FSM SUPREME COURT TRIAL DIVISION

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| MARIA LIGOHR, LINA WILSON, MERLANCE AMOR, DARLEEN P. ALEXANDER, LORENZO DAVID, SENOLIDA ROBI, CONNIE JULIO, MEMORINA YESIKI, HERMAN JOEL, MARCEY JOEL, MARY MANUEL, KIMBERLY LEBEHN, DORA RASU, and VICTORIA BRAIE,<br><br>Plaintiffs,<br><br>vs.<br><br>DAVID PANUELO, in his official capacity as President of the Federated States of Micronesia, and the GOVERNMENT OF THE FEDERATED STATES OF MICRONESIA,<br><br>Defendants. | ) | CIVIL ACTION NO. 2021-007 |

ORDER GRANTING DISMISSAL IN PART

Larry Wentworth
Associate Justice

Hearing: April 21, 2021
Decided: May 14, 2021

APPEARANCES:

For the Plaintiffs: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonia, Pohnpei FM 96941

For the Defendants: Quintina Letawerpiy, Esq.
Jeffrey S. Tilfas, Esq.
Assistant Attorneys General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Joinder and Severance

Under Rule 12(b)(7), a complaint may be dismissed without prejudice for the failure to join a party under Rule 19. Rule 19 governs the joinder of persons needed for a just adjudication – indispensable parties. Ligohr v. Panuelo, 23 FSM R. 308, 311 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Joinder and Severance

Since the Constitution grants the FSM national government exclusive authority over immigration, and, although an FSM citizen seeking to enter the FSM, if permitted to do so by the FSM immigration authorities, may well need to negotiate a further hurdle, a particular state's quarantine barrier, before actually making it home, complete relief between the parties – in overcoming the immigration entry barrier – can be accorded because no state is an indispensable party. Ligohr v. Panuelo, 23 FSM R. 308, 311 (Pon. 2021).

Civil Procedure – Dismissal – Before Responsive Pleading; Civil Procedure – Joinder and Severance

The court will deny a motion to dismiss for failure to join indispensable parties when the court has not been shown that it cannot accord complete relief between the parties already present in the action without the joinder of others. Ligohr v. Panuelo, 23 FSM R. 308, 311 (Pon. 2021).

Constitutional Law – Case or Dispute – Political Question

When the Constitution contains a textually demonstrable commitment of the issue to a coordinate branch of government, it is a nonjusticiable political question not to be decided by the court because of the separation of powers required by the Constitution. Ligohr v. Panuelo, 23 FSM R. 308, 311 (Pon. 2021).

Constitutional Law – Case or Dispute – Political Question; Separation of Powers – Executive Powers; Separation of Powers – Legislative Powers

Although the Constitution specifically commits to the President the power to declare emergencies, the Constitution also specifically provides the avenues by which a Presidential emergency declaration can be reviewed by the other branches of government. Since, under article X, section 9(b), judicial interference is specifically prohibited for the first 30 days after the emergency declaration is made, a Presidential emergency declaration is a nonjusticiable political question for those first 30 days, but the clear implication is that after those 30 days, the emergency declaration is no longer nonjusticiable, and the judiciary may interfere thereafter. However, before those 30 days expire, Congress has the sole power to "interfere" with or review Presidential emergency declarations. Ligohr v. Panuelo, 23 FSM R. 308, 312 (Pon. 2021).

Public Health; Separation of Powers – Executive Powers

The Constitution provides that, if required to preserve public peace, health, or safety, at a time of extreme emergency caused by civil disturbance, natural disaster, or immediate threat of war, or insurrection, the President may declare a state of emergency and issue appropriate decrees, and the covid-19 pandemic is an emergency because the covid-19 pandemic constitutes a world-wide natural disaster and therefore is a proper ground for a Presidential emergency declaration. Ligohr v. Panuelo, 23 FSM R. 308, 312 (Pon. 2021).

Public Health; Separation of Powers – Executive Powers

A disease outbreak, such as the covid-19 pandemic, satisfies the definition of natural disaster for Presidential emergency declarations. Ligohr v. Panuelo, 23 FSM R. 308, 312 (Pon. 2021).

Public Health; Separation of Powers – Executive Powers

A "natural disaster" emergency extends to, and includes, the threatened imminent arrival of a novel pandemic in the FSM. Thus, not only is the covid-19 pandemic a natural disaster, but also the threat of its imminent arrival in the FSM was a sufficient basis for the President to issue an emergency declaration. Ligohr v. Panuelo, 23 FSM R. 308, 313 (Pon. 2021).

Civil Rights – Acts Violating; Separation of Powers – Executive Powers

A Presidential emergency declaration (and any appropriate decrees thereunder), by its very nature, will impair some civil right(s). The Constitution provides that a civil right impacted by a Presidential decree issued under a declared state of emergency may be impaired only to the extent actually required for the preservation of peace, health, or safety. Ligohr v. Panuelo, 23 FSM R. 308, 313 (Pon. 2021).

Civil Rights – Acts Violating

Although not specifically mentioned in the Constitution, FSM citizens have the civil right to reside in or return to the FSM because that right is inherent in the concept of citizenship or nationality and human rights. Ligohr v. Panuelo, 23 FSM R. 308, 313 (Pon. 2021).

Public Health; Separation of Powers – Executive Powers

Since a civil right impacted by a Presidential decree issued under a declared state of emergency may be impaired only to the extent actually required for the preservation of peace, health, or safety, the FSM citizen plaintiffs may seek a declaratory judgment that less drastic alternative measures to preserve the FSM's health and safety might have been imposed on them for the covid-19 pandemic natural disaster than barring them from entering the FSM. Ligohr v. Panuelo, 23 FSM R. 308, 313 (Pon. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On April 21, 2021, the court heard the Defendants' Motion to Dismiss Plaintiffs' Complaint for Declaratory Judgment, filed March 15, 2021; Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed March 26, 2021; and the defendants' Opposition to Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed April 8, 2021. For the reasons given below, the motion is granted in part.

## I. PLAINTIFFS' CLAIMS

The plaintiffs are FSM citizens who are stranded outside of the FSM because of President David Panuelo's March 2020 emergency declaration barring all persons from entering the FSM due to the covid-19 pandemic. The plaintiffs allege that the President lacked the authority to close the FSM's borders because his emergency declaration was not based on any of the grounds specifically authorized under the Constitution's article X, section 9(a) and was therefore invalid from the start. The plaintiffs further allege that, as FSM citizens, they were entitled to be informed in advance of the President's decision to close the FSM's borders, but were not. Presumably, if they had been informed, they then would have had an opportunity to return home before the borders closed. The plaintiffs also allege that less drastic alternative measures were (and still are) available for the President to preserve the public peace, health, and safety.

The plaintiffs therefore seek a declaratory judgment that the President's March 2020 declaration contravened the Constitution; that the emergency declaration was invalid *ab initio*; that less drastic alternatives exist that would allow FSM citizens, such as themselves, to return home; and that the President acted beyond his constitutional authority when he closed the FSM borders.

## II. DEFENDANTS' MOTION TO DISMISS

The defendants, President Panuelo and the FSM national government, move to dismiss the plaintiffs' complaint because the plaintiffs failed to join an indispensable party – the State of Pohnpei (and likely other states depending on a plaintiff's intended destination) – that also bars the plaintiffs' return; because the matter is a nonjusticiable political question; and because the President acted within his authority.

### A. Whether *Indispensable Parties Not Joined*

The defendants contend that Pohnpei is (or the four states are) indispensable parties because, although the President's declaration closed the FSM borders to entry, each state has also closed its borders,

therefore making each state, to which a plaintiff intends to return, an indispensable party. The plaintiffs assert that they only seek a declaratory judgment that they can enter the FSM, not a declaratory judgment that any particular state must also admit them unconditionally.

Under Rule 12(b)(7), a complaint may be dismissed without prejudice for the "failure to join a party under Rule 19." Rule 19 governs the joinder of persons needed for a just adjudication – indispensable parties.

The Constitution grants the FSM national government exclusive authority over immigration. FSM Const. art. IX, § 2(c). Constitutionally, the states do not have a say in immigration matters. Admittedly, an FSM citizen seeking to enter the FSM, if permitted to do so by the FSM immigration authorities, may well need to negotiate a further hurdle – a particular state's quarantine barrier – before actually making it home. But complete relief between the parties – in overcoming the immigration entry barrier – can be accorded. The court concludes that no state is an indispensable party.

The court will deny a motion to dismiss for failure to join indispensable parties when the court has not been shown that it cannot accord complete relief between the parties already present in the action without the joinder of others. Marsolo v. Esa, 18 FSM R. 59, 63 (Chk. 2011). That is the situation here. Complete relief be accorded between the parties already joined.

B. *Whether this Action Is a Nonjusticiable Political Question*

The defendants contend that the plaintiffs, in this action, are asking the court to adjudicate a nonjusticiable political question and therefore the court must dismiss the complaint. When the Constitution contains a textually demonstrable commitment of the issue to a coordinate branch of government, it is a nonjusticiable political question not to be decided by the court because of the separation of powers required by the Constitution. Aten v. National Election Comm'r (III), 6 FSM R. 143, 145 (App. 1993).

Although the Constitution specifically commits to the President the power to declare emergencies, the Constitution also specifically provides the avenues by which a Presidential emergency declaration can be reviewed by the other branches of government. Under article X, section 9(b), "[a] declaration of emergency may not impair the power of the judiciary except that the declaration shall be free from judicial interference for 30 days after it is first issued." Since "judicial interference" is specifically prohibited for the first 30 days after the emergency declaration is made, a Presidential emergency declaration is a nonjusticiable political question for those first 30 days. The clear implication is that after those 30 days, the emergency declaration is no longer nonjusticiable, and the judiciary may "interfere" thereafter.

However, before those 30 days expire, Congress has the sole power to "interfere" with or review Presidential emergency declarations. FSM Const. art. X, § 9(c). Congress also has the power to extend the declaration. (And Congress has done so.) The Constitution provides that:

> Within 30 days after the declaration of emergency, the Congress of the Federated States of Micronesia shall convene at the call of its presiding officer or the President to consider revocation, amendment, or extension of the declaration. Unless it expires by its own terms, is revoked, or extended, a declaration of emergency is effective for 30 days.

FSM Const. art. X, § 9(c).

Since more than 30 days (actually more than a year with Congress's extensions) has passed since the President's March 2020 emergency declaration, the court must reject the defendants' contention that this declaratory judgment lawsuit is a nonjusticiable political question.

C. *Whether President Had Authority to Issue Proclamation*

1. *Contentions Concerning Presidential Powers in Extreme Emergencies*

The plaintiffs contend that a pandemic, or the threat of a pandemic spreading into the FSM, is not an emergency or a circumstance for which the Constitution authorizes the President to issue an emergency proclamation. The Constitution provides that "[i]f required to preserve public peace, health, or safety, at a time of extreme emergency caused by civil disturbance, natural disaster, or immediate threat of war, or insurrection, the President may declare a state of emergency and issue appropriate decrees." FSM Const. art. X, § 9(a).

The plaintiffs contend that the covid-19 pandemic cannot be used by the President to declare a state of emergency and issue decrees because the covid-19 pandemic is not an emergency caused by a "civil disturbance, natural disaster, or immediate threat of war, or insurrection." The defendants counter that the covid-19 pandemic constitutes a world-wide natural disaster and therefore is a proper ground for a Presidential emergency declaration.

2. *Is the Covid-19 Pandemic a Natural Disaster?*

The plaintiffs assert that the covid-19 pandemic is not a natural disaster. They argue that a natural disaster is a sudden environmental event, such as an earthquake, a typhoon, or a flood, but not a disease. The court does not agree.

"Natural" is something "[b]rought about by nature as opposed to artificial means." BLACK'S LAW DICTIONARY 1126 (9th ed. 2009). It is also something "in accordance with, or determined by, nature; characteristic of the physical world; produced in the course of nature." 65 C.J.S. *Natural*, at 53 (1966) (footnotes omitted). And a disaster is "[a] calamity; a catastrophic emergency," BLACK'S LAW DICTIONARY 529 (9th ed. 2009), or a "calamity, misfortune, or mishap; any unfortunate event, especially sudden or great misfortune," 26A C.J.S. *Disaster*, at 967 (1956) ("disaster" is often "synonymous with catastrophe"). A calamity "indicates or supposes a somewhat continuous state, produced not usually by the direct agency of man, but by natural causes, such as fire, flood, tempest, disease, etc." 12A C.J.S. *Calamity*, at 568 (1980).

"Courts have consistently noted, in different contexts, that a disease outbreak is a natural disaster." Easom v. US Well Servs., Inc., 527 F. Supp. 3d 898, 908 (S.D. Tex. 2021) (citing Natural Res. Def. Council v. Environmental Prot. Agency, 896 F.3d 459, 464 (D.C. Cir. 2018); Meyer v. Conlon, 162 F.3d 1264, 1266 (10th Cir. 1998); Badgley v. Varelas, 729 F.2d 894, 902 (2d Cir. 1984)). Numerous courts have held that the covid-19 pandemic is a natural disaster. *E.g.*, Friends of Danny DeVito v. Wolf, 227 A.3d 872, 888-89 (Pa. 2020) ("covid-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions"); Casey v. Lamont, 258 A.3d 647, 659 (Conn. 2021) (covid-19 is a serious disaster); Grisham v. Romero, 483 P.3d 545, 558 n.20 (N.M. 2021) (no argument raised that covid-19 pandemic is not a natural disaster); JN Contemporary Art LLC v. Phillips Auctioneers LLC, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020) ("cannot be seriously disputed that the covid-19 pandemic is a natural disaster"); Easom, 527 F. Supp. 3d at 908 ("covid-19 also qualifies as a 'natural' disaster because human beings were not responsible for starting or consciously spreading the virus"); BP v. Surrey County Council, [2020] EWCOP 17 ¶¶ 9-10 (Eng. & Wales Ct. of Prot. Mar. 25, 2020) (covid-19 pandemic falls within natural disasters). And the Delaware Chancery Court, when it concluded that the covid-19 pandemic was a natural disaster, rejected the interpretation of "natural disaster" (which the plaintiffs herein made as well) that natural disasters can only be sudden, singular events attributable to the four classical elements of earth, water, fire, and air, and not to a disease. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, 2020 WL 7024929, at *57-*58 (Del. Ch. Nov. 30, 2020).

The court therefore concludes that the covid-19 pandemic satisfies the definition of natural disaster.

3. *Is Covid-19 Pandemic an FSM Natural Disaster?*

The plaintiffs assert that even if a disease, such as covid-19, could be a natural disaster, covid-19 is not presently here in the FSM. The plaintiffs therefore argue that, even if the covid-19 pandemic were a natural disaster, it is not a natural disaster or a catastrophe that is, or has, occurred in the FSM because there are no, and have been no, covid-19 cases in the FSM, and therefore the President could not make an emergency declaration based on it.

The court will not take such a cavalier attitude towards the public health and safety of the FSM and its people. The court fails to understand how a raging world-wide pandemic could not be considered a natural disaster until it has started killing people in the FSM, and only then could the President issue an emergency declaration to preserve the public health and safety. The court will not read the President's emergency powers so narrowly as to render them impotent in the face of an unprecedented pandemic, that threatens to inundate our shores, and which only empowers the President to act once it has become too late to stem the tide or to have any beneficial preventative effect. The court takes judicial notice that, if the President had not closed the FSM's borders, the covid-19 pandemic would have arrived in the FSM not long thereafter, and that the FSM health and medical system was ill-prepared to face it.

4. *Court's Holding*

The court therefore concludes that a "natural disaster" emergency extends to, and includes, the threatened imminent arrival of a novel pandemic in the FSM. The court therefore not only holds that the covid-19 pandemic is a natural disaster but also holds that the threat of its imminent arrival in the FSM was a sufficient basis for the President to issue an emergency declaration. Accordingly, the defendants' motion to dismiss is granted to the extent that the plaintiffs allege that the covid-19 pandemic is not a natural disaster and thus not a proper subject of a Presidential emergency declaration. The motion to dismiss is also granted to the extent that the plaintiffs allege that the absence of covid-19 cases in the FSM means there is no natural disaster.

C. *Whether There Are less Drastic Alternatives*

A Presidential emergency declaration (and any appropriate decrees thereunder), by its very nature, will impair some civil right(s). From the plaintiffs' standpoint, the civil right, that the President's March 2020 emergency declaration impaired, is the right of a citizen to reside in or return to the country of his or her citizenship. That right is not specifically mentioned in the Constitution. But it is a right that appears to be inherent in the concept of citizenship or nationality and human rights. "Everyone has the right . . . to return to his country." U.N. Universal Declaration of Human Rights art. 13(2), G.A. RES. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

The Constitution provides that a civil right impacted by a Presidential decree issued under a declared state of emergency "may be impaired only to the extent actually required for the preservation of peace, health, or safety." FSM Const. art. X, § 9(b). Since that is so, the plaintiffs' complaint, to the extent that it seeks a declaratory judgment that less drastic alternative measures should have been applied to them (and whether that might have included an advance warning of the FSM borders' closure) is not dismissed.

## IV. CONCLUSION

Accordingly, the court dismisses the plaintiffs' complaint to the extent that the plaintiffs claim that the President lacked any authority to issue the March 2020 emergency declaration barring all persons from entering the FSM. The plaintiffs may proceed on their claims that, as applied to them as FSM citizens, less drastic measures might have been imposed to preserve the FSM's health and safety.