

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FANG LIN AI; DOES 1-1000,

Plaintiffs – Appellants,

CONCORDE GARMENT MANUFACTURING CORP.,

Plaintiff – Counterdefendant  
–Appellant,

v.

UNITED STATES OF AMERICA,

Defendant – Counterclaimant  
– Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN MARIANA ISLANDS

---

BRIEF FOR THE APPELLEE

---

TAMARA W. ASHFORD  
*Acting Assistant Attorney General*

BRIDGET M. ROWAN (202) 514-1840  
TERESA T. MILTON (202) 514-2947  
*Attorneys, Tax Division  
Department of Justice  
Post Office Box 502  
Washington, D.C. 20044*

*Of Counsel:*  
ALICIA A.G. LIMTIACO  
*United States Attorney*

---

---

## TABLE OF CONTENTS

	<b>Page</b>
Table of contents .....	i
Table of authorities .....	iii
Glossary .....	xi
Statement of jurisdiction.....	1
A.    Introduction.....	1
B.    Jurisdiction in the District Court .....	3
C.    Jurisdiction in the Court of Appeals.....	5
Statement of the issues.....	6
Statement of the case.....	8
A.    Historical and legal background: the Commonwealth of the Northern Mariana Islands.....	8
B.    Taxpayers’ refund suits and the proceedings in the District Court .....	12
C.    The District Court’s opinions.....	14
Summary of argument .....	18
Argument.....	22
I.    The District Court correctly concluded that FICA taxes are due, from both employers and employees, with respect to wages from all employment in the Commonwealth of the Northern Mariana Islands, regardless of the citizenship of the employees .....	22
Standard of review .....	22

	Page
A. Wages from employment within the United States are subject to FICA, and the Commonwealth of the Northern Marianas, like Guam, is within the United States for FICA purposes .....	22
1. The governing statutes .....	22
2. The District Court’s application of the relevant statutes .....	27
B. The arguments that taxpayers adopt from other related pending appeals, <i>American Pacific</i> and <i>Hong Kong Entertainment</i> , do not show error in the District Court’s conclusion.....	31
C. Foreign contract workers in the CNMI are not exempt from FICA taxation under a statutory exemption that applies to workers from the Philippines .....	40
D. Under Covenant § 606(b), both employees and employers are subject to FICA taxes on wages paid for employment in the CNMI.....	47
1. Like the Federal Circuit in <i>Zhang</i> , the District Court read § 606(b) as making both employees and employers subject to FICA taxation .....	47
2. Taxpayers show no error in the District Court’s conclusion .....	53
II. Taxpayers’ constitutional due process argument, based on the theory that the statutes are void for vagueness, is without merit.....	57
Standard of review .....	57

	Page
Conclusion .....	62
Statement of related cases .....	63
Certificate of compliance.....	64
Certificate of service.....	65
Addendum .....	66

## TABLE OF AUTHORITIES

### Cases:

<i>Andrus v. Glover Constr. Co.</i> , 446 U.S. 608 (1980) .....	44
<i>Atl. Dept. Stores, Inc. v. United States</i> , 557 F.2d 957 (2d Cir. 1977).....	50
<i>Blue Lake Rancheria v. United States</i> , 653 F.3d 1112 (9th Cir. 2011) .....	49
<i>Champlin Refining Co. v. Corporation Com'n of State of Oklahoma</i> , 286 U.S. 210 (1932) .....	58
<i>Charlotte's Office Boutique, Inc. v. Commissioner</i> , 425 F.3d 1203 (9th Cir. 2005) .....	50
<i>Commonwealth of the Northern Mariana Islands v. United States</i> , 670 F. Supp. 2d 65 (D.D.C. 2009) .....	11, 37
<i>Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz</i> , 691 F.2d 878 (9th Cir. 1982) .....	44
<i>Connally v. General Constr. Co.</i> , 269 U.S. 385 (1926) .....	58
<i>Eche v. Holder</i> , 694 F.3d 1026 (9th Cir. 2012) .....	37
<i>Edye v. Robertson</i> , 112 U.S. 580 (1884) .....	34
<i>Fleming v. Pickard</i> , 581 F.3d 922 (9th Cir. 2009) .....	22, 57
<i>Griffin v. Oceanic Contractors, Inc.</i> , 458 U.S. 564 (1982) .....	57
<i>Groome Resources, Ltd. v. Parish of Jefferson</i> , 234 F.3d 192 (5th Cir. 2000) .....	21, 58

<b>Cases (continued):</b>	<b>Page(s)</b>
<i>Hunt v. City of Los Angeles</i> , 638 F.3d 703 (9th Cir. 2011) .....	58
<i>Kahn v. United States</i> , 753 F.2d 1208 (3d Cir. 1985) .....	58
<i>Malar v. Commissioner</i> , 151 F.3d 962 (9th Cir. 1998) .....	50
<i>Mariana Islands v. United States</i> , 279 F.3d 1070 (9th Cir. 2002) .....	24, 25, 27, 30, 45
<i>Northern Mariana Islands v. United States</i> , 399 F.3d 1057 (9th Cir. 2005) .....	8, 51
<i>Parker v. Levy</i> , 417 U.S. 733 (1974) .....	60
<i>Public Employees' Retirement Bd. v. Shalala</i> , 153 F.3d 1160 (10th Cir. 1998) .....	48, 50
<i>Sagana v. Tenorio</i> , 384 F.3d 731 (9th Cir. 2004) .....	11, 37
<i>Saipan Stevedore Company, Inc. v. Director, Office of Workers' Compensation Programs</i> , 133 F.3d 717 (9th Cir. 1998) .....	8, 9, 27, 30, 34
<i>Smith v. Marsh</i> , 194 F.3d 1045 (9th Cir. 1999) .....	18
<i>Taniguchi v. Kan Pac. Saipan, Ltd.</i> , 132 S. Ct. 1997 (2012) .....	53, 54
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001) .....	44
<i>Tsao v. Desert Palace, Inc.</i> , 698 F.3d 1128 (9th Cir. 2012) .....	18
<i>U.S. ex rel. Richards v. De Leon Guerrero</i> , 4 F.3d 749 (9th Cir. 1993) .....	8
<i>United States v. Chang Da</i> , 538 F.3d 1078 (9th Cir. 2008) .....	30
<i>United States v. Cleveland Indians Baseball Company</i> , 532 U.S. 200 (2001) .....	36, 43, 50, 55
<i>United States v. Fei Ye</i> , 436 F.3d 1117 (9th Cir. 2006) .....	27

<b>Cases (continued):</b>	<b>Page(s)</b>
<i>United States v. Fior D'Italia, Inc.</i> , 536 U.S. 238 (2002) .....	48, 50
<i>United States v. Moore</i> , 109 F.3d 1456 (9th Cir. 1997) .....	59-60
<i>United States v. Quality Stores</i> , 134 S.Ct. 1395 (2014) .....	36
<i>United States v. Saffo</i> , 227 F.3d 1260 (10th Cir. 2000) .....	60
<i>United States v. Tatoyan</i> , 474 F.3d 1174 (9th Cir. 2007) .....	56-57
<i>Zhang v. United States</i> , 640 F.3d 1358 (Fed. Cir. 2011).....	<i>passim</i>

**Statutes:**

Immigration and Nationality Act (8 U.S.C.):	
§ 101(a)(15)(H)(ii) .....	19, 24, 29, 41-42
§ 1101(a)(17) .....	29
18 U.S.C.:	
§ 922(a)(6) .....	59
§ 2314 .....	30
§ 2421 .....	30
Internal Revenue Code (26 U.S.C.):	
§ 61 .....	49
§§ 1401-1403 .....	54
§ 3101 .....	<i>passim</i>
§ 3101(a) .....	14, 22
§ 3101(b) .....	22
§§ 3101-3128 .....	1, 22, 49
§§ 3101-3510 .....	48
§ 3111 .....	6, 7, 36, 49
§ 3111(a) .....	14, 23
§ 3111(b) .....	23
§ 3121 .....	17
§ 3121(a) .....	23

<b>Statutes (continued):</b>	<b>Page(s)</b>
§ 3121(b) .....	<i>passim</i>
§ 3121(b)(A)(i) .....	<i>passim</i>
§ 3121(b)(B) .....	13, 23
§§ 3121(b)(1)-(21) .....	19, 23, 46
§ 3121(b)(18) .....	19, 24, 27, 37, 40-43, 46-47
§ 3121(e) .....	6, 13-15, 18, 27-28
§ 3121(e)(2) .....	23
§ 6532 .....	3
§ 7402 .....	4
§ 7405(a) .....	4
§ 7422 .....	4
28 U.S.C.:	
§ 1291 .....	5
§ 1340 .....	4
§ 1346 .....	4
29 U.S.C. § 206(a)(1) .....	11
33 U.S.C. § 901, <i>et seq.</i> .....	30
Social Security Act (42 U.S.C.)	
§ 1-2113 .....	35
§ 410(a)(18) .....	41
48 U.S.C.:	
§ 1681 .....	9
§ 1801 .....	4, 7-9, 24
§ 1821(a) .....	5
§ 1822 .....	4

**Statutes (continued):** **Page(s)**

Covenant to Establish a Commonwealth of the Northern  
Mariana Islands in Political Union with the United  
States of America, 48 U.S.C. § 1801:

§ 101.....	8
§ 402(a) .....	4
§ 501(a) .....	10
§ 502(a) .....	10
§ 502(a)(1).....	26
§ 502(a)(2).....	26, 46
§ 503(a) .....	11
§ 503(c).....	11
§ 601.....	26
§ 601(c).....	6, 13-15, 26, 41, 46
§ 605(b) .....	45
§ 606.....	32, 35-36, 51
§ 606(a) .....	32-35
§ 606(b) .....	<i>passim</i>
§ 606(c).....	32-35
§ 701.....	10
§ 702.....	10
§ 702(a)(1).....	36
§ 702(f) .....	11, 29
§ 703(b) .....	10
§ 1003.....	9
§ 1003(b) .....	10

Commonwealth Employment Act of 2007, 2007 N. Mar. I. Pub. L. No.15-108.....	29
--	----

Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754 .....	11, 12, 29, 36
---	----------------

Fair Minimum Wage Act of 2007, Pub. L. 110-28, § 8103(a), 121 Stat. 112, 188.....	11
--	----

<b>Statutes (continued):</b>	<b>Page(s)</b>
Nonresident Workers Act, 3 N. Mar. I. § 4411 .....	29, 37
Pub. L. 86-778, § 103(a), (o), 74 Stat. 924.....	40-41
Pub. L. 86-778, § 103(d), 74 Stat. 937.....	41
Pub. L. No. 94-241, 90 Stat, 263 .....	4, 8, 24
Pub. L. No. 98-213, § 19, 97 Stat. 1 .....	29

**Rules and Regulations:**

Fed. R. App. P.:	
Rule 4(a)(1)(B) .....	5
Treas. Reg. (26 C.F.R.):	
§§ 1-1563.....	48
§ 31.3121(e)-1 .....	23

**Miscellaneous:**

<i>Black's Law Dictionary</i> (5th ed. 1979) .....	50, 53-54
<i>Black's Law Dictionary</i> (7th ed. 1999).....	34
Convention between the United States of America and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and the Encouragement of International Trade and Investment, June 4, 1976, 30 U.S.T. 5253. ....	42

Miscellaneous (continued):	Page(s)
Dorothy E. Hill, <i>Guest Worker Programs Are No Fix For Our Broken Immigration System: Evidence From The Northern Mariana Islands</i> , 41 N. Mex. L. Rev. 131 (2011).....	29
H.R. Rep. 1799, 86th Cong., 2d Sess. 19.....	41
H.R. Rep. No. 94-364, 94th Cong., 1st Sess. (1975).....	24
IRS Announcement 2012-43, 2012-51 I.R.B. 723, 2012 WL 6579763.....	24
IRS <i>Publication 80, Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands</i> (2005).....	42
<i>N. Mariana Islands Commission on Federal Laws, Welcoming America's Newest Commonwealth</i> (1985) .....	52
Presidential Proclamation No. 4534, 42 Fed. Reg. 56,593 (1977) .....	10
Presidential Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986) .....	9
Robert L. Adair, <i>Closing a Loophole in the Pacific: Applying the Immigration and Nationality Act to the Commonwealth of the Northern Mariana Islands</i> , 16 Asian Pac. Am. L.J. 74, 83-96 (2011).....	11, 37
S. Rep. No. 596, 94th Cong., 2d Sess. 2 (1976) .....	34
S. Rep. No. 94-433, 94th Cong., 1st Sess. (1975) .....	24, 30

Miscellaneous (continued):	Page(s)
<i>Section by Section Analysis of the Covenant, Northern Marianas Political Status Commission .....</i>	<i>20-21, 38, 39, 51, 52, 55</i>
<i>The Federalist No. 75, at 410 (Alexander Hamilton) E.H. Scott ed., 2002).....</i>	<i>34</i>
<i>Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.-N. Mar. I., art. 3, 61 Stat. 3301 .....</i>	<i>9</i>

## GLOSSARY

<b>Commission</b>	Northern Mariana Islands Commission on Federal Laws
<b>Concorde</b>	Concorde Garment Manufacturing Corporation
<b>Covenant</b>	Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America
<b>CNMI</b>	Commonwealth of the Northern Mariana Islands
<b>INA</b>	Immigration and Nationality Act
<b>IRS</b>	Internal Revenue Service

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**No. 13-17491**

**FANG LIN AI; DOES 1-1000,  
Plaintiffs – Appellants,**

**CONCORDE MANUFACTURING CORP.,  
Plaintiff – Counterdefendant  
–Appellant,**

**v.**

**UNITED STATES OF AMERICA,  
Defendant – Counterclaimant  
– Appellee.**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN MARIANA ISLANDS**

---

**BRIEF FOR THE APPELLEE**

---

**STATEMENT OF JURISDICTION**

**A. Introduction**

In this refund suit for Federal Insurance Contributions Act (FICA) taxes (26 U.S.C., or Internal Revenue Code (I.R.C.) §§ 3101 – 3128), Concorde Garment Manufacturing Corporation (Concorde) and several thousand of its temporary foreign workers (collectively, taxpayers) sought refunds of both the employee and employer portions of FICA

taxes paid with respect to the wages earned by those workers for services performed in the Commonwealth of the Northern Mariana Islands (CMNI). (ER 110-114.)<sup>1</sup> The suit was based on essentially the same contentions as those advanced by the employers in *American Pacific Textile, et al. v. United States* (No. 13-16348) and *Hong Kong Entertainment v. United States* (No. 13-16355), currently pending before this Court, and in *Zhang v. United States*, 640 F.3d 1358 (Fed. Cir. 2011).

Taxpayers here (like the taxpayers in *American Pacific*, *Hong Kong Entertainment*, and *Zhang*) argue for a citizenship-based application of the FICA statutes to their foreign workers. Under the FICA statutes, however, citizenship is irrelevant (absent an explicit statutory exception) if the employment occurs within the United States, and the CMNI is within the United States, for FICA purposes, because it is treated like Guam for purposes of applying the FICA laws.

---

<sup>1</sup> “ER” references are to the excerpts of record filed by the appellants. “SER” references are to the supplemental excerpts of record filed by the appellee.

## **B. Jurisdiction in the District Court**

Between April 14 and May 16, 2008, Concorde and many of its individual workers filed claims for refund of FICA taxes paid for one or more quarterly tax periods from 2004 through 2007. (ER 106-07, 109.) On December 28, 2009, the Internal Revenue Service (IRS) issued a partial (and erroneous) refund in the amount of \$1,181,265.71, which was the amount (plus interest) that Concorde had requested as a refund for 2006.<sup>2</sup> (SER 10-11.) The IRS took no action on any other refund claims of Concorde or its workers. (ER 107.)

Taxpayers filed their complaint seeking refunds with respect to their remaining claims on July 29, 2011, within the time limits of I.R.C. § 6532.<sup>3</sup> (ER 235.) They also sought damages, in an amount “to be

---

<sup>2</sup> Taxpayers state (Br. 14) that the IRS issued a refund of FICA taxes pursuant to a refund request for the years 2004 through 2007, but only 2006 FICA taxes were refunded.

<sup>3</sup> The complaint asserted refund claims on behalf of Concorde and thousands of employees for unspecified amounts representing both the employer and employee portions of FICA taxes paid over the period from 2004 to 2007. Taxpayers sought, in discovery, records from the IRS in order to calculate the amount of their claims, which implicated approximately 2000 employees. The parties agreed to suspend compiling those records pending the outcome of the Government’s motion for judgment on the pleadings.

proven at trial,” resulting from claimed violations of constitutional rights and from allegedly improper collection actions taken by the IRS to recover the 2006 FICA taxes that it determined had been refunded to Concorde in error.<sup>4</sup> (ER 114-123.) The Government answered and asserted a counterclaim to recover the erroneous refund. (SER 1-11.)

To the extent that the District Court had jurisdiction, that jurisdiction rested on 28 U.S.C. §§ 1340 and 1346, 26 U.S.C. §§ 7402, 7405(a), and 7422, 48 U.S.C. § 1822, and Section 402(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (the Covenant), Pub. L. No. 94-241, 90 Stat. 263, *reprinted as amended at* 48 U.S.C. § 1801.<sup>5</sup>

---

<sup>4</sup> On appeal, taxpayers are no longer pursuing the wrongful collection claim or the constitutional claims, except for the due process claim focusing on purported vagueness.

<sup>5</sup> The IRS’s records reflected that Concorde had timely filed claims for refund, but the IRS was unable to verify the jurisdictional soundness of each individual refund claim without retrieving the thousands of records involved. In its answer, the Government admitted that the District Court had jurisdiction to the extent that each plaintiff had filed a timely administrative refund claim, waited six months before filing suit, and raised the claims that were raised in the complaint. (ER 94.) The point was rendered moot by the District Court’s disposition of the case.

On August 20, 2013, the District Court issued a memorandum opinion and order granting the Government's motion for judgment on the pleadings with respect to taxpayers' tax refund and constitutional claims. (ER 9-27.) Treating the Government's motion as a motion for summary judgment insofar as it addressed taxpayers' claims of improper collection, the court granted summary judgment to the Government. (*Id.*) On October 11, 2013, the District Court issued an order granting judgment to the Government on its counterclaim. (ER 4-8.)

### **C. Jurisdiction in the Court of Appeals**

The District Court entered judgment for the Government on all claims, including its counterclaim, on October 15, 2013. (ER 3.) That judgment resolved all the issues with respect to all the parties. On December 6, 2013, taxpayers filed a notice of appeal. (ER 1-2.) Taxpayers' notice of appeal was timely under Fed. R. App. P. 4(a)(1)(B).<sup>6</sup> This Court's jurisdiction rests on 28 U.S.C. § 1291 and 48 U.S.C § 1821(a).

---

<sup>6</sup> Taxpayers filed a notice of appeal from the District Court's order of August 20, 2013, but, because the District Court had not yet  
(continued...)

## STATEMENT OF THE ISSUES

To fund the Social Security and Medicare programs, the Federal Insurance Contributions Act (FICA), 26 U.S.C. (I.R.C.) §§ 3101, 3111, imposes a tax, on both employers and employees, on wages with respect to employment. Under those FICA provisions, employment means service of any kind performed for an employer within the United States (26 U.S.C. § 3121(b)), “irrespective of the citizenship of either” the employee or the employer, and the United States, when used in a geographic sense, includes Guam (26 U.S.C. § 3121(e)).

Article VI of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, which addresses revenue and taxation, provides, generally, in Section 601(c), that references in the Internal Revenue Code to Guam will be deemed to refer to the Northern Mariana Islands, and, specifically, in Section 606(b), that the laws imposing taxes to support

---

(...continued)

addressed the Government’s counterclaim, and no final judgment had been entered, taxpayers voluntarily dismissed this appeal (docketed as No. 13-16779) on October 3, 2013.

the Social Security System are applicable to the Northern Mariana Islands as they apply to Guam. 48 U.S.C. § 1801.

The issues in this case are:

1. Whether the District Court correctly rejected taxpayers' citizenship-based theories and concluded that, pursuant to the FICA provisions of the Internal Revenue Code and the related provisions of the Covenant, FICA taxes were properly imposed on wages paid to all of Concorde's employees in the Commonwealth of the Northern Mariana Islands, including its foreign contract workers, and that those FICA taxes were due from both Concorde and the employees, pursuant to I.R.C. § 3101 and § 3111.

2. Whether the District Court correctly held that taxpayers' due process challenge to the FICA statutes on the grounds of vagueness lacked merit because the statutory basis for imposing FICA taxes on foreign workers in the CMNI was sufficiently clear to put employers and employees on notice.

## STATEMENT OF THE CASE

### A. **Historical and legal background: the Commonwealth of the Northern Mariana Islands**

In 1975, the people of the Northern Mariana Islands endorsed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant), which was approved by the United States Congress in 1976.<sup>7</sup> See 48 U.S.C. § 1801. The Northern Mariana Islands thereby became a self-governing commonwealth, in “political union with and under the sovereignty of the United States of America.” Covenant, Article I, § 101.

Several opinions of this Court have detailed the history of the Northern Mariana Islands and the path towards political union with the United States. See, e.g., *Northern Mariana Islands v. United States*, 399 F.3d 1057 (9th Cir. 2005); *Saipan Stevedore Company, Inc. v. Director, Office of Workers’ Compensation Programs*, 133 F.3d 717 (9th Cir. 1998); *U.S. ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751 (9th Cir. 1993). After World War II, the United Nations established the

---

<sup>7</sup> Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263.

Trust Territory of the Pacific Islands encompassing most of the islands of Micronesia, including the Northern Mariana Islands, to be administered by the United States pursuant to a Trusteeship Agreement with the United Nations Security Council.<sup>8</sup> *Id.* at 751.

In the early 1970's, the Northern Marianas sought a closer, more permanent relationship with the United States. *Saipan*, 133 F.3d at 720. Those discussions resulted in the Covenant, which was unanimously endorsed by the Northern Mariana legislature, approved by 78.8% of Mariana plebiscite voters, and enacted into law by Congress. The Covenant redefined the political relationship between the Northern Marianas and the United States and established the Commonwealth as an unincorporated territory of the United States. *See* 48 U.S.C. § 1801. The Covenant was implemented in phases, *see* Covenant, Article X, § 1003, and on November 3, 1986, with the Covenant in full effect, the Trusteeship was terminated by Presidential Proclamation. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986), *reprinted in* 48 U.S.C. § 1681 note, at 222.

---

<sup>8</sup> Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.-N. Mar. I., art. 3, 61 Stat. 3301, 3302.

As taxpayers note, the Covenant, in several provisions, provided for unique economic support to the CMNI. Thus, as taxpayers observe, Article VII, § 701 and § 702 provide for direct financial support to the CMNI to aid economic development. Section 703(b) of the Covenant further provides that the federal income taxes and custom duties collected by the CMNI would be paid into the CMNI treasury. FICA taxes were expressly excluded from that provision, however. The FICA tax provisions, in short, were not subject to qualification based on economic concerns peculiar to the CMNI, and were simply made applicable to the CMNI as they applied in Guam.

Some Constitutional provisions and laws of the United States became fully applicable in the CMNI (Article V, § 501(a), § 502(a)) relatively quickly after approval of the Covenant;<sup>9</sup> some, like the laws that impose excise and self-employment taxes, became fully applicable after termination of the Trusteeship in 1986 (Article VI, § 606(b)).

Some, like the federal immigration laws and the minimum wage laws

---

<sup>9</sup> By Presidential Proclamation No. 4534, 42 Fed. Reg. 56,593 (1977), the provisions of the Covenant specified in Article X, § 1003(b), became effective on the same date that the Constitution of the CNMI became effective, which was January 9, 1978.

did not initially apply to the CMNI (Article V, § 503(a), § 503(c)).<sup>10</sup>

Accordingly, for approximately thirty years following ratification of the Covenant, the CMNI promulgated and applied its own immigration laws, designed to attract foreign workers to work in the CMNI's garment-manufacturing and tourism businesses. *See Sagana v.*

*Tenorio*, 384 F.3d 731 (9th Cir. 2004); *Commonwealth of the Northern Mariana Islands v. United States*, 670 F. Supp.2d 65, 72 (D.D.C. 2009).

Eventually, however, the CMNI's separate immigration laws were re-evaluated in light of concerns regarding the unanticipated consequences of CMNI's approach and in light of the goal of establishing uniform adherence to the immigration policies of the United States. *See*

*Commonwealth of the Northern Mariana Islands*, 670 F.Supp.2d at 72.

*See also* Robert L. Adair, *Closing a Loophole in the Pacific: Applying the Immigration and Nationality Act to the Commonwealth of the*

*Northern Mariana Islands*, 16 Asian Pac. Am. L.J. 74, 83-96 (2011).

---

<sup>10</sup> Under the Consolidated Natural Resources Act of 2008, Article V, § 503(a) was superseded by provisions of United States immigration law. Pub. L. No. 110-229, § 702(f), 122 Stat. 754, 860 (2008). And under the Fair Minimum Wage Act of 2007, the minimum wage provision of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206(a)(1)) became applicable to the CNMI. Pub. L. 110-28, § 8103(a), 121 Stat. 112, 188.

Against that backdrop, Congress enacted Title VII of the Consolidated Natural Resources Act of 2008, which generally applied federal immigration law to the CNMI, subject to a transition period. Pub. L. No. 110-229, 122 Stat. 754, 853 (2008).

**B. Taxpayers' refund suits and the proceedings in the District Court**

Concorde is incorporated in the CNMI and conducts garment-manufacturing operations there. (ER 105.) From 2004 to 2007, Concorde employed foreign temporary contract workers, who were lawfully admitted into the CNMI for work purposes. (*Id.*) Concorde paid the employer portion of FICA taxes, with respect to the wages that it paid to these workers, pursuant to I.R.C. § 3111. (ER 104-05, 120.) It also withheld the employee portion of FICA taxes from the workers' wages and paid that portion to the IRS, pursuant to I.R.C. §§ 3101, 3102. (ER 111, 122.)

Concorde and thousands of its workers who were "citizens of the Peoples Republic of China" then sought recovery of the taxes in this refund suit, alleging that the imposition of FICA taxes "on employees and employers in the Commonwealth of the Northern Mariana Islands

is without legal authority.”<sup>11</sup> (ER 105, 112.) Because I.R.C. § 3121(b)(A)(i) imposes FICA taxes on wages from employment within the United States “irrespective of . . . citizenship,” taxpayers asserted (ER 112) that the CMNI was not part of the United States for FICA purposes. *Compare* I.R.C. § 3121(b)(B). They advanced this argument notwithstanding the provisions of I.R.C. § 3121(e), which state that, with respect to employment subject to FICA, Guam is part of the United States (when that term is used geographically in the FICA provisions), and Article VI, § 601(c) and § 606(b) of the Covenant, which state that the Internal Revenue Code provisions generally, and the FICA provisions specifically, apply to the CMNI as they apply to Guam.

Taxpayers’ complaint also sought unspecified damages based on allegations that taxation of the wages of foreign workers in the CNMI was unconstitutional and that the IRS’s effort to collect the refund of 2006 taxes (which the IRS considered to be erroneous) was illegal. (ER 113-121.) The Government answered the complaint and filed a

---

<sup>11</sup> Taxpayers amended their complaint without objection by the Government, and only that complaint appears in the excerpts of record. (ER 237-238.) The amended complaint added more foreign contract workers as plaintiffs.

counterclaim for the amount of the refund of 2006 FICA taxes. (ER 93-103.)

The Government then filed a motion for judgment on the pleadings asserting that the complaint failed to state a claim for relief. (SER 12-60.) The Government contended that the above-mentioned provisions of the Internal Revenue Code (§ 3121(b)(A)(i) and § 3121(e)), and of the Covenant (Article VI, §§ 601(c) and 606(b)), taken together, require the payment of FICA taxes with respect to all wages from all employment in the CNMI, including the wages of foreign temporary contract workers. (SER 27-40.) After a hearing, the court held for the Government, dismissing taxpayers' complaint and entering judgment for the Government on its counterclaim. (ER 4-27, 239.)

### **C. The District Court's opinions**

The District Court summarized the FICA tax regime, noting that both employees and employers are required to pay a tax on wages with respect to employment under I.R.C. § 3101(a) and § 3111(a). (ER 11.) The court explained that "employment" is "service . . . performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States. . .," I.R.C.

§ 3121(b), and the term “United States,” when “used in a geographical sense,” “includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa,” I.R.C. § 3121(e). (*Id.*) Although the District Court recognized that the CNMI is not expressly identified in FICA’s statutory definition of “United States,” the court pointed out that Covenant § 601(c) deems references to Guam in the Internal Revenue Code to refer also to the CNMI, and that Covenant § 606(b) provides for the applicability to the CNMI of federal laws that “impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System” in the same manner “as they apply to Guam.” (ER 12.)

The District Court reasoned that FICA taxes must apply to all workers in the CNMI because (1) the term “United States” in the FICA statutes is a geographical term, *i.e.*, it refers to places “within the United States” and “outside the United States,” (2) Guam is expressly included in the United States when the term is used in a geographical sense, (3) “FICA taxes apply on Guam irrespective of the citizenship of either the employee or the employer,” and (4) Covenant § 606(b) makes

excise taxes “to benefit the Social Security System” applicable to the CNMI as they apply to Guam. (ER 16.)

The District Court rejected taxpayers’ claim that, even if the employer FICA tax is an excise tax that falls within Covenant § 606(b)’s terms, the employee FICA tax is an income tax that is not covered by § 606(b). (ER 16-17.) The court found that the “ordinary meaning” of the term excise tax “does not clearly include or clearly exclude the employee FICA tax,” but that an accepted legal definition of the term “can easily encompass the employee FICA tax.” (*Id.*) The court pointed out that legislative history also supports the conclusion that employee FICA taxes fall within the meaning of Covenant § 606(b). The District Court concluded that taxpayers’ “statutory challenge to FICA taxation fails.”

In analyzing the various constitutional challenges that taxpayers raised as to the imposition of FICA taxes on foreign contract workers in the CNMI, the court first looked to taxpayers’ claim that their due process rights were injured because the provisions imposing FICA taxes in the CNMI are unclear, which is the only constitutional argument

that taxpayers are pursuing on appeal.<sup>12</sup> (ER 18.) The District Court considered and rejected the contention that the FICA statutes and the Covenant are so vague as to leave taxpayers without guidance on the proper tax treatment of workers' wages, holding that "26 U.S.C. § 3121 and the relevant provisions of the Covenant" provide a statutory basis for the imposition of FICA taxes that is "sufficiently clear to put employers and employees in the CNMI on notice to pay them," as, in fact, taxpayers did. (ER 18.)

Finally, the District Court considered and rejected taxpayers' claim, no longer pursued on appeal, that the IRS wrongly attempted to collect a refund of taxpayers' 2006 FICA taxes. (ER 24.)

In a separate opinion, the District Court addressed the Government's counterclaim, which sought recovery of the 2006 FICA taxes that the Government alleged had been refunded to Concorde in error. (ER 4-8.) Once the District Court had concluded that taxpayers were subject to the payment of FICA taxes, the court further concluded

---

<sup>12</sup> Taxpayers have expressly abandoned the arguments they made below that imposing FICA taxes on the wages of foreign contract workers violates their Fifth Amendment due process and equal protection rights. (Br. 16 n.4.)

that “[t]he Government is . . . entitled to judgment as a matter of law on the claim seeking recovery of the erroneous refund to Concorde.”<sup>13</sup> (ER 6, 239.)

The District Court’s judgment is correct and should be affirmed.

### SUMMARY OF ARGUMENT

The District Court correctly concluded that FICA taxes are imposed on both employers and employees on wages from employment in the CNMI, irrespective of the citizenship of the employees and employers. Employment under I.R.C. § 3121(b)(A)(i) is defined as service performed by an employee for an employer, irrespective of the citizenship of either, if the employment is “within the United States.” The FICA statutes define “the United States,” when used in a geographical sense, to include Guam (I.R.C. § 3121(e)), and the Internal Revenue Code undisputedly applies employee and employer FICA taxes to wages for employment in Guam, irrespective of citizenship, absent a

---

<sup>13</sup> In reaching this conclusion, the District Court rejected taxpayers’ arguments that the Government’s counterclaim was time-barred and that the Government was barred by unclean hands from seeking recovery of the erroneously issued refund. (ER 7-8.) Taxpayers do not repeat these arguments on appeal, and thus have waived them. *See, e.g., Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1137 n.13 (9th Cir. 2012); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

specific and applicable statutory exemption to “employment” pursuant to I.R.C. § 3121(b). *See* I.R.C. §§ 3121(b)(1)-(21). The terms of the Covenant apply federal laws that apply in Guam (including the laws imposing taxes to support Social Security) to the CNMI. Consequently, as the District Court held, wages from employment in the CMNI are subject to FICA taxes without regard to the citizenship of the employees or employers because that employment is deemed to be within the United States. The Federal Circuit, in *Zhang v. United States*, 640 F.3d 1358 (2011), reached the same conclusion.

Concorde argues that even if FICA taxes generally apply in the CNMI without regard to citizenship, FICA taxes do not apply to the wages they paid foreign workers (specifically, Chinese workers) in the CMNI. Concorde argues that applying FICA taxes in the CNMI as they apply in Guam means that the wages it pays should be exempted from FICA because their foreign workers are “similarly situated” to Filipino contract workers in Guam, who are admitted to Guam under § 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C.) (H-2 status). Those workers from the Philippines are expressly exempted from the payment of FICA taxes by I.R.C. § 3121(b)(18). An express

and specific statutory exemption that does not apply by its terms cannot, however, be extended to groups not covered by its terms, even if it has been shown that the workers were similar (which is not the case).

Alternatively, taxpayers fall back on a claim that Covenant § 606(b) requires payment of employer, but not employee, FICA taxes. That claim relies on § 606(b)'s reference to "excise" and self-employment taxes that support the Social Security system; taxpayers assert that employee FICA taxes do not fall within this description. Taxpayers' argument is incorrect: FICA taxes are an excise tax on wages from employment. Taxpayers' argument ignores that fact that the employee portion of FICA (like the employer portion) is an employment tax under Subtitle C of the Internal Revenue Code that is imposed on wages — albeit, in the case of employees, the tax is imposed on income from wages, I.R.C. § 3101. In that regard, taxpayers also ignore the several contemporary authorities that treat the employer and employee portions of FICA indistinguishably as employment taxes and excise taxes. Moreover, as the District Court (and the Federal Circuit in *Zhang*) reasoned, any ambiguity in the coverage of § 606(b) was answered by reference to legislative history and the *Section by Section*

*Analysis of the Covenant.* Nothing can be found in those sources to suggest an intent to distinguish between employee and employer FICA taxes, which are consistently applied together.

Finally, taxpayers assert that having to discern the applicability of the FICA tax provisions by reading Code and Covenant provisions together results in unconstitutional vagueness, which relieves them of the obligation to comply with those laws. In this regard, taxpayers do not assert that any particular provision is vague, but that the difficulties of synthesizing the Code and the Covenant lead to unconstitutional vagueness. The complexity of a statutory scheme is not generally grounds for striking it down on constitutional grounds, and taxpayers point to no authorities that support that position. And, where an economic regulatory scheme is at issue, the statutory rule must be so vague and indefinite as to be no rule at all (*see, e.g., Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000)), which, again, is not the situation here. The District Court correctly rejected this argument, which falls of its own weight in light of taxpayers' longstanding practice of paying FICA taxes and their

acknowledgement that a possible argument against payment only came to them in recent years.

The District Court's judgment is correct and should be affirmed.

## ARGUMENT

### I

**The District Court correctly concluded that FICA taxes are due, from both employers and employees, with respect to wages from all employment in the Commonwealth of the Northern Mariana Islands, regardless of the citizenship of the employees**

#### Standard of review

This Court reviews *de novo* the District Court's grant of judgment on the pleadings. *See Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

**A. Wages from employment within the United States are subject to FICA, and the Commonwealth of the Northern Marianas, like Guam, is within the United States for FICA purposes**

#### **1. The governing statutes**

The taxes imposed by the Federal Insurance Contributions Act (26 U.S.C. §§ 3101-3128) are used to support the Social Security and Medicare systems and are imposed, on both employers and employees, on the wages from employment, broadly defined. Sections 3101(a) and (b) of the Internal Revenue

Code impose a tax on “wages (as defined in section 3121(a)) received by [an individual] with respect to employment (as defined in section 3121(b)),” *i.e.*, the employee FICA tax. Sections 3111(a) and (b) impose an employer FICA tax on wages. For both components of FICA, “wages” include “all remuneration for employment” (§ 3121(a), Addendum, *infra*).

Employment is broadly defined by I.R.C. § 3121(b), Addendum, although it is also subject to precisely drawn statutory exceptions (I.R.C. §§ 3121(b)(1)-(21)). Under I.R.C. § 3121(b)(A)(i), “employment” means “any service, of whatever nature, performed by an employee for the person employing him, irrespective of the citizenship or residence of either . . . within the United States.” Accordingly, non-citizens working “within the United States” are subject to FICA taxes. Under I.R.C. § 3121(b)(B), employment also includes services “outside of the United States” that are performed by citizens for an American employer.

When the term “United States” is used in a geographical sense, it includes Guam. I.R.C. § 3121(e)(2), Addendum. *See also* Treas. Reg. § 31.3121(e)-1 (26 C.F.R. 2007 ed.). Accordingly, because Guam is

within the United States, for FICA purposes, FICA taxes are imposed in Guam as they are imposed “within the United States,” under I.R.C. § 3121(b)(A)(i), irrespective of the citizenship of the employees or employers. As taxpayers point out, there is a statutory exception to FICA taxation in Guam, which applies to workers from the Philippines temporarily admitted to Guam under section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (INA) (H-2 status). I.R.C. § 3121(b)(18), Addendum. That specific exception does not, by its terms, apply here.<sup>14</sup>

The Covenant, whereby the Northern Mariana Islands became a Commonwealth of the United States, was approved by Congress and is codified at 48 U.S.C. § 1801.<sup>15</sup> Accordingly, the canons of statutory construction guide its interpretation. *See N. Mariana Islands v. United*

---

<sup>14</sup> That exception would also apply to workers from the Philippines temporarily admitted to the CMNI under that immigration status. *See* IRS Announcement 2012-43, 2012-51 I.R.B. 723, 2012 WL 6579763. But the workers with respect to whom Concorde is claiming an exemption are not workers from the Philippines that satisfy those INA criteria.

<sup>15</sup> Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263. *See also* H.R. Rep. No. 94-364, 94th Cong., 1st Sess. (1975); S. Rep. No. 94-433, 94th Cong., 1st Sess. (1975).

*States*, 279 F.3d 1070, 1072-73 (9th Cir. 2002). Under the terms of the Covenant, as the District Court concluded, the CMNI should be treated like Guam for purposes of applying the FICA taxing statutes.

Taxpayers' suggestion that the manner in which the CMNI became a Commonwealth of the United States places it in a special category when it comes to the application of FICA taxes is, thus, certainly not founded in the Covenant itself, and there is no suggestion in the Covenant or the FICA tax laws that a special FICA-exempting analysis applies to the CMNI.

First, as a general matter, Article I of the Covenant establishes that the CMNI is in political union with, and under the sovereignty of, the United States. Article V, styled "Applicability of Laws," establishes that certain United States statutes and constitutional provisions will apply in the CNMI as they apply elsewhere in the United States and, as a default, that the laws applicable to Guam as they are applicable to the states will apply in the CMNI. With certain exceptions, federal laws are applicable in the CNMI if they apply both to Guam and to the several states. FICA taxes certainly fit this description.

The provisions of the Covenant that specifically address taxation confirm that conclusion. Article VI of the Covenant addresses taxation, and Section 601(c), Addendum, establishes presumptions that relate to the applicability of tax laws. Like Article V, Section 502(a)(2)'s general rule, Section 601(c) equates Internal Revenue Code references to Guam with references to the CNMI:

(c) References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant.

Section 606(b), Addendum, makes explicit that tax laws relating to taxation that supports the Social Security system are applicable in the CNMI if they apply to Guam:

Excise and self employment taxes to support or which provide benefits from the United States Social Security System will on January 1 of the first calendar year following the termination of the Trusteeship Agreement or upon such earlier date as may be agreed to by the Government of the Northern Mariana Islands and the Government of the United States become applicable to the Northern Mariana Islands as they apply to Guam.

To summarize, under several terms of the Covenant, the FICA tax treatment of wages in Guam governs the tax treatment of wages in the CMNI (*see* Covenant, § 502(a)(1), § 601, and § 606(b)), and in Guam, pursuant to the provisions of the Internal Revenue Code

(I.R.C. §§ 3121(b)(A)(i), 3121(e)), FICA generally applies regardless of citizenship. The statutory exception to this rule, *i.e.*, I.R.C.

§ 3121(b)(18), for temporary workers from the Philippines in Guam who have a particular immigration status, which is the focus of taxpayers' argument for exemption from FICA, does not, by its terms, apply to Concorde or its workers, whom Concorde describes as Chinese citizens.

## **2. The District Court's application of the relevant statutes**

The District Court correctly applied the relevant statutes according to their terms to conclude that wages from employment in the CMNI are subject to FICA regardless of the citizenship of Concorde's employees because the CMNI is "within the United States" and the cited exception for Filipino workers in Guam does not apply.

As noted, the canons of statutory interpretation guide interpretation of the Covenant (*see N. Mariana Islands*, 279 F.3d at 1074). If that language is clear, Congressional intent must be given effect. *See United States v. Fei Ye*, 436 F.3d 1117, 1120 (9th Cir. 2006); *Saipan Stevedore*, 133 F.3d at 722. The District Court correctly reasoned that, because the Internal Revenue Code's references to FICA provisions apply to employment in Guam,

regardless of the citizenship of either the employee or employer, the same rules apply to the CNMI “[b]y operation of Covenant § 606(b).” (ER 16.)

The District Court noted that the Federal Circuit reached the same conclusion in *Zhang v. United States*, 640 F.3d 1358 (2011), which addressed the identical question presented here and concluded that FICA taxes apply, as a general rule, to wages from employment in the CNMI regardless of the citizenship of the employees. (ER 114.) Like the court here, the Federal Circuit relied on the terms of I.R.C. §§ 3121(b) and (e) and on Title VI of the Covenant. The Federal Circuit concluded that since “FICA is unquestionably a law that imposes excise taxes to support Social Security,” FICA laws apply to the CNMI because they are applicable to employees and employers in Guam. *Id.* at 1366-68.

Taxpayers inexplicably assert (Br. 30) that the *Zhang* decision did not address their argument that FICA taxes are not applicable “to nonresident workers admitted to the CNMI under the NWA

[Nonresident Workers Act, 3 N. Mar. I. § 4411, *et seq.*].”<sup>16</sup> The individual plaintiffs in *Zhang* were, like the individual plaintiffs here, “nonresident aliens, citizens of the People’s Republic of China, who worked for [an employer] in the CNMI as nonimmigrant alien contract workers . . . .” 640 F.3d at 1359. One of the arguments that the Federal Circuit addressed, and rejected, was the claim of these taxpayers that Pub. L. No. 98-213, § 19, 97 Stat. 1459, 1464, “limits FICA taxation in the CNMI” by excluding aliens “from participating in, and paying taxes to support” the Social Security system. *Id.* at 1368.

---

<sup>16</sup> Effective January 1, 2008, the Commonwealth Employment Act of 2007, 2007 N. Mar. I. Pub. L. No.15-108, replaced the Nonresident Workers Act. The Commonwealth Employment Act was superseded by the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 702(f), 122 Stat. 754, 860, which extended U.S. immigration laws to the CNMI as of November 29, 2009. See Dorothy E. Hill, *Guest Worker Programs Are No Fix For Our Broken Immigration System: Evidence From The Northern Mariana Islands*, 41 N. Mex. L. Rev. 131, 163 n. 195 (2011).

Section 702(f) of the Consolidated Natural Resources Act provides:

The provisions of this section and of the immigration laws, as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)), shall, on the transition program effective date, supersede and replace all laws, provisions, or programs of the Commonwealth relating to the admission of aliens and the removal of aliens from the Commonwealth.

The District Court in this case rightly recognized that the Federal Circuit in *Zhang* decided the same issues that are presented here.

The court's conclusion here regarding FICA was in keeping, moreover, with Congress's early intent that the "the federal laws applicable to Guam and of general application to the several States shall also apply to the Northern Mariana Islands." S. Rep. No. 94-433, at 77. *See also United States v. Chang Da*, 538 F.3d 1078, 1084 (9th Cir. 2008) (applying 18 U.S.C. §§ 2421 and 2314 to the CNMI because "they were enacted before the Covenant's 1978 effective date, and are applicable to the several states and Guam"); *Saipan Stevedore Co., Inc.*, 133 F.3d at 721 (applying Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, to the CNMI because "previously enacted laws which are of general application to the States and which apply to Guam, apply to the Northern Mariana Islands"); *N. Mariana Islands*, 279 F.3d at 1073 (applying Quiet Title Act to the CNMI because it "was in existence on January 9, 1978, and because the Quiet Title Act is applicable to Guam [fn. omitted] and to the States generally. . .").

In short, taxpayers have shown no error in the District Court's construction of the relevant provisions of the Internal Revenue Code and the Covenant.

**B. The arguments that taxpayers adopt from other related pending appeals, *American Pacific* and *Hong Kong Entertainment*, do not show error in the District Court's conclusion**

Taxpayers' initial argument is to the effect that the District Court erred because the applicable federal statutes governing FICA taxes and section 606(b) of the Covenant apply FICA taxes "only to CNMI domiciliaries entitled to U.S. citizenship and not to nonimmigrant aliens such as the plaintiff Employees in this case." (Br. 19-20.)

Taxpayers do not advance specific arguments in this regard, but instead adopt the arguments urged by the appellants in consolidated appeals pending before this Court, *i.e.*, *American Pacific Textile, Inc., et al. v. United States* (9th Cir. - No. 13-16348) and *Hong Kong Entertainment*

*(Overseas) International, Ltd. v. United States* (9th Cir. - No. 13-16355). (Br. 19.) While we question the propriety of this rather vague

"adoption" by reference of arguments made in a lengthy brief in a separate appeal, we discuss taxpayers' initial argument briefly, because taxpayers' other arguments build on it.

In the *American Pacific* and *Hong Kong Entertainment* appeals, the taxpayers rely on the structure of Title VI, § 606 of the Covenant to argue that the Covenant excludes foreign contract workers in the CNMI from FICA taxation. Covenant § 606 addresses both the merger of pre-Commonwealth funds with the United States Social Security system and with ongoing funding to support the Social Security system. Section 606(a) addresses the social security fund of the Trust Territory of the Pacific Islands and directs the transfer of those funds to the Northern Mariana Islands Social Security Retirement Fund, a segregated entity under the authority of the United States Treasury. Section § 606(b) establishes that, on a specified date, “[t]hose laws of the United States which impose excise and self-employment taxes to support . . . the United States Social Security System” will become effective in the CNMI “as they apply to Guam.” Section 606(c) explains how the Northern Mariana Islands Social Security Retirement Fund will be absorbed into the United States Social Security fund after the laws mentioned in § 606(b) take effect.

The *American Pacific* and *Hong Kong Entertainment* taxpayers made much of the fact (as do taxpayers here, *see* Br. 9, 12, 23, 27, 30),

that foreign contract workers in the Northern Marianas historically did not pay into the Trust Territory's social security fund or the Northern Mariana Islands Social Security Retirement Fund. They theorize that because Covenant § 606(a) and § 606(c) address the treatment of the amounts in those two funds, it follows that Covenant § 606(b) must be directed only to the treatment of workers who contributed to those amounts, *i.e.*, citizens and residents of the CNMI, but not foreign temporary contract workers.

Thus, much of the argument in *American Pacific* and *Hong Kong Entertainment* is based on the purported intent of the Covenant's drafters, as opposed to the plain language of the governing provisions. That intent (which taxpayers also resort to in this appeal, *see* Br. 21, 32, 34) — even if there were support for taxpayers' characterization of it, which there is not — is not determinative. In the first place, there is no reason to look behind the terms of the Internal Revenue Code and the Covenant, which are clear in imposing FICA taxes across the board in the CNMI to the same extent as they apply in Guam. Even if such an

exploration were appropriate, however, it would be Congressional intent that would be relevant, not the thoughts of the Covenant's drafters.<sup>17</sup>

The statutory organization that forms the basis for taxpayers' argument does not suggest the exclusion of any individuals from the taxes imposed by § 606(b), especially given that no such broad-based exclusion for all foreign workers applies in Guam, which was the model adopted by the Covenant. As the Federal Circuit in *Zhang* explained, the proximity of § 606(b) to § 606(a) and § 606(c) simply "reflect[ed] the

---

<sup>17</sup> The taxpayers in *American Pacific* and *Hong Kong Entertainment* likened the Covenant to a treaty, claiming that the intent of the drafters should therefore be taken into account. But a treaty is generally understood to be "a compact between independent nations." *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (the "Head Money Cases"); see also *The Federalist No. 75*, at 410 (Alexander Hamilton) (E.H. Scott ed., 2002) (a treaty's "objects are contracts with foreign nations .... They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign"); *Black's Law Dictionary* (7th ed. 1999) (a treaty is "[a] formally signed and ratified agreement between two nations or sovereigns"). By contrast, this Court has described the Covenant as a "legislative-executive agreement which redefined the political relationship between the United States and the Commonwealth." *Saipan Stevedore Co.*, 133 F.3d at 720. As the Court recognized in *Saipan*, "the Covenant acknowledges Congressional power over territories," Congress having deemed the relationship of the United States with the CNMI to be "territorial in nature with final sovereignty invested in the United States and plenary legislative authority vested in the United States Congress." 133 F.3d at 721, n.9, quoting S. Rep. No. 596, 94th Cong., 2d Sess. 2 (1976).

sequential timing” of those provisions, *i.e.*, § 606(a) addressed the handling of existing NMI social security funds before § 606(b)’s effective date, § 606(b) specified that FICA taxes would be applicable to the CNMI after termination of the Trusteeship Agreement, and § 606(c) directed how the previously segregated NMI social security funds would be handled when the new FICA provisions took effect. 640 F.3d at 1375-76. The Federal Circuit concluded that “[n]either the text nor the structure of § 606 supports [an] argument for excluding . . . nonimmigrant alien contract workers [ ] from the scope of Covenant § 606(b).” 640 F.3d at 1376.

The taxpayers in *American Pacific* and *Hong Kong Entertainment* also rely on a claimed inconsistency between FICA benefits and FICA taxes in the CNMI to assert that nonimmigrant foreign workers were intended to be exempt from FICA taxation. But the Internal Revenue Code and the Social Security Act, 42 U.S.C. §§ 1-2113, are two distinct statutory schemes that serve different purposes and address different matters. Title 42 addresses the administration of programs providing benefits and the scope of eligibility for those programs. The Internal Revenue Code’s concerns are the imposition and collection of taxes to

support the Social Security system. Accordingly, the FICA tax statutes are written expansively to tax all wages from employment and to foster the administerability of collection. *See United States v. Quality Stores*, 134 S.Ct. 1395 (2014); *United States v. Cleveland Indians Baseball Company*, 532 U.S. 200, 212 (2001). The Code's FICA provisions make no reference to the provisions of Title 42 as a condition on the broad applicability of FICA to wages from employment. I.R.C. §§ 3101, 3111, 3121(b). There is, in short, no basis for taxpayers' contention that § 606(b) of the Covenant should be read as imposing qualifications on the FICA statutes (imported from other realms) that do not appear on the face of § 606 itself.

In a similar vein, taxpayers here go to great lengths to describe the unique immigration scheme that existed in the CNMI prior to the enactment of the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 702(a)(1), 122 Stat. 754 (2008), which generally made the immigration laws of the United States effective in the CNMI. (Br. 7-10.) Prior to that time, the federal Immigration and Nationality Act did not apply to the CMNI, and the CMNI was authorized to implement its own immigration law, which it did. Accordingly, the CMNI enacted

the Nonresident Workers Act (NWA), 3 N. Mar. I. Code §§ 4411, *et seq.* See *Eche v. Holder*, 694 F.3d 1026, 1027 (9th Cir. 2012); *Sagana v. Tenorio* 384 F.3d at 733-735. Concerns over the consequences of those local laws led to their eventually being superseded by the federal system. See *Commonwealth of the Northern Mariana Islands*, 670 F.Supp.2d at 72; *Closing a Loophole in the Pacific*, 16 Asian Pac. Am. L.J. at 86.

Neither the local nor the federal immigration laws, at any point, however, served to override the provisions of the Internal Revenue Code and the Covenant that together dictate the imposition of FICA taxes on workers in the CNMI, including foreign temporary workers. As with Social Security benefits provisions, which operate separately from the FICA taxing provisions of the Internal Revenue Code, the CNMI's immigration system has nothing to do with the question of taxation that is presented here. Unless the tax provisions specifically provide for an exception drawn from immigration law (as is the case with I.R.C. § 3121(b)(18)), it is improper to read the immigration laws as creating exceptions to the FICA statutes that cannot be found in those statutes themselves.

Finally, after adopting the arguments advanced in *American Pacific* and *Hong Kong Entertainment*, taxpayers add their own gloss that the Covenant’s “legislative history confirms that the CNMI and the United States did not believe that the Covenant would subject nonresident workers to taxes levied under the U.S. Social Security system.” (Br. 27.) Taxpayers cite no legislative history that “confirms” this claim. Instead, they point to evidence that the CNMI (not Congress) was concerned about the effect of new federal taxes on the CNMI economy after the Covenant became effective (Br. 27-28), and speculate that, given this concern, significance should be attributed to the absence of any references to FICA taxes on foreign contract workers in voter education materials, the *Section by Section Analysis* of the Covenant,<sup>18</sup> and congressional debates (Br. 28-29).

This is a slender reed on which to base a claim that Congress did not intend for FICA taxes to apply to nonimmigrant foreign contract workers in the CNMI. The voter education materials on which taxpayers rely did not inform CNMI voters of the coming FICA tax

---

<sup>18</sup> Hearing Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 94th Cong., Serial No. 94-28, 626 (1975).

obligation at all, either as it applied to residents or as it applied to nonimmigrant foreign workers. The *Section by Section Analysis* (at 80-81) explained that new FICA taxes coming to the CNMI would be comparatively “burdensome,” but also explained that gradual implementation was intended to address this problem.

The Congressional comments that taxpayers cite (Br. 29) were addressed to concerns about the costs of bringing the CNMI into the federal fold. The most that taxpayers have been able to garner from these comments is their assertion that, if FICA taxes were going to be imposed on nonimmigrant foreign workers in the CNMI, someone would surely have mentioned this windfall as a counterweight to other costs. Nothing in taxpayers’ argument demonstrates that “the parties to the Covenant” “did not intend to apply FICA taxes to the wages earned by nonresident aliens,” and, at all events, taxpayers’ unfounded speculations about intent cannot serve to abrogate statutory language. (Br. 30.)

**C. Foreign contract workers in the CNMI are not exempt from FICA taxation under a statutory exemption that applies to workers from the Philippines**

Taxpayers assert that, even if FICA taxes in the CNMI are not limited to CNMI citizens (a limit that they and the taxpayers in *American Pacific* and *Hong Kong Entertainment* advocate), the wages of the individual plaintiffs in this case nonetheless are not subject to FICA taxes. (Br. 20-30.) They base this argument on Covenant § 606(b)'s dictate that FICA taxation in CNMI should follow the FICA taxing scheme in Guam. Section 3121(b)(18) of the Internal Revenue Code, as noted, provides an exemption from FICA tax for contract workers in Guam who are residents of the Philippines. According to Concorde (Br. 22), their foreign contract workers in the CNMI, who are not from the Philippines, are, nonetheless, "similarly situated" to those exempt contract workers, and thus they should be excused from FICA taxes for work in the CNMI. Again, taxpayers' argument depends on reading terms and conditions into the FICA statutes and the Covenant that are simply not there.

Section 3121(b)(18) was enacted in 1960, when Social Security benefits and FICA taxation first became applicable in Guam. *See Pub.*

L. 86-778, § 103(a), (o), 74 Stat. 924, 936, 939. It provides that the term “employment,” for FICA purposes, does not include “service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)).” Simultaneously with its enactment, Congress provided that workers from the Philippines who were temporarily in Guam would not be covered by the Social Security system. Pub. L. 86-778, § 103(d), 74 Stat. 937, 939; *see* 42 U.S.C. § 410(a)(18) (“employment” does not include “service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 1101(a)(15)(H)(ii) of Title 8”). The House Report indicated “that the Philippine Government favors this exclusion.” H.R. Rep. 1799, 86th Cong., 2d Sess. 19.

In keeping with the terms of Covenant § 601(c) and § 606(b), the IRS recognizes that the tax exemption provided by I.R.C. § 3121(b)(18) for Filipino contract workers in Guam also applies in the CNMI. Thus, the IRS has stated that an exemption from FICA taxes applies to a

“Philippine or Korean resident admitted to Guam under section 101(a)(15)(H) of the Immigration and Nationality Act or *admitted as contract workers to the Commonwealth of the Northern Mariana Islands*” (emphasis added).<sup>19</sup> *IRS Publication 80, Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands* (2005). The IRS’s position on the exception is entirely consistent with its reading of the applicable statutes: the FICA statutes apply in the CMNI as they apply in Guam.

Taxpayers argue for more, suggesting that I.R.C. § 3121(b)(18) and Covenant § 606(b) should be read to exempt *all* nonresident workers in the CNMI from FICA taxes because of the similarity of their situation to that of Filipino workers in Guam. (Br. 27.) The individual plaintiffs here, however, are not similarly situated to the Philippine workers who are exempted by statute from taxation under the FICA

---

<sup>19</sup> South Korean workers in Guam are exempt from FICA taxes under a 1976 treaty between the United States and South Korea. Convention between the United States of America and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and the Encouragement of International Trade and Investment, June 4, 1976, 30 U.S.T. 5253.

statutes (and excluded from coverage under the Social Security Act). There is no FICA exemption for Chinese workers temporarily admitted to Guam or to the CMNI. And although Concorde suggests that its Chinese workers may not be eligible for Social Security coverage, it does not rely on a particular statute for that suggestion. In any event, taxation of wages to support the Social Security system and the provision of benefits under that system are two separate and distinct matters: FICA taxation is not (absent some specific statutory exception) contingent upon the worker's eligibility for benefits. *See Cleveland Indians*, 532 U.S. at 212 (“Although Social Security taxes are used to pay for Social Security benefits in the aggregate, there is no direct relation between taxes and benefits at the level of an individual employee.”) Finally, taxpayers make no claim that any consultations have been had with the Chinese Government about how their citizens temporarily working in the CNMI should be treated for Social Security purposes. Concorde nonetheless claims that the rule of I.R.C. § 3121(b)(18) applies to their temporary Chinese workers.<sup>20</sup>

---

<sup>20</sup> In the District Court, taxpayers acknowledged that I.R.C. § 3121(b)(18) offers them no relief because it does not extend “to

(continued...)

The law is clearly to the contrary when it comes to taxpayers' attempt to stretch a specific statutory exemption to persons outside its reach. As the Supreme Court has explained, “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980)); see also *Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878, 880 (9th Cir. 1982) (rejecting claim of Indian tribe that it was exempt from federal excise taxes under provision exempting states, state subdivisions, and the District of Columbia; even though Indian tribe was a governmental entity, “a specific exemption remains necessary”).

---

(...continued)

workers in the Commonwealth who are not admitted pursuant to an H2B visa issued under rules and regulations set forth in the [Immigration and Nationality Act].” (Doc. 40 at 16.) They argued, however, that the disparate treatment of workers from the Philippines (and Korea), as opposed to workers from China, violated equal protection, an argument they have abandoned on appeal.

Taxpayers attempt to cobble together some evidence of an intent to allow a broad tax exemption that can apply to foreign contract workers in the CNMI, pointing out that the drafters of the Covenant at one time provided for FICA taxation in the CNMI under “laws of the United States which impose taxes to support, or which provide benefits from, Title II of the Social Security Act of 1935, as amended, and those regulations promulgated under the authority promulgated therein.” (Br. 21, citing Dec. 19, 1974 Draft Covenant § 605(b)). They note that the final language of Covenant § 606(b) provided for the imposition of FICA taxes in the CNMI “as they apply to Guam,” and assert that this change in language must have had significance because “the FICA statutes do not apply across the board to every worker within [Guam], regardless of citizenship or immigration status.” (Br. 22.)

As noted above (at p. 34 n.17), because the Covenant is construed like a statute, it is not the intent of the Covenant’s drafters that determines the question presented here, but, rather, to the extent the governing provisions are not clear, it is the intent of Congress that is relevant. *Northern Mariana Islands v. United States*, 279 F.3d at 1074 n.5 (it would “undermin[e] congressional intent if we were to decline to

give effect to what section 502(a)(2) of the Covenant by its terms requires”); *Zhang*, 640 F.3d at 1364 (“canons of statutory construction guide our interpretation of the Covenant”). The evidence of legislative intent to excuse foreign contract workers from FICA taxation is confined to the enactment of I.R.C. § 3121(b)(18), which affects only Filipino workers (with a particular immigration status) in Guam and in the CNMI (by extension under Covenant § 601(c) and § 606(b)).

Concorde suggests that the absence of the exemption they seek for their foreign workers can be explained by the fact that the exemption from FICA tax found in I.R.C. § 3121(b)(18) is based on the immigration status of Filipino workers under United States immigration laws, while, during the years at issue, workers in the CNMI had no such status due to the CNMI’s separate immigration system. (Br. 25.) There is no reason, however, that Congress could not have provided an exemption from the FICA tax laws based on a criterion other than immigration status under federal law, including immigration status in the CMNI. The exceptions to FICA taxation in §§3121(b)(1)-(21) do, after all, range rather widely. The absence of the exemption that taxpayers are looking

for cannot be explained away by suggesting that it would have been impossible legislatively to accomplish the result that taxpayers seek.

Finally, taxpayers assert that it is not “material” that I.R.C. § 3121(b)(18) “is addressed to Philippine residents,” because they claim that this simply reflects the fact that the Philippines “is the country the United States targeted with its Guam immigration policies.” (Br. 26.) They claim that they should not be excluded from this exemption simply because the CNMI historically exercised its immigration powers to create a system that “recruited temporary workers from all over the world rather than focusing on a single location” as did Guam in the case of the Philippines. (Br. 26.) It is difficult to imagine what could be more material to the reading of I.R.C. § 3121(b)(18) than its terms; the statute singles out workers from the Philippines and addresses their tax liability under the FICA statutes.

**D. Under Covenant § 606(b), both employees and employers are subject to FICA taxes on wages paid for employment in the CNMI**

**1. Like the Federal Circuit in *Zhang*, the District Court read § 606(b) as making both employees and employers subject to FICA taxation**

As explained above, Covenant § 606(b) provides that “[t]hose laws of the United States which impose excise and self-employment taxes to

support the Social Security System” will “become applicable to the Northern Mariana Islands as they apply to Guam” following termination of the Trusteeship Agreement. Taxpayers contend (Br. 31-38) that the employee FICA tax is not an excise tax, and that, because Covenant § 606(b) refers only to excise and self-employment taxes, it does not impose employee FICA taxes in the CNMI. The District Court correctly rejected that narrow and, ultimately, unreasonable reading of the statutes.

The employment taxes that fund the federal Social Security and Medicare systems have been recognized as excise taxes. *See Public Employees’ Retirement Bd. v. Shalala*, 153 F.3d 1160, 1161 (10th Cir. 1998) (federal Social Security and Medicare systems funded by excise taxes separate and distinct from federal income taxes). *See also United States v. Fior D’Italia, Inc.*, 536 U.S. 238, 241 (2002) (“[T]he tax law imposes, not only on employees, but also ‘on every employer,’ an ‘excise tax,’ *i.e.*, a FICA tax, in an amount equal to a percentage ‘of the wages . . . paid by him with respect to employment.’”) While Subtitle A of the Internal Revenue Code addresses income taxes (I.R.C. §§ 1-1563), Subchapter C addresses “employment” taxes (I.R.C. §§ 3101-3510). *See*

*Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011) (discussing FUTA taxes as employment taxes). FICA taxes, which are imposed on both employers and employees, are taxes on the “wages” from “employment,” and are a subset of employment taxes, contained in Chapter 21 of Subchapter C (I.R.C. §§ 3101-3128).

Although FICA’s employee provision speaks in terms of the tax being imposed on “the income of every individual” with respect to “wages” (I.R.C. § 3101), and the employer provision speaks in terms of an “excise tax” on the wages (I.R.C. § 3111), FICA taxes are focused on employment and the wages therefrom; they are not, in fact, true income taxes (taxing income within the scope of I.R.C. § 61).

That conclusion was reached by the Federal Circuit in *Zhang*, wherein the Court found it “reasonable to conclude that ‘excise’ in Covenant § 606(b) refers to both the employee and employer FICA taxes.” 640 F.3d at 1371. Noting that the Internal Revenue Code does not offer a definition of “excise” taxes, the Court observed that the term “excise” has long been used to refer to “various license fees and practically every internal revenue tax except the income tax” (quoting

*Black's Law Dictionary* (5th ed. 1979), and aptly reasoned that “[t]he FICA tax, a tax on employment, fits this definition.” *Id.*

Moreover, as the Federal Circuit observed, the term “excise” tax as well as the term “employment tax” are broadly used to encompass both the employee and employer FICA taxes. 640 F.3d at 1372 (citing *Fior D’Italia, Inc.*, 536 U.S. at 240; *Cleveland Indians*, 532 U.S. at 204). This Court, like other Circuits, has broadly swept the employee portion of FICA under the general rubric of “employment” taxes. *See, e.g.*, *Charlotte’s Office Boutique, Inc. v. Commissioner*, 425 F.3d 1203, 1206, 1209 (9th Cir. 2005) (“employment taxes” used to refer to both employer and withheld employee portion of FICA); *Malar v. Commissioner*, 151 F.3d 962, 965 (9th Cir. 1998). *See also Pub. Emp. Ret. Bd.*, 153 F.3d at 1161; *Atl. Dept. Stores, Inc. v. United States*, 557 F.2d 957, 958 (2d Cir. 1977). Given the contemporary understanding of FICA taxes as employment taxes (not income taxes), it is reasonable to conclude, as did the District Court, that Covenant § 606(b)’s reference to excise taxes that support the Social Security system “can easily encompass the employee FICA tax” as well as the employer FICA tax. (ER 17.)

The District Court found support for this conclusion, moreover, in a reading of legislative history. (ER 17.) Like the *Zhang* court, the District Court examined the Congressional committee reports and the *Section by Section Analysis*, and found no suggestion of any intent to distinguish between employer and employee FICA taxes. (*Id.*) House Report No. 94-364, at 11, for example, stated that chamber's understanding that "Subsection (b) [of Covenant § 606] assures that the laws of the United States which impose taxes to support . . . the United States Social Security System will become applicable to the Northern Marianas as they are applicable to Guam upon termination of the Trusteeship Agreement . . ."). The Senate Report considering approval of the Covenant contained the same language. S. Rep. 94-433, at 82-83. And the *Section by Section Analysis*, which this Court has recognized as authoritative evidence of the Covenant's meaning (*see, e.g., Northern Mariana Islands v. United States*, 399 F.3d at 1065), contained the drafter's statement that "Subsection (b) [of Section 606] assures that the laws of the United States which impose taxes to support or which provide benefits from the United States Social Security System will become applicable to the Northern Marianas as they are applicable to

Guam upon termination of the Trusteeship Agreement . . . .” *Id.* at 80-81. “At that point,” the *Section by Section Analysis* continued, “those laws of the United States which impose taxes to support the United States Social Security system will become applicable.” *Id.*

The District Court concluded from its study of relevant statutory language and legislative history that the Covenant’s references to “taxes that support” the Social Security system were intended to include both the employer and employee portions of FICA. (ER 17.) The Federal Circuit, looking to the same sources, reached the same conclusion: the relevant legislative history demonstrates that Congress intended to apply both the employee and employer FICA taxes to the CNMI through Covenant § 606(b).<sup>21</sup> *Id.* at 1374.

---

<sup>21</sup> The Federal Circuit in *Zhang*, 640 F.3d at 1373-74, also found it meaningful that the Second Interim Report of the Northern Mariana Islands Commission on Federal Laws assumed that both “[e]mployers and employees in the Northern Mariana Islands are made subject to taxes imposed by the Federal Insurance Contributions Act to support the federal social security system” by the terms of the Covenant. *See N. Mariana Islands Commission on Federal Laws, Welcoming America’s Newest Commonwealth*, at 415.

**2. Taxpayers show no error in the District Court's conclusion**

The District Court recognized that the Internal Revenue Code does not define the term “excise tax,” and turned to the rule in *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012), that an undefined statutory term should be given its “ordinary meaning.” (ER 16.) The court found, however, that the ordinary meaning of “excise tax” does not clearly include or exclude employee FICA taxes. (*Id.*) The court thus looked to *Black's Law Dictionary* for further explication, and concluded that the definition there “easily encompassed” the employee FICA tax as well as the employer FICA tax. (ER 16-17.) Taxpayers find fault with the District Court's analysis, asserting that the court failed properly to apply *Taniguchi's* standards. (Br. 32-33)

Taxpayers first complain that the District Court should have gone beyond the Internal Revenue Code and looked to the Covenant for a definition of “excise tax.” They claim that the Covenant provides such a definition, because it “refers specifically to the Social Security statutes, which use ‘excise tax’ to describe only the tax imposed on employers.” (Br. 32-33.) Taxpayers' circular argument shows no error on the part of

the District Court. Section 606(b) of the Covenant does not refer to “the Social Security statutes,” but rather refers to the “federal statutes which impose excise and self-employment taxes to support the Social Security System,” *i.e.*, the FICA tax provisions of the Internal Revenue Code. It is precisely these provisions that the District Court and the *Zhang* court explored in attempting to discern whether they should be read to include both employee and employer FICA taxes.

Taxpayers further claim that the District Court failed to follow *Taniguchi’s* dictate to read an undefined term in a statute so as to be consistent with related statutory provisions. (Br. 33-34, 38.) According to taxpayers, the court failed to realize that relying on the *Black’s Law Dictionary* definition of “excise tax” would cause the term to encompass the self-employment tax and thus render superfluous Covenant 606(b)’s references to both excise and self-employment taxes. (Br. 34.)

Taxpayers are wrong. The Covenant’s separate references to excise and self-employment taxes are not redundant, because the two are separate types of levy. Self-employment tax is imposed by I.R.C. §§ 1401-1403, found in Subtitle A of the Internal Revenue Code, and because it is asserted against self-employed individuals rather than wage-earning

employees, it has to be imposed on self-employment income, not wages from employment. Thus, a separate mention of those taxes is not superfluous.

Taxpayers also assert that the District Court attributed too much significance to statements in the *Section by Section Analysis* and in Congressional reports that referred to federal laws “which impose taxes to support the United States Social Security System.” (Br. 36-37.) The District Court read these statements in the same way as did the *Zhang* court, finding that they offered no evidence of any intent to distinguish between employee and employer FICA taxes under the regime being imposed. Taxpayers attempt to undermine this reasonable interpretation by pointing out that Social Security benefits are not applied identically in the CNMI and in Guam and by theorizing that the quoted statements may just have been simplifications that omitted details “to provide a clearer picture.” (Br. 37.)

As explained above at pp. 35-36, any attempt to intertwine the taxing provisions of the Internal Revenue Code with the benefits provisions of the Social Security Act, and to make the former dependent on the latter, is misdirected. *See Cleveland Indians*, 532 U.S. at 212.

Covenant § 606(b) provides for the imposition of FICA taxes in the CNMI as they apply in Guam, without regard to whether benefits under the Social Security system are identical in the two geographic areas. Taxpayers do not suggest, nor could they, that employee FICA taxes are not due with respect to wages for employment in Guam.

Moreover, taxpayers' reading of § 606(b) to the effect that employees need not pay FICA taxes on wages earned in the CNMI would achieve the bizarre result that CNMI citizens (whom no one disputes would be entitled to Social Security benefits to the same extent as any United States citizen) would pay no taxes to support the Social Security system. Taxpayers' reading leads to the equally bizarre conclusion that Congress deliberately chose to reduce FICA taxation in the CMNI to one-half of the rate applicable everywhere else.

Excusing employees in the CNMI from the payment of FICA taxes would also result in an unwarranted distinction between employees and self-employed individuals, who are plainly included in the coverage of § 606(b), and who pay both the employee's and employer's shares of FICA taxes. As this Court has recognized, statutes should be read to avoid absurd results. *See United States v. Tatoyan*, 474 F.3d 1174, 1181

(9th Cir. 2007) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)). The District Court correctly rejected taxpayers' reading of § 606(b) of the Covenant.

## II

### **Taxpayers' constitutional due process argument, based on the theory that the statutes are void for vagueness, is without merit**

#### **Standard of review**

The District Court's disposition of the constitutional issue on the motion for judgment on the pleadings is reviewable *de novo*. See *Fleming v. Pickard*, 581 F.3d 922 at 925.

---

Taxpayers' due process argument, to the effect that they were relieved of their obligation to pay FICA taxes because the governing provisions of the Internal Revenue Code and the Covenant lacked clarity, was correctly rejected by the District Court. Taxpayers argue (Br. 17) that, if this Court "disagrees with the Plaintiffs' statutory arguments, the Plaintiffs still should not have to pay FICA taxes because the legal web that the Government constructs to justify taxation is so vague that application would violate the Plaintiffs' constitutional rights to due process." This argument is akin to a void-

for-vagueness claim, *i.e.*, a claim that a provision is invalid when its “words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law.” *Champlin Refining Co. v. Corporation Com’n of State of Oklahoma*, 286 U.S. 210, 243 (1932).

The so-called vagueness doctrine bars the application of “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011). Those guidelines are applicable to tax statutes. *See Kahn v. United States*, 753 F.2d 1208, 1222 n. 8 (3d Cir. 1985) (void for vagueness challenge required taxpayer to demonstrate that she was unable to deduce what was allowed). Where an economic or regulatory scheme is at issue, the statutory rule must be so vague and indefinite as to be essentially no rule at all. *See Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d at 217.

Taxpayers do not argue, however, that any particular provision of the Internal Revenue Code or the Covenant is unconstitutionally vague.

Instead, they construct a novel claim that unconstitutional “vagueness” results from “the difficulty of synthesizing cross-referencing provisions in FICA statutes, the Covenant, and the CNMI’s own immigration law.” Taxpayers argue that the Government has failed to “provide a consistent and coherent explanation of why the governing laws apply to the Plaintiffs,” and that, in such circumstances, “those laws could not have placed the Plaintiffs on notice that they were required to pay FICA taxes” (Br. 39, 42).

Courts, including this one, have held, however, that a vagueness argument cannot survive the maker’s evident awareness of the proscriptions of the statute alleged to be too vague. In *United States v. Moore*, 109 F.3d 1456, 1467 (9th Cir. 1997), for example, this Court considered a vagueness argument advanced by two defendants who were convicted after cooperating in the purchase of a firearm for one defendant’s fourteen-year-old son. Both defendants argued that the provision of the Gun Control Act that barred a straw man purchase (18 U.S.C. § 922(a)(6)) was too vague to pass constitutional muster. The Court rejected this argument, partly based on evidence that “both [defendants] understood their respective legal obligations in this case,

even though they unlawfully sought to work around them.” *Id*; see also *Parker v. Levy*, 417 U.S. 733, 756 (1974) (test for vagueness does not allow “one who has received fair warning of the criminality of his own conduct from the statute in question” “to attack it because the language would not give similar fair warning with respect to other conduct. . .”); *United States v. Saffo*, 227 F.3d 1260, 1270 (10th Cir. 2000) (rejecting vagueness challenge where defendant’s conduct evidenced awareness of its illegality).

Because taxpayers’ payments of FICA taxes clearly indicate their understanding of a statutory obligation to make such payments, their claim that the taxing regime is unconstitutionally vague must fail.

Finally, taxpayers’ claim that the Government has not provided a consistent explanation of the governing laws is incorrect, but is, in any event, irrelevant. Taxpayers complain that the Government has relied on three different Covenant provisions to support the imposition of FICA taxes in the CNMI (Br. 40), but they show no inconsistency on the Government’s part simply because it has relied on multiple parts of an overall statutory scheme to buttress an argument about the effects of that scheme. They complain that the Government “changed its mind”

about the reading of Covenant § 606(b) in the *Zhang* litigation, but this so-called change of mind was instead an additional argument to show that the term “excise” in § 606(b) encompasses both employee and employer FICA taxes. And most of taxpayers’ complaints are directed to various Government statements about the availability of social security benefits in the CNMI, even though they acknowledge that “[b]enefits may not be before the Court.” (Br. 41-42.) Taxpayers can point to no alteration in the Government’s consistent position that FICA taxes apply to the wages of foreign contract workers in the CNMI and are payable by both employees and employers.

As the District Court pointed out, the fact that taxpayers paid FICA taxes during the periods at issue is plain evidence that they were on notice of their obligation to do so. (ER 18.) Taxpayers themselves concede as much, asserting that it was only five years ago that they “examin[ed] the Social Security system as it existed in the CNMI” and “concluded that they were *not* responsible for FICA taxes” (emphasis added). (Br. 40.) Taxpayers’ constitutional due process argument was properly rejected as meritless.

**CONCLUSION**

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

TAMARA W. ASHFORD  
*Acting Assistant Attorney General*

/s/ Teresa T. Milton

BRIDGET M. ROWAN (202) 514-1840  
TERESA T. MILTON (202) 514-2947  
*Attorneys*  
*Tax Division*  
*Department of Justice*  
*Post Office Box 502*  
*Washington, D.C. 20044*

*Of Counsel:*  
ALICIA A.G. LIMTIACO  
*United States Attorney*

JUNE 2014

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that there are two pending appeals that present the same issues as those presented here. The Court has ordered the consolidation of those appeals: *American Pacific Textile, Inc., et al. v. United States* (9th Cir. – No. 13-16348) and *Hong Kong Entertainment (Overseas) International, Ltd. v. United States* (9th Cir. – No. 13-16355). The brief for the appellee in the consolidated appeals was filed on May 30, 2014.

## CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements of Federal Rule of Appellate Procedure 32(a)

Case Nos 13-17491

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 12,235 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 2010 in 14-point Century Schoolbook, *or*

this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/ Teresa T. Milton

Attorney for United States

Dated: June 13, 2014

**CERTIFICATE OF SERVICE**

It is hereby certified that on June 13, 2014, I electronically filed the foregoing brief for the appellee with the Clerk of the Court using the CM/ECF system. Counsel for the appellant is a registered CM/ECF user, and will be served by the CM/ECF system.

/s/ Teresa T. Milton

TERESA T. MILTON

*Attorney*

**ADDENDUM**

	<b>Page</b>
Internal Revenue Code (26 U.S.C.):	
§ 3121(a) .....	67
§ 3121(b) .....	67
§ 3121(e) .....	68
Covenant Article VI:	
Section 601 .....	68
Section 606(b) .....	69

26 U.S.C. § 3121. Definitions

(a) Wages

For purposes of this chapter, the term “wages” means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash

\* \* \*

(b) Employment

For purposes of this chapter, the term “employment” means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

\* \* \*

(18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii));

(e) State, United States, and citizen

For purposes of this chapter—

(1) State

The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) United States

The term “United States” when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

\* \* \*

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263, *reprinted as amended at* 48 U.S.C. §1801:

Title VI, Section 601:

(a) The income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax on the first day of January following the effective date of this Section, in the same manner as those laws are in force in Guam.

(b) Any individual who is a citizen or a resident of the United States, of Guam, or of the Northern Mariana Islands (including a national of the United States who is not a citizen), will file only one income tax return with respect to his income, in a manner similar to the provisions of Section 935 of Title 26, United States Code.

(c) References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant.

Title VI, Section 606:

\* \* \*

(b) Those laws of the United States which impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System will on January 1 of the first calendar year following the termination of the Trusteeship Agreement or upon such earlier date as may be agreed to by the Government of the Northern Mariana Islands and the Government of the United States become applicable to the Northern Mariana Islands as they apply to Guam.