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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

TONY KORAB, TOJIO CLANTON, KEBEN ENOCH, CASMIRA AGUSTIN, ANTONIO IBANA, AGAPITA MATEO and RENATO MATEO, individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

PATRICIA MCMANAMAN, in her official capacity as Interim 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.

CIVIL NO. 10-00483 JMS-KSC
[Civil Rights Action]
[Class Action]

**REPLY MEMORANDUM** IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION RE: NEW RESIDENTS, FILED APRIL 28, 2011; CERTIFICATE OF SERVICE
**[Related Doc. Nos. 63 & 66]**

**HEARING:**
Date: June 2, 2011
Time: 9:00 a.m.
Judge: J. Michael Seabright

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION RE: NEW RESIDENTS, FILED APRIL 28, 2011**

Plaintiffs CASMIRA AGUSTIN, ANTONIO IBANA, AGAPITA MATEO and RENATO MATEO, individually and on behalf of those similarly situated, by and through their counsel Lawyers for Equal Justice, Alston Hunt Floyd & Ing, and Bronster Hoshibata, file this Reply in support of their *Motion For*

*Preliminary Injunction Re: New Residents* ("Motion"). The Court should grant the Motion and issue a preliminary injunction (1) prohibiting Defendants Patricia McManaman and Kenneth Fink ("the State") from excluding resident aliens lawfully in the United States for less than five years ("New Residents") from State health benefit programs that are available to citizens of the United States and other residents of Hawai`i and (2) enrolling New Residents in Basic Health Hawai`i ("BHH").

## I. INTRODUCTION

The State's *Memorandum in Opposition to Plaintiffs' Motion For Preliminary Injunction RE: New Residents* ("Opposition") does nothing to preclude an injunction as to New Residents. While the State makes much of the fact that the New Residents, unlike the COFA Residents, were not enrolled in the Other Programs[1] prior to the State's 2009 benefit cuts, this fact has no relevance to the Motion because: (1) the "last uncontested status" is not the State's benefit scheme as of the date Plaintiffs filed their complaint, but the provision of State benefits to aliens on an equal basis with similarly-situated citizens, and (2) the State's previous discrimination against New Residents does not insulate its continued

[1] "Other Programs" refers to QUEST, QUEST-Net, QUEST-Ace, QExA, SHOTT, and similar programs. See First Order at *2 n.4 (citing stipulated facts regarding the Other Programs).

discrimination from scrutiny. In addition, the Court should not follow the recently-decided Connecticut Supreme Court of *Pham v. Starkowski*, ---A.3d---, 300 Conn. 412, 2011 WL 1124005 (Conn. April 5, 2011) because (a) that case does not change the Supreme Court and Ninth Circuit law upon which the Court properly relied in the COFA Orders[2] and (b) the Connecticut case concerned statutes that did not facially categorize beneficiaries according to alienage. None of the State's arguments can conceal the fact that the New Residents and the COFA Residents are identically-situated in all relevant respects. The Court should extend the preliminary relief it granted COFA Residents to New Residents.

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[2] "COFA Orders" are defined herein as they are in the Motion: (1) the *Order Denying Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted As to COFA Residents* (Doc. 30, "First Order"); and (2) *Order Granting Plaintiffs' Motion for Preliminary Injunction*, issued December 13, 2010 (Doc. 42, "Second Order").

## II. ARGUMENT

### A. Plaintiffs' Motion for Preliminary Injunction[3] Is Proper

The State argues that the "relief requested by [New Residents] goes far beyond the purpose of a preliminary injunction." Opposition at 6. They are wrong because (1) the State's focus on the "status quo" is misguided, and (2) regardless, the relevant status quo is the equal provision of State health benefits without discrimination based on alienage.

#### 1. The State's focus on status quo is misplaced

"Too much concern with the status quo may lead a court into error." *Steinberg v. Checker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). Furthermore, "[t]here is no particular magic in the phrase 'status quo'. The purpose of a preliminary injunction is always to prevent irreparable injury . . . If the current status quo is the cause of the irreparable injury, the Court should alter the status quo to prevent the injury." *Foster v. Dilger*, NO. 3: 10-41-DCR, 2010 WL

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[3] The State does not argue that the more onerous mandatory injunction standard applies, but even if it does, Plaintiffs meet it. In general, mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1980). at 1115 (quoting *Clune v. Publishers' Ass'n of N.Y. City*, 214 F. Supp. 520, 531 (S.D.N.Y. 1963)). But this is an extreme case in which a mandatory injunction is appropriate. Plaintiffs will go blind or perhaps even die if they cannot receive health benefits. Such injury is both "very serious" and not "capable of compensation in damages."

3620238, *2 (E.D. Ky. Sept. 9, 2010) (internal quotation marks and citation omitted). Therefore, the "focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Steinberg*, 573 F.2d at 925. Accordingly, the State's focus on the "status quo," Opposition at 6, should not distract the court from analysis of the preliminary injunction factors.

**2. The "last uncontested status" is the equal provision of State health benefits without discrimination based on alienage**

Even if the State insists on a determination of the status quo, it is the "last uncontested status," not the "*status quo* that existed on June 30, 2010." Opposition at 2; *see Goto.Com, Inc. v. Walt Disney Company*, 202 F.3d 1199 (9th Cir. 2000).

The State cites *Goto.Com* for the proposition that if the New Residents were returned to the status quo they would be receiving "benefits which they did not have prior to the institution of the action." Opposition at 6. But *GoTo.com* holds that "the status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the 'last uncontested status which preceded the pending controversy.'" *Id.* at 1210. The *GoTo.com* court determined that the last uncontested status was when the defendant began infringing the plaintiff's trademark, not when the Plaintiff sued the defendant for doing so. *Id.* The court reasoned that to hold otherwise would lead to "absurd situations in which plaintiffs could never bring suit once infringing conduct had begun." *Id.*

Here, Plaintiffs contest the State's unequal provision of State benefits based on alienage. Accordingly, the "last uncontested status" is the State's provision of benefits without regard to alienage; not, as the State asserts, when Plaintiffs initiated this action.[4] Therefore, the preliminary relief Plaintiffs seek is appropriate.

### B. The Court's Has Already Resolved the Issues Relevant to This Motion

In the COFA Orders, the Court held that: (1) the State discriminated based on alienage by cutting benefits to COFA Residents but not to similarly-situated Hawai`i residents; (2) strict scrutiny applied to that discrimination because PRWORA's grant of discretion to States to determine COFA Residents' eligibility for State benefits was not a "uniform rule;" and (3) COFA Residents were entitled to a preliminary injunction because they were likely to prevail on their equal protection claim. COFA Orders; *see also* Motion at 11-12.

The same reasoning applies to the State's alienage-based classification of New Residents, who are identical to the COFA Residents in all relevant respects. In the First Order, the Court held that PRWORA "granted states the authority to determine the eligibility of state benefits for certain groups of aliens

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[4] The last uncontested status can be in the distant past; *see Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067 (10th Cir. 2009) (last uncontested status was four years prior to the complaint).

including COFA Residents." First Order at *7. PRWORA grants states the exact same authority with respect to the New Residents.[5] Specifically, 8 U.S.C. §§ 1621 and 1622 forbid states from providing state benefits to illegal immigrants but preserves states discretion to provide benefits to both "nonimmigrants" (like the COFA Residents) and "qualified aliens" (like the New Residents). *See also* First Order at *7.

This "broad grant of discretion" is no more "uniform" with respect to the New Residents than it is with respect to the COFA Residents. Rather, it "fosters a lack of uniformity between the states based on the state's own consideration of who should receive benefits based on alienage . . . ." First Order at *10. Accordingly, the State's decision to deny benefits to New Residents is subject to strict scrutiny and, since the State's justifications for its discrimination are identical to its justifications for its discrimination against COFA residents, does not pass review. *Id*.; Second Order at *1.

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[5] The New Resident class includes "qualified immigrants" under PRWORA who are entitled to federal benefits after five years of U.S. residency. See 8 U.S.C § 1611 (limiting federal benefits to "qualified immigrants"), 1613 (making qualified immigrants who have resided in the U.S. for less than five years ineligible for federal benefits), 1641 (defining "qualified immigrants"). It also includes "nonimmigrants" or other lawfully-resident aliens who are not "qualified immigrants." Under PRWORA the State has discretion to extend state benefits to both of these subcategories. 8 U.S.C §§ 1621, 11622.

### C. The State May Not Continue to Discriminate Merely Because It Has Done So Before

The State attempts to distinguish the COFA Orders based on fact that "prior to the creation of BHH the New Residents received no medical assistance benefits from the State . . . ." Opposition at 1; Motion at 2.[6] The State argues that, with respect to the New Residents, BHH is therefore a "new and additional benefit," not alienage-based discrimination. Opposition at 1-5, 10-12.

At best, the State's argument merely goes to show that the state has discriminated against the New Residents for longer than it discriminated against the COFA Residents. But equal protection demands parity between similarly-situated groups, not parity between the same group at various points in time. The State cites no authority to support its position that discrimination may escape strict

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[6] In support of its contention that it did not provide any medical assistance to New Residents prior to 2010, the State argues that IHI "is not a medical assistance program" but "a subsidy to providers". Opposition at 3. The State's description of IHI is misleading for at least three reasons. First, the State's use of the present tense is misleading because IHI has been terminated. Fink Decl. ¶ 13 (asserting that IHI was renewed through the end of FY 2010 only). Second, the State's contention that, even in the absence of IHI, community clinics are not allowed to turn away patients who cannot pay overlooks that (a) New Residents may be billed by services provided by some safety providers who cannot turn them away and (b) under IHI, New Residents received specialized services *beyond* the services offered by community health centers that became unavailable upon the termination of IHI. Opposition at 3; Fink Decl. § 16. Finally, the nature of the IHI program is not relevant to Plaintiffs Motion; Plaintiffs' equal protection claim is not based on the State's termination of IHI, but on the State's failure to provide the New Residents benefits equivalent to those provided to similarly situated citizens and other aliens under the Other Programs.

scrutiny merely because it is longstanding, because none exists. To the contrary, evidence that a discriminatory practice is longstanding *supports* equal protection claims against local governments under § 1983. *Monell v. Dept. of Social Serv's of City of New York*, 436 U.S. 658, 691, 694 (1978).

It is true that in the First Order, the Court took note of the fact that "[f]or the last fourteen years Defendants have provided COFA Residents the same benefits as those provided to citizens and other qualified aliens, regardless of federal funding." First Order at *12. However, the Court held that this fact showed that "the issue is not whether a state must create a benefits program for certain groups of individuals where no program exists, but rather where a program involving state funding already exists, whether a state may then exclude certain groups from that program based on alienage." First Order at *12.

Although the State has not provided New Residents the same benefits as citizens and other qualified aliens for the last fourteen years, the issue is the same. The Other Programs exist. Accordingly, the State may not exclude certain groups from that program based on alienage. *Id.* That the New Residents were excluded from the Other Programs inception and the COFA Residents were excluded only in 2010 is of no moment.

### D. The Court Should Follow the Supreme Court and Ninth Circuit, Not *Pham*

The State argues that the Court should revisit its decisions COFA Orders based on *Pham*, a recently-issued Connecticut Supreme Court Opinion. Opposition at 9. The Court should not do so because: (1) the foreign *Pham* does nothing to undermine the Supreme Court and Ninth Circuit law on which the COFA Orders rest, and (2) *Pham* is distinguishable because the Connecticut statutes at issue did not facially classify beneficiaries by alienage.

#### 1. *Pham* is not an "Intervening Change in Law"

*Pham* held that Connecticut did not discriminate on the basis of alienage when it terminated an aliens-only health benefits program while maintaining another that provided similar care to similarly-situated citizens and other aliens. 2011 WL 1124005 at *6 ("§§ 55 and 64 do not discriminate on the basis of alienage, and, therefore, we do not reach the issue of whether a court should apply rational basis review or strict scrutiny"). Defendants ask the Court to follow *Pham* and do the same here. Motion at 8-12.

The Court, however, has already decided this issue: "Defendants' implementation of the Old Programs and BHH classify individuals based on alienage." First Order at *11. *Pham* is a change in the law of the State of Connecticut, but not "an intervening change" in the Ninth Circuit and Supreme

Court law on which the COFA Orders are based. Accordingly, there is no reason for the Court to reverse its earlier analysis.

**2. *Pham* is Irrelevant**

Upon the enactment of PRWORA in 1996, Connecticut enacted the State Medical Assistance for Noncitizens Program ("SMANC"). SMANC provided state-funded benefits to "qualified aliens" barred from participating in federal Medicaid by 8 U.S.C. § 1613's "five year rule". *Pham*, 2011 WL 1124005 at *4. Connecticut also provided state-funded benefits to aliens who were *not* "qualified aliens" under its State Administered General Assistance Medical program (SAGA).

In 2009, Connecticut eliminated SMANC but not SAGA. Qualified aliens who had not been resident in the U.S. for five years (*i.e.*, SAGA's former beneficiaries) sued and obtained a preliminary injunction. *Id*. at *5. On appeal, the Connecticut Supreme Court found that: (1) the termination of SMANC did not discriminate on the basis of alienage because SMANC was an aliens-only program that did not benefit any similarly-situated citizens, *id*. at *6,8; (2) SAGA did not discriminate on the basis of alienage because it classified residents by their eligibility for federal Medicaid, not their immigration status, *id.* at *20; and (3) Connecticut's continued provision of partially-state funded benefits to citizens under its core Medicaid programs did not discriminate against aliens because those

programs were partially federally-funded. *Id*. at *16-17). Accordingly, it reversed without reaching the question of whether strict scrutiny applied. *Id*. at *21.

The Connecticut Supreme Court held that this Court's First Order did not impact its analysis because neither of the statutes at issue in *Pham* was analogous to the BHH rule. *Id at* *16 ("the Hawai`i law rendered the plaintiffs . . . ineligible for certain state funded medical programs (old programs) that formerly had provided assistance to both aliens and citizens . . .").[7] The court noted that SAGA served all "*persons who do not meet the categorical eligibility criteria for Medicaid* . . .," and drew "absolutely no classification on the basis of a person's citizenship status." *Id*. at *20 (quoting General Statutes § 17b-192(a) (emphasis in original). It covered not only non-qualified aliens but also needy citizens ineligible for federal Medicaid because they were not (for example) blind, disabled, pregnant, or the parent of a dependent child. *Id*. SAGA excluded the *Pham* Plaintiffs not because they were aliens but because PRWORA defined them as "qualified aliens."

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[7] The Connecticut Supreme Court, however, also described BHH as "involv[ing] discrimination within medical assistance programs that were funded and administered exclusively by the state and did not involve a claim that the state was treating aliens differently than citizens who received assistance under federal Medicaid." *Pham*, 2011 WL 1124005 at *16. Since the Other Programs, like SAGA, were partially federally-funded, this characterization is inaccurate.

By contrast, Hawai`i's Other Programs *do* classify on the basis of alienage, and explicitly so. Hawaii Administrative Rule ("HAR") § 17-1722.3 makes "*citizens of COFA nations and legal permanent residents admitted the United States for less than five years*. . . " ineligible for "any and all state medical assistance . . . through QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for-service, [and] SHOTT." HAR § 17-1722.3-1 (emphasis added). The Rule's eligibility requirements section confirms that it applies only to "*an alien* who is not eligible for federal medical assistance and is either (A) A citizen of a COFA nation; or (B) A legal permanent resident . . . " HAR § 17-1722.3-7 (emphasis added). Plaintiffs were excluded from the Other Programs because they were aliens, not because PRWORA defines them as "qualified aliens."

Accordingly, *Pham* is simply not relevant.[8]

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[8] The Connecticut Supreme Court's holding that Connecticut does not have to provide State-funded benefits equal to "federal Medicaid" provided to citizens is similarly irrelevant. Connecticut apparently puts populations that are categorically-eligible for partial federal reimbursement into one program and puts populations whose benefits are not federally reimbursable into another program (SAGA). *Id*. at *2 n.10 ("optional coverage [for groups not categorically eligible for Medicaid] . . . is not relevant to the issues presented by this appeal"). Connecticut apparently has no analogue to the Other Programs, which serves both federally-reimbursable populations *and* non-federally-reimbursable populations (COFA Residents). Opposition at 15-17 (describing the Other Programs). It is to these programs, and not to "federal Medicaid," in which the New Residents seek to enroll.

### E. The State's Remaining Arguments Give the Court No Reason to Reverse the COFA Orders

The State's remaining arguments fail.

First, the State argues that its program survives strict scrutiny because it has a compelling reason for classifying by alienage — namely, that the State cannot afford to vindicate Plaintiffs' rights to equal protection. This reason is not sufficient. The Court has already rejected this argument. Second Order at *4-5.

Second, the State alleges that the balance of equities does not favor Plaintiffs because "Plaintiffs fail to provide any breakdown of the State's expenditures for the New Residents." Opposition at 31. But the Court has already held that the balance of equities favors Plaintiffs even if "the money Defendants save in implementing BHH is significant, it does not outweigh the physical and financial harm caused to COFA Residents." Second Order at *5. The physical and financial harm that will befall New Residents is at least as significant as that which will befall COFA Residents. Motion at 5-7.

Finally, the State alleges that an injunction is not in the public interest because the Motion "is simply an appeal for this Court to substitute policy decisions made by the Executive Branch of the government of the State of Hawai`i with their view of what appropriate policies should be." Opposition at 32. This characterization is wrong. The Motion is not based on policy views; it is based on well-established equal protection law that requires courts to strictly scrutinize state

alienage-based classifications. This law is in turn based on fundamental constitutional values which recognize that the limits to the majoritarian branches of government's ability to vindicate the rights of "insular minorities."

## III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion extending the injunctive relief already granted by this Court to New Residents should be granted.

DATED: Honolulu, Hawai`i, May 16, 2011.

/s/ J. Blaine Rogers
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