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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 Hawaii, Department of Human Services, Med-QUEST Division Administrator,

Defendants.

CIVIL NO. 10-00483 JMS KSC

PLAINTIFFS' **MEMORANDUM IN OPPOSITION** TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED (FRCivP, Rule 12(b)(6), FILED SEPTEMBER 9, 2010; CERTIFICATION OF COMPLIANCE WITH LR 7.5(b); CERTIFICATE OF SERVICE

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I. INTRODUCTION

Defendants' Motion to Dismiss for Failure to State a Claim upon which Relief may be Granted (FRCivP, Rule 12(b)(6)), filed September 9, 2010 (Doc. 8, "Motion"), provides no basis for dismissing either Plaintiffs' equal protection or ADA[1] claims.[2] The discriminatory actions of the State of Hawai`i ("State" or "Hawai`i"), Department of Human Services ("DHS") (together, "Defendants") have significantly threatened the health and safety of Hawai`i's

[1] "ADA" refers to the Americans with Disabilities Act, 42 U.S.C. § 12132.

[2] In support of the Motion, Defendants include a declaration and exhibits setting forth factual statements, which as a general rule this Court should not consider. *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003) (the court considers only the pleadings on a motion to dismiss). While this Court has the discretion to consider matters outside the pleadings (and in doing so, convert the motion to one for summary judgment), Fed. R. Civ. P. 12(d), Plaintiffs respectfully request that this Court decide the matter solely on the pleadings. Defendants have not provided a separate concise statement of facts of allegedly undisputed material, and they have not shown how their purported factual materials demonstrate the absence of a genuine issue of material fact. Therefore, Defendants' declaration and exhibits should be stricken or disregarded.

COFA Residents[3] and New Residents[4] and deprived them of their civil rights under the Fourteenth Amendment of the U.S. Constitution. By implementing BHH,[5] Defendants have limited or eliminated potentially life-saving health care benefits for COFA Residents and New Residents solely on the basis of their alienage, while continuing to provide adequate benefits to similarly-situated citizens and other groups of aliens. Because aliens are a discrete and insular minority, Defendants have the burden of proving that the disparate benefits available under BHH are justified by some compelling rationale. Defendants' attempts to evade strict scrutiny of BHH fail. Furthermore, they have identified neither a compelling rationale nor even a rational basis for distinguishing aliens from non-aliens. Finally, Defendants fail to refute the claim that the State has complied with the "integration mandate" of the ADA; to the contrary, BHH unnecessarily forces disabled COFA Residents and New Residents into institutionalized settings.

Plaintiffs' Complaint, filed August 23, 2010 (Doc. 1, "Complaint"), establishes cognizable claims for relief under the Equal Protection Clause and the

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[3] "COFA Residents" refers to non-pregnant adults, age nineteen or older, lawfully residing in Hawai`i, who are citizens of countries with Compacts of Free Association with the United States. Complaint ¶ 1.

[4] "New Residents" refers to non-pregnant adult immigrants, age nineteen or older, who have been United States residents for less than five years. Complaint ¶ 1.

[5] "BHH" refers to Basic Health Hawai`i.

ADA. Therefore, Defendants' Motion should be denied.

II. STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss is viewed with disfavor, especially where the complaint alleges civil rights violations. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Clemens v. DaimlerChrysler Corp*., 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). In other words, the factual allegations in the Complaint must "be enough to raise a right to relief above the speculative level." *Williams ex rel. Tabiu v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

In evaluating a motion to dismiss, the court must accept as true all material allegations in the complaint and construe them in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). To the extent the State introduced disputed facts and has failed to comply with Court rules in submitting those disputed facts, the Court should disregard them and should consider only the pleadings. *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003). As discussed below, the

pleadings and facts, and the reasonable inferences therefrom, support cognizable legal theories and facially plausible claims upon which relief can be granted.

III. ARGUMENT

A. Plaintiffs Have Stated a Valid Claim for Violation of The Equal Protection Clause

The Complaint states an Equal Protection claim by alleging that BHH and the Defendants' policy of denying COFA Residents and New Residents equal access to health insurance programs unjustifiably discriminates in the provision of health care benefits based on alienage, in violation of the Equal Protection Clause. Therefore, Defendants' Motion to Dismiss as to Count I of the Complaint must be denied.

1. The Defendants' Denial of Equal Access to State Health Programs is Subject to Strict Scrutiny

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Moreover, where, as here, a state's action impacts "discrete and insular minorit[ies]" who can be shut out of the political process, "heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)).

The United States Supreme Court has established that aliens are a "prime example" of such a discrete and insular minority: "classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny." *Graham*, 403 U.S. at 372 (citations and footnotes omitted); *see also Nyquist v. Mauclet*, 432 U.S. 1 (1977) (intra-alien discrimination also strictly scrutinized). "Accordingly, . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is **confined within narrow limits**." *Graham*, 403 U.S. at 372 (citations, footnotes, and quotations omitted; emphasis added).

In *Graham*, the United States Supreme Court made clear that states may not treat aliens differently from citizens without a compelling justification, striking down Arizona and Pennsylvania statutes that limited eligibility for public welfare benefits based on alienage. *Graham*, 403 U.S. at 372-76. Applying strict scrutiny, the Court held: "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens." *Id*. at 374.

Other courts have followed *Graham's* lead, applying strict scrutiny when faced with the issue presented here, namely the deprivation of medical benefits provided by the state to certain groups of resident aliens. *See, e.g., Ehrlich*

v. Perez, 908 A.2d 1220, 1243 (Md. Ct. App. 2006) (stating that under the equal protection clause of the Maryland constitution, the court would "employ a strict scrutiny standard of review in [its] consideration of the State action . . . that, in effect, discriminated against the provision of State-funded medical assistance benefits based on an alienage classification"); *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (applying strict scrutiny under both the New York and U.S. Constitutions to strike down a New York statute that made certain classes of aliens ineligible for state medical benefits); *Hong Pham v. Starkowski*, No. HHDCV09-5034410S, 2009 WL 5698062 (Conn. Super. Ct. Dec. 18, 2009) (enjoining enforcement of a state law on equal protection grounds on facts virtually identical to those present here).

In the Complaint, Plaintiffs allege that (1) DHS has limited or eliminated state health care benefits for COFA Residents and New Residents; (2) DHS specifically targeted COFA Residents and New Residents for benefit cuts on the basis of their nationality, immigration status, and/or alienage; and (3) DHS continues to provide superior health care benefits to similarly-situated citizens and aliens with other immigration statuses through programs that are State-planned, State-administered, and largely State-funded. In other words, Defendants are unlawfully attempting to do precisely what the *Graham* Court said it cannot do.

Under *Graham* and its progeny, the State's benefit cuts are subject to strict scrutiny.[6]

2. Defendants' Cannot Avoid Strict Scrutiny by Arguing that Congress Has Also Chosen to Discriminate on the Basis of Alienage

Defendants' do not dispute that BHH classifies Hawai`i residents by immigration status. Nor do they dispute that equal protection imposes strict scrutiny on classification by immigration status. Rather, Defendants' attempt to distinguish the present circumstances from the cases cited above by arguing that it is "Congress, not the State, that has excluded aliens from federally funded Medicaid coverage." Motion at 15; 7-12; *see Mathews v. Diaz*, 426 U.S. 67, 78-83 (1976) (federal government discrimination based on alienage is subject only to rational basis review).

The Defendants' argument fails because the Plaintiffs do not complain of their exclusion from federal Medicare, but of the State's decision to cut benefits they received under State-funded programs that are part of Hawai`i's State-planned and administered health care safety net. In addition, Defendants' reliance upon the

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[6] *See, e.g.*, *In re Griffiths*, 413 U.S. 717, 718, 721 (1973) (applying "close judicial scrutiny"); *Exam. Bd. Eng'rs v. de Otero*, 426 U.S. 572, 601-02 (1976) (applying "strict judicial scrutiny" and striking a law of Puerto Rico that prevented aliens from obtaining engineering licenses); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (applying "close judicial scrutiny" and striking a state law that prevented aliens from receiving state financial assistance for higher education).

Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[7] to justify BHH is disingenuous. Congress enacted PRWORA in 1996, and for fourteen years since then the State has provided equal benefits to citizens and COFA Residents alike. Also, unlike other states, Hawai`i has received $75 million in federal funds to assist with the cost of health benefits provided to COFA Residents, and Hawai`i will continue to receive millions in federal funds for this purpose.[8] To claim now they must now provide inferior benefits to COFA Residents because of PRWORA is absurd.

Medicaid, 42 U.S.C. §§ 1396 *et seq*., is administered by the states and jointly funded by state and federal governments, with the federal government partially reimbursing state expenditures according to a state-specific matching formula. 42 U.S.C. § 1396(b). For example, in 2008, the federal government matched Hawai`i's Medicaid spending at a rate of about 1.3:1, such that Hawai`i funded about 43.5% of total "federal" Medicaid expenditures and the federal government funded 56.5%. 71 Fed. Reg. 230, 69209-69211 (November 30, 2006).[9]

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[7] Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 8 U.S.C. §§ 1601 *et. seq*)

[8] *See* Pub. L. No. 108-188, § 104(e)(3), 117 Stat. 2720 (2003) (codified as amended in 48 U.S.C. § 1921(c)).

[9] After the American Recovery and Reinvestment Act, Pub. L. No. 111-5, §§ 1856, 1881-94, 123 Stat. 115, distributed stimulus funds to the states through Medicaid, Hawai`i's share fell to around 33% in 2009. *See* 74 Fed. Reg. 75, 64697-64699

As a condition of electing to receive federal funds, states must abide by eligibility requirements imposed by federal law. *San Lazaro Ass'n Inc. v. Connell*, 286 F.3d 1088 (9th Cir. 2002). Medicaid's authorizing legislation divides potentially-eligible beneficiaries into two categories: (1) those to whom participating states **must** provide benefits, and (2) those to whom states **may choose** to provide benefits. 42 U.S.C. § 1396(a)(10)(A)(i)-(ii). Expenditures for both groups are matched by federal funding. *Id*.; 42 U.S.C. § 1396(b). In addition to the required and optional populations, states may expand Medicaid eligibility to "expansion populations" by creating "experimental, pilot, or demonstration" projects. 42 U.S.C. § 1315. If the Secretary of the federal Health and Human Services Department ("Secretary") approves these projects by waiving statutory eligibility requirements, expenditures under such projects are partially reimbursed by the federal government. *Spry v. Thompson*, 487 F.3d 1272, 1273-1275 (9th Cir. 2007). On the other hand, if a state expands the eligible population **without** a waiver—as Hawai`i did by providing health benefits to disadvantaged aliens between 1997 and 2009—state expenditures on that population are neither reimbursed by the federal government nor subject to the federal laws that govern that Medicaid program. Such a program is simply a state program. *See Thompson*,

(December 8, 2009).

487 F.3d at 1277 (state may disregard federal requirements for enrollees ineligible for federally-reimbursed Medicaid).

In 1996, PRWORA limited the eligibility of non-citizens for federally-reimbursed Medicaid. The act divided aliens into three categories.[10] "Qualified aliens" are those who are lawfully admitted for permanent residence or fall into another of the categories in 8 U.S.C. § 1641(b). They are generally eligible for federal benefits just as they were before PRWORA as long as they either entered the U.S. before 1996 or have been present in the U.S. for more than five years. 8 U.S.C. § 1612. Qualified aliens who were admitted after 1996, and have not been resident in the U.S. for five years (e.g., the New Residents) are not eligible for benefits. 8 U.S.C. § 1613. All other aliens are also not eligible for federal benefits, including both undocumented aliens and aliens like the COFA Residents, who lawfully reside in the United States under color of law. 8 U.S.C. § 1611.

PRWORA preserves the states' discretion to provide health benefits to both New Residents and "non-immigrants" like the COFA Residents at its own expense. 8 U.S.C. § 1622; *Hong Pham*, 2009 WL 5698062 at *3; *Aliessa*, 754

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[10] Additionally, PRWORA establishes numerous exceptions that reverse the eligibility or non-eligibility of certain groups within these categories for certain benefits. None of these exceptions apply to the Defendants' cut of Plaintiffs' benefits.

N.E.2d at 1091; *Ehrlich*, 908 A.2d at 702; *Soskin v. Reinertson*, 353 F.3d 1242, 1246 (10th Cir. 2004). Specifically, the statute provides that

> Notwithstanding any other provision of law . . . a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien (as defined in Section 1641 of this title), [or] a nonimmigrant under the Immigration and Nationality Act[.]

8 U.S.C. § 1622(a).[11]

Thus, while the Medicaid-PRWORA statutory framework is complex, its effect on the Defendants' power to determine Plaintiffs' eligibility for State benefits is not: the Defendants' continues to have **broad discretion** to choose the populations they wish to cover. It chooses the optional populations who will be covered, chooses (albeit subject to the Secretary's approval) the expansion populations that will be covered, and chooses the populations who will be covered using State funds. Most importantly, no federal law limits Hawai`i's power to provide health benefits to either COFA Residents or New Residents. To the contrary, recent federal law amending the Compact of Free Association suggests

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[11] The statute also provides that states **must** make eligible for state programs certain categories of "qualified aliens"—lawfully-admitted permanent residents, veterans, and many refugees who have entered or been granted asylum within the last five years, among others—and **must not** make eligible undocumented aliens. But Plaintiffs here do not fall into either of these categories. 8 U.S.C. §§ 1621; 1622. As New Residents and "non-immigrants," they fall squarely into the category of immigrants over which PRWORA gives the State full discretion. *See* 8 U.S.C. § 1622.

that Hawai‘i should be providing equal health benefits to COFA Residents. Pub. L. No. 108-188, § 104(e)(3), 117 Stat. 2720 (2003) (providing for funding to Hawai`i to defray costs resulting from COFA Residents' "increased demand placed on health, education, social, or public safety services . . . ."). Thus, the State's decision to provide benefits to citizens and qualified aliens who fall into its optional and expansion populations – but not to the COFA Residents or New Residents – is a **State** decision, one that is subject to strict scrutiny under the cases cited above. *See Hong Pham*, 2009 WL 5698062, at *17 (State had to provide State-funded health care for aliens that matched federally-reimbursed Medicaid provided to citizens).

Defendants' argument rests on the mistaken assumption that its alienage classification escapes strict scrutiny as long as PRWORA does not "**require**[] the State to create its own benefit program for these aliens." Motion at 14 (emphasis in original); Motion at 18 ("The PRWORA does not require . . . ."). This formulation reverses the burden of proof: only if the State's action **is** required by federal law may it argue that the alienage-based classification is Congress's doing, not the State's. Defendants' cannot make this showing, because—as Defendants' themselves admit in their Motion—"[n]either COFA Residents nor New Residents are among the groups that must be included or excluded" under

PRWORA, and Hawai`i therefore has "discretion to determine the eligibility of such aliens, including Plaintiffs." Motion at 18; *see* 8 U.S.C. § 1622.

Defendants' reliance upon *Soskin*, *Avila*, *Khrapunskiy*, and *Doe v. Comm'r of Transitional Assistance* is inappropriate. *See* Motion at 17-25. The states in each of these cases claimed that they enacted the challenged legislation to conform with the classifications in PRWORA, which was enacted in 1996. The states enacted their laws within a reasonable period of time after PRWORA. In *Avila* and *Doe v. Comm'er of Transitional Assistance*, the state governments of Arizona and Massachusetts, respectively, passed their laws in 1997. In *Khrapunskiy*, the New York law at issue was enacted in 1998. The *Soskin* law was passed in March of 2003. Thus, each of these cases addressed laws that were passed within seven years of PRWORA. In contrast, here, the law at issue, BHH, became effective in 2010—fourteen years after PRWORA. It is disingenuous for the State to claim that PRWORA is the genesis of BHH when it was enacted nearly a decade and a half **after** PRWORA.

Defendants' further argue that, as a practical matter, they cannot re-enroll Plaintiffs in QUEST, QUEST-Net, QUEST-ACE, or QExA (collectively with SHOTT, the "Old Programs") because those programs are not purely state-funded programs but rather federally-reimbursed demonstration projects that must therefore obey PRWORA. Motion at 10-12. Defendants' argument, however, is

belied by the facts. Defendants' admit that they have been voluntarily providing health care coverage for financially-eligible COFA Residents since approximately 1997. Motion at 3. They do nothing to explain why it cannot continue to do so, whether under administrative auspices of the Old Programs or under a new program that provides aliens benefits equal to those provided to non-aliens under the Old Programs.

Defendants' suggestion that "federal action" (whereby the federal government does not equally reimburse the cost of providing health care to certain immigrants) will immunize from equal protection scrutiny a state's decision not to provide such benefits is flawed. Defendants cite no cases in support of this proposition. Given that Supreme Court precedent teaches that financial considerations are not grounds for escaping strict scrutiny, the Court should not accept it. *See, e.g.*, *Graham*, 403 U.S. at 375 ("The saving of welfare costs cannot justify an otherwise invidious classification." (Quotation marks and citation omitted.)).

3. PRWORA does not Authorize the State to Discriminate Between Aliens and Non-Aliens

Defendants' closely related alternate argument—that even if PRWORA does not control Hawai`i's eligibility decisions, it empowers the State to discriminate on the basis of alienage by delegating Congress's power over

naturalization to the states—is similarly unsound. Motion at 20-21 (citing *Soskin*, 353 F.3d at 1255-56).

Most decisions have rejected this argument. In *Hong Pham*, plaintiffs similar to the New Residents challenged Connecticut's decision to terminate state-funded medical benefits. 2009 WL 5698062, at *1 n.1. The plaintiffs argued that Connecticut's system distinguished needy non-alien residents from similarly needy alien residents by giving the non-aliens federal benefits, but giving the aliens neither federal nor state benefits. *Id*. at *1. Just as Hawai‘i does here, Connecticut argued that PRWORA authorized it to make distinctions betweens aliens and non-aliens for the purposes of providing medical care. The court rejected this argument, ruling that PRWORA "simply does not provide the states with any sort of consistent guidance or clear limits as to what they can and cannot do in dealing with legal aliens who lost their eligibility for federal Medicaid." *Id*. at *16. Therefore, the court held that Connecticut's benefit cuts were subject to strict scrutiny. *Id*. at *17.

In *Aliessa*, plaintiffs that PRWORA treats identically to the New Residents and COFA Residents challenged New York's termination of their state-funded health benefits upon the passage of PRWORA. *Aliessa*, 754 N.E.2d at 1089-90. The state argued that its policy was authorized by PRWORA, but the court ruled that construing the statute to authorize " 'discriminatory treatment of

aliens at the option of [s]tates' " would go "significantly beyond what the *Graham* Court declared constitutionally questionable." *Id*. at 1097, 1099 (quoting *Graham*, 403 U.S. at 382). Thus, New York's provision of state benefits to citizens but not to similarly-situated aliens was alienage-based discrimination subject to strict scrutiny. *Id*. at 1098.

In *Ehrlich*, the plaintiffs challenged Maryland's failure to appropriate funds for medical benefits for legal aliens who were ineligible for federal benefits under PRWORA. *Ehrlich*, 908 A.2d at 1230. As in *Aliessa* and *Hong Pham*, the court found that PRWORA did not authorize state alienage classification. *Id*. at 1243. Thus, the Maryland policy "discriminated in the provision of State-funded medical assistance benefits based on an alienage classification" and was subject to strict scrutiny. *Id*. at 1243-44.

Ignoring these cases, Defendants instead rely on the majority decision in *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004), which held that PRWORA authorizes alienage-based state classifications for the purposes of limiting health benefits. The two-judge majority recognized that the discretion PRWORA affords states distinguishes it from the statute in *Mathews*. It also took notice of *Graham*'s dictum that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." Nevertheless, it reasoned that "[o]ne way of regarding the impact of Congressional policy is to view the PRWORA as

creat[ing] two welfare programs, one for citizens and one for aliens," and that Congress could thereby use its power to classify by alienage to insulate subsequent state discrimination against aliens from strict scrutiny. *Id*. at 1255-56.

Soskin's reading of PRWORA is wrong for at least three reasons. First, it fails to address the serious constitutional question identified by the Supreme Court in *Graham*:

> Under Art I, § 8, cl. 4, of the Constitution, Congress' power is to "establish a[] uniform Rule of Naturalization." A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity. Since "statutes should be construed whenever possible so as to uphold their constitutionality," we conclude that [the federal statute at issue] does not authorize the Arizona [alienage classification].

403 U.S. at 382-83 (citation omitted and brackets added). The Supreme Court reiterated the importance of the "uniform rule" language in another case, suggesting that "if the Federal Government has **by uniform rule** prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction." *Plyler v. Doe*, 457 U.S. 202, 219 n. 19 (1982) (emphasis added); *see also Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985).

Ehrlich, *Aliessa*, and *Hong Pham* all followed this line of reasoning

by holding that construction of PRWORA to allow delegation of Congress's power to classify health care beneficiaries by immigration status or alienage would raise the same constitutional issues that the *Graham* court avoided. *Ehrlich*, 908 A.2d at 1241 ("The unbridled discretion afforded by Congress prevents us from characterizing the material provisions of PRWORA as 'uniform.' ")**;** *Aliessa*, 754 N.E.2d at 1098 (PRWORA "does not impose a **uniform** immigration rule for States to follow" (emphasis in original)); *Hong Pham*, 2009 WL 5698062, at *16 ("This court agrees with the ruling in *Aliessa* and *Ehrlich*" on "PRWORA's lack of uniformity.").

As justification for declining to follow the Supreme Court on the "uniform rule" issue, the *Soskin* majority could only suggest that other sections of the Constitution might give Congress an independent, unconstrained power to discriminate on the basis of alienage, and that Congress might be able to delegate **that** power to the states. *Soskin*, 353 F.3d at 1256-57. But as the dissenting judge in *Soskin* explained, this possibility is precluded by the fundamental precept that the Constitution is superior to the laws of Congress: "**Congress does not have the power to authorize the individual States to violate the Equal Protection Clause**." *Id.* at 1275 (Henry, J., dissenting) (quoting *Graham*, 403 U.S. at 382) (emphasis in original).

Second, *Soskin* failed to recognize that *Graham* had alternate grounds

for its narrow construction of the federal statute at issue: state health care policy cannot encroach on the federal government's power to establish a comprehensive scheme for the regulation of immigration. *Graham*, 403 U.S. at 376-380; *Soskin*, 353 F.3d at 1268 (Henry, J., dissenting) (*Graham* holds that "state legislation must not encroach upon exclusive federal power"). Pursuant to its plenary power over immigration, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that aliens may be inadmissible on health-, criminal-, or security-related grounds. 8 U.S.C. §§ 1182(a)(1) - (3). Congress, however,

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

Graham, 403 U.S. at 377 (citing 42 U.S.C. § 1981) (emphasis added). In other words, the Supreme Court has made it clear that aliens lawfully within this country have a right to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under nondiscriminatory laws." *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948). Furthermore, the Supreme Court has explained how a state restriction on the employment of aliens can impermissibly encroach on this federal policy of equality:

> The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

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

BHH presents the same danger of encroachment, as a COFA Resident or New Resident who becomes catastrophically ill will be unable to live in Hawai`i because of the discriminatory denial of public assistance. *See Graham*, 403 U.S. at 379-380 (denial of public assistance equivalent to denial of right to earn a living). These individuals will either have to return to their home countries or face the consequence of having no coverage for prohibitively-expensive, life-saving health care. Thus, here, as in *Graham*, the State's proposed reading of PRWORA would raise a serious constitutional question not only under the uniformity language of Art I, § 8, cl. 4, but also under the separation of powers between the federal and state governments contemplated by the same clause.

Third, *Soskin* is inapposite based on the clear direction Hawai`i has received from the Federal government through federal funding of Compact Impact funds, which are given to Hawai`i and other jurisdictions affected by COFA migration to defray costs as a result of "increased demand placed on health,

education, social, or public safety services . . . ." Pub. L. No. 108-188, § 104(e)(3), 117 Stat. 2720 (2003) (codified as amended in various subsections of 48 U.S.C. § 1921). Since 2003, Hawai`i has received nearly $75 million in Compact Impact funds; in this fiscal year, Hawai`i will receive over $11 million. Complaint ¶ 26. Statutes should be constructed so as to be consistent. *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). Defendants' fail to offer any explanation as to why Congress continues to appropriate funds for benefits with one statute, and yet authorizes Hawai`i to deny COFA Residents benefits with another.

4. Defendants' Remaining Arguments against Strict Scrutiny Fail

Defendants also argue that strict scrutiny should not apply to their discrimination against COFA Residents and New Residents because (1) the State is affirmatively providing benefits, not cutting benefits on the basis of alienage; (2) that it should be exempt from scrutiny because its benefit cuts were partial and not total; and (3) the State is classifying on the basis of eligibility for federally-reimbursable Medicaid, not alienage. All three of these arguments are without merit.

First, Defendants allege that they are "not excluding aliens from a state-funded program," but rather "creating a benefit program specifically for ineligible aliens." Motion at 23. By comparing BHH to the baseline of federally-mandated benefits, Defendants characterize the program as "affirmatively

dedicating resources" to aliens who would otherwise be without health care. Motion at 6, 12-18. This is simply sophistry. The undisputed facts show that the State was providing the Plaintiffs with benefits equal to those of citizens until this year, when it disenrolled them from its general Medicaid programs on the basis of their status as aliens. Complaint ¶ ¶ 7, 11, 14. On these facts, Defendants attempt to paint BHH as a program that generously corrects a gap in Congress's failures is disingenuous.

Second, Defendants argue that it "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." Motion at 25. But no one has suggested that the State can deny all health benefits to COFA and New Residents. Indeed, last year the state was sued in both state and federal court for doing so. Complaint ¶ 27. Defendants can only escape scrutiny by providing parity to all beneficiaries. In taking this position, Plaintiffs are not asking the Court to endorse "perverse incentives . . . in times of budgetary crisis." Motion at 25. Rather, they are asking the court to address a problem that federal law has recognized since the time of *Carolene Products*—namely, that without adequate judicial scrutiny, budgetary pressures can lead state policymakers to disregard constitutional rights guaranteed to "insular minorities" by the Equal Protection Clause.

What **does** "defy logic" is the Defendants' suggestion that by naming its alienage-based benefit cut "Basic Health Hawai`i," it can turn a frog into a prince. Disenrollment plus re-enrollment in a less generous program is just a benefit cut by another name. That the benefit cut was partial rather than total is of no import; the State's action facially discriminated against aliens legally residing in the United States.

Third, the Defendants' argument that they are classifying based on eligibility for federally-reimbursable Medicaid, and not alienage, is equally specious. The State contends that it "did not draw classifications between citizens and aliens; it drew classifications between residents who were eligible for Medicaid and those who were ineligible." Motion at 23. The State goes on, stating "it is not distinguishing between groups of people based on their alienage. Rather, Defendants simply chose to provide a benefit to persons who are ineligible for federal Medicaid due to the impact of PRWORA." *Id.* at 24-25.

This argument is belied by facts that Defendants admits at the forefront of its Motion, which are also pled in the Complaint: DHS limits or eliminates health care benefits for COFA Residents and New Residents on the basis of their nationality, immigration status, and/or alienage. Complaint ¶¶ 1, 15, 30, 35, 39. Defendants cannot be allowed to single out COFA Residents and New Residents for disenrollment from superior health benefits based on their alienage or

citizenship, and then later claim that this classification was based solely on their federal eligibility.

5. Defendants' Discriminatory Denial of Equal Access to State Health Programs Does Not Pass Strict Scrutiny

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

(a) No compelling interest is served by BHH

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

Defendants' argument that a compelling interest is served is unsupported by law. Relying heavily on *Avila v. Biedess*, 78 P.3d 280 (Ariz. Ct.

App. 2003), a depublished Arizona opinion without precedential value, Defendants argue that because an Arizona statute passed strict scrutiny, BHH and Defendants' policy of denying equal access to State health programs should similarly pass strict scrutiny. *Avila* is of no moment here.

Avila involved two separate Arizona statutes, a federally-funded Medicaid statute, and a separate state-funded "Premium Sharing Program" ("PSP") statute. The court applied strict scrutiny to the PSP statute because the statute had "adopted eligibility criteria based on alien status that are not mandated by federal law." *Avila*, 78 P.3d at 287. The court went on:

> The distinctive aspect of this case, however, is that the Premium Sharing Program is essentially a state-funded extension of the federally-funded Title XIX program. Arizona has chosen to use the Premium Sharing Program to extend . . . coverage to people who would not qualify for the Title XIX program. Except for income levels, the eligibility criteria for both programs are essentially the same, and persons who qualify for the Title XIX program are expressly excluded from coverage under the Premium Sharing Program.

Id. at 288.

The Arizona court concluded that "it furthers an important governmental interest for the state to have uniform eligibility criteria for both parts of the program, so that the significant difference between the two programs is income level." *Id.* "The combination of the federal policy and the benefits of uniform eligibility criteria for different parts of the state's program create the **rare**

circumstance when a state classification based on alien status satisfies strict scrutiny." (Emphasis added.)

Even if *Avila* was correctly decided—which it was not—the reasoning of that case is inapposite here because BHH is not a state-funded extension of a federally-funded program, but a separate, independent program with different eligibility criteria and different benefits provided to its members. Thus, the interests of "uniform eligibility criteria" for the purposes of separation based on income do not apply. In this case, the State has no compelling interest to justify providing limited, inadequate benefits to a class of people solely on the basis of their alienage.

(b) BHH and Defendants' discriminatory policies are not narrowly tailored

There is no indication that DHS "narrowly tailored" the BHH rules or its discriminatory policy to achieve the goals of the legislature. Suspect classifications like race, alienage, and ancestry "are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotation marks omitted). There are several factors that are relevant in determining whether a suspect classification is narrowly tailored, including "the efficacy of alternative remedies," and "the flexibility and duration of the relief." *Western States Paving Co., Inc. v. Washington State Dept. of Transp.*, 407 F.3d 983, 993 (9th Cir. 2005) (citing

United States v. Paradise, 480 U.S. 149, 171 (1987)).

While DHS has allowed certain COFA Residents to remain in long-term care programs, DHS has done nothing to ensure that other existing patients or previously disenrolled patients with disabilities or with serious medical conditions will get the long-term or critical care that they need. Complaint ¶¶ 41-45.

Moreover, the revised BHH is virtually indistinguishable from the original version. In *Sound, et al. v. Koller, et al.*, Case No. CV09-00409 JMS-KSC ("Sound"), after debating the constitutionality of BHH before this Court, the parties stipulated to extend the temporary restraining order, which halted the implementation of BHH pending the State's completion of the administrative rulemaking process pursuant to Haw. Rev. Stat. Chapter 91. Despite the concerns of COFA Residents and New Residents regarding the constitutional viability of BHH, it is apparent that the State in actuality had no intention of substantially changing the program. Public hearings held by the State during this process were simply a charade, further demonstrating the lack of narrow tailoring.

For these reasons, Plaintiffs have sufficiently pleaded a claim for relief for violation of the Equal Protection Clause, and Defendants' Motion to Dismiss must be denied.

6. Plaintiffs Have Stated a Claim for Relief even if Rational Basis Applies

Even if this Court declines to strictly scrutinize BHH, the Plaintiff's

Complaint still states a claim on which relief may be granted. Construed in the light most favorable to them, Plaintiffs' facts establish that the State's classification of Hawai`i residents by immigration status is not rationally related to the only conceivable rational basis for that policy—saving money. Discriminatory benefit cuts save no more money than non-discriminatory benefit cuts, and the high cost of the emergency care that Plaintiffs will require in the absence of preventive care means that the benefit cuts will not save money at all.

A state classification comports with the Equal Protection Clause only "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Distinctions between similarly-situated groups can only be rational as a means to a legitimate public end, for discrimination itself is never rational. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588-89 (9th Cir. 2008) (the "first step in equal protection analysis is to identify the defendants' classification of groups"); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) ("[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary."). Moreover, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. City of Cleburne Living Center*, 473 U.S. 432, 446 (1985).

Here, Defendants classify Hawai`i residents by immigration status,

providing health benefits to citizens and certain "qualified aliens" but not to the COFA Residents and New Residents. Defendants identify just one conceivable rational basis for this classification: saving money. Motion at 26-27. This end is not rationally related to the Defendants' classification for at least two reasons.

First, the relationship between the Defendants' classification and their financial goals is unsubstantiated. Cutting state benefits saves money, but distributing the pain of those benefit cuts through discrimination does not. Thus, singling out the Plaintiffs was a purely arbitrary decision which violates the Equal Protection Clause under even the most deferential standard of review. *See Lockary*, 917 F.2d at 1150.

Second, Defendants ignore the fact that the cuts in coverage for preventative care will end up costing the State more money as patients who are denied preventative care suffer serious—and costly—medical emergencies. When necessary treatments are cut, patients will have to wait until they have developed a serious medical condition posing a serious threat to bodily health, and then seek treatment in a hospital setting. Complaint ¶¶ 37, 38, 45. Any cost savings as a result of the benefit cuts will be short term and ephemeral, and the Defendants' policy will only tend to exacerbate the State's budget crisis.

Therefore, even if rational basis applies, Plaintiffs can show that the

State's policy does not pass muster, and the Court should therefore deny the Defendants' Motion to Dismiss.

B. Plaintiffs Have Stated A Legitimate Claim For Relief For Violation Of The ADA's "Integration Mandate"

Defendants' Motion should also be denied because the Complaint more than sufficiently states a claim for relief under the ADA. Defendants challenge the sufficiency of the Plaintiffs' claims by arguing that "there are no facts in the complaint to establish that the denial of benefits to the Plaintiffs was by reason of their disabilities." Motion at 30. This assertion is false.

Plaintiffs allege in their Complaint that "Defendants are discriminating against COFA Residents and New Residents by requiring them to seek care in a hospital setting. Defendants are not administering the Med-QUEST Division programs in the most integrated setting appropriate to meet the needs of patients with disabilities." Complaint ¶ 46. As further grounds for their claim, Plaintiffs alleged that some members are disabled individuals under the ADA, Complaint ¶ ¶ 5, 8, 9, 14, but are being forced into isolation by being required to go to hospitals for in-patient or emergency room care. Complaint ¶ ¶ 6, 7, 11, 12, 16, 32, 37, 42, 44, 45, 62-64. These facts are sufficient to find a plausible claim for relief under the ADA.

1. Some Plaintiffs Are Disabled

To establish that an individual suffers from a disability under the

ADA, one must prove, among other things, that "he has a physical or mental impairment that substantially limits one or more of his major life activities." 42 U.S.C. § 12102(2). A "physical impairment" is "[a]ny physiological disorder, or condition . . . or anatomical loss affecting," *inter alia*, the "cardiovascular" system. 29 C.F.R. § 1630.2(h)(1). "Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

Several COFA Residents require medication, treatments, transportation, and other services in order to avoid hospitalization. Complaint ¶¶ 5, 9, 14. Additionally, some COFA Residents are no longer able to work because of their health problems, and require several medications per month and frequent visits to the hospital for such serious procedures as dialysis in order to survive. Complaint ¶¶ 8, 9. Therefore, these COFA Residents are disabled individuals under the ADA. *See, e.g., School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281 (1987) (categorizing an impairment that was "serious enough to require hospitalization" as an impairment that substantially limits one or more major life activities); *Bizelli v. Amchem*, 981 F. Supp. 1254, 1257 (E.D. Mo. 1997) (finding that a plaintiff had established a record of impairment when the defendants were aware that the plaintiff had undergone surgery and chemotherapy to treat testicular cancer).

2. The State has Subjected the Disabled Plaintiffs to Discrimination Based on their Disability

Under BHH, Defendants provide emergency services for otherwise non-qualified COFA Residents who suffer "a sudden onset of a medical condition . . . manifesting itself in acute symptoms of sufficient severity such that the absence of immediate medical attention could be expected to result" in one of the following: (1) placing the patient's health in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious dysfunction of any bodily organ or part. Hawai`i Administrative Rules ("HAR") § 17-1723-5. Thus, COFA Resident patients who are ineligible to receive the services they need under BHH are forced to go to hospitals for in-patient or emergency room care.

It is settled law that unjustified isolation of the disabled constitutes discrimination. *Olmstead v. Zimring*, 527 U.S. 581, 597 (1999); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1119 (N.D. Cal. 2009). The ADA's "integration mandate" effectuates one of the act's primary purposes, which is to end the isolation and segregation of disabled persons. *Wagner*, 669 F. Supp. 2d at 1119 (quoting *Arc of Washington State v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005)); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal 2009), *injunction granted*, 2010 U.S. Dist. LEXIS 22975 (2010).

Disabled COFA Residents are being discriminated against under the ADA by being forced to go to hospitals for in-patient or emergency room care.

ADA regulations state, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d). "The 'most integrated setting' means 'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.' " *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d at 1170 (citing 28 C.F.R. pt. 35, app A). If a state forces a disabled person to be isolated in an institution in order to obtain necessary services, then the state violates the integration mandate. *See Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003).

An integration claim may arise from state actions that give rise to a serious risk of unnecessary institutionalization. *Wagner*, 669 F. Supp. 2d at 1119. That is, a state violates the ADA's integration mandate when it fails to provide, or decides to eliminate, needed services for disabled persons—or places such persons at risk of isolation.[12] For example, in *Wagner* the court preliminarily enjoined a

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[12] *See Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (imposition of cap on prescription medications placed participants in community-based program at high risk for premature entry into nursing homes in violation of ADA); *Ball v. Rodgers*, No. CV 00-67-TUC-EHC, 2009 WL 1395423, at *5 (D. Ariz. April 24, 2009) (failure to provide disabled with needed services "threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care" in violation of the ADA and Rehabilitation Act); *Mental Disability Law Clinic v. Hogan*, No. CV-06-63202008 WL 4104460, at *15

change in state law that would have placed benefit recipients at a severe risk of hospitalization or institutionalization due to a loss in services. *Wagner*, 669 F. Supp. 2d at 1119. There, California attempted to cut in-home care services under its In-Home Supportive Services program. The Plaintiffs argued that the cuts violated the ADA's integration mandate "by placing people in serious risk of being forced to move out of their homes to the less integrated setting of institutions." *Id.* The court agreed that plaintiffs had shown a likelihood of success on the merits of their ADA claim. *Id.*

This case is essentially the same as *Wagner* because the State is, as a practical matter, forcing disabled COFA Residents to receive care in a hospital or emergency room, instead of in the most integrated setting appropriate to meet the needs of the disabled patient. Taking the facts in the Complaint as true, and all reasonable inferences therefrom, Plaintiffs have therefore pled a sufficient claim for relief for discrimination based on disability under the ADA.

IV. CONCLUSION

Defendants' arguments for dismissal are without merit. Plaintiffs have asserted viable and plausible claims for relief under the Equal Protection Clause

(E.D.N.Y. Aug. 29, 2008) ("[E]ven the risk of unjustified segregation may be sufficient under *Olmstead*.").

and the ADA. Therefore, Defendants' Motion to Dismiss must be denied.

DATED: Honolulu, Hawai‘i, October 5, 2010.

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CERTIFICATION OF COMPLIANCE WITH LR 7.5(b)

Using the "Word Count" tool in Microsoft Word 2003, Counsel for Plaintiffs certifies that the length of the above Memorandum is 7,312 words.

DATED: Honolulu, Hawai`i, October 5, 2010.

/s/ J. Blaine Rogers
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