does **not** discriminate against aliens in favor of citizens when it provides an optional limited state-funded benefit for aliens only. See, Doe, 773

[7] Dissenting Justice Cordy authored the unanimous decision in Doe. See, Doe, 773 N.E.2d at 406.

N.E.2d at 411. Therefore, Finch does not support a finding of discrimination by the State against Plaintiffs.

Plaintiffs also claim that Khrapunskiy v. Doar, 909 N.E.2d 70 (N.Y. 2009) is "factually inapposite to the situation here." Ans. Br. at 33. The program in question in Khrapunskiy is a federal public benefit from which certain aliens were excluded because of the Welfare Reform Act. Plaintiffs' reference to the State's voluntary participation in Medicaid and administrative oversight, Ans. Br. at 33, is irrelevant to the issue of whether Medicaid is a federal public benefit subject to the alienage exclusion created by the Welfare Reform Act. The holding in Khrapunskiy did not rest on the fact that the federal government was administering the program rather than the state. "Because **the State** did not create a program of benefits which excluded plaintiffs, levels of scrutiny are inapplicable and there is no basis for an equal protection challenge." Khrapunskiy, 909 N.E.2d at 76.

D. The State Did Not Waive Its Arguments Relating to Congressional Intent Under the Compacts.

The State dedicated the first six pages of its opposition to Plaintiffs' Motion for Preliminary Injunction to the impact of the Compacts, and was clear that "understanding the intent of Congress is key to evaluating the legal status of" COFA Residents. CR/ER 13 at 7-13. Moreover, the State made clear that the statement of policy in the Compacts that COFA Residents have "sufficient means

of support in the United States" is consistent with Congressional intent under the Welfare Reform Act. CR/ER 13 at 11.

The State never argued that the language of the Compacts regarding deportability of COFA Residents who cannot show they have sufficient means of support directs the State to deport COFA Residents, see Ans. Br. at 38, nor that the "provision of grant funds for health and medical assistance to the COFA countries," constituted a "uniform rule instructing states to withhold health and medical benefits from citizens of those countries." Ans. Br. at 39. The State's position is that the federal policy under the 2003 Compact[8] is incompatible "with the notion that States may be forced, against their will, to provide the full complement of healthcare benefits that the federal Medicaid program provides for citizens." Open. Br. at 58-59.

E. The Amici Curiae Fail to Establish that the State is "Jointly Liable" for the Federal Government's Liabilities to COFA Residents.

The overriding theme of the amici curiae brief[9] is that the **United States** caused serious harm to the Micronesians and failed to discharge its responsibilities

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[8] The 2003 Compact is the Compact of Free Association Amendments of 2003, P.L. 108-188, December 17, 2003, 117 Stat. 2720. See, Open. Br. at 10, fn. 2.

[9] The State consented to the filing of an amici curiae brief on behalf of the Japanese American Citizens League – Honolulu Chapter and the National Association for the Advancement of Colored People – Honolulu Branch. The State was not informed of the inclusion of Kokua Kalihi Valley Comprehensive Family Services as amicus curiae.

to provide medical care to the Micronesians, and that the State of Hawai'i, "as a constituent member of the United States, along with its receipt of federal funds," is "jointly liable" for providing their medical care. Amici Br. at 13, 29. This conclusion is wholly unsupported, and should be disregarded.

1. This Court Should Not Give Judicial Notice to Facts Asserted By Amici Curiae For the First Time on Appeal

Amici curiae rely on many resources which were not part of the proceedings below, and for which amici curiae have not requested that this court take judicial notice. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). While this rule applies only to adjudicative facts, id., at 201(a), the court may take judicial notice of adjudicative and legislative facts. See, Korematsu v. U.S., 584 F.Supp. 1406, 1414 (1984). "Adjudicative facts are usually those facts that are in issue in a particular case. . . . Legislative facts are 'established truths, facts or pronouncements that do not change from case to case but [are applied] universally, while adjudicative facts are those developed in a particular case.'" Id., quoting United States v. Gould, 536 F.2d 216, 220 (8th Cir. 1976).

The amici curiae cite to information for the first time on appeal that was not considered by the District Court, and is therefore not part of the record. For

instance, amici curiae purport to quote the Attorney General Task Force Report, which was not part of the record below. Amici Br. at 30, 32-33. The amici curiae completely misrepresent the findings of the Attorney General Task Force Report, but it is impossible for the State to rebut the amici curiae's arguments without itself referring to matters outside the record. Therefore, any references to facts that are not part of the Clerk's Record should be disregarded.

Likewise, the amici brief relies on the opinions of many individuals, which are not adjudicative facts or legislative facts of which the court may take judicial notice. There is no reason why the opinions of amici curiae should be given any more weight than those of the parties. They should also be disregarded. Korematsu, 584 F.Supp. at 1414. To the extent that these opinions are cited by amici curiae as support for the District Court's finding of discrimination by the State against COFA Residents, then they are proferred as adjudicative facts which should be subject to the procedures of Rule 201, Federal Rules of Evidence. Id., at 1415. Since these "facts" were not before the District Court, they cannot be considered now. Id.; Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910, 918 (9th Cir. 2006).

The Ninth Circuit "has urged a cautious approach" when applying Rule 201 of the Federal Rules of Evidence, observing that "'the taking of evidence, subject to established safeguards, is the best way to resolve controversies involving

disputes of adjudicative facts.'" Korematsu, 584 F.Supp. at 1415, quoting Banks v. Schweiker, 654 F.2d 637, 640 (9th Cir. 1981).

Here, amici curiae list three pages of "Other Authorities" upon which they rely. See, Amici Br. at v-vii. Although many of the facts established by these other authorities may ultimately be admissible before a trial court, they would be subject to challenge and cross-examination, which is not available to the State since they are facts raised for the first time in this appeal. Center for Bio-Ethical Reform, 455 F.3d at 918, fn. 3. ("There is good reason why we generally do not consider issues for the first time on appeal – the record has not been developed, the district court has not had an opportunity to consider the issue, and the parties' arguments are not developed against the district court decision.")

2. *The Historical Facts Are Irrelevant to the Issue in this Appeal*

The issue on appeal is whether the State discriminated against COFA Residents, in violation of their right to equal protection, when it reduced the benefits of a state-funded medical assistance program that was available only to COFA Residents who were barred from federal Medicaid by the Welfare Reform Act. While the amici brief provides much background regarding the United States' alleged breach of duty to the Micronesian people, it is not useful for establishing that the **State** is legally obligated to provide the same level of federal medical assistance benefits to COFA Residents that the federal government allows to

citizens, but denies to COFA Residents. In fact, amici curiae rightly conclude that "the **federal** government has the ultimate duty to fulfill its promises to the Micronesian peoples." Amici Br. at 34 (emphasis added).

The amici curiae brief sets forth extensive historical facts regarding the harm caused by the United States due to nuclear testing in Marshall Islands, the Compacts of Free Association, and the failure of the U.S. to fulfill its obligations to the Micronesians under trust and contractual agreements. Amici Br. at 10-11, 13-29. Even assuming these representations to be completely true[10], these historical facts should be disregarded. Although the court may take judicial notice of historical facts, see, Korematsu, 584 F.Supp. at 1414, these points have already been addressed in pertinent part by the parties in the preliminary injunction proceedings below, as well as in the opening brief, and amici curiae's expansion of that information is unnecessary in this case. See, CR/ER 10-1 at 13-15, 19-21, 40-42 (mtn for prelim inj); CR/ER 13 at 7-13 (opp to prelim inj mtn); CR/ER 16 at 6-

[10] It is undisputed that the United States engaged in nuclear testing in the Pacific region, causing damage to certain Micronesian countries and peoples, and leading eventually to the creation of the Compacts of Free Association. See, Section 177 of the 2003 Compact, as amended. The State disagrees with Plaintiffs' and amici curiae's characterization of some of the historical facts, but it is unnecessary to evaluate those inaccuracies in this Reply Brief.

10 (reply to opp to prelim inj mtn); Open. Br. at 9-10, 58-64; Ans. Br. at 19; CR/SER 10-3, 10-5, 10-6 to 10-11 (decl in support of mtn for prelim inj).[11]

3. The Compacts Represent a Complete Settlement of COFA Residents' Claims for Loss or Damage Resulting from the U.S. Nuclear Testing Program

As noted by amici curiae, the Compacts provide significant funding for the settlement of all claims for "compensation owing for loss or damage resulting from [the United States'] nuclear testing program." Amici Br. at 24; see, People of Enewetak v. United States, 864 F.2d 134, 135-136 (Fed. Cir. 1988). And, also as noted by amici curiae, the Marshallese have unsuccessfully sued the federal government for failing to fulfill those obligations. Amici Br. at 25, citing People of Enewetak, 864 F.2d at 136, Juda v. U.S., 13 Cl. Ct. 677, 690 (1987).[12]

Therefore, it is the federal government, and not the State of Hawai'i, that is liable for any damages to COFA Residents. Amici curiae have not identified any legal authority for finding the State jointly liable. It is not sufficient to say that

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[11] The declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction describe current harm to certain COFA Residents, while amici curiae describe, for the most part, direct harm to Micronesians resulting from the United States' nuclear testing.

[12] The Federal Circuit Court of Appeals affirmed the Claims Court dismissal of the underlying actions because the agreement between the Republic of the Marshall Islands and the United States expressly foreclosed jurisdiction of the United States over such claims. People of Enewetak, 864 F.2d at 136-137.

Plaintiffs make no distinction between Hawai'i's federal Medicaid program, which is a federal public benefit under the Welfare Reform Act, whose eligibility requirements are governed by **federal** law, and Hawai'i's state-funded medical assistance that used to provide COFA Residents with the same level of benefits as Medicaid, but funded entirely with state funds, which is a state public benefit under the Welfare Reform Act. This failure is necessary for Plaintiffs to support a finding of discrimination. There is no dispute that the State is **required** by **federal** law to exclude COFA Residents from federal Medicaid, as it has since COFA Residents were barred by Congress from Medicaid eligibility upon enactment of the Welfare Reform Act. Ans. Br. at 16. The fact that State moneys also contribute to the federal Medicaid program is irrelevant; the key point is that **federal** law dictates that COFA Residents are barred from the Medicaid program. That is what makes the federal Medicaid program **not** a State program**.**

Plaintiffs wrongly argue that the State's provision of federal Medicaid to citizens requires it to provide wholly optional state-funded medical assistance to aliens excluded from Medicaid by federal law. The State is under no constitutional obligation to make up for, or undo, the federal government's discrimination against COFA residents.

Thus, it makes no sense for plaintiffs to say that the removal of COFA Residents "from the Hawai'i [state-funded] programs" -- thereby simply restoring

compact impact 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." Amici Br. at 30.

4. The Definition of the Term "Aloha Spirit" Does Not Create a Legal Obligation to Provide State Funded Health Care to COFA Residents

Second, amici curiae argue that the State statute defining the "Aloha Spirit" is "the legislature's directive" to government officials to "contemplate the idea of 'Aloha,'" and that this "expressed commitment of the State of Hawai'i . . . provide[s] legal and moral cornerstones for . . . 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 . . .". Amici Br. at 12-13; see, Haw. Rev. Stat. § 5-7.5.

Far from being a directive upon which government officials **must** act, the statute describes the "Aloha Spirit" as "traits of character that express the charm, warmth and sincerity of Hawaii's people," and only suggests that government officials "**may** contemplate and reside with the life force and give consideration to the 'Aloha Spirit'" when performing their duties. Haw. Rev. Stat. § 5-7.5(a) and (b) (emphasis added). The Aloha Spirit statute cannot, by its terms, create such a mandatory legal responsibility. Any claims of moral obligations should be addressed to Congress in the first instance, not to the Courts. And even if an unjustified moral obligation could be placed upon the State of Hawaii for not

making up for the **federal** government's actions, that argument, too, should be addressed to the State legislature. Amici curiae's moral concerns have no basis whatsoever in the proper interpretation of the Equal Protection Clause.

CONCLUSION

For the reasons stated above and in the opening brief, the State respectfully requests that the district court's order granting plaintiffs' motion for preliminary injunction be REVERSED.

DATED: Honolulu, Hawai‘i, August 17, 2011.

STATE OF HAWAI‘I
DAVID LOUIE
Attorney General
State of Hawai‘i

/s/ Lee Ann N.M. Brewer
HEIDI M. RIAN
LEE-ANN N.M. BREWER
JOHN F. MOLAY
Deputy Attorneys General

Attorney for Defendants-Appellants
Patricia McManaman and Kenneth Fink

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,695 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

DATED: Honolulu, Hawai‘i, August 17, 2011.

STATE OF HAWAI‘I
DAVID LOUIE
Attorney General
State of Hawai‘i

/s/ Lee Ann N.M. Brewer
HEIDI M. RIAN
LEE-ANN N.M. BREWER
JOHN F. MOLAY
Deputy Attorneys General

Attorneys for Defendants-Appellants
Patricia McManaman and Kenneth Fink

CERTIFICATE OF SERVICE

I certify that on August 17, 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 CM/ECF system.

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Catherine Leilani Aubuchon
BRONSTER HOSHIBATA
Suite 2300
1003 Bishop Street
Honolulu, Hawaii

DATED: Honolulu, Hawai‘i, August 17, 2011

/s/ Lee Ann N.M. Brewer
LEE ANN N.M. BREWER
JOHN F. MOLAY
Deputy Attorneys General

Attorneys for Defendants-Appellants 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