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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

TONY KORAB, TOJIO CLANTON and KEBEN ENOCH, individually and on behalf of all 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. CV 10-00483 JMS KSC [Civil Rights Action] [Class Action] **PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION FILED OCTOBER 4, 2010; DECLARATION OF JOSEPH HUMPHRY; CERTIFICATE OF SERVICE**

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION FILED OCTOBER 4, 2010

I. INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction is disingenuous at best and deceptive at worst. Basic Health Hawai‘i ("BHH") blatantly classifies and discriminates based on alienage, and is subject to and will not survive strict scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971).

Defendants attempt to justify the discriminatory health care policy by claiming that their hands are tied based on the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996.[1] Contrary to the Defendants' repeated assertions, PRWORA does not prohibit the State from providing state-funded health care benefits to COFA Residents and New Residents. Further, PRWORA is a red herring. Plaintiffs' attack is against the State for excluding them from state-funded health benefit programs, not *federally*-funded Medicaid programs. In fact, the State was providing health care benefits to COFA Residents through State-funded programs for 13 years after PRWORA was enacted. There is no suggestion anywhere in the Opposition that the State violated PRWORA from 1996 to 2010. The real motivation for the discriminatory policy is to cut costs, and the State has purposely targeted a discrete, insular and protected minority that is extremely vulnerable, to exclude from its health care programs.

Plaintiffs seek to require the State to reinstate the policy in place before July 1, 2010, when Plaintiffs had access to the same level of state-funded health care benefits as United States citizens, regardless of their citizenship or immigration status. In other words, Plaintiffs request that the discriminatory new policy cease and the *status quo ante* be restored.

[1] 8 U.S.C. §§ 1611, *et seq.*

II. ARGUMENT

A. Defendants' Discussion About The Compacts Of Free Association Is Misleading.

The State devotes several pages of its Opposition to discussing the Compacts of Free Association between the United States and the Freely Associated States.[2] However, the State focuses on irrelevancies and attempts to divert the Court's attention from the critical facts, which are: (1) COFA Residents have the right to enter, live and work in the United States without visas, (2) the State receives federal funds for costs associated with the health, education, and welfare of COFA Residents, and (3) if those funds are not enough, the State can request more from the Federal government.[3]

The Compacts of Free Association are treaties that were approved by Congress and ratified by the President. The Compacts exist because the United

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[2] The Freely Associated States are the Republic of the Marshall Islands ("RMI"), the Federated States of Micronesia ("FSM"), and the Republic of Palau ("Palau"). Citizens of the Freely Associated States residing in Hawai‘i are referred to as "COFA Residents" in this reply.

[3] Throughout the Opposition, the State suggests that Plaintiffs are deportable. Def. Mem. at 4-5 ("a COFA Resident 'who cannot how that he or she has sufficient means of support in the United States, is deportable'"). This threat is inappropriate and offensive, since the State has absolutely no authority to deport aliens. *Plyler v. Doe*, 457 U.S. 202, 219 n. 19, 102 S.Ct. 2382 (1982) (a state may not independently exercise the power to deport aliens; that power lies solely with the Federal government). In addition, someone who qualifies for state-funded medical assistance is not necessarily someone who does not have "sufficient means of support."

States and the Freely Associated States have maintained deep ties and a cooperative relationship since World War II.[4] During the war, the United States and Japan fought many of the major battles of the Pacific campaign in the Micronesian islands. In the 1940s and 1950s, the United States conducted nuclear weapons testing in four atolls of the RMI, displacing residents of those atolls and causing numerous medical conditions from the thermonuclear fallout. 48 U.S.C. § 1903. After World War II, the Micronesian islands became part of the United Nations Trust Territory of the Pacific Islands, administered by the United States. P.L. 99-239, Preamble.

In the 1980s, the Compacts were negotiated and ratified, giving the United States power over half a million square miles of the Pacific between Hawai‘i and Guam to the exclusion of military forces from other nations. P.L. 99-239, § 311(b)(2). Citizens of the Freely Associated States and the United States have the ability to enter, live and work in each other's countries.[5] P.L. 99-239, §§ 141, 142.

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[4] See http://www.state.gov/r/pa/ei/bgn/1839.htm.

[5] The State asserts that COFA Residents have the option to enter the United States under the Compact or through normal immigration channels. Def. Mem. at 6. This assertion is misleading and unclear as to what "normal immigration channels" the State is referring to. If by "normal immigration channels" the State refers to a visa application process, then this process is not available to COFA Residents. A visa application is completed prior to admission to the United States through the Department of State presence in that country. COFA Residents are exempted from applying for permission to enter the United States, and there is no such visa application process or infrastructure in the Freely Associated States because of the

The United States Armed Forces accepts volunteers from the Freely Associated States for active service and may even draft citizens of Freely Associated States who habitually reside in the United States, its territories or possessions.[6] P.L. 99-239, § 341.

The Federal government appropriates "Compact Impact" funds to repay certain jurisdictions for costs associated with providing health, education, and other public services to citizens of the Freely Associated States. Under the Compact of Free Association Amendments Act of 2003, 48 U.S.C. § 1904, *et seq*. (the "2003 Compact"), the Federal government established a permanent annual appropriation of $30,000,000 to the governments of the State of Hawai'i, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa to "aid in defraying the 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 Freely Associated States. 48 U.S.C. §

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special relationship between the United States and the Freely Associated States under the Compact.

[6] Micronesians volunteer to serve in the U.S. Armed Forces at approximately double the per capita rate as Americans; they are also eligible for admission to U.S. Service Academies. See http://www.state.gov/r/pa/ei/bgn/1839.htm. U.S. Army recruiters make a dozen visits each year to the Freely Associated States to recruit Micronesian men and women for the war effort in the Middle East, Afghanistan and Pakistan. Since the War on Terror began, many Micronesians have died either in combat or otherwise while serving the United States.

1904(e)(3).

The State has been receiving Compact Impact funds since 2003. For FY2010-11, the State of Hawai‘i received $11,228,742 in Compact Impact funds. Declaration of Kenneth S. Fink, attached to the Opposition, ¶ 16.

Federal law recognizes that if Hawai‘i needs additional funds, there is a mechanism for getting additional funds appropriated. The State may report annually to the Secretary of the Interior on the impacts of the Compacts, which information will be used to recommend corrective action to Congress to eliminate any adverse consequences in the State. 48 U.S.C. § 1904(e)(8). The State may request additional sums needed to offset the increased demands placed on Hawai‘i’s educational, social or public safety services or infrastructure. 48 U.S.C. § 1904(e)(10). The State may even request reimbursement to its health care institutions for costs incurred in treating COFA Residents. 48 U.S.C. § 1904(e)(6).

In its Opposition, Defendants complain that the Compact Impact funds are insufficient to reimburse the State for health care services provided to COFA Residents.[7] However, the 2003 Compact provides the State of Hawai‘i a roadmap to obtaining additional reimbursement and even for reimbursement to health care

[7] The State asserts that the total estimated expenditures for services to COFA Residents currently exceeds $100 million per year. In support of this number, the State cites Dr. Fink’s declaration, which states that this figure is based on his “understanding” and nothing else. Fink Decl., ¶ 17. This assertion is mere hearsay and should be disregarded.

institutions that have been providing services to COFA Residents. The State has introduced no cognizable evidence of any efforts it has made to get additional reimbursement from the Federal government. Regardless, the 2003 Compact clearly enables the State to seek additional funds to further offset the impact of COFA migration.

Most importantly, what the 2003 Compact shows is that Congress is not preventing the State from providing public benefits to COFA Residents. On the contrary, Congress is giving federal funds to the State to provide these benefits and even established a mechanism for the State to get more funds if needed. Under principles of statutory construction, when reconciling a more recent and specific statute with a more general and older one, the more specific statute is treated as an exception to the general statute and controls the circumstances in which it applies. See *Thompson v. Calderon*, 151 F.3d 918, 928 (9th Cir. 1998) (J. Kleinfeld, concurring). Because the 2003 Compact is more recent and specific than PRWORA, the clear indication from Congress is that Hawai‘i should be providing health care benefits to COFA Residents.

B. Plaintiffs Are Likely To Prevail On The Merits.

1. BHH Violates The Equal Protection Clause.

For more than a decade, Plaintiffs enjoyed and had access to the same level of state-funded health benefits as other residents of Hawai‘i. In 2010, based on

alienage alone, the State excluded Plaintiffs from the QUEST programs and deemed them into BHH. BHH expressly discriminates based on alienage: "Basic Health Hawai'i means the State funded medical assistance program 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." HAR § 17-1417-2. On its face, BHH runs afoul of the Fourteenth Amendment. U.S. CONST. amend. XIV ("[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws.").

In an attempt to escape responsibility for its discriminatory policy, the State blames Congress for excluding COFA Residents and New Residents from coverage under federal public benefit programs. However, the State cannot hide behind Congress where the public benefit program at issue is a **state**-funded program.

The State claims that PRWORA prohibits it from extending coverage through federally-funded Medicaid to COFA Residents and New Residents. Again, this claim rings hollow. PRWORA prohibits states from including non-qualified aliens in federal Medicaid programs. PRWORA does not prohibit the State from using state funds or Compact Impact funds to provide benefits to COFA Residents or New Residents. That is precisely what the State has been doing for the over 13 years.

The Other Programs[8] at issue here are state-funded Medicaid programs, and the State admits this fact. On August 10, 2009, the Med-Quest Division issued an internal memo called "Policy and Program Development Clarification" regarding medical assistance to COFA Residents. The memo states:

> Citizens of a COFA country have not been eligible for federally-funded medical assistance, except for emergency services, since 08/96. The Department has been providing ***State-funded medical assistance*** to COFA citizens by enrolling them in the ***QUEST, QUEST-Net, QUEST-ACE, QExA, SHOTT, or fee-for-service programs***. The Department can no longer afford to sustain the level of services that are being provided with State funds. A new State-funded program, Basic Health Hawai'i (BHH), will provide medical coverage effective 09/01/09 to certain aliens who do not qualify for federally funded medical assistance. Eligible individuals shall be enrolled in a BHH health plan that will provide coverage of contracted medical services similar to the QUEST-Net and QUEST-ACE programs.

Exhibit "D" of Motion, at 1 (emphasis added). If these Other Programs are state-funded, as Defendants admit, then they are **not** prevented from extending coverage based on PRWORA. After 13 years of providing these services to Plaintiffs, the State chose to exclude them solely on the basis of alienage, not on the basis of PRWORA.

In the Opposition, Defendants purportedly quote language from "Special Terms and Conditions" or STCs for the QEx and QExA waivers that "specifically

[8] In this reply, Plaintiffs adopt the definition of "Other Programs" used in the Motion, which includes QUEST, QUEST-Net, QUEST-ACE, QExA, the State of Hawai'i Organ and Tissue Transplant ("SHOTT"), and fee-for-service programs. See Motion at 2, fn. 2.

excludes unqualified aliens, including aliens from the Compact of Free Association countries." Def. Mem. at 16. Defendants even cite the STCs at Exhibit D, pages 2 and 5, and Exhibit E at pages 3, 5, 6, 10, and 15 – 21. However, the STCs do not contain the quoted language. Even if they did, the provisions would only show that federal Medicaid funding is not available for COFA Residents. They do not require state-funded health programs to exclude COFA Residents, nor do they prevent the State from using federal Compact Impact funds for this purpose.

This is a classic case of a suspect classification subject to strict scrutiny. The State provides state-funded public health benefits through the Other Programs to U.S. citizens who do not qualify for federal Medicaid benefits. Thus, the State cannot deny these same benefits from other residents who would qualify for the Other Programs but for their alienage.

The facts of this case are most akin to *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001), in which New York enacted a statute that denied state Medicaid benefits to the plaintiffs based on their status as legal aliens. The plaintiffs suffered from potentially life-threatening illnesses and, but for the exclusion under the New York statute, they would qualify for Medicaid benefits funded solely by the State. Id. at 1088. Like Hawai‘i before July 1, 2010, New York chose to extend non-federally subsidized Medicaid benefits at its own expense to individuals who were not otherwise entitled to federal Medicaid benefits. Id. at

1089. After the PRWORA passed, New York stopped provided the benefits to the plaintiffs.

The plaintiffs challenged the statute and prevailed. Applying strict scrutiny, the New York Court of Appeals held that the statute violated the Equal Protection Clauses of the United States and New York State Constitutions because it denied state Medicaid benefits to otherwise eligible lawfully admitted residents based on their status as aliens. Id. at 1098-99.

Despite *Aliessa*, the State repeatedly cites *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009), for the proposition that the right to equal protection does not require the State to create a new public assistance program to guarantee equal outcomes. The *Khrapunskiy* case, however, is inapposite to the facts here and, therefore, its holding is unpersuasive.

In *Khrapunskiy*, New York State amended its social services law in 1998 which rendered plaintiffs ineligible for public assistance payments. Id. at 73. The court held that because New York was conforming its statute to mirror PRWORA and was not creating a program of benefits that excluded plaintiffs or drew classifications along suspect lines, the statute did not violate the Equal Protection Clause. Id. a 76.

The most significant distinction in *Khrapunskiy* is that the State of New York did not have an existing state-funded public assistance program for which the

plaintiffs were eligible. Thus, the state would have had to enact a new public assistance program so that the plaintiffs would receive benefits equal to benefits available to U.S. citizens. Id. at 77.

Here, Plaintiffs are not asking the State to create a whole new health benefits program for them. They are simply asking the State to reinstate them into the Other Programs, in which they were participating for 13 years after PRWORA. Plaintiffs are seeking to restore the *status quo ante* and enjoin the State from continuing BHH.

The State's new policy does not pass strict scrutiny, because it is not narrowly tailored to serve a compelling state interest.[9] BHH was implemented to address the budget deficit. However, the Supreme Court has explicitly rejected this as a compelling reason: "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." *Graham*, 403 U.S. at 375.

Here, even if there is a budget shortfall, saving money is not adequate justification for implementing discriminatory legislation. Moreover, Federal law

[9] The State urges the Court to heed *Avila v. Biedess*, 78 P.3d 280 (Ariz. Ct. App. 2003), and find that its suspect classification serves a compelling state interest. However, *Avila* was depublished and has no precedential value. See *Avila v. P Biedess/AHCCCS*, 85 P.3d 474 (Ariz. Mar 16, 2004) (review denied and ordered depublished).

provides a mechanism for the State to obtain additional Compact Impact funds. In any event, the stated goal of saving money is illusory and will result in mid- and long-term increased costs to the community and taxpayers. Declaration of Neal Palafox, attached to Motion, ¶ 13.

2. BHH Discriminates Against Disabled Plaintiffs In Violation Of The Americans With Disabilities Act.

The State claims that Plaintiffs are not qualified individuals with a disability, but offers no support for that statement. In addition, the State claims that QUEST and QExA are federal public benefit programs and Plaintiffs are being excluded from these programs because of PRWORA and the State's Section 1115 waivers. This cannot be true, since QUEST and QExA are state-funded benefit programs, and Plaintiffs have been participating in these programs since at least 1996. Exhibit "D" to Motion, at 1.

C. Defendants Failed To Rebut The Irreparable Injury That Will Occur.

The State does not even try to rebut Plaintiffs' argument that irreparable injury will occur if an injunction is not issued. Through the Declaration of Dr. Anthea Wang, the State discusses its efforts to transition dialysis patients to BHH without any disruption in service. However, the State does not address the numerous patients who cannot even get BHH benefits because of the enrollment cap. There is no mention of the numerous other severe consequences of BHH on

patients with serious medical conditions such as cancer or patients who will develop serious conditions that could have been prevented with ongoing medical care.

In *Aliessa*, the plaintiffs were deprived of ongoing medical care and being forced to seek emergency medical treatment when their medical condition reached crisis and catastrophic levels. 754 N.E.2d at 1093. Diabetics would not be able to get treatment until their condition reached emergency proportions such as insulin shock, renal failure and possibly amputation. Id. Asthmatics would receive no medical care until they experienced severe attacks which could lead to suffocation and death. Id. The New York Court of Appeals viewed these potential harms to the plaintiffs as serious and irrevocable enough to strike down the law. Id. at 1093, quoting *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261, 94 S.Ct. 1076 ("To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health.").

Similarly, here, the State of Hawai‘i is forcing the COFA Residents and New Residents to seek emergency medical care once they exhaust their allotted doctors visits and prescription medication. Those with serious medical conditions are already experiencing the dire consequences of BHH's limits. For example, Dr. Joseph Humphry, a physician at Kalihi Palama Health Center, has a patient with

end stage renal disease who has exhausted his allotted outpatient visits for the year and can no longer see his nephrologist. Declaration of Joseph Humphry, attached to Motion, ¶ 12. The limited coverage under BHH "will prompt his progression to dialysis in the next 2-3 months." Id.

Dr. Humphry has another patient who required dialysis immediately and was not enrolled in BHH because of the enrollment cap. Declaration of Joseph Humphry, attached to this Reply, at ¶ 11. That patient is being dialysed at the Queen's Medical Center inpatient dialysis unit through a temporary catheter. Id. A permanent fistula would significantly decrease the risk of infection and other complications, but the patient cannot afford the cost of surgery to insert the fistula. Id.

Plaintiff Tojio Clanton had heart bypass surgery in 2005 and received a kidney transplant in 2006. Declaration of Tojio Clanton ("Clanton Decl.") attached to Motion, ¶¶ 8, 9. Recently, he went into kidney failure, because he stopped taking the medication that kept his body from rejecting the kidney transplant. Clanton Decl., ¶ 16. That medication was not covered by BHH, and he could not afford to purchase it along with the other numerous medications he must now purchase out of pocket. Id., ¶¶ 13, 14, 16. When his kidney failed, he was forced to go to the emergency room for treatment and admitted to the hospital for 14 days. Id., ¶ 15. He has now exhausted his annual allotted doctors visits and any

further doctors visits or hospital stays are not covered by BHH. Id., ¶ 17.

Undoubtedly, Plaintiffs are suffering irreparable injury both medically and financially. Defendants do not dispute this fact. An injunction is the only appropriate remedy.

D. The Balance Of Equities Favors Granting The Injunction, Which Is In The Public Interest.

The State's argument against the preliminary injunction is based on a faulty premise. To make matters worse, the State is allowing COFA Residents and New Residents to die. To justify BHH, the State claims budget restrictions and increasing expenditures for medical assistance to COFA Residents, while ignoring the Federal law that authorizes the State to seek additional Compact Impact funds. The State threatens that it will eliminate Plaintiffs' medical assistance benefits entirely, which clearly it cannot do. *Aliessa*, 754 N.E.2d at 1098-99 (denying state-funded Medicaid benefits based on alienage violates the Equal Protection Clause). In balancing the equities, an injunction must issue and is in the public interest.

III. CONCLUSION

Plaintiffs respectfully ask that this Court grant the Motion and issue a preliminary injunction which requires DHS to:

(1) Re-enroll all COFA Residents who were disenrolled from DHS's state funded health benefit programs (*e.g.*, QUEST, QUEST-Net, QUEST-ACE, QExA,

SHOTT) on the basis of their alienage;

(2) Allow COFA Residents to enroll in DHS's other state funded health benefits programs for which they would be eligible if they were U.S. citizens;

(3) Allow New Residents to enroll in DHS's state funded health benefits 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, 42 U.S.C. § 12132.

DATED: Honolulu, Hawai'i, October 12, 2010.

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