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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

vs.

PATRICIA MCMANAMAN in her official capacity as Director of the State of Hawaii 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

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS; MEMORANDUM IN SUPPORT; DECLARATION OF KENNETH FINK; STATEMENT OF UNDISPUTED MATERIAL FACTS; CERTIFICATE OF SERVICE

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS

Comes now, Defendants Patricia McManaman and Kenneth Fink, through their undersigned counsel, and hereby moves this Honorable Court to grant their motion for summary judgment pursuant to the Federal Rules of Civil Procedure, Rule 56, and dismiss this action as to the New Resident Plaintiffs, and give judgment in favor of Defendants, with all costs, including attorneys' fees.

This motion is brought pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCivP") and is based on the Memorandum in Support of the Motion, the evidence presented by way or declaration and documentation, and the records and files before this Court.

DATED: Honolulu, Hawaii, April 28, 2011.

/s/ John F. Molay .
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TONY KORAB, TOJIO CLANTON and KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiffs, vs. PATRICIA MCMANAMAN in her official capacity as Director of the State of Hawaii 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 MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS

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MEMORANDUM IN SUPPORT

1. Question Presented

The question presented in this Motion is: Should the action be dismissed as to the New Residents? This Court should answer that question in the affirmative because:

- The State of Hawaii did not violate Plaintiffs' Equal Protection rights under the United States Constitution;
- BHH does not discriminate based on alienage against aliens and in favor of citizens;
- The federal government, not the State, has chosen to exclude New Residents from Medicaid coverage;
- The Centers for Medicare & Medicaid Services has prohibited coverage for New Residents in QUEST, QExA, QUEST-Net, and QUEST-ACE;
- The Equal Protection Clause does not require that the State create a health care program for aliens whom Congress has chosen not to cover;
- To the extent the State has chosen to create a program just for aliens, it is subject to a rational basis standard of review;
- There is a rational basis for the State to provide to non-eligible aliens with different benefits than it provides to those who are eligible for federally-funded benefits;

- Plaintiffs have not shown *Olmstead* is applicable to the New Residents;
- Defendants have shown they have a viable defense to an *Olmstead* claim; and
- Plaintiffs have not stated a claim for discrimination based on disability.

2. Underlying Facts

The term "New Residents" as applied in the present lawsuit refers to non-pregnant legal immigrants, age nineteen or older, who have been legally residing in the United States for less than five years. (Fact 1) Since 1996, New Residents have not been eligible for the federal Medicaid program and have not received state-funded medical assistance benefits through the QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for service, or SHOTT programs, collectively referred to as the Other Programs by Plaintiffs. (Fact 2) The Basic Health Hawaii (BHH) program is a state-funded medical assistance program only for certain aliens, including New Residents, who are ineligible for the federal Medicaid program. (Fact 3) On July 1, 2010, BHH was implemented and New Residents became eligible for BHH, subject to the program limitations. (Fact 4) Certain New Residents were deemed into BHH pursuant to HAR § 17-1722.3-33(b). (Fact 5) The New Residents that were deemed into BHH and have continued to meet the eligibility requirements have received state-funded BHH benefits from the State of Hawaii since July 1, 2010. (Fact 6) Should this Court decide to restore the *status quo*

that existed on June 30, 2010, the New Residents would no longer be eligible to receive state-funded medical assistance benefits from the State of Hawaii. (Fact 7)

3. The State of Hawaii Did Not Violate Plaintiffs' Equal Protection Rights Under the United States Constitution

Congress, not Defendants, has elected to exclude certain aliens -- including New Residents -- from coverage in federal public benefit programs such as Medicaid. Nothing in the Equal Protection Clause requires the State to affirmatively provide benefits that the federal government denies to aliens, nor does it require the State, if it chooses to provide benefits, to provide the same level that it provides under the Medicaid program with federal support. In other words, "the equal protection clause does not require the state to treat individuals in a manner similar to how others are treated in a different program governed by a different government." *Hong Pham v. Starkowski*, 2011 WL 1124005 at 10 (citing *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 414 (Mass. 2002), *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004), *Khrapunskiy v. Doar*, 909 N.E.2d 70 (N.Y. 2009)). "[A] state does not discriminate against aliens when it treats aliens covered under an alien-only benefit program differently from the way in which citizens and other aliens are treated under a separate, federal-state benefit program." *Id.* at 13.

Even if treating aliens in an alien-only benefit program differently from citizens in a federal-state benefit program is found to be discrimination based on

alienage, BHH passes muster under rational basis review, which is all that is required when the State is not excluding individuals based on alienage but providing state-funded benefits to aliens who do not qualify for Medicaid coverage. To the extent that New Residents believe they should receive benefits comparable to those provided to citizens and other qualified aliens under Medicaid, their remedy is with Congress, not this Court.

A. BHH Does Not Discriminate Based on Alienage Against Aliens and in Favor of Citizens.

Plaintiffs have relied on *Hong Pham v. Starkowski*, 2009 WL 5698062 (unreported) (Conn. Super. Dec. 18, 2009), in which the state of Connecticut had a state-funded medical assistance program for certain aliens who were ineligible for federal Medicaid. Like the present case, the plaintiff and class members were legal aliens who were in need of nonemergency medical assistance because they were indigent and ineligible for such assistance through the federal Medicaid program. *Id*. at 1. The Connecticut state legislature effectively eliminated the state program under which the plaintiff and class members had been receiving the benefits in response to budgetary constraints. *Id*. Again, as in this action, the plaintiffs claimed this decision discriminated against them on the basis of alienage, in violation of federal law. *Id*. The trial court declared that the state legislative classification in that case distinguishes between citizens who are eligible for federal Medicaid and aliens who are not. Therefore, this was a classification based

on alienage that requires strict scrutiny standard of review. 2009 WL 5698062 at 14.

However, the Connecticut Supreme Court recently overturned this decision in *Hong Pham v. Starkowski*, 2011 WL 1124005 (April 5, 2011)[1]. The Connecticut Supreme Court rejected the plaintiff's argument in a well-reasoned opinion:

> We conclude that, in substantially eliminating [the state program], the state did not draw a classification on the basis of alienage because that program does not benefit citizens as opposed to aliens. To draw a classification on the basis of alienage, the state statute in question typically must afford some benefit to citizens but deny that benefit to at least some aliens because of their status as noncitizens.

Id. at 8.

The Connecticut Supreme Court reviewed United States Supreme Court cases following *Graham v. Richardson*, 403 U.S. 365 (1971), a cased heavily relied upon by Plaintiffs, and determined that the Supreme Court found discrimination based on alienage in *state* programs that favored citizens over aliens on the basis of an individual's citizenship status. *Id.* Specifically, each case cited,

[1] The Connecticut Supreme Court incorrectly described this court's earlier order for preliminary injunction as relating to "a Hawaii law that rendered the plaintiffs, who all were aliens in need of public medical assistance, ineligible for certain state funded medical programs (old programs) that formerly had provided assistance to both aliens and citizens. That law placed the plaintiffs in a different state funded program that provided less assistance than citizens continued to receive under the state's old programs." *Hong Pham*, 2011 WL 1124004 at 16. In fact, citizens have always been eligible for the federal Medicaid benefit, and the aliens in question were eligible for state-funded medical assistance. The aliens were never removed from a state funded program that served citizens.

including *Graham*, involved situations where a state discriminated against aliens in programs that included citizens. None compared aliens in an aliens-only program with citizens who were eligible for a federal or federal-state program from which the alien was barred. *Id*.

Therefore, the Connecticut Supreme Court noted that the state program that was eliminated provided assistance only to those aliens who are barred by the federal government from participating in federal Medicaid and that no citizens received benefits under Connecticut's program, as in the present case. *Id*. The *Hong Pham* Court stated that that the relevant question in determining if state action discriminates on the basis of alienage is not "whether the state is taking action that harms only aliens but, rather, whether the state program provides a benefit to citizens that it does not provide to some or all aliens because of their status as noncitizens." (citing *Nyquist v. Mauclet*, 432 U.S. 1 at 3-4, 12; and *Graham*, *supra*. at 367-68, 376) *Id*. The *Hong Pham* Court then concluded that:

> Because only aliens, and not citizens, ever have benefited from [the state benefit program], and because no citizens presently receive assistance under the program, the state is not providing a benefit to citizens that it is withholding from the class members and is not treating aliens disparately as compared to citizens. **We therefore conclude that § 64 of Spec. Sess. P.A. 09–5 does not discriminate against aliens in favor of similarly situated citizens and, therefore, does not create a classification based on alienage.**

Id. (emphasis added) Accordingly, the court in *Hong Pham* did not need to determine whether rational basis review or strict scrutiny applied. *Id.* at 21.

Other appellant court decisions that have explicitly considered the question of whether a statutory limitation in a program that serves only aliens discriminates against aliens and in favor of citizens have all ruled that such statutory limitations do not discriminate against aliens. In *Doe*, a Massachusetts statute created a special, alien-only cash assistance program for qualified aliens who were made ineligible for assistance under the federal TANF program by the PRWORA five year rule, but imposed a statutory durational residency requirement in Massachusetts such that not all qualified aliens who were made ineligible for TANF could qualify for the alien-only state benefit program. The court held that the statutory limitation "does not discriminate against aliens in favor of citizens." *Doe*, 773 N.E. at 411.

Similarly, in *Soskin*, the Tenth Circuit addressed Colorado's discretionary election to cut back on the scope of aliens who would be eligible to participate in Colorado's federal Medicaid program. Federal Medicaid law requires the states to cover "qualified aliens" who are otherwise eligible for assistance in their state Medicaid program (including by meeting the five year rule, if applicable), but affords the states the option to define additional groups of lawfully-admitted aliens as being eligible to participate in the federal program. Colorado initially elected to cover a more expansive group of aliens, but then, faced with a budget crunch, cut back to

the mandatory group of "qualified aliens." Notwithstanding that the federal Medicaid program serves both eligible citizens and eligible aliens, the option to serve additional aliens only applied to, and only benefited, aliens. Under these circumstances, *Soskin* followed *Doe*, and ruled that "[a] state's exercise of the federal option to include fewer aliens in its alien-only program, then, should not be treated as discrimination against aliens as compared to citizens." *Id.* at 1255-56.

Likewise, in this case, the State is not affording a benefit to citizens that is not available to aliens. Citizens are eligible for federal Medicaid, which by federal law excludes the New Residents. BHH is a benefit offered only to certain aliens, and not to citizens. The State did not draw classifications between citizens and aliens; it drew classifications between residents who were eligible for Medicaid and those who were ineligible. The reasoning of *Doe* and *Soskin* regarding the absence of discriminatory treatment between aliens and citizens in a limitation to a program that serves only aliens fully applies to the facts of this case.

Plaintiffs contend that Hawai'i is drawing impermissible classifications between citizens and aliens because BHH provides less medical coverage than federal benefit programs provide to citizens under Medicaid. However, "[t]hat aspect of the discrimination is Congress's doing," *Soskin*, 353 F.3d at 1256, when it excluded Plaintiffs from Medicaid and refused to provide states with any federal funding for Plaintiffs' medical care. By contrast, Hawai'i remains committed to

furnishing health care benefits to New Residents that Congress has turned its back on, despite the State's current budget crisis.

B. The Federal Government, Not the State, Has Chosen to Exclude New Residents From Medicaid Coverage

The Medicaid program, established in 1965, is "a cooperative federal-state program that directs federal funding to states to assist them in providing medical assistance to low-income individuals." *Ball v. Rodgers,* 492 F.3d 1094, 1098 (9th Cir. 2007) (citation and quotation marks omitted). "A state is not required to participate in Medicaid, but once it chooses to do so, it must create a plan that conforms to the requirements of the Medicaid statute and the federal Medicaid regulations." *Dep't of Health Servs. v. Sec'y of Health & Human Servs*., 823 F.2d 323, 325 (9th Cir. 1987). In return for its conformity with federal requirements, participating state governments get partial reimbursement, in the form of "federal financial participation" or "FFP" from the federal government. *Spry v. Thompson*, 487 F.3d 1272 , 1273 (9th Cir. 2007); *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1093 (9th Cir. 1999).

As part of the Personal Responsibility Work Opportunities Reconciliation Act (PRWORA), enacted in 1996, Congress directed that eligibility for Medicaid and other federal benefit programs be limited to "qualified aliens." 8 U.S.C. §§ 1611, *et. seq.* With limited exceptions, PRWORA provides that "an alien who is not a qualified alien [hereinafter, "nonqualified alien"] . . . is not eligible for any Federal public benefit." 8 U.S.C. § 1611(a); *see* 8 U.S.C. § 1641(b). Thus,

Congress has decreed that any noncitizen who does not satisfy the definition of qualified alien or meet one of the exceptions is ineligible for Medicaid, even if he or she meets all other Medicaid eligibility requirements.

Qualified aliens include legal permanent residents, asylees, refugees, certain aliens granted temporary parole into the United States for a period of at least one year, aliens whose deportation has been withheld, aliens granted conditional entry, aliens who are Cuban and Haitian entrants, and certain aliens and their children who have been battered or subjected to extreme cruelty. 8 U.S.C. § 1641(b)-(c).

While qualified aliens are generally eligible for federal benefits, PRWORA provides that those who entered the United States after August 22, 1996 (the date of PRWORA's enactment), are ineligible for any "Federal means-tested public benefit" for a period of five years following their date of entry. 8 U.S.C. § 1613(a). Refugees, asylees, and veterans and their families are exempted from the waiting period. *Id*. at § 1613(b). Medicaid is a means-tested program, and the U.S. Department of Health and Human Services has confirmed that qualified aliens applying for Medicaid are subject to the five-year waiting period. 62 Fed. Reg. 46,256 (August 26, 1997). Thus, most qualified aliens entering the U.S. after August 22, 1996, including the New Residents, must wait five years to become eligible for Medicaid.[2]

[2] Recent legislation made an exception to this bar for pregnant women and children. Pub. L. No. 111-3 § 214. Hawai'i immediately took advantage of this provision to include these groups in Medicaid.

C. The Centers for Medicare & Medicaid Services Has Prohibited Coverage for New Residents in QUEST, QExA, QUEST-Net, and QUEST-ACE

Medicaid is overseen at the federal level by the Department of Health and Human Services ("HHS") through HHS's Centers for Medicare and Medicaid Services ("CMS"). See *Robert F. Kennedy Med. Ctr. v. Leavitt*, 526 F.3d 557, 558 (9th Cir. 2008). Section 1115 of the Social Security Act authorizes the Secretary to approve experimental or demonstration projects to encourage states to adopt innovative programs that are likely to assist in promoting the objectives of Medicaid. *See* 42 U.S.C. § 1315(a). *See generally Spry v. Thompson*, 487 F.3d 1272; *Pharm. Research & Mfrs. of Am. v. Thompson*, 354 U.S. App. D.C. 150, 313 F.3d 600, 602 (D.C. Cir. 2002). Under an approved Section 1115 demonstration project, a State can be given the authority to modify its Medicaid program to provide benefits, use delivery systems (such as managed care), or cover groups that would not otherwise be eligible for Medicaid. *See Spry*, 487 F.3d at 1273-74. Once the waiver is granted, the State is subject to "Special Terms and Conditions" or STCs that govern how the waiver program will operate.

Hawai‘i has a Section 1115 waiver from CMS which enables it to provide, with federal matching funds, several different health care benefit packages to different populations in the State. The original QUEST waiver was implemented in 1993, and it gave the State the authority to provide Medicaid state plan benefits through managed care to Medicaid enrollees who were covered under Medicaid's various coverage categories for children and parents. The State also received

authority to cover certain groups (with federal funding) who were not otherwise eligible for Medicaid. These are known as "demonstration-eligibles" because they are made eligible for coverage pursuant to the Section 1115 demonstration project. As it has developed over time, the principal non-Medicaid group eligible for QUEST coverage is non-disabled, childless adults with incomes below the federal poverty level. Under the terms of the waiver, that group is subject to an enrollment cap, although there are various exceptions to imposition of the cap.

In 1996, the State implemented the "QUEST-Net" program through its Section 1115 demonstration program. QUEST-Net provides full Medicaid coverage to children and a less comprehensive package of benefits to adults who otherwise have too much income or assets to qualify for Medicaid. Adult enrollment in QUEST-Net is limited to those who previously had QUEST coverage but no longer meet those eligibility requirements.

When the QUEST demonstration project was renewed in 2006 as "QUEST Expanded" ("QEx") the State received the authority to cover additional adults through "QUEST Adult Coverage Expansion" or "QUEST-ACE," which provides coverage to adults who cannot be enrolled in QUEST due to the enrollment cap. Benefits under QUEST-ACE are equivalent to those available under QUEST-NET.

Most recently, the waiver was renewed to include "QUEST Expanded Access" or "QExA." QExA adds institutional and home-and-community-based

long term care benefits to the QUEST benefit package to individuals who qualify for Medicaid coverage in an aged, blind, or disabled eligibility group.

The STCs for both the QEx waiver, granted in 2006, and the QExA waiver, granted in 2008, state that all requirements of the Medicaid programs expressed in law, regulation, and policy statement, not expressly waived or identified as not applicable to the waiver shall apply. The State's 1115 waivers do not, and cannot, waive the restriction imposed by the PRWORA that New Residents are ineligible for federal Medicaid for a period of five years following their date of entry. 8 U.S.C. § 1613(a). Therefore, although the waivers do provide federal funding for some groups not otherwise eligible for Medicaid, the terms of the waivers make clear that there is no federal funding available for New Residents.

Although prohibited by PRWORA and the terms of its waivers from extending Medicaid coverage to New Residents, the State, nonetheless, chose to provide health benefits using only state tax dollars, without federal financial participation, as follows:

First, alien children and pregnant women who were not eligible for enrollment in Medicaid but who otherwise met QUEST eligibility criteria were provided the equivalent of full QUEST coverage. (See footnote 1, above)

Second, New Residents who otherwise meet the eligibility criteria for enrollment in QUEST, QUEST-Net, QUEST-ACE, or QExA are to be provided benefits through BHH.

D. The Equal Protection Clause Does Not Require That the State Create a Health Care Program for Aliens Whom Congress Has Chosen Not to Cover

When Congress passed the PRWORA, it excluded certain groups of aliens, including New Residents, from receiving federal public benefits such as Medicaid. *See* 8 U.S.C. §§ 1611(a), 1613(a). Nothing in federal or state law, including the PRWORA and the equal protection clauses of the United States constitutions, **requires** the State to create its own benefit program for these aliens whom Congress has excluded from coverage.

The Fourteenth Amendment provides that "[n]o state . . . shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The word "person" in this context includes "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*, 403 U.S. at 371. "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis [i.e. rational basis review]." *Id* "This is so in 'the area of economics and social welfare.'" *Graham*, 403 U.S. at 371 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). However, "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny [i.e. strict scrutiny]." *Id*. at 372.

The Supreme Court's decision in *Graham*, *supra*, held that States on their own cannot treat aliens differently from citizens without a compelling justification. *Id*. at 372-76. *Graham* resolved a consolidated appeal of two cases in which legal aliens challenged welfare programs in Arizona and Pennsylvania on equal protection grounds. *Id*. at 366-69. Arizona limited eligibility for federally funded programs for persons who were disabled, in need of old-age assistance, or blind, to U.S. citizens and persons who had resided in the U.S. for at least 15 years. *Id*. Pennsylvania limited eligibility for a state-funded welfare program to residents who were U.S. citizens or who had filed a declaration of intention to become citizens. *Id*. at 368. The Supreme Court observed that "the Arizona and Pennsylvania statutes in question create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country." *Id*. at 371. Notably, *Graham* was decided before the PRWORA restricted the eligibility of aliens for federal public benefits. Consequently, the Court reviewed these classifications under strict scrutiny and concluded "that 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 *Graham*, the statutes in question provided public assistance to citizens but denied the same assistance to aliens simply on the basis of their citizenship status. *Id.* at 376. *Graham* is not applicable here, however, where it is Congress, not the

State, that has excluded aliens from federally funded Medicaid coverage, and the State is providing a state-funded benefit that is separate and distinct from federal Medicaid.

In a case decided three years after *Graham*, the Supreme Court held that the federal government may treat aliens differently from citizens so long as the classification satisfies rational basis review. *Mathews v. Diaz*, 426 U.S. 67, 78-83 (1976). In that case, the Court upheld Congress's decision to "condition an alien's eligibility for participation in [Medicare] on continuous residence in the United States for a five-year period and admission for permanent residence." *Id*. at 69. The Court emphasized Congress's broad constitutional power over naturalization and immigration and noted that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Id*. at 80-81. Therefore, the Court applied rational basis review and held that "it is unquestionably reasonable for Congress to make an alien's eligibility [for federal Medicare benefits] depend on both the character and the duration of his residence." *Id*. at 82-83.

Following *Mathews*, lower courts have uniformly applied rational basis review to uphold federal statutes that exclude certain aliens from various welfare programs, even if those programs are administered by the States. *See, e.g.*, *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (upholding under rational basis review PRWORA restrictions on alien eligibility for state-administered pre-natal

Medicaid benefits); *Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000) (same for food stamps); *City of Chicago v. Shalala*, 189 F.3d 598, 603-05 (7th Cir. 1999) (same for supplemental social security income and food stamps); *Rodriguez v. United States*, 169 F.3d 1342, 1346-50 (11th Cir. 1999). Thus, the PRWORA provisions that exclude New Residents from receiving federal Medicaid benefits are clearly constitutional.

The Equal Protection Clause does not require States to fill in the gaps where Congress has excluded aliens from federal benefits but has given states discretion to furnish aliens with such benefits using state funds. *See, e.g.*, *Hong Pham v Starkowski,* 2011 WL 1124005 at 10 (Conn.) ("[T]he equal protection clause does not require the state to treat individuals in a manner similar to how others are treated in a different program governed by a different government."); *Khrapunskiy*, 909 N.E.2d at 77 ("Simply put, the right to equal protection does not require the State to create a new public assistance program in order to guarantee equal outcomes . . . . Nor does it require the State to remediate the effects of the PRWORA."); *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 414 (Mass. 2002) (finding that Massachusetts was not required to establish a state-funded program where the PRWORA barred qualified aliens from receiving federal temporary assistance for needy families until they had resided in the U.S. for five years but gave states discretion to provide such benefits to those aliens using state funds); *see also Soskin*, 353 F.3d at 1255 (holding that states do not

discriminate against aliens in violation of the Equal Protection Clause when states choose not to provide aliens with the maximum benefits permitted by federal law).

E. To the Extent the State Has Chosen to Create a Program Just for Aliens, It is Subject to a Rational Basis Standard of Review

In the PRWORA, Congress not only specified the categories of aliens that were eligible and ineligible for federal benefit programs, it also included rules governing coverage of aliens by state or local benefit programs. The statute defines a "state or local public benefit" as a "health . . . benefit for which payments or assistance are provided to an individual, household, or family eligibility unit" that is provided "by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(B).

The PRWORA does not require states to create benefit programs for aliens whom Congress has barred from receiving federal coverage. However, if states choose to commit their own resources to establish programs that help fill in those coverage gaps that Congress created, the PRWORA does delineate some eligibility rules for aliens. The statute provides that state programs may not exclude certain groups of qualified aliens, *see* 8 U.S.C. § 1622(b), but must exclude other groups, *see id*. § 1621(a). New Residents are not among the groups that must be included or excluded. Instead, the PRWORA gives states the discretion to determine the eligibility of such aliens, including the New Resident Plaintiffs, for state-funded benefits. *See id*. § 1622(a) ("a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien . . . ").

Several courts have addressed whether States that maintain state benefit programs may constitutionally exclude those aliens for whom Congress has made coverage optional. These courts have applied rational basis review where a State has created an optional state-funded benefit program exclusively for aliens and where it has decided to terminate such a program. In 2002, for example, the Massachusetts Supreme Court upheld as constitutional a state law that created a supplemental state-funded welfare program with a six-month residency requirement to provide benefits for aliens who became ineligible after the PRWORA imposed the five-year residency requirement for federally funded benefits. *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 406, 414-15 (Mass. 2002). The court found that "the Massachusetts Legislature was not required to establish the supplemental program" for aliens who did not meet the federal criteria and concluded that, having done so, its six-month waiting period was based on residency, not alienage, and thus was not subject to strict scrutiny. *Id*. at 411, 414-15. In concluding that rational basis review applied, the court also considered:

> the context in which the supplemental program was enacted; its purpose and the clearly noninvidious intent behind its promulgation; the effect of its implementation on mitigating the harm to qualified alien families that might otherwise be without substantial assistance for five years under the requirements of the welfare reform act [PRWORA]; and the potential harm to those families if the Legislature could only choose to create an all-or-nothing program as a remedy to their disqualification from federally funded programs.

Id. at 414.

Applying the rational basis standard, the court observed that Massachusetts's state benefit program was "consistent with national policies regarding alienage[] and places no additional burdens on aliens beyond those contemplated by the [PRWORA]." *Id*. at 414-15. The court concluded that the program furthered "the Federal policy of self-sufficiency and self-reliance with respect to welfare and immigration by ensuring that aliens first attempt to be self-sufficient before applying for State-funded welfare benefits. In addition, the six-month residency requirement encourages aliens to develop enduring ties to Massachusetts." *Id*. at 415. Finally, the court found that "[t]he fact that the Legislature might have been able to satisfy the requirements of the [PRWORA] in a different way does not mean that the legislative decision to enact [the state program] was irrational or constitutionally impermissible." *Id*.

In 2004, the Tenth Circuit upheld as constitutional Colorado's decision to mitigate a budget shortfall by eliminating its optional coverage of certain aliens from Medicaid (those whom, unlike New Residents, a State may cover under Medicaid). *Soskin*, 353 F.3d at 1246, 1254-57. After conducting an extensive discussion of *Graham* and *Mathews*, the court concluded that neither case determined the result. "Unlike *Graham*, here we have specific Congressional authorization for the state's action, the PRWORA. Unlike *Mathews*, here we have a state-administered program, and the potential for states to adopt coverage

restrictions with respect to aliens that are not mandated by federal law." *Id*. at 1251. Instead, "[t]his case fits somewhere in between." *Id*.

The Tenth Circuit noted that, unlike the federal law at issue in *Mathews*, the PRWORA "gives states a measure of discretion" that can take into account the impact on the state budget. *Id*. That is because states are "addressing the Congressional concern (not just a parochial state concern) that 'individual aliens not burden the public benefits system.'" *Id*. (quoting 8 U.S.C. §1601(4)). The court commented that "[t]his may be bad policy, but it is Congressional policy; and we review it only to determine whether it is rational." *Id*.

Plaintiffs have argued that the Congressional authorization to the states under PRWORA does not constitute a "uniform rule," and therefore strict scrutiny applies. *See*, Doc. 10-1 at 20-22. However, the Tenth Circuit in *Soskin* clearly demonstrates that the uniformity requirement of the Naturalization Clause does not negate the impact of the Congressional authorization, rejecting the concern expressed by *dicta* in *Graham* and by the holding in *Aliessa v. Novello*, 96 N.Y.2d 418, 752 N.E.2d 1085 (Ct. App. 2001). *Soskin* first demonstrates that the Naturalization Clause is not directly applicable to the question of whether a state may condition welfare benefits based on alienage status following the alien's entry into the country because that question is not related to the citizenship process. *Soskin*, 353 F.3d at 1256. ("Indeed it is not at all clear how the authority 'to establish a uniform Rule of Naturalization' is being exercised when Congress

restricts welfare benefits to aliens on grounds that have no direct relationship to the naturalization process. Whether the alien is seeking naturalization is no a consideration under the PRWORA.") *Soskin* then finds that Congress has other sources of constitutional authority over aliens in addition to the Naturalization Clause and quotes the decision of the United States Supreme Court in *Plyler* for the proposition that "[o]ther sources of Congressional authority include its plenary authority with respect to foreign relations and international commerce, and … the inherent power of a sovereign to close its borders." *Id.* (quoting *Plyler*, 457 U.S. at 225).

Finally, the Tenth Circuit borrowed reasoning from the Massachusetts Supreme Court's *Doe* opinion to explain how equal protection principles apply in cases that fall within the gray area between the bright lines of *Graham* and *Mathews*. The court described what Congress did in the PRWORA as, "in essence," creat[ing] two welfare programs, one for citizens and one for aliens . . . . The decision to have separate programs for aliens and citizens is a Congressional choice, subject only to rational-basis review." *Id*. (citing *Mathews*, 426 U.S. at 78-83). When a state exercises the option to include more or fewer aliens in the aliens-only program, that decision "should not be treated as discrimination against aliens as compared to citizens. That aspect of the discrimination is Congress's doing . . . ." *Id*. at 1255-56. Thus, the Tenth Circuit held that rational basis review applies to such classifications. *Id*.

The only time a court has applied strict scrutiny and declared a state program unconstitutional occurred when, following passage of the PRWORA, New York created a state-funded medical assistance program for U.S. citizens that completely excluded non-qualified aliens from eligibility. *See Aliessa*, 754 N.E.2d at 1090, 1094-99. The New York program provided the equivalent of Medicaid coverage to citizens that met Medicaid income requirements but did not meet categorical eligibility. The court rejected the state's argument that its exclusion of non-qualified aliens was merely "implement[ing] title IV's Federal immigration policy and should therefore be evaluated under the less stringent 'rational basis' standard." *Id*. at 1095. The court held that Congress's attempt to give states discretion not to extend state benefits to non-qualified aliens "produc[es] not uniformity, but potentially wide variation . . . . Considering that Congress has conferred upon the states such broad discretionary power to grant or deny aliens State Medicaid [i.e., state-funded medical assistance], we are unable to conclude that title IV reflects a uniform national policy." *Id*. at 1098. It held that the state's attempt to exclude non-qualified aliens from its state-only medical assistance program did not pass strict scrutiny and violated the Equal Protection Clause.[3]

[3] An Arizona state court, addressing that State's exclusion of aliens from a program for non-Medicaid eligibles, upheld the constitutionality of the program under strict scrutiny, on the ground that Congress in the PRWORA intended to give States the discretion to exclude all but a small group of aliens from their state programs. *See Avila v. Biedess,* 78 P.3d 280, 283 (Ariz. Ct. App. 2003). The PRWORA provides that "a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen

However, a subsequent case from New York made clear that, despite the holding in *Aliessa*, "the right to equal protection does not require the State to create a new public assistance program in order to guarantee equal outcomes . . . Nor does it require the State to remediate the effects of the PRWORA." *Khrapunskiy*, 909 N.E.2d at 77.

Plaintiffs allege that, as long as Hawai'i maintains a state-funded program such as BHH, the Equal Protection Clause mandates that Hawai'i provide the same coverage that citizens receive through Medicaid. Otherwise, in Plaintiffs' view, the discrepancy in coverage constitutes discrimination based on alienage and is subject to strict scrutiny.

Plaintiffs' argument is doubly flawed. First, Hawai'i is not distinguishing between groups of people based on their alienage. Rather, the State simply chose to provide a benefit to persons who are ineligible for federal Medicaid due to the impact of PRWORA. Federal program eligibility is not a suspect classification and, thus, only triggers rational basis review.

Second, as previously discussed, neither the PRWORA nor the Equal Protection Clause compels Hawai'i to create a state-funded benefit program to provide health care coverage for aliens whom Congress has excluded from Medicaid. *See, e.g.*, *Khrapunskiy*, 909 N.E.2d at 77; *Doe*, 773 N.E.2d at 414. It

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the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7).

defies logic to interpret equal protection principles as permitting Hawai‘i to provide non-qualified aliens with no medical coverage, but not permitting Hawai‘i to provide them with some medical coverage. To adopt Plaintiffs' all-or-nothing view and invalidate BHH would create perverse incentives for states -- particularly in times of budgetary crisis -- to eliminate, rather than merely scale back, state-funded medical assistance to non-qualified aliens in order to avoid alleged constitutional infirmity.

F. There is a Rational Basis for the State to Provide to Non-Eligible Aliens With Different Benefits Than It Provides to Those Who Are Eligible for Federally-Funded Benefits

Defendants' decision to provide non-eligible aliens with a lesser level of benefits than it provides to those who are eligible for federally-funded Medicaid benefits satisfies rational basis review. "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic" of government choices. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Therefore, the state's decision to provide health benefits to non-eligible aliens through BHH must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id*. at 320; *accord Baehr*, 74 Haw. at 572 ("[u]nder the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest").

Furthermore, a State "that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification." *Id*.

(quotation omitted). Rather, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *accord Baehr*, 74 Haw. at 572 ("[o]ur inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment"). The state "has no obligation to produce evidence to sustain the rationality of a statutory classification"; "[t]he burden is on [Plaintiffs] to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320.

Although it is under no legal obligation to do so, Hawai'i chose to use state funds to provide health benefits to non-eligible aliens through BHH. While not as comprehensive as the full Medicaid package, it is not illegitimate for the State, in making this determination, to take into account its current budget situation, given Congress's goal in the PRWORA that "individual aliens not burden the public benefits system." 8 U.S.C. § 1601(4); *see also Aleman v. Glickman*, 217 F.3d 1191, 103 (9th Cir. 2000) (recognizing that concern about the fiscal impact of providing benefits constitutes a legitimate government objective). Plaintiffs do not, nor can they, dispute that the state's decision to provide BHH benefits to New Residents, which are generally less comprehensive than the federal Medicaid benefits available to citizens and certain qualified aliens, was rationally related to these legitimate state and federal governmental interests. Therefore, the state has

satisfied rational basis review and has not violated Plaintiffs' rights under the Equal Protection Clause.

4. Plaintiffs Have Not Shown *Olmstead* is Applicable to the New Residents

Plaintiffs have cited the case of *Olmstead v. L.C.*, 527 U.S. 581(1999) in support of their claim that the State of Hawaii has violated their rights by discriminating against them based on their disabilities. In *Olmstead* the Supreme Court interpreted the failure to provide medicaid services in a community-based setting as a form of discrimination on the basis of disability. However, the Supreme Court also specifically noted:

> We do not in this opinion hold the ADA imposes upon the States a "standard of care" for whatever medical services they render, or that the ADA requires the States to "provide a certain level of benefits to individuals with disabilities." [internal citation omitted] We do hold, however, that States must adhere to the ADA's non-discrimination requirement with the services they in fact provide.

Id. at 603, n. 14.

Here, Plaintiffs are arguing that the State of Hawaii must provide **additional** services that they had previously not provided because failure to provide those services may cause Plaintiffs to be at a greater risk of institutionalization. Therefore, based on the nature of their claim, *Olmstead* does not appear to be controlling because in *Olmstead* the parties disputed only--and the Court addressed only--where the State of Georgia should provide the services, not whether it must provide it. *Accord, Rodriguez v. City of New York*, 197 F.3d 611, 619 (2nd Cir.

1999). Because the State of Hawaii had not been providing any medical benefits to the New Residents prior to BHH, there is no support in *Olmstead* for Plaintiffs' request that this Court order the State of Hawaii provide them now.

5. Defendants Have Shown They Have a Viable Defense to an *Olmstead* Claim

The non-discrimination requirement of the ADA was discussed in *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003):

> When a state's policies discriminated against the disabled in violation of the ADA, the ADA's regulations mandate reasonable modifications to those policies in order to avoid discrimination on the basis of disability, at least where such modification would not fundamentally alter the nature of the services provided by the state [citing] *Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 1996).

Id. at 517.

Here, as noted previously, the New Residents had not been receiving **any** medical benefits from the State prior to the implementation of BHH. **None** of the cases cited by Plaintiffs concern a similar situation. Instead, all deal with otherwise qualified individuals receiving less services or benefits that they had previously been receiving. *See Townsend, supra*.; *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003); *ARC of Washington, Inc. v. Braddock*, 427 F. 3d 615 (9th Cir. 2005); *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009); and *Ball v. Rogers*, 2009 WL 1395423 (D. Ariz. 2009).

Plaintiffs' request would be a fundamental alteration of the services offered by the State of Hawaii. Instead of providing none (pre-July 2010) or limited

benefits (July 2010 to the present) Plaintiffs are requesting this Court to order the State of Hawaii to provide the same benefits that it provides to citizens and certain qualified aliens through its Medicaid program. This is simply an attempt to circumvent federal law and have this Court impose a standard of care as to the services that should be provided.

6. Plaintiffs Have Not Stated a Claim for Discrimination Based on Disability

Title II of the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added).

In order to establish a violation under Title II of the ADA, a plaintiff must show that:

> (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

Townsend v. Quasim, 328 F.3d 511, 516 (9th Cir. 2003) (quoting *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)).

A "qualified individual with a disability" is defined under Title II as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements

> for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Plaintiffs are not qualified individuals with a disability. Plaintiffs allege that they are being discriminated against by being excluded from QUEST and QExA, both federal public benefit programs. As noted above, New Residents are excluded from federal public benefit programs by virtue of PRWORA, and the State's Section 1115 waivers. They do not meet the essential eligibility requirements for receiving medical benefits.

There are no facts in the First Amended Complaint that establish that the denial of any benefit to the Plaintiffs was by reason of their disabilities. The First Amended Complaint clearly alleges that any denial of benefits was based on **alienage**, not disability status. The decision to place Plaintiffs into BHH has absolutely nothing to do with the disability status of any of the Plaintiffs. Plaintiffs have simply not been denied a benefit they would have otherwise received had they not been disabled.

This non-discrimination provision requires that the State not discriminate against the disabled versus non-disabled within BHH, not that this Court compare the services provided in one of its Medicaid programs to a non-Medicaid program. See *Hong Pham (2011)*, *supra*.

Therefore, as they have not shown that the disabled New Residents are not being denied any benefits offered to other BHH recipients, Plaintiffs have failed to support their claim for discrimination based on disability.

7. Conclusion

For the reasons set forth above, Defendants request this Court grant Defendants summary judgment as to all claims brought by the new residents.

DATED: Honolulu, Hawaii, April 28, 2011.

/s/ John F. Molay .
JOHN F. MOLAY
Deputy Attorney General
Attorney for Defendants

PATRICIA McMANAMAN and
KENNETH FINK

CERTIFICATION OF LENGTH OF MEMORANDUM

Pursuant to L.R. 7.5 counsel for Defendants hereby certifies the length of the Memorandum in Support of Defendants' Motion for Partial Summary Judgment to be 7,485 words, using the word count feature of Word 2007.

DATED: Honolulu, Hawaii, April 28, 2011.

/s/ John F. Molay .
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TONY KORAB, TOJIO CLANTON and KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiffs, vs. PATRICIA MCMANAMAN in her official capacity as Director of the State of Hawaii 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 DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Fact	Evidentiary Support
1. The term "New Residents" as applied in the present lawsuit refers to non-pregnant legal immigrants, age nineteen or older, who have been legally residing in the United States for less than five years.	1. Fink Declaration
2. Since 1996, New Residents have not been eligible for the federal Medicaid program and have not received state-funded medical assistance benefits through the QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for service, or SHOTT programs, collectively referred to as the Other Programs by Plaintiffs.	2. Fink Declaration
3. The Basic Health Hawaii (BHH) program is a state-funded medical assistance program only for certain aliens, including New Residents, who are ineligible for the federal Medicaid program.	3. Fink Declaration
4. On July 1, 2010, BHH was implemented and New Residents became eligible for BHH, subject to the program limitations.	4. Fink Declaration
5. Certain New Residents were deemed into BHH pursuant to HAR § 17-1722.3-33(b).	5. Fink Declaration
6. The New Residents that were deemed into BHH and have continued to meet the eligibility requirements have received state-funded BHH benefits from the State of Hawaii since July 1, 2010.	6. Fink Declaration
7. Should this Court decide to restore the *status quo* that existed on June 30, 2010, the New Residents would no longer be eligible to receive state-funded medical assistance benefits from the State of Hawaii.	7. Fink Declaration

DATED: Honolulu, Hawaii, April 28, 2011.

/s/ John F. Molay .
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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 Hawaii 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

DECLARATION OF KENNETH S. FINK, M.D., M.G.A., M.P.H.

DECLARATION OF KENNETH S. FINK, M.D., M.G.A., M.P.H.

I, Kenneth S. Fink, M.D., M.G.A., M.P.H., declare as follows:

1. I make this Declaration to the best of my personal knowledge and if called to testify I could and would do so competently as follows:

2. Since June 30, 2008, I have been the Administrator of the Department of Human Services, Med-QUEST Division, which is the state agency that administers the Medicaid program in the State of Hawaii.

3. I received a Medical Doctor degree from the University of Pennsylvania in 1996, a Master of Governmental Administration degree from the University of Pennsylvania in 1995, and a Master of Public Health degree from the University of North Carolina at Chapel Hill in 2000. I completed a residency in family medicine at the University of Washington from 1996 to 1999 and a residency in preventive medicine at the University of North Carolina at Chapel Hill from 1999 to 2001. I have been board certified in family medicine since 1999 and in preventive medicine since 2002 and was granted the degree of Fellow by the American Academy of Family Physicians in 2004 and by the American College of Preventive Medicine in 2006.

4. I was a Robert Wood Johnson Clinical Scholar completing a health services research fellowship in 2001 and was a Kerr White Visiting Scholar completing a health policy fellowship in 2003.

5. From 2003 to 2004, I directed the U.S. Preventive Services Task Force program and from 2004 to 2006 I directed the Evidence-based Practice Centers program where I helped implement the Comparative Effectiveness Research program, both at the U.S. Department of Health and Human Services (DHHS) Agency for Healthcare Research and Quality. From 2006 to 2008, I served as the Chief Medical Officer for the DHHS, Centers for Medicare & Medicaid Services Region 10.

6. In addition, I have been a physician in the U.S. Air Force Reserve since 2000, am a flight surgeon, currently hold the rank of Lieutenant Colonel, and am a veteran of Operation Enduring Freedom. I currently have academic appointments at the University of Washington and the University of Hawaii, and I am widely published in the peer reviewed literature.

7. The term "New Residents" as applied in the present lawsuit refers to non-pregnant legal immigrants, age nineteen or older, who have been legally residing in the United States for less than five years.

8. Since 1996, New Residents have not been eligible for the federal Medicaid program and have not received state-funded medical assistance benefits through the QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for service, or SHOTT programs, collectively referred to as the Other Programs by Plaintiffs.

9. The Basic Health Hawaii (BHH) program is a state-funded medical assistance program only for certain aliens, including New Residents, who are ineligible for the federal Medicaid program.

10. On July 1, 2010, BHH was implemented and New Residents became eligible for BHH, subject to the program limitations.

11. Certain New Residents were deemed into BHH pursuant to HAR § 17-1722.3-33(b).

12. The New Residents that were deemed into BHH and have continued to meet the eligibility requirements have received state-funded BHH benefits from the State of Hawaii since July 1, 2010.

13. Should this Court decide to restore the *status quo* that existed on June 30, 2010, the New Residents would no longer be eligible to receive state-funded medical assistance benefits from the State of Hawaii.

I declare the foregoing to be true and correct under penalty of perjury.

DATED: Honolulu, Hawaii, April 25, 2011.

KENNETH S. FINK

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

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Defendants.

CIVIL NO. 10-00483 JMS KSC

CERTIFICATE OF SERVICE OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS

CERTIFICATE OF SERVICE OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS

I hereby certify that on April 28, 2011 I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the District of Hawaii by using the CM/ECF system.

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