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TONY KORAB, TOJIO CLANTON,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

TONY KORAB, TOJIO CLANTON,
and KEBEN ENOCH, each
individually and on behalf of those
persons similarly situated,

Plaintiffs,

vs.

LILLIAN B. KOLLER, in her official
capacity as Director of the State of
Hawai'i, Department of Human
Services, and KENNETH FINK, in his
official capacity as State of Hawai'i,
Department of Human Services, Med-
QUEST Division Administrator,

Defendants.

Case No. CV10-00483 JMS-KSC
[Civil Rights Action]
[Class Action]

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM IN SUPPORT OF
MOTION; DECLARATION OF
ELIZABETH M. DUNNE;
DECLARATION OF KEBEN
ENOCH; DECLARATION OF
ESPERN LEIT; DECLARATION
OF TOJIO CLANTON;
DECLARATION OF TONY
KORAB; DECLARATION OF
NEAL A. PALAFOX;
DECLARATION OF WILFRED
ALIK; DECLARATION OF
RITABELLE FERNANDES;
DECLARATION OF SEJI
YAMADA; DECLARATION OF
JOSEPH HUMPHREY; EXHIBITS
"A" – "H"; CERTIFICATE OF
WORD COUNT; CERTIFICATE
OF SERVICE**

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs TONY KORAB, TOJIO CLANTON, and KEBEN ENOCH, individually and on behalf of those similarly situated, by and through their counsel Lawyers for Equal Justice, Alston Hunt Floyd & Ing, and Bronster Hoshibata, hereby move this Court for entry of a preliminary injunction prohibiting the State of Hawai'i, Department of Human Services ("DHS") from (1) excluding (a) individuals residing in Hawai'i under Compacts of Free Association ("COFA") (the "COFA Residents"), and (b) resident aliens lawfully in the United States for less than five years ("New Residents") (collectively, "Plaintiffs"), from health benefit programs that are available to citizens of the United States and other residents of Hawai'i, and (2) enrolling COFA Residents and New Residents in a new program called Basic Health Hawaii ("BHH"), which provides benefits inferior to those available to other Hawai'i residents under other DHS administered programs.

Plaintiffs seek this relief because (1) DHS's policy of refusing to allow COFA Residents and New Residents access to the same health benefit programs as United States citizens violates the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution by discriminating against Plaintiffs on the basis of alienage; and (2) DHS's use of alienage as a criterion for

determining eligibility for health benefits violates the Federal government's exclusive power over immigration.

In addition, on behalf of a subclass consisting of disabled COFA Residents and New Residents, Plaintiffs seek an injunction barring DHS from excluding them from programs such as QUEST, QExA, and SHOTT, which in effect denies them outpatient-based treatment, makes treatment available only in a hospital, and therefore violates the "integration mandate" of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12132.

DHS implemented a policy that fundamentally changed the benefits available to Plaintiffs in violation of the Equal Protection Clause and the ADA. The policy should be undone. Plaintiffs ask this Court to order DHS to:

- (1) re-enroll all COFA Residents who were disenrolled from DHS-sponsored health benefits programs (*e.g.*, QUEST, QUEST-Net, QUEST-ACE, QExA, SHOTT) on the basis of their alienage;
- (2) allow COFA Residents to enroll in other DHS-sponsored sponsored health benefits programs for which they would be eligible if they were U.S. citizens;
- (3) allow New Residents to enroll in DHS-sponsored health benefit programs (*e.g.*, QUEST, QUEST-Net, QUEST-ACE, QExA, SHOTT) for which they would be eligible but for their immigration status; and

(4) require DHS to provide health care services to disabled Plaintiffs in a manner consistent with the integration mandate of the ADA.

This Motion is brought pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure and is supported by the attached memorandum, declarations, and exhibits and by such additional matters as may be presented to this Court at hearing.

DATED: Honolulu, Hawai'i, September 13, 2010.

/s/ J. Blaine Rogers

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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

TONY KORAB, TOJIO CLANTON,
and KEBEN ENOCH, on behalf of
themselves and all others similarly
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Plaintiffs,

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LILLIAN B. KOLLER, in her official
capacity as Director of the State of
Hawaii, Department of Human
Services, and KENNETH FINK, in his
official capacity as Med-QUEST
Division Administrator of the
Department of Human Services, State
of Hawaii,

Defendants.

Case No.
[Civil Rights Action]
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**MEMORANDUM IN SUPPORT OF
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Less than a year after their first illicit attempt to cut health care benefits was halted by this Court, Defendants are trying again. Under the new – but substantively similar – Basic Health Hawai`i (“BHH”), Defendants, as agents of the State of Hawai`i and its Department of Human Services (together, “DHS”), are trampling the constitutional rights of persons residing in Hawai`i under Compacts of Free Association (“COFA”) with the United States (“COFA Residents”) and lawful resident aliens who have been U.S. residents for less than five years (“New Residents”) by:

1. discriminating in the provision of health care benefits on the basis of alienage and immigration status, in violation of the Equal Protection clause of the United States Constitution;¹
2. denying health care benefits on the basis of alienage and immigration status, which is constitutionally impermissible because it encroaches on exclusive federal power; and
3. discriminating against disabled COFA Residents and New Residents by denying them outpatient-based treatment for serious ailments and, instead, providing such treatment only in a manner that violates the “integration mandate” of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132.

¹ Plaintiffs intend to dismiss their claim premised on the Constitution of the State of Hawai`i. With respect to the equal protection issues raised herein, this Motion is based exclusively on the U.S. Constitution.

Effective July 1, 2010, DHS disenrolled non-pregnant COFA

Residents aged 19 or older from their State health benefits programs² and deemed them into BHH, which provides inferior and limited care compared to the services provided to U.S. citizens who participate in other DHS-sponsored health care programs, particularly the programs known as QUEST and QExA, which provide a comprehensive array of benefits. New Residents were not previously enrolled in State health benefits programs because of DHS's long-standing policy of denying New Residents equal access to such programs. A limited number of New Residents were, however, deemed into BHH based on their prior receipt of other State financial assistance.

As its name indicates, BHH provides only rudimentary health care, such as limited inpatient and outpatient physician visits and four prescription drugs per month. Patients with chronic or serious illnesses, with disabilities, and those requiring numerous prescription medications are deprived of critical, potentially life-sustaining care.

Not only does BHH substantially reduce many COFA Residents' benefits, but also it imposes a 7,000 person cap on statewide enrollment. This means that COFA Residents who were not already enrolled in a State health

² These programs include QUEST, QUEST-Net, QUEST-ACE, QExA, the State of Hawai'i Organ and Tissue Transplant ("SHOTT"), and fee-for-service programs (collectively, the "Other Programs").

benefits program will not be able to get health benefits through *any* State program. Most, if not all, of these residents will have no health care apart from emergency room services for acute needs.

Moreover, because BHH does not provide adequate coverage for disabled COFA Residents and New Residents in need of acute or routine care, disabled Plaintiffs are forced to seek such services from hospital emergency rooms. Forcing disabled Plaintiffs to seek treatment in a hospital setting violates the integration mandate of the ADA.

Accordingly, Plaintiffs ask this Court to order DHS to:

- (1) re-enroll all COFA Residents who were disenrolled from the Other Programs on the basis of their alienage;
- (2) allow COFA Residents to enroll in Other Programs for which they would be eligible if they were U.S. citizens;
- (3) allow New Residents to enroll in the Other Programs for which they would be eligible but for their immigration status; and
- (4) require DHS to provide health care services to disabled Plaintiffs in a manner consistent with the integration mandate of the .

II. FACTS

A. The Prior Challenge To BHH

DHS first attempted to severely cut or eliminate health benefits to COFA Residents and New Residents in or around July 2009. In *Sound et al. v.*

Koller et. al, Case No. CV09-00409 JMS-KSC, however, this Court granted Plaintiffs' motion for temporary restraining order ("TRO"), finding that (1) they were likely to succeed on the merits of their due process claim, (2) there was a possibility for irreparable harm, (3) the balance of equities favored Plaintiffs, and (4) the public interest weighed in favor of injunctive relief. The parties subsequently stipulated to extend the TRO pending Defendants' compliance with the Hawai'i Administrative Procedures Act, Haw. Rev. Stat. § 91-3 ("HAPA"), which resulted in the re-formulated BHH at issue here. Plaintiffs also prevailed in a companion State court case, obtaining summary and final judgment on their HAPA claim.

B. Post-Sound Events

On January 25 and 26, 2010, pursuant to the Extended TRO, DHS conducted public hearings on a revised version of BHH. Declaration of Elizabeth M. Dunne ("Dunne Decl.") ¶ 5. Over 100 people participated in the public hearing process, during which Lawyers for Equal Justice ("LEJ") testified regarding its concerns that BHH violated the Equal Protection clause of the U.S. Constitution. *Id.* ¶ 6. LEJ also expressed its concerns regarding DHS's failure to translate the public hearing notice and BHH's rules into the languages most commonly spoken by the impacted population or to provide adequate oral translation services during the hearing. *Id.*

On or around May 11, 2010, Elizabeth M. Dunne of LEJ met with Deputy Attorney General Lee-Ann Brewer, Esq. and Dr. Kenneth Fink, Med-QUEST Administrator, to discuss the ongoing concerns regarding BHH. *Id.* ¶ 7. In response to LEJ's concerns regarding the constitutionality of BHH and the deficiencies in the public hearing process, Dr. Fink indicated that further legal challenges delaying implementation of BHH could result in even further benefit cuts or the possible elimination of the program altogether. *Id.* ¶ 8.

On June 24, 2010, Ms. Brewer sent an email to Ms. Dunne confirming that further action to enforce the impacted residents' constitutional and statutory rights had the real possibility of compromising residents' ability to get near term benefits. *Id.* ¶ 9.

Notwithstanding the public testimony against BHH and the concerns expressed by LEJ, DHS implemented BHH on July 1, 2010, disenrolling thousands of COFA Residents and "deeming" most of them into BHH. Despite the *Sound* ruling and continued concerns regarding the content of the notices provided to BHH enrollees, DHS informed enrollees in substantially the same written form as they had the first time they attempted to cut benefits. Exhibits "B" and "C".

As a result of the *Sound* cases, and patients and health care providers' concerns about the need for dialysis treatment, DHS decided to offer some coverage for dialysis treatments under its Emergency Medical Assistance Program

("EMAP") for aliens. HAR § 17-1722.3-20; HAR § 17-1723, subchapter 2. This coverage is not part of BHH. Providing dialysis as an emergency service, rather than as a regular health care program, creates uncertainty. Coverage under EMAP requires extensive paperwork, must be renewed on a regular basis, is not guaranteed, and does not include coverage for all essential prescription medications. Most dialysis patients take approximately 10-12 prescription medications per month, an amount well above BHH's four prescription per month limit. Declaration of Dr. Wilfred Alik ("Alik Decl.") ¶ 8; Declaration of Tony Korab ("Korab Decl.") ¶ 6.

C. COFA Residents and Health Care In Hawai'i

The COFA nations are the Republic of the Marshall Islands, Federated States of Micronesia and the Republic of Palau. Each of these nations entered into a Compact of Free Association with the United States. *See* 48 U.S.C. § 1901, 48 U.S.C. § 1931. Under these treaties, the United States exercises strategic denial of over half a million square miles of the Pacific between Hawai'i and Guam to the military forces of other nations. *See, e.g.*, 48 U.S.C. § 311(b)(2). Citizens of COFA nations may freely "enter into, lawfully engage in occupations, and establish residence as a non-immigrant in the United States and its territories and possessions" 48 U.S.C. § 141(a). Similarly, United States citizens may live and work in the COFA countries. 48 U.S.C. § 142.

Until 1996, COFA Residents and New Residents were eligible for federally funded health care under Medicaid. The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996, however, eliminated all federal health care coverage for all non-qualified aliens, 8 U.S.C. § 1612(a)(1), and those legal aliens who have resided in the United States for less than five years, 8 U.S.C. § 1613. PRWORA rendered non-qualified aliens – like COFA Residents and New Residents – ineligible for Federal Medicaid benefits. PRWORA does not restrict states from providing health care programs for non-qualified aliens with state funds. 8 U.S.C. § 1613.

Even after PRWORA, the State of Hawai`i has continued to receive millions of federal funds for COFA Residents' health, education and welfare. Since 2003, the Compacts of Free Association have provided for a permanent appropriation of \$30,000,000 in federal funds that is apportioned and distributed annually among the governments of the State of Hawai`i, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. P.L. 108-188 § 104(e). These funds are referred to as "Compact Impact" funds. Each year, Congress re-appropriates Compact Impact funds for the State of Hawai`i. Congress intended that these funds "aid in defraying costs incurred by affected jurisdictions as a result of increased demands placed on health, educational, social, or public safety services or infrastructure related to such services due to the

residence in affected jurisdictions of qualified nonimmigrants from the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau.

P.L. 108-188 § 104(e)(3).

Since 2003, the State of Hawai`i has received \$74,655,000 in Compact Impact funds. For FY2010-11, the State received \$11,229,000 in Compact Impact Funds and will continue to receive \$11,229,000 each year until the next enumeration of COFA citizens is conducted by the U.S. Department of the Interior and the U.S. Census Bureau. *See* U.S. Census Bureau Final Report, 2008 Estimates of Compact of Free Association (COFA) Migrants dated April 2009, attached as Exhibit "E".

The Compact of Free Association Amendments Action of 2003, P.L. 108-188, also allows the State of Hawai`i to seek additional funds for reimbursement to its health care institutions and "increased demands placed on educational, social, or public safety services or infrastructure" related to public services provided to COFA Residents. P.L. 108-188 § 104(e)(6), (10).

From 1997 to July 2010, the State of Hawai`i provided health coverage to COFA Residents. *Policy and Program Development Clarification*, dated August 10, 2009, attached as Exhibit "D", at 1. DHS provided health coverage to COFA Residents by enrolling them in the Other Programs, under which they received benefits the same as those provided to U.S. citizens. Under

these programs, the COFA Residents received comprehensive medical care, including dialysis, cancer treatments, long-term care services, and prescription drugs.

DHS has not been providing health coverage under the Other Programs to New Residents. DHS Information Act response, dated 6/15/10, attached as Exhibit "H", at 5. Although BHH provides some medical benefits, many COFA Residents have been unable to obtain sufficient medication since BHH's implementation. *See, e.g.*, Korab Decl. ¶ 14; Declaration of Tojio Clanton ("Clanton Decl.") ¶¶ 12, 14. DHS's inadequate BHH program fails to address significant health risks facing Hawai'i's COFA Residents and New Residents.

D. DHS's Discriminatory Health Care Policy

1. The BHH program eliminates or drastically reduces health benefits

In implementing BHH, DHS either eliminated or drastically reduced benefits to COFA Residents and continued its discrimination against New Residents by denying them equal access to State health insurance programs. Defendants specifically targeted COFA Residents and New Residents because of their alienage and immigrant status. HAR § 17-1714-2 (describing BHH as a medical assistance program administered by DHS for "aliens age nineteen years and older who are citizens of a COFA nation, or legal permanent residents who have resided in the United States for less than five years.").

BHH provides only a minimal array of benefits, such as “no more than ten days of medically necessary inpatient hospital care related to medical care, surgery, psychiatric care, and substance abuse treatment”; “maximum of twelve outpatient visits including adult health assessments, family planning services, diagnosis, treatment, consultations, to include substance abuse treatment, and second opinions”; “maximum coverage of six mental health visits, limited to one treatment per day”; and “maximum of four medication prescriptions per calendar month” which “shall not exceed a one-month supply.” HAR § 17-1722.3-18; Exhibit "C".

BHH also does not have any special provisions related to cancer treatments, nor are such treatments covered as an emergency service. A typical cancer patient receiving chemotherapy generally needs one to three treatments per week and over ten prescriptions per month. Declaration of Wilfred Alik ("Alik Decl.") ¶ 9. Among the exhaustive list of items excluded from BHH coverage are transportation services upon which many elderly, seriously ill, and disabled residents rely to get to and from doctors' visits. HAR § 1722.3-19.

The BHH program has a 7,000 person statewide enrollment cap, with open enrollment only when enrollment drops below 6,500. HAR § 17-1722.3-10. More than 7,700 COFA Residents were receiving state-funded medical assistance as of May 31, 2010. Exhibit "H". Eligible COFA Residents, after being

disenrolled, and certain New Residents, were "deemed into" BHH without regard to the enrollment cap. HAR § 17-1722.3-33. Because the current enrollment exceeds the cap by 20% or more, however, there is no chance of open enrollment in the foreseeable future.

DHS's QUEST and QExA programs, from which COFA Residents and New Residents are excluded, provide significantly greater benefits than BHH, and obviously greater benefits than being uninsured. Both QUEST and QExA provide comprehensive medical and behavioral health and unlimited prescription drugs. The QExA program delivers medical and behavioral health services to certain individuals who are aged, blind or disabled. The State has contracted with Evercare and Ohana to provide the health plans for the QExA program. The Evercare and Ohana plans provide substantially greater benefits than BHH. *See, e.g., Evercare Member Handbook for the State of Hawaii QUEST Expanded Access (QExA) Program*, attached as Exhibit "E", at 10-18

Moreover, because persons who are aged, blind, or disabled often need significantly greater medical care, COFA Residents and New Residents who would otherwise be eligible for the QExA program but for their alienage and immigrant status, are particularly impacted by the reduced benefits under BHH or the inability to obtain State health insurance altogether. For instance, because dialysis patients are considered disabled, they were enrolled in QExA and were

able to get all of their medications. Now they cannot. *See, e.g.*, Declaration of Espem Leit ("Leit Decl.") ¶ 10.

Under BHH, COFA Residents, with the exception of those who received a transplant by May 31, 2010, were also removed from SHOTT. HAR § 17-1722.3-29. New Residents were never eligible for SHOTT. COFA Residents and New Residents are also not able to enroll for long-term care services. HAR § 17-1722.3-28(c). Long-term care services include attendant care, assisted living services, environmentally accessible adaptations, home delivered meals, home maintenance, residential care and nursing services. *See* Ohana Handbook at 24-32; Evercare Handbook at 15-19.

2. BHH's Effect on COFA Residents

In light of their limited coverage or uninsured status, COFA Residents and New Residents with serious illnesses do not know if, when, or from where, they will be able to get preventative care, essential medical treatment, and an adequate supply of prescription drugs. For example, Plaintiff Tony Korab, a diabetic with heart problems, used to receive dialysis treatments three times a month and requires 15-16 prescription drugs per month to treat his various ailments. Korab Decl. ¶¶ 4-6. Because BHH only covers four prescription drugs, however, Mr. Korab will have to pay up to \$1,500 per month for his prescriptions, an amount he cannot afford. *Id.* ¶ 14. Moreover, Mr. Korab, who was previously

enrolled in SHOTT because he needs a kidney transplant, was notified by DHS in May 2010 that he would be disenrolled from SHOTT if he did not get a transplant before June 1, 2010. *Id.* ¶¶ 10-11. Mr. Korab did not receive – and under BHH cannot receive – his needed transplant and has been disenrolled from SHOTT. *Id.* ¶ 11.

Physicians who treat COFA Residents have also witnessed the deleterious effects of BHH. Declaration of Dr. Seiji Yamada ("Yamada Decl.") ¶¶ 8-14; Declaration of Dr. Joseph Humphrey ("Humphrey Decl.") ¶¶ 11-15; Declaration of Dr. Ritabelle Fernandes ("Fernandes Decl.") ¶¶ 17-24; Declaration of Neal A. Palafox ("Palafox Decl.") ¶¶ 11-13; Alik Decl. ¶¶ 11-16. Dr. Ritabelle Fernandes, who has worked at the Kokua Kalihi Valley Community Health Center since 2001 and is a Clinical Associate Professor at the University of Hawai'i John A. Burns School of Medicine, has approximately 100 uninsured patients who are COFA Residents. Fernandes Decl. ¶ 14. Dr. Fernandes is struggling to provide adequate care to her patients in light of the limited patient visits and prescription drugs covered by BHH. *Id.* ¶¶ 15, 17. She is being forced to "cut corners" and schedule COFA Residents' appointments in three to four month intervals rather than the necessary one to two month intervals so they do not exceed their BHH-imposed limitation of 12 outpatient visits. *Id.* ¶ 17. If Dr. Fernandes has a patient in need of dialysis or cancer treatment, she must refer the patient to specialists

before treatment can begin. *Id.* ¶ 18. Unfortunately, numerous nephrologists and vascular surgeons will not accept patients who are on BHH. *Id.* Even if specialists accept BHH enrollees, it takes five to six patient visits to get the patient in dialysis treatment. *Id.* As a result, a patient of Dr. Fernandes' used six of her allotted 12 outpatient visits within one month of BHH going into effect. *Id.*

Another of Dr. Fernandes' patients, Inok Kony, had a total hip replacement but is now being denied physical therapy for post-surgical rehabilitation because it is not a covered benefit under BHH. *Id.* ¶ 20. Mark Marcus, who has disabling ankylosing spondilitis and cannot sit in a wheelchair or regular chair, had been receiving transportation benefits through QExA, which allowed him to see his rheumatologist. *Id.* ¶ 22. Mr. Marcus was subsequently disenrolled from QExA and deemed into BHH. *Id.* Since BHH does not cover transportation services, Mr. Marcus is unable to go to his doctors' appointments. *Id.*

III. ARGUMENT

A. Standard For Granting Preliminary Injunctive Relief

The Ninth Circuit has recently clarified the controlling standard for injunctive relief in light of the Supreme Court's decision in *Winter v. Natural Res. Def. Council*, ---U.S. ---, 129 S.Ct. 365 (2008). *Alliance for Wild Rockies v. Cottrell*, ---F.3d ---, No. 09-35756, 2010 WL 2926463, at *6-7 (9th Cir. July 28, 2010); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th

Cir. 2009). A party seeking a preliminary injunction must demonstrate that he is likely to succeed on the merits, that irreparable harm is likely in the absence of preliminary relief, that the balance of equities tips in favor of such relief, and that an injunction is in the public interest. *Am. Trucking*, 559 F.3d at 1052. A preliminary injunction is also appropriate when the moving party demonstrates “that serious questions going to the merits [are] raised and the balance of hardships tips sharply in the [moving party's] favor,” so long as that party can establish the other Winter factors, including the likelihood of irreparable harm. *Alliance for Wild Rockies*, 2010 WL 2926463, at * 7.

Plaintiffs may move for class-wide relief before moving to certify a class. *See V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1114 n.6 (N.D. Cal. 2009) (dismissing plaintiffs concurrently filed motion for class certification without prejudice); *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161, 1178 n. 14 (N.D. Cal. 2009) (“District courts are empowered to grant preliminary injunctions ‘regardless of whether the class has been certified’”).

B. Plaintiffs Will Likely Prevail On The Merits Of Their Equal Protection Claim

Plaintiffs are likely to succeed on their constitutional claim because BHH and the State’s policy of denying COFA Residents and New Residents equal access to health insurance programs unjustifiably discriminates in the provision of health care benefits based on alienage and immigrant status in violation of the

Equal Protection Clause.

1. The State's Denial of Equal Access to State Health Programs Violates the Equal Protection Clause and is Subject to Strict Scrutiny Review

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The term "person" in the equal protection context "encompasses lawfully admitted resident aliens as well as citizens of the United States and **entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.**" *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (citations omitted; emphasis added).

The United States Supreme Court has established that under the U.S. Constitution, "classifications based on alienage, like those based on nationality . . . or race . . . are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (citations omitted). "Accordingly, . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is *confined within narrow limits.*" *Graham*, 403 U.S. at 372 (citations, footnotes, and quotations omitted; emphases added). Moreover, where, as here, the state's action impacts "discrete and insular minorities" who "can be shut out of the political

process . . . heightened judicial solicitude is appropriate.” *Graham*, 403 US 365 at 372; see also *United States v. Carolene Products Co.*, 304 US 144, 153 n. 4 (1938)).

In *Graham*, the United States Supreme Court made clear that states may not treat aliens differently from citizens without a compelling justification, striking down Arizona and Pennsylvania statutes that limited eligibility for public welfare benefits based on alienage. 403 U.S. at 372-76.³ Applying strict scrutiny, the *Graham* Court held: “a State’s desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania’s making non-citizens ineligible for public assistance, and Arizona’s restricting benefits to citizens and longtime resident aliens.” *Id.* at 374.

In this case, the State is unlawfully attempting to do precisely what the *Graham* Court said it cannot do. Thus, the Defendants’ state-based classification based on alienage is subject to strict scrutiny review.⁴ Not only is the

³ In contrast, the federal government may rationally discriminate based on alienage. *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (holding that federal laws that discriminate on the basis of alienage will be upheld unless they are “wholly irrational”).

⁴ See, e.g., *In re Griffiths*, 413 U.S. 717, 718 (1973) (applying “close judicial scrutiny”); *Exam. Bd. Eng’rs v. de Otero*, 426 U.S. 572, 601-02 (1976) (applying “strict judicial scrutiny” and striking a law of Puerto Rico that prevented aliens from obtaining engineering licenses); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (applying “close judicial scrutiny” and striking a state law that prevented aliens from receiving state financial assistance for higher education).

State required to treat aliens and citizens equally, the Federal government appropriates on a permanent annual basis funds for COFA Residents' health care and authorizes a process for the State to seek additional funds. Given these circumstances, the State cannot exclude COFA Residents from the health care benefits that are available to U.S. citizens based on alienage.

Courts have repeatedly applied strict scrutiny when faced with the issue presented here, namely the deprivation of medical benefits provided by the state to certain groups of resident aliens. *See Ehrlich v. Perez*, 394 Md. 691, 730-31, 908 A.2d 1220, 1243 (Md. Ct. App. 2006) (stating that under the equal protection clause of the Maryland constitution, the court would "employ a strict scrutiny standard of review in [its] consideration of the State action . . . that, in effect, discriminated against the provision of State-funded medical assistance benefits based on an alienage classification); *Aliessa v. Novello*, 96 N.Y.2d 418, 435, 754 N.E.2d 1085, 1098 (N.Y. 2001) (applying strict scrutiny under both the New York and U.S. Constitutions to strike down a New York statute that made certain classes of aliens ineligible for state medical benefits); *Kurti v. Maricopa County*, 201 Ariz. 165, 171, 33 P.3d 499, 505 (Ariz. App. 2001) (applying strict scrutiny to Arizona statutes restricting eligibility for health care benefits for "a certain subclass of aliens" and finding those statutes to be unconstitutional).

The State cannot hide behind Congress' plenary federal power in enacting PRWORA, when it, and not Congress, is responsible for determining who is eligible for state funded medical benefits and to what extent. In *Aliessa*, the court found that a New York law denying medical assistance to legal immigrants violated the equal protection clauses of both the state and federal constitutions. In its well-reasoned conclusion, the court stated: "[T]itle IV goes significantly beyond what the *Graham* Court declared constitutionally questionable. In the name of immigration policy, it impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid." *Aliessa*, 754 N.E.2d at 436. PRWORA does not insulate the DHS's discriminatory policy regarding access to state health insurance programs from strict scrutiny review. As the *Graham* Court reiterated, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Graham*, 403 U.S. at 382.

In *Hong Pham v. Starkowski*, 2009 WL 5698062 (Conn. Super. Dec. 18, 2009), the Superior Court of Connecticut recently enjoined enforcement of a state law on equal protection grounds on facts virtually identical to those present here. The *Starkowski* court considered whether a state law terminating state funded medical benefits to legal residents residing in the state for less than five years violated the equal protection clauses of the state and federal constitutions.

The *Starkowski* court, following *Aliessa* and *Ehrlich*, rejected the argument that Defendants will likely make here, to the effect that because PRWORA does not allow federal funds to be used for non-emergency medical assistance to COFA Residents and New Residents, Hawai`i, too, may discriminate against putative class members without facing strict scrutiny review. In rejecting this argument, the *Starkowski* court reasoned: "PRWORA simply does not provide the states with any sort of consistent guidance or clear limits as to what they can and cannot do in dealing with legal aliens who lost their eligibility for federal Medicaid." *Starkowski*, 2009 WL 5698062, at *16. In other words, the states have discretion to develop their own rules and policies regarding eligibility for state health insurance programs, and if the state's rules and policies treat certain residents differently based on their alienage and immigrant status, those rules and policies are subject to strict scrutiny review. As in *Graham*, *Aliessa*, *Ehrlich*, and *Starkowski*, this Court should apply strict scrutiny in reviewing DHS's discriminatory health care policy.

2. The "Uniform Rule" Theory Does Not Apply Here

This Court should likewise reject the court's reasoning in *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004). In *Soskin*, the Tenth Circuit determined that rational-basis review was appropriate because "[a] state's exercise of the option to include fewer aliens in its aliens-only program [under the

provisions of the PRWORA] . . . should not be treated as discrimination against aliens as compared to citizens. Rather, what the State is doing is discriminating within the aliens-only program against one class of aliens as compared to other classes of aliens." *Id.* at 1255-56.

Soskin's holding was premised on the nebulous "uniform rule" theory, which provides that "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien sub-class, the States may, of course, follow the federal direction." *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982). As discussed above, PRWORA provides no such uniform rule. Rather, it grants

discretion to the states with regard to their decisions whether to provide state-funded medical benefits on the basis of alienage, to those aliens who do not meet the requirements for federal medical assistance. The grant of discretion, without more, is not a uniform rule for purposes of imposing a rational basis test.

Ehrlich, 908 A.2d at 1241; *see Soskin*, 353 F.3d at 1265, (Henry, J., dissenting) (rejecting majority's finding that PRWORA sets forth uniform rules that the states must follow in responding to its requirements). *Soskin* fails to adequately distinguish the clear teachings of *Graham* and its progeny. *See Graham*, 403 U.S. at 382-83 ("Under Art. I § 8, cl. 4 of the Constitution, Congress' power is to 'establish a uniform rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of

citizenship requirements for federally supported welfare programs would appear to contravene the explicit constitutional requirement of uniformity.”) Contrary to *Soskin*, there is no basis for applying rational-basis review here.⁵

Further undermining *Soskin's* applicability is the clear direction Hawai`i has received from the Federal government with respect to COFA Residents in the form of Compact Impact funds. These funds are intended by Congress to aid Hawai`i and other jurisdictions affected by COFA migration to defray costs as a result of "increased demands placed on **health**, educational, social, or public safety services" P.L. 108-188 § 104(e)(3) (emphasis added). Since 2003, Hawai`i has received nearly \$75 million in Compact Impact funds. In this fiscal year, Hawai`i will receive over \$11 million (over one-third of the funds allocated to affected jurisdictions) in Compact Impact funds. U.S. Census Bureau Final Report, Exhibit "E". Congress further provided that Hawai`i could seek additional funds for reimbursement to its health care and other institutions as a

⁵ In *Sudomir v. McMahan*, 767 F.2d 1456 (1985), the Ninth Circuit recognized that the uniform rule theory may apply when the federal law *requires* some alienage-based classification. *Id.* at 1466. Here, however, as the *Ehrlich* court explained, there is no uniform federal policy at issue because the states have *discretion* whether to follow the federal guidelines under the PRWORA or not. *Doe v. Commissioner of Transitional Assistance*, 777 N.E.2d 404 (Mass. 2002), which also relied on the uniform federal rule theory to uphold a six month eligibility waiting period based on residency, is distinguishable for the same reason as *Soskin*. Moreover, the *Doe* court considered only a residency, not an alienage based classification to which it would, in fact, have applied a strict scrutiny analysis. 773 N.E.2d 414.

result of increased demands related to public services provided to COFA Residents. P.L. 108-188 § 104(e)(6), (10). Through the Compact Impact funds, the Federal government has essentially been directing, and reimbursing, the State of Hawai`i for costs it incurs in providing services to COFA Residents. There is no "uniform rule" that allows the State of Hawai`i to discriminate against COFA Residents based on alienage.

Finally, this case is distinguishable from *Soskin* because of the difference in alienage-based classifications. Whereas the *Soskin* classification was a general one, the one here is specifically directed at residents of the COFA nations, with which the United States has entered lawful and binding agreements allowing for migration. And, as discussed above, the United States has further accounted for COFA Residents' presence by providing the Compact Impact funds. The group discriminated against here is distinct from the one discriminated against in *Soskin*.

In sum, this Court should adhere to the Supreme Court's clear direction as set forth in *Graham* and follow the well-reasoned decisions of *Starkowski*, *Ehrlich*, and *Aliessa* in holding that strict scrutiny applies.

3. The State's Discriminatory Denial of Equal Access to State Health Programs Cannot Pass Strict Scrutiny

Under a strict scrutiny standard, a state must show that the classification is "suitably tailored to serve a compelling state interest." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). There is neither a compelling interest nor suitable tailoring here.

a. No compelling interest is served by BHH

There is no compelling State interest in denying COFA Residents and New Residents State health insurance. BHH and the State's policy of denying equal access to State health programs is premised exclusively on cutting costs, which the Supreme Court has explicitly held is a "particularly inappropriate and unreasonable" ground upon which to base an alienage classification. *Graham*, 403 U.S. at 376; *see Diaz*, 426 U.S. at 85 (footnote omitted) ("Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned.")

Moreover, any cost savings as a result of the benefit cuts are only short term and may be entirely ephemeral. Cuts in coverage for preventative and acute care will, in fact, end up costing the State more money as persons who are

denied preventative care suffer serious—and costly—medical emergencies.

Palafox Decl. ¶ 13.

b. *BHH and the State's discriminatory policy are not narrowly tailored*

There is no indication that DHS "narrowly tailored" the BHH rules or its discriminatory policy. To the contrary, DHS ignored the recommendations made in reports by two State committees – the Uninsured Committee and the COFA task force committee. Palafox Decl. ¶ 9. DHS did not take into account common diseases and health conditions experienced by the targeted population. There is no evidence that DHS adequately considered alternatives to the cuts imposed. While DHS, for instance, allowed certain COFA Residents to remain in long-term care programs, DHS has done nothing to ensure that other existing patients or previously unenrolled patients with disabilities or with serious medical conditions will get the long-term or critical care that they need. Nor do Plaintiffs believe that DHS looked at the programs administered by the Med-QUEST Division as a whole when considering other possible cost-cutting measures.

Moreover, there is no indication that DHS has any plan on how to handle the dire consequences that will result from its implementation of BHH. Nor is there any indication that DHS has been or will provide assistance to the various medical providers currently providing medical services to COFA Residents and New Residents. Neither good conscience nor strict scrutiny countenance such a

myopic approach.

For these reasons, Plaintiffs have shown a likelihood of success on their equal protection claim.

4. The Constitution Prohibits State Alien Residency Requirements that either Deny Welfare Benefits to Noncitizens or Condition them on Longtime Residency

The alienage classification imposed by BHH and the State's discriminatory policy is constitutionally infirm for an additional reason: states that restrict the eligibility of aliens for welfare benefits merely because of their alienage contravene overriding federal policies in an area constitutionally-entrusted to the federal government. *Graham*, 403 U.S. at 378.⁶ The federal government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v.*

⁶ See also *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (striking down a Pennsylvania alien registration statute on grounds of federal pre-emption because "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."); *Takahashi*, 334 U.S. at 419 (holding that state laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with "this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid").

Fish & Game Comm'n, 334 U.S. 410, 419 (1948).⁷ Pursuant to that power, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that aliens may be inadmissible on health-, criminal-, or security-related grounds. 8 U.S.C. § 1182(a)(1)-(3). Moreover, "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." *Id.* § 1182(a)(4).

Congress, however,

has not seen fit to impose any burden or restriction on aliens who become indigent *after* their entry into the United States. Rather, it has broadly declared: 'All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens'

Graham, 403 U.S. at 377 (citing 42 U.S.C. § 1981) (emphasis added). The Supreme Court has made it clear that, whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within this country have a

⁷ In *Takahashi*, the Court invalidated a California law that prevented resident aliens ineligible for citizenship from obtaining state fishing licenses, as inconsistent with the Congressional determination to admit such aliens without burden or restrictions. 334 U.S. at 419.

right to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under nondiscriminatory laws." *Takahashi*, 334 U.S. at 420.

Thus, it is congressionally-decreed federal policy that lawfully-admitted resident aliens who become public charges for causes arising *after* their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property. *Graham*, 403 U.S. at 378. The policy requiring New Residents to have been present in Hawai'i for a minimum of five years to be eligible for BHH clearly imposes "auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on public assistance. Alien residency requirements for welfare benefits necessarily operate . . . to discourage entry into or continued residency in the State." *Id.* at 379. In considering the "reasonableness" of a state restriction on the employment of aliens in terms of its effect on the right of a lawfully admitted alien to live where he chooses, the

Supreme Court stated:

It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode,

for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

Truax v. Raich, 239 U.S. 33, 42 (1915).

The same is true here, for under DHS's policy a COFA Resident or New Resident who becomes catastrophically ill will be unable to live in Hawai'i because of the discriminatory denial of public assistance. These individuals will either have to return to their home countries or face the consequence of having no coverage for prohibitively-expensive, life-saving health care. The Constitution does not allow for such a result. "State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." *Graham*, 403 U.S. at 380.⁸

⁸ *Graham* additionally held that Arizona's durational residency requirement – like the 5-year requirement imposed on New Residents here – was constitutionally impermissible. 403 U.S. at 382.

5. DHS's Discriminatory Policy Violates the ADA's "Integration Mandate"

The ADA, 42 U.S.C. § 12132, prohibits discrimination based on disability. Unjustified isolation of the disabled is discrimination. *Olmstead v. Zimring*, 527 U.S. 581, 597 (1999); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1119 (N.D. Cal. 2009). The ADA's "integration mandate" effectuates one of the primary purposes underlying the ADA, which is to end the isolation and segregation of disabled persons. *V.L. v. Wagner* at 1119 (quoting *Arc of Washington State v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005)); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal 2009), *injunction granted*, 2010 U.S. Dist. LEXIS 22975 (2010). ADA regulations state, "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d). "The 'most integrated setting' means 'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'" *Brantley v. Maxwell-Jolly* at 1170 (citing 28 C.F.R. pt. 35 app A). If the state forces a disabled person to be isolated in an institution in order to obtain necessary services, then the state violates the integration mandate. *See Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003).

An integration claim may arise from state actions that give rise to a serious risk of unnecessary institutionalization. *V.L. v. Wagner* at 1119. That is, the state violates the ADA's integration mandate when the state's failure to provide, or decision to eliminate, needed services isolates disabled persons -- or places such persons at risk of isolation.⁹ For example, in *Wagner* the district court preliminarily enjoined a change in state law that would have placed benefit recipients at a severe risk of hospitalization or institutionalization due to a loss in services. *Wagner* at 1119.

There, California attempted to cut in-home care services under its In-Home Supportive Services program. Plaintiffs argued that the cuts violated the ADA's integration mandate "by placing people in serious risk of being forced to move out of their homes to the less integrated setting of institutions." *Id.* Agreeing Plaintiffs had shown a likelihood of success on the merits of their ADA claim, the court looked at evidence that patients who lost assistance with taking their

⁹ See *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (imposition of cap on prescription medications placed participants in community-based program at high risk for premature entry into nursing homes in violation of ADA); *Ball v. Rodgers*, 2009 WL 1395423, at *5 (D.Ariz. 2009) (failure to provide them with needed services "threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care" in violation of the ADA and Rehabilitation Act); *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460, at *15 (E.D.N.Y.2008) ("even the risk of unjustified segregation may be sufficient under *Olmstead*").

medications, with attending medical appointments, in performing tasks essential to their continued health, and with un-met in home care needs were put at severe risk of hospitalization and institutionalization. *Id.*

None of this is to say that the integration mandate creates an affirmative obligation to provide services. Rather, in deciding whether the State has complied, the issue is *where* the state provides services. *Townsend v. Quasim*, 328 F.3d at 517. If the state provides a service to disabled individuals, the state simply cannot force the individuals into an institution to obtain the service. *Id.*

This case is similar to *Wagner*. Several COFA Residents require medication, treatments, transportation, and other services in order to avoid hospitalization. Fernandes Decl. ¶¶ 18-22, 28, 31; Palafox Decl. ¶¶ 12, 13; Alik Decl. ¶¶ 15-16; Humphrey Decl. ¶ 16. Furthermore, under BHH, the State provides emergency services for otherwise non-qualified aliens who suffer “a sudden onset of a medical condition ... manifesting itself in acute symptoms of sufficient severity such that the absence of immediate medical attention could be expected to result” in one of the following: (1) placing the patient’s health in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious dysfunction of any bodily organ or part. HAR § 17-1723-5. In practice, this means that COFA Resident patients who are ineligible to receive the services they

need under BHH are forced to go to hospitals for in-patient or emergency room care. Humphrey Decl. ¶ 16; Alik Decl. ¶ 15; Fernandes Decl. ¶ 25.

C. Plaintiffs Face Irreparable Injury

The reduction or elimination of public medical benefits irreparably harms the participants in the programs being cut. *See Beltran*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that possibility that plaintiffs would be denied Medicaid benefits sufficient to establish irreparable harm); *Cota v. Maxwell Jolly*, 688 F.Supp.2d 980, 997 (N.D. Cal. 2010) (“the reduction or elimination of public medical benefits is sufficient to establish irreparable harm to those likely to be affected by the program cuts); *Newton-Nations v. Rogers*, 316 F.Supp.2d 883, 888 (D. Ariz. 2004) (citing *Beltran* and finding irreparable harm shown where Medicaid recipients could be denied medical care as a result of their inability to pay increased co-payment to medical service providers); *Edmonds v. Levine*, 417 F.Supp.2d 1323, 1342 (S.D. Fla. 2006) (finding that state Medicaid agency's denial of coverage for off-label use of prescription pain medication would irreparably harm plaintiffs).

In this case, the threat of harm is clear, imminent, and potentially catastrophic. There is ample evidence that COFA Residents and New Residents will suffer significant harms to their health and physical well-being without equal access to State health insurance programs. Putative class members suffer from a

variety of medical conditions that require medical treatment and monitoring.

Enoch Decl. ¶¶ 10-11; Clanton Decl. ¶¶ 4-10; Leit Decl. ¶ 3; Korab Decl. ¶¶ 4-5.

Many patients need prescription drugs that, out of pocket, would cost over \$1,500 per month. Korab Decl. ¶¶ 6, 14; Leit Decl. ¶ 10. While health care providers are scrambling to place patients in free or reduced-cost prescription drug programs, if and for how long patients will be able to get drugs under these programs is uncertain. Fernandes Decl. ¶ 16. In some cases, limited medical treatments may be available through hospital emergency rooms, but hospitals are unlikely to be able to provide these services over an extended period of time. Palafox Decl. ¶ 12. For instance, it has been extremely difficult for Mr. Enoch to get the diagnostic tests he needs to determine whether he has cancer. Enoch Decl. ¶¶ 12-14. The same is true for countless other patients who, even if covered by BHH, will use five to six doctors' visits just to get diagnosed. Fernandes Decl. ¶ 18; Alik Decl. ¶ 13.

Disabled patients in need of routine life-saving and long-care will be particularly impacted. Enoch Decl. ¶¶ 10-13, 15; Korab Decl. ¶¶ 6, 16. Patients in need of transplants have been removed from SHOTT. Korab ¶¶ 10-11. Putative class members have no choice but to reduce the amount of critical medical services they consume. For some, this will lead to diminished health that will take its

course over a few years; for others, death could happen in a matter of weeks or months. Korab Decl. ¶¶ 4, 16; Enoch Decl. ¶¶ 10-13, 15.

Although less dramatic, patients denied preventative and routine care also face irreparable injury. Health care professionals have long recognized the importance of long-term care in reducing “morbidity and mortality.” Timothy R. Dresselhaus, MD MHP, et al., Measuring Compliance with Preventative Care Guidelines, 15 J. Gen. Intern. Med. 782 (2000). Guidelines from major medical associations emphasize the importance of preventative care in reducing potentially irreversible health consequences and late diagnosis of disease. *See* American Cancer Society; Eddy D: Guidelines for the Cancer Related Checkup; *CA-A Cancer Journal for Clinicians* 1980; 30:194-237; Medical Practice Committee, American College of Physicians: *Ann Intern Med* 1981; 95:729-732; U.S. Preventative Services Task Force, *Guide to Clinical Preventative Services*, (2nd Ed. Williams & Wilkins 1996).

Finally, the threat of harm here extends beyond the putative class. Patients forced to seek health care and expensive life-saving treatments at emergency rooms and through health providers willing to accept uninsured patients will impose significant financial burdens on these entities and the health care system as a whole. *See* Letter to Governor Lingle by the chairs of the House and Senate committees on Human Services for the State of Hawai'i, dated August 26,

2009, attached as Exhibit "G" (stating that the decision to go forward with the new DHS rule "could also weaken the safety net of community health centers").

D. The Balance Of Equities Clearly Favors Plaintiffs

The balance of harms weighs strongly in favor of injunctive relief. There is little doubt that the putative class members will suffer grave harm if a preliminary injunction is not promptly granted. More specifically, putative class members will be harmed in three ways: medically, financially, and emotionally. DHS, on the other hand, will suffer largely a hypothetical financial harm.

As discussed in Part C above, there is ample evidence that putative class members will suffer significant harms to their health and physical well-being without equal access to State health insurance programs.

Putative class members also face serious financial harm. If injunctive relief is not granted, putative class members will be forced to pay, to the extent they are able, for their own critical medical services. Because putative class members have very low income levels, any savings they may have will likely be quickly depleted. Leit Decl. ¶¶ 10-11; Korab Decl. ¶¶ 13-14, 16; Enoch Decl. ¶ 15. The financial effect of depriving putative class members of their current level of medical benefits, or any state health coverage at all, will be tremendous.

Finally, class members will suffer significant emotional harms if injunctive relief is not granted. A number of Plaintiffs have testified to the stress

and fear they are suffering as a result of their inability, or the uncertainty surrounding their ability, to get health insurance or critical medical treatment. Enoch Decl. ¶ 15; Leit Decl. ¶ 9; Korab Decl. ¶ 16; Clanton Decl. ¶ 18. Moreover, many are forced to negotiate this already-difficult process in a foreign language. As Dr. Fernandes testifies, the confusion surrounding coverage has caused patients to miss important medical appointments for fear of out-of-pocket expenses. Fernandes Decl. ¶ 27. As a result, “[t]here is a very high risk that patients in need of acute care will end up being hospitalized due to delay in seeking medical help or will otherwise experience severe health problems or even death.” Palafox Decl. ¶ 14.

In contrast, Defendants stand to suffer largely a hypothetical financial harm. If the Court were to order the injunctive relief requested here, the State would be incurring substantially the same costs it has been. DHS's purported cost-savings goal is undermined by the fact that the implementation of BHH is likely to result in negative financial consequences in the form of increased health care costs and costly litigation. Palafox Decl. ¶ 13. Finally, DHS's administrative burden in complying with the Court's order is minimal. DHS can, as it previously has, issue temporary insurance cards to ensure that these residents are able to immediately access the care that they need.

Therefore, the balance of equities tips sharply in favor of Plaintiffs.

See Independent Living Center of Southern California v. Maxwell-Jolly, 572 F.3d 644, 657-58 (9th Cir. 2009) (“hardship to the State . . . was outweighed by the hardships likely to be suffered by . . . beneficiaries, who would be forced to go without medical care.”); *Beltran*, 677 F.2d at 1322 (district court did not err in concluding that in balancing “the medical or financial hardship to [state Medicaid recipients] against the financial hardship to the state” that the balance of hardships ‘tipped sharply’ in favor of the plaintiffs).

E. Preliminary Injunctive Relief Is In The Public Interest

Finally, the public will be and has been ill-served by DHS's discriminatory health care policy. When patients are deprived of preventive and critical medical care, they end up spending much greater amounts of time in hospital emergency rooms. As discussed above, emergency room care is exponentially more costly than the same treatment at outpatient facilities. Palafox Decl. ¶ 13. Uninsured patients forced to seek health care, including life-saving treatments, at emergency rooms and through other non-covered providers will impose significant financial and time burdens on the health care system as a whole. *See Palafox Decl. ¶ 13*. The general public not otherwise directly impacted by Defendants' discriminatory policy, is likely to suffer immediately from increased