MARK J. BENNETT 2672
Attorney General of Hawaii

HEIDI M. RIAN 3473
JOHN F. MOLAY 4994
LEE-ANN N.M. BREWER 5583
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
465 South King Street, Room 200
Honolulu, Hawaii 96813
Telephone: (808) 587-3050
Facsimile: (808) 587-3077
E-Mail: John.F.Molay@hawaii.gov

Attorneys for Defendants
LILLIAN B. KOLLER and KENNETH FINK

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

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; DECLARATION OF JOHN F. MOLAY; DECLARATION KENNETH FINK; DECLARATION OF ANTHEA WANG; EXHIBITS A-E; CERTIFICATE OF SERVICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. PLAINTIFFS' MOTION DOES NOT ADDRESS THE UNIQUE POSITION OF COFA RESIDENTS, INCLUDING THE NAMED PLAINTIFFS

In their Memorandum in Support of Motion (Dkt. No. 10-1, hereafter Memorandum) Plaintiffs misrepresent the intent of Congress in entering into the Compacts of Free Association (COFA, or Compact) with the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau (Palau). These countries are collectively referred to as the "Freely Associated States." Understanding the intent of Congress is key to evaluating the legal status of citizens of Freely Associated States who enter into and reside in the United States under any of the Compacts (COFA Residents).

The United States entered into a COFA with the FSM and RMI in 1986, and with Palau in 1994. See Compact of Free Association Act of 1985, P.L. 99-239; Compact of Free Association with Palau Act of 1989, P.L. 101-219 (the Palau Compact). The Compact with FSM and RMI was renegotiated and amended in 2003. See Compact of Free Association Amendments of 2003, P.L. 108-188 (the 2003 Compact)[1]. Palau and the United States have recently renegotiated the Palau

[1] The 2003 Compact contains two Compacts of Free Association, one with the FSM (the U.S.-FSM Compact), and one with the RMI (the U.S.-RMI Compact). There are special sections that apply to one or both Compacts, numbered sec. 101 –

Compact, which is pending approval of the Palau Congress and the United States Congress.[2]

The Compacts are clear that COFA Residents are admitted to work and establish residence as a "nonimmigrant" in the United States without regard to provisions of the Immigration and Nationality Act (INA) relating to labor certification and nonimmigrant visas. 2003 Compact, sec. 141(a) and (d); see, also, Palau Compact sec. 141(a).

The Compacts include grant assistance that is provided directly to the Freely Associated States to address, among other things, health care in those countries, "with priorities in the education and health care sectors." 2003 Compact, sec. 211(a); see, also, Palau Compact sec. 211(d) (grant of $631,000 annually for fifteen years … for health and medical programs). Specifically, this grant assistance is made "to support and improve the delivery of preventive, curative and environmental care and develop the human, financial, and material resources necessary for the [FSM and RMI] to perform these services." 2003 Compact, sec. 211(a)(2).

---

110. The U.S.-FSM Compact and U.S.-RMI Compacts are set forth in separate subsections of Title II, Sec. 201, and each Compact has essentially identical sections with section numbers beginning with section 111. Citations in this memorandum to the U.S.-FSM Compact and U.S.-RMI Compact will be to the 2003 Compact with one section number.

[2] Pacific Islands Report, Pacific Islands Development Program, East-West Center, with Support From Center for Pacific Islands Studies, University of Hawai'i, http://pidp.eastwestcenter.org/pireport/2010/September/09-14-10.htm

Other than the grant assistance noted above, the Palau Compact contains no provision for health care services to its citizens within the United States.

With respect to the FSM and RMI, the 2003 Compact has specific, but limited, health care provisions, addressing health care to citizens of the Freely Associated States in their home countries and the United States, including:

- The Government of the RMI may request that the United States "continue to provide special medical care and logistical support thereto for the remaining members of the population of Rongelap and Utrik who were exposed to radiation resulting from the 1954 United States thermo-nuclear "Bravo" test ...". 2003 Compact, sec. 103(f);
- The Four Atoll Health Care Program limits services provided by the United States Public Health Service or any other United States agency pursuant to the separate agreement between the United States and the RMI to peoples of the Bikini, Enewetak, Rongelap, and Utrik Atolls. See, 2003 Compact, sec. 103(h). The separate agreement was "for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens …for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs." 2003 Compact, sec. 177.

- Authorization for appropriations for health care reimbursement to "health care institutions in the affected jurisdictions for costs resulting from the migration of citizens of the RMI, FSM and Palau to the affected jurisdictions" as a result of the Compacts, as amended. 2003 Compact, sec. 104(e)(6). These appropriations are directed to private health care institutions, and not to the State of Hawai'i.
- Department of Defense medical facilities are to be made available on a limited basis "for use by citizens of the FSM and the RMI who are properly referred to the facilities by government authorities responsible for provision of medical services in the FSM, RMI, Palau and the affected jurisdictions." 2003 Compact, sec. 104(e)(7)(A). The services of the National Health Service Corps[3] are made "available to the residents of the [FSM] and the [RMI] to the same extent and for so long as such services are authorized to be provided to persons residing in any other areas within or outside the United States." 2003 Compact, sec. 104(e)(7)(B)

The 2003 Compact is clear that Congress did not intend for there to be any adverse impact to the affected jurisdictions. See, 2003 Compact, sec. 104(e). Most significantly, the 2003 Compact is clear that a COFA Resident "**who cannot**

[3] The National Health Service Corps (NHSC) recruits health care providers to work in rural and urban areas where health care services are scarce, often through health centers supported by the U.S. Department of Health and Human Services, Health Resources and Services Administration. http://nhsc.hrsa.gov/about/

show that he or she has sufficient means of support in the United States, is deportable." 2003 Compact, sec. 141(f)(1) (emphasis added). This is consistent with Congressional intent under the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996, also known as the Welfare Reform Act.

As noted in the Memorandum, COFA Residents were excluded from eligibility for federal health care coverage under PRWORA. Memorandum at 7, citing 8 U.S.C. § 1612(a)(1). Under PRWORA, Congress stated that the immigration policy of the United States is that "aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and … the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). By requiring "sufficient means of support in the United States," the 2003 Compact is consistent with Congressional intent under PRWORA, which eliminated COFA Resident's eligibility for federal public assistance benefits.

The Compacts are also consistent with Congressional intent under immigration law. COFA Residents are admitted to the United States as a "nonimmigrant," with only the labor certification and non-immigrant visa requirements of the Immigration and Nationality Act disregarded. 2003 Compact and Palau Compact, sec. 141(a). "Nonimmigrants" are, as a class, individuals who

are in the United States temporarily and would not be eligible for public assistance benefits.[4]

Plaintiffs ignore the fact that COFA Residents have the option to enter the United States under the Compact or through normal immigration channels. The INA expressly applies, with limited exceptions, to any person admitted or seeking admission to the United States under the Compact. 2003 Compact, sec. 141(f). See, also, 2003 Compact, sec. 141(a) ("any person in the following categories *may* be admitted to, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States …"). Admission to the United States under the Compact does not confer on a COFA Resident the right to establish the residence necessary for naturalization under the INA. See, 2003 Compact, sec. 141(h). However, the option to enter the United States freely under the Compact "shall not prevent a citizen of the [Freely Associated States] from otherwise acquiring such rights or lawful permanent resident alien status in the United States.". 2003

[4] Nonimmigrants include: "officials and employees of foreign governments and certain international organizations; aliens visiting temporarily for business or pleasure; aliens in transit through this country; alien crewmen serving on a vessel or aircraft; aliens entering pursuant to a treaty of commerce and navigation to carry on trade or an enterprise in which they have invested; aliens entering to study in this country; certain aliens coming temporarily to perform services or labor or to serve as trainees; alien representatives of the foreign press or other information media; certain aliens coming temporarily to participate in a program in their field of study or specialization; aliens engaged to be married to citizens; and certain alien employees entering temporarily to continue to render services to the same employers." *Mathews v. Diaz*, 426 U.S. 67, 79 (1976) (citing 8 U.S.C. s 1101(a)(15)).

Compact, sec. 141(c) **Therefore, individuals who exercise the option to enter into the United States under the Compact subject themselves to the terms and conditions set forth in the Compact, and are precluded from enjoying the benefits of permanent resident alien or naturalized citizen status.**

II. PLAINTIFFS' MOTION IS MISLEADING REGARDING THE RECEIPT AND DISPOSITION OF FEDERAL FUNDS

Plaintiffs state that "the Federal government has essentially been directing, and reimbursing, the State of Hawaii for costs it incurs in providing services to COFA Residents." See, Memorandum at 23. This is a gross exaggeration, and suggests that the funding received through Compact Impact funds fully, or at least substantially, covers the total state fund expenditures for services rendered to COFA Residents in the State of Hawaii. This is simply not true.

The State of Hawaii currently receives $11,228,742 in Compact Impact funds each federal fiscal year. Declaration of Kenneth Fink (Fink Dec.) at 16; see, also, Memorandum at 8. Total state fund expenditures for all services rendered to COFA Residents currently exceed $100 million each year[5]. Fink Dec. at 17. The medical assistance portion of the State's expenditures has increased considerably since fiscal year 2007 (July 1, 2006 – June 30, 2007) when the State of Hawaii spent approximately $28,798,721 in state general funds to provide state-only

[5] The figures presented in Dr. Fink's Declaration are based on review of pertinent Department records and are based on discussions with members of the Departmental staff. The figures presented are approximate.

funded medical assistance to COFA Residents. This amount increased to $33,492,322 in state fiscal year 2008, and to $43,053,882 in state fiscal year 2009. Fink Dec. at 8-10.

The passage of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) and the American Recovery and Reinvestment Act of 2009 (ARRA), and federal reimbursement for emergency services rendered to COFA Residents, resulted in additional federal matching funds that offset state fund expenditures for medical assistance provided to COFA Residents. Fink Dec. at 12-13. Without this additional federal funding, total state expenditures would have been $48,402,643 in state fiscal year 2010. Fink Dec. at 11-15. Still, even with the additional federal funding, the Med-QUEST Division anticipates that State general fund expenditures for medical assistance provided to COFA residents in state fiscal year 2010 would exceed $39 million, far in excess of the $11,228,742 annual Compact Impact grant. Fink Dec. at 15. Therefore, it is clear that the Federal government is *not* directing the State, nor reimbursing the State for costs it incurs in providing services to COFA Residents.

III. PLAINTIFFS' MOTION DOES NOT PROVIDE THIS COURT WITH THE FACTS SURROUNDING DIALYSIS COVERAGE

Plaintiffs seek to sensationalize the coverage of dialysis as an "emergency service." See, Memorandum at 6. In fact, COFA Residents who were already receiving dialysis should have had no disruption in services from their regular

dialysis providers, due to the careful planning and preparation by the Med-QUEST Division, particularly its Medical Director, Dr. Anthea Wang.

As the Med-QUEST Medical Director, Dr. Wang was responsible for developing a provider memo that would explain coverage of dialysis services under Hawaii Medicaid's emergency medical assistance program. A true and correct copy of the provider memorandum, ACS M10-07, dated May 18, 2010, from Kenneth S. Fink, Med-QUEST Division Administrator, to Dialysis Nephrologists and Facilities, is attached as Exhibit A ("the provider memo"). See, Declaration of Anthea Wang (Wang Dec.) at 5.

Dr. Wang engaged in extensive consultation with dialysis nephrologists and dialysis facilities during development of the provider memo, beginning several months prior to implementation of the Basic Health Hawaii (BHH) program. Wang Dec. at 6. Based on the input of the dialysis providers, the provider memo details the specific CPT codes to be utilized by dialysis nephrologists and dialysis facilities when billing for dialysis services, as well as the drugs that are administered during dialysis that will be included as part of the emergency medical assistance benefit. Wang Dec. at 7. The provider memo also describes the claims procedure, which directs claims for dialysis and covered dialysis medications under the emergency medical assistance benefit to be submitted to the Med-QUEST Division's fiscal agent, Affiliated Computer Services (ACS). *Id.*

Dr. Wang continues to be in communication with social workers and physicians of dialysis facilities, as well as hospitals and primary care clinics, assisting them in submitting applications and claims for their patients who need dialysis coverage under emergency medical assistance, including COFA residents who are in BHH and those who are not. Wang Dec. at 8.

For COFA Residents who were already receiving dialysis at the time they were deemed into BHH on July 1, 2010, the Med-QUEST division worked with the dialysis facilities ahead of time to identify clients that were undergoing dialysis and automatically opened an emergency period to allow for acceptance of the dialysis-related codes and prevent disruption of services. Wang Dec. at 9.

For BHH clients who need dialysis services after July 1, 2010, dialysis providers are required to submit a one page form, DHS 1149A, with attached supporting documentation from the client's physician, such as the dialysis orders. This request comes directly to me and is approved within the day of receipt. The approval allows the opening of an emergency period to allow for acceptance of dialysis-related codes through emergency Medical assistance. The approval of services for these clients is faster and more streamlined than for non-BHH clients because BHH clients are already in our system. Wang Dec. at 10; Exhibit A at 4.

New clients that are not in BHH must complete, in addition to the DHS 1149A, a medical assistance application, and an Aid to Disabled Review

Committee (ADRC) packet to qualify the individual for eligibility to receive emergency medical assistance. This procedure is the same procedure followed by anyone who is applying for emergency Medical assistance. Wang Dec. at 11.

Finally, approval of emergency dialysis services for any eligible aliens, including COFA Residents and New Residents, will be for up to 12 months, therefore renewal documentation is completed annually. See, Wang, Dec. at 12.

Therefore, it is clear that dialysis approved for any eligible alien under the emergency medical assistance program is delivered on a regularly scheduled basis through dialysis facilities, requires reasonable eligibility paperwork, renewed at a reasonable annual interval, and that approval for COFA Residents and new Residents enrolled in BHH is faster and more streamlined that for non-BHH clients.

IV. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON MERITS

1. BHH Did Not Violate Plaintiffs' Equal Protection Rights

Congress, not Defendants, has elected to exclude certain aliens -- including COFA Residents and New Residents -- from coverage in federal public benefit programs such as Medicaid. Despite the lack of federal funding, the State historically has recognized the health care needs of ineligible aliens, particularly

COFA Residents, and has therefore opted to voluntarily provide health coverage to these groups with state dollars.

Far from discriminating on the basis of alienage, the State is affirmatively dedicating resources to providing health care to those whom the federal government has refused to cover. Nothing in the Equal Protection Clause requires the State to create such a program; 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. BHH passes muster under rational basis review, which is all that is required when the State is not excluding individuals based on alienage but affirmatively offering state-funded benefits to aliens who do not qualify for Medicaid coverage. Moreover, in light of Congress's authority over immigration, even strict scrutiny would not invalidate the State's application of the congressionally-established Medicaid eligibility categories. To the extent that COFA Residents and New Residents believe they should receive benefits comparable to those provided under Medicaid, their remedy is with Congress, not this Court.

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

Congress has decreed that "Non-Qualified Aliens," including COFA Residents and New Residents, cannot be covered under Medicaid. 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 must wait five years to become eligible for Medicaid; New Residents -- those within the five-year bar -- are ineligible.

COFA Residents are "nonimmigrants" who do not fall within any of the qualified alien categories and thus are not eligible for federal benefits under Medicaid. The Department of Homeland Security has confirmed that citizens of the Freely Associated States "may reside, work and study in the United States, but they are not 'lawful permanent residents.'" (U.S. Citizenship & Immigration Servs., Fact Sheet: Status of the Citizens of the Freely Associated States of the Federated States of Micronesia & the Republic of the Marshall Islands, Ex. B at 4-5, and Fact Sheet: Status of Citizens of the Republic of Palau, Ex. C at 3.)

3. The Centers for Medicare & Medicaid Services Has Prohibited Coverage for Non-Qualified Aliens in QUEST, QExA, QUEST-Net, and QUEST-ACE

Medicaid is overseen at the federal level by the Department of Health and Human Services through its 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*, 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, and for certain "demonstration eligibles" who were not otherwise eligible for Medicaid but made eligible under the Section 1115 waiver. The principal non-Medicaid group eligible for QUEST are 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, with certain exceptions.

In 1996, the State implemented the "QUEST-Net" program through its Section 1115 waiver. 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-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.

The STCs for both the QEx waiver, granted in 2006, and the QExA waiver, granted in 2008, state that the "demonstration eligibles" for those waivers (which include QUEST, QUEST-Net, QUEST-ACE, and QExA) "specifically excludes unqualified aliens, including aliens from the Compact of Free Association countries." (Ex. D at 2, 5; Ex E at 3, 5, 6, 10, 15 – 21). **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 non-qualified aliens, including COFA residents.**

4. Despite the Federal Restrictions, the State Has Chosen to Use Its Own Funds to Provide Health Benefits to Ineligible Aliens

Although prohibited by PRWORA and the terms of its waivers from extending Medicaid coverage or coverage through QUEST, QUEST-Net, QUEST-ACE, or QExA to non-qualified aliens, the State, nonetheless, chose to provide health benefits using only state tax dollars, without federal financial participation, as follows (Haw. Admin. R. § 1722.3-1):

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.

Second, all other non-qualified aliens who otherwise meet the eligibility criteria for enrollment in QUEST, QUEST-Net, QUEST-ACE, or QExA are to be provided benefits through BHH.

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

Plaintiffs allege that their enrollment in BHH, a wholly state-funded program created to provide a medical assistance benefit for aliens only, rather than the QUEST, QUEST-Net, QUEST-ACE, and QExA programs, violates equal protection principles.

When Congress passed the PRWORA, it excluded certain groups of aliens, including COFA Residents and 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 and Hawai‘i 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 v. Richardson*, 403 U.S. 365, 371 (1971). "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.

Plaintiffs' argument regarding equal protection primarily rests on the Supreme Court's decision in *Graham v. Richardson, supra*. In that case, the Supreme Court 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. 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.

Graham is not applicable here, however, where it is Congress, not the State, that has excluded aliens from federally funded Medicaid coverage. 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 COFA Residents and 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.*, *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009) ("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 v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (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).

Plaintiffs mistakenly state that "[t]he policy requiring New Residents to have been present in Hawaii for a minimum of five years to be eligible for BHH" is wrong. Memorandum at 28. New Residents are eligible for BHH as provided in the applicable administrative rules, and there is no residency requirement. HAR § 17-1722.3-7. A qualified alien must have been resident in the **country** for five years before becoming eligible for **federal** public assistance benefits. Hawaii's Medicaid program, consistent with federal Medicaid requirements, does not grant New Residents eligibility for federal Medicaid.

Plaintiffs have cited no authority to support the proposition that, when aliens are excluded from federal public benefit programs by federal law, a State is constitutionally required to provide those same benefits at State expense. Therefore, as noted by Plaintiffs, the State of Hawaii did not provide any state-funded medical assistance to New Residents following the PRWORA. Including New Residents in BHH provided them with medical assistance benefits, other than emergency medical assistance, for the first time in over a decade. Further, in doing so, the State is not obligated to provide equivalent public assistance benefits.

6. To the Extent the State Has Chosen to Create a Program Just for Non-Qualified 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). Neither COFA Residents nor New Residents are among the groups that must be included or excluded. Instead, the PRWORA gives states the discretion to determine the eligibility of such aliens, including 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 . . . [and] a nonimmigrant under the Immigration and Nationality Act").

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*, *supra*, at 414-15. 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 COFA Residents and New Residents, a State may cover under Medicaid). *Soskin v. Reinertson*, 353 F.3d 1242, 1246, 1254-57 (10th Cir. 2004). 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.*

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.*

Courts have applied strict scrutiny and declared a state program unconstitutional on two occasions. One 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 v. Novello*, 754 N.E.2d 1085, 1090, 1094-99 (N.Y. 2001). 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. It held that the state's attempt to exclude non-qualified aliens from its state-only medical assistance program – which was available to citizens – did not pass strict scrutiny and violated the Equal Protection Clause.[6] 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

[6] 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 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).

guarantee equal outcomes . . . Nor does it require the State to remediate the effects of the PRWORA." *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009).

Hong Pham v. Starkowski, 2009 WL 5698062 (unreported)(Conn. Super. Dec. 18, 2009) also declared a state program unconstitutional under strict scrutiny review. The court in *Starkowski* accepted plaintiffs' representation that "*persons situated similarly in all relevant respects*" were those that are eligible for federal Medicaid. *Starkowski* at *14 (emphasis in original). The court therefore found that the legislative classification in question "classifies based on alienage," requiring strict scrutiny standard of review. *Id.* Hawaii, like all states, must comply with federal requirements that exclude certain persons from eligibility for federal Medicaid. Plaintiffs in *Starkowski*, and in this case, are excluded from federal Medicaid by PRWORA; Medicaid-eligible persons are not. Therefore, the key distinction between plaintiffs in *Starkowski* and in this case, and persons eligible for federal Medicaid, is not their alienage, but their eligibility for federal Medicaid under federal standards, which is dictated by Congress, not the states. Federal program eligibility is not a suspect classification and, thus, only triggers rational basis review.

In this case, the State is not excluding aliens from a state-funded program. Rather, it is creating a benefit program specifically for ineligible aliens, as did Massachusetts. 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. Among the ineligible residents, the State drew further distinctions pursuant to federal law based on age and pregnancy, providing coverage comparable to Medicaid for pregnant women and children, and coverage comparable to QUEST-Net and QUEST-ACE for all others. Because none of those classifications constitutes a suspect class, the state need only satisfy rational basis review. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (holding that a distinction based on pregnancy is not a sex-based classification subject to heightened scrutiny); *Daoang v. Dept' of Education*, 63 Haw. 501 (1981) (finding rational basis for compulsory retirement age for state employees); *Nagle v. Bd. of Educ.*, 63 Haw. 389, 394 (1981) ("age is not a suspect classification"). Unlike in *Aliessa*, Hawai'i did not create a state-funded benefit program that covers citizens but excludes aliens. On the contrary, Hawai'i instituted a state-funded benefit program so that COFA Residents and New Residents would not be left without health coverage. Therefore, strict scrutiny is not appropriate in 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 COFA Residents and other aliens that Congress has turned its back on, despite the State's current budget crisis.

Plaintiffs do not appear to dispute that Hawai'i could completely eliminate state-funded medical assistance to COFA Residents and other Medicaid-ineligible aliens. Instead, 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. Again, 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 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, or to never begin providing state-funded medical assistance to non-qualified aliens.

7. 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). See Memorandum at 25. 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.

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). 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).

Furthermore, the United States Supreme Court has recognized that in allocating governmental benefits to a given class of aliens, one may take into account the character of the relationship between the alien and this country. "The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country…" *Mathews, supra,*at 80. As noted above, the character of the COFA Residents' relationship with this country is as a nonimmigrant, deportable for lacking self-sufficiency. Therefore, the State of Hawaii's treatment of COFA Residents does not conflict with or alter "the

conditions lawfully imposed by Congress upon admission, naturalization and residence" of COFA Residents in the United States. *Takahashi v. Fish & Game Comm'n,* 334 U.S. 410, 419 (1948).

Plaintiffs do not, nor can they, dispute that the state's decision to transfer COFA residents and other non-eligible aliens to BHH 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.

8. Even if Strict Scrutiny Applies, the State's Classification of Non-Eligible Aliens is Suitably Tailored to Serve a Compelling State Interest

The state's decision to provide benefits to Plaintiffs through BHH still comports with Equal Protection, even if strict scrutiny applies. Under strict scrutiny review, Hawai'i must show that its classification of non-eligible aliens is "suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

In 2003, an Arizona appeals court applied strict scrutiny and upheld Arizona's decision to exclude qualified aliens with less than five years of residency from a state-funded program that extended medical benefits to individuals who were ineligible for Medicaid due to income restrictions. *Avila v. Biedess*, 78 P.3d 280, 283, 287-88 (Ariz. Ct. App. 2003); Review Denied and Ordered Depublished, *Avila v. P Biedess/AHCCCS*, 207 Ariz. 257, 85 P.3d 474 (Ariz. Mar 16, 2004).

Defendants note that although the case has no precedential value, it is being offered because they believe the *Avila* court's reasoning is sound. Notably, the Arizona Supreme Court did not reverse the decision of the Arizona appeals court. The court determined that the state program was "essentially a state-funded extension of the federally-funded [Medicaid] program," and the state's interest in having uniform eligibility criteria for both programs satisfied strict scrutiny. *Id*. at 288. The court reasoned that "[t]he combination of the federal policy [expressed in the PRWORA] 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." *Id*.

> [W]e believe it would be an impractical and strained application of the Equal Protection Clause to bar a state from using federal eligibility criteria for a state program when a mandatory federal policy applies to one portion of a program and the state merely acts to implement uniform rules of alien eligibility for another [state-funded] part of the same program.

Id.

While not directly on point, *Avila* is instructive to the present case. In *Avila*, the state exercised its discretion under the PRWORA to completely exclude aliens from its state-funded medical assistance program. *Id*. at 283. By contrast, Hawai'i used its discretion to reduce the full Medicaid-like benefits the Plaintiffs used to receive, and instead implemented the BHH Program. If Arizona's decision to mimic Congress and exclude aliens from coverage satisfies strict scrutiny,

Hawai‘i’s decision to be more generous than Congress and include aliens in a state-funded benefit program must also satisfy that standard.

As previously discussed, Hawai‘i also could have avoided potentially violating the Equal Protection Clause simply by eliminating medical benefits for non-eligible aliens, which is precisely what Congress did when it passed the PRWORA. *See, e.g.*, *Khrapunskiy*, 909 N.E.2d at 77; *Doe*, 773 N.E.2d at 414. If the Court holds that BHH was unconstitutional, the state’s only economically feasible and constitutional option may be to deny Plaintiffs any state-funded health benefits. Such a perverse and impractical reading of the Equal Protection Clause should not be adopted. Instead, even if strict scrutiny applies in the present case, the Court should find that the State complied with equal protection principles.

9. BHH Does Not Contravene Federal Policies

Plaintiffs argue that denying COFA Residents and New Residents access to the same medical assistance benefits that are available to similarly needy U.S. citizens contravenes federal policies in an area constitutionally-entrusted to the federal government. Memorandum at 26 (citing *Graham*). Plaintiffs are correct that the federal government has broad constitutional powers over the terms and conditions of an alien’s admission and naturalization. However, contrary to Plaintiffs’ assertions, Congress has clearly imposed a restriction on COFA Residents who become indigent after their entry into the United States.

Plaintiffs rely on *Graham* for the proposition that "Congress … has not seen fit to impose any burden or restriction on aliens who become indigent *after* their entry into the United States." Memorandum at 26 (citing *Graham*). However, the Compacts provide that section 237(a)(5) of the INA "shall be construed and applied as if it reads as follows: "any alien who *has been admitted* under the Compact, or the Compact, as amended, *who cannot show that he or she has sufficient means of support* in the United States, *is deportable.*" 2003 Compact, sec. 141(f)(1) (emphasis added). Therefore, it is clear that Congress distinguished the terms and conditions of admission and residency of COFA Residents to prohibit lack of self-sufficiency after entry into the country.

10. 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.

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, COFA Residents and 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.

B. THE BALANCE OF EQUITIES DOES NOT FAVOR PLAINTIFFS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 376 (2008). Defendants believe Plaintiffs understate the effect of the proposed injunction. "… Defendants stand to suffer largely a **hypothetical** financial harm." Memorandum at 37 (emphasis added). Frankly, the nearly $40 million a year that

the State is spending on non-mandatory medical care for the Plaintiffs is not "hypothetical." And given the pattern of increasing expenditures for medical assistance to COFA Residents, this figure can be expected to grow significantly in coming years. See, Fink Dec. ¶ 8-10, 15. Since the State of Hawaii cannot indulge in deficit spending, the issuance of the proposed injunction will force the State of Hawaii to consider spending cuts by reducing benefits provided in its Medicaid programs. Alternatively, the State may decide it has no choice but to eliminate medical assistance benefits to Plaintiffs entirely.

C. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST

Plaintiffs' discussion of the public interest is simply an appeal for this Court to substitute policy decisions made by the Executive Branch of the government of the State of Hawaii with their view of what appropriate policies should be. There is a strong public policy to be protected in allowing the State of Hawaii to exercise the discretion granted to it by the federal government as to what level of state-funded services should be provided to the Plaintiffs. See *PG Const. Co. v. George & Lynch, Inc.*, 834 F.Supp. 645, 658-659 (D. Del. 1993) (preliminary injunction was denied to bidder on public construction project where bidder's claim was not supported by statute or regulation).

V. CONCLUSION

For the reasons set forth above, Defendants ask this Court to deny Plaintiffs' Motion for a Preliminary Injunction.

DATED: Honolulu, Hawaii, October 4, 2010.

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

LILLIAN B. KOLLER 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 Opposition to Plaintiffs' Motion for Preliminary Injunction to be 8,945 words, using the word count feature of Word 2003.

DATED: Honolulu, Hawaii, October 4, 2010.

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

LILLIAN B. KOLLER and
KENNETH FINK