UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1162

VALENTIN SOSKIN, BEI DEI HOWE, EVA ROSENTHAL, VATACHAGAN TATEVOSIAN, GINDA K. GELFAND, YAKOV GELFAND, DUBALE SHIBESHI and SARIN PERLMAN, on their own Behalf and on Behalf of All others Similarly Situated,	)
Plaintiffs-Appellants,	)
vs.	)
KAREN REINERTSON, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing,	)
Defendant-Appellee.	)

PLAINTIFFS'-APPELLANTS' MOTION FOR INJUNCTION ON APPEAL

Plaintiffs-Appellants move the Court to enjoin, pending appeal, the currently-scheduled May 1 implementation of Colorado's recently-enacted Senate Bill 03-176 ("SB03-176"), which aims to reduce the state budget deficit by terminating the Medicaid benefits of approximately 3500 immigrants, all of whom are lawfully present in this country. Without this Court's intervention before May 1, Plaintiffs and the members of the putative class will lose such vital medical services as chemotherapy, nursing home care, surgical care, home care

services, and life-sustaining prescription medications, thereby causing irreparable and possibly life threatening injury to their physical health and well-being.

Plaintiffs filed this class action on March 27, 2003 to enjoin the implementation of SB03-176 on grounds that (a) it violates the equal protection guarantee of the 14th Amendment, and (b) Defendant's termination process violates procedures mandated by Medicaid law and due process. After Plaintiffs obtained a temporary restraining order, the district court denied preliminary injunctive relief in an Order dated April 16, 2003 ("Order").[1]

The district court's conclusion that Plaintiffs were unlikely to succeed on the merits of either claim (1) rests on erroneous legal reasoning that misconstrues Supreme Court precedent governing the degree of equal protection scrutiny applicable to state statutes that discriminate on the basis of alienage; and (2) completely disregards Defendant's dispositive testimonial concessions that she terminated Medicaid benefits in violation of unequivocal federally-mandated procedures. Moreover, the district court's conclusion that the public interest weighs in favor of Defendant is based solely on the irrelevant assumption that the state may need to reallocate some budgetary resources if it is compelled to comply with its constitutional and statutory obligations.

Plaintiffs asked the district court to stay the implementation of SB03-176

[1] The temporary restraining order prevented Defendant from terminating benefits on the originally-scheduled date of April 1. Now that the restraining order has been lifted, Defendant currently plans to terminate benefits on May 1. See the attached Supplemental Declaration of Gregory R. Piché ("Piché Decl.").

pending appeal, but the district court has not ruled, and the requested relief does not appear to be forthcoming or otherwise attainable before the impending May 1 terminations. It is beyond doubt, as the district court acknowledged, that Plaintiffs and the putative class will suffer irreparable harm if SB03-176 is not enjoined and their Medicaid is stopped, since they will lose access to crucial medical care and treatment. While the injunction will stay Colorado from temporarily realizing budget savings projected from the implementation of SB 03-176, the harm to Defendant from that temporary stay is irrelevant since Plaintiffs will ultimately prevail on the merits. In any event, Plaintiffs are prepared to expedite the briefing of the appeal to further minimize any possible harm to Defendant.

A. THE LOSS OF MEDICAID WILL CAUSE PLAINTIFFS AND PLAINTIFF CLASS MEMBERS IRREPARABLE HARM.

Defendant agrees that if SB03-176 is implemented Plaintiffs and the putative class will lose essential medical services and treatment. *See* Prelim. Inj. Hrg. Transcript ("Tr."), at 32-33. Plaintiffs will lose nursing home coverage, doctor's visits, medications, long-term care, and all other non-emergency medical services essential to their health and, in many cases, survival. *Id*. Against the backdrop of Defendant's acknowledgment of the vital medical care and services that will be lost and the vivid portrayals of imminent harm in Plaintiffs' declarations, the district court could not but find that "[e]ven a temporary suspension of coverage would result in irreparable injury to many of

the Plaintiffs." (emphasis supplied.) Order at 12-13.

Even a brief interruption in medical services is deleterious to patients and constitutes irreparable harm. *Nat'l Assoc. of Psychiatric Treatment Ctrs. v. Weinberger*, 661 F.Supp. 76 (D. Colo. 1986). Because the elimination or denial of Medicaid services poses grave risks to health, the loss of Medicaid is irreparable injury. *See, e.g.*, *Visser v. Taylor*, 756 F. Supp. 501 (D. Kan. 1990) (finding the denial of Medicaid coverage for medically necessary prescription drugs to cause irreparable harm.)

B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

1. SB03-176 Violates Equal Protection by Discriminating Against Lawful Immigrants on the Basis of Alienage.

Colorado's termination of Medicaid to lawful immigrants is subject to strict scrutiny as a *state* determination to discriminate on the basis of alienage. In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Supreme Court held that state discrimination against lawful immigrants is subject to strict scrutiny, and struck down as a violation of equal protection two state welfare statutes because state distinctions between citizens and immigrants, "like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."

In *Graham,* the Supreme Court directly addressed whether strict scrutiny applies to state-imposed discrimination against immigrants that is purportedly "authorized" by Congress. Arizona contended that a federal statute authorized it to impose a residence requirement on immigrants only. The Court rejected that

interpretation of the statute because of the constitutional problems it would raise. First, referring to Congress's power to "establish a uniform Rule of Naturalization," U.S. Const. Art. I § 8 cl. 4, the Court explained that "[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 [the] explicit constitutional requirement of *uniformity*." *Graham,* 403 U.S. at 382 (emphasis added; citing and quoting U.S. Const. Art. I, § 8, cl. 4).[2] Second, "[a]lthough the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* (emphasis added) (citing *Shapiro v. Thompson,* 394 U.S. 618, 641 (1969)).[3] Because both of the reasons provided in *Graham* apply equally in this case, Colorado's statute is subject to strict scrutiny, a test it cannot meet.

[2] In addition to the Naturalization Clause, the Court has also found authority for Congress's immigration power as "an incident of sovereignty belonging to the government of the United States" which "cannot be granted away" and is "incapable of transfer." *Chae Chan Ping v. United States,* 130 U.S. 581, 609 (1889).

[3] *See also Saenz v. Roe,* 526 U.S. 489, 508 (1999) ("Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation"); *Katzenbach v. Morgan,* 384 U.S. 641, 651-52 n.10 (1966) (Congress may not by statute "restrict, abrogate, or dilute" obligations of states under Fourteenth Amendment).

The district court applied only rational basis review to SB03-176, an analysis that rests on least two critical errors. First, the ruling fails to recognize that strict scrutiny applies when *states* discriminate against lawful immigrants in welfare programs, regardless of whether the program uses state or federal funds. Second, in relying on the alienage classifications in 8 U.S.C. § 1612 as grounds for departing from strict scrutiny review of Colorado's statute, the court ignored the principle that distinctions based on alienage in welfare statutes are subject to relaxed scrutiny only when Congress establishes a uniform national standard.[4] Because Congress in 8 U.S.C. § 1612 did not establish a uniform national standard, the district court plainly erred in concluding that the Colorado statute does not implicate "the constitutional requirement of uniformity." Order at 8.

The ruling below dismisses the dispositive nature of *Graham* on the fundamentally erroneous assumption that it did not concern a program involving federal funds. According to the district court "the facts at issue here are distinguishable" because the Colorado program is "not a state-only funded program as in *Graham*... ." Order at 8. In fact, the Arizona statute declared

[4] Section 1612 was enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). PRWORA establishes two uniform prohibitions on immigrants' eligibility for non-emergency Medicaid. Under PRWORA, "not qualified" immigrants are barred from Medicaid, 8 U.S.C. § 1611, and "qualified" immigrants (lawful permanent residents and other designated categories of lawful immigrants) who enter the United States on or after August 22, 1996, with some exceptions, are barred for a period of five years after their entry into the country, *id.* § 1613. PRWORA also included the provision on which the ruling below relies, § 1612, which provides that states may impose their own prohibitions on the Medicaid eligibility of "qualified" immigrants, with some exceptions. *Id.*. Lawful immigrants such as Plaintiffs remain eligible for Medicaid under PRWORA, unless a state affirmatively acts to terminate their eligibility.

unconstitutional in *Graham* was part of "the State's participation in federal categorical assistance programs," and was "supported in part by federal grants-in-aid and… administered by the States under federal guidelines." *Graham,* 403 U.S. at 366-67. That is precisely the same as the Colorado Medicaid program at issue here. Therefore, the district court's rejection of *Graham's* strict scrutiny standard rests on a critically mistaken premise.

The district court further erred by concluding that Colorado's statute "does not threaten to proliferate divergent eligibility requirements throughout the participating states." Order at 8. The ruling provides no explanation for this conclusion, finding only that SB03-176 is permitted by 8 U.S.C. § 1612 and does not implicate "the constitutional requirement of uniformity" because it represents "a limited option." *Id.* The critical issue under the Supreme Court's reasoning in *Graham* is whether a federal statute "permit[s] state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs." *Graham,* 403 U.S. at 382. There is no exception for "limited" divergence. In this case, there can be no doubt that § 1612 would lead to divergent state laws as is evidenced by the very fact that other states have not imposed the restrictions at issue here. Hence, Plaintiffs and thousands of other lawful immigrants are barred from eligibility solely because they happen to reside in Colorado.

The ruling below relied erroneously on cases involving federal statutes imposing nationally-uniform mandatory restrictions against immigrants in welfare

programs that are not presented here. Order at 7. For example, *Kiev v. Glickman,* 991 F.Supp. 1090 (D.Minn. 1998) and *Abreu v. Callahan,* 971 F.Supp. 799 (S.D.N.Y. 1997), concerned PRWORA's uniform federal restrictions on immigrant eligibility for Supplemental Security Income ("SSI") and Food Stamps. Those cases are not relevant here because they involved restrictions enacted by Congress that impose a nationwide uniform federal rule prohibiting welfare coverage for specified categories of noncitizens. Under *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976), such a uniform federal dictate is subject to rational basis scrutiny because Congress has exercised its plenary power over immigration and naturalization to restrict welfare eligibility nationwide to designated categories of noncitizens.

The district court also erroneously distinguished the ruling of the *only* jurisdiction that has squarely addressed the effect of PRWORA's adoption of provisions allowing states to impose "optional" restrictions. In *Aliessa v. Novello,* 96 N.Y.2d 418, 754 N.E.2d 1085 (N.Y. 2001), New York's highest court rejected the state's claim that PRWORA relaxes the equal protection standard of review applicable when states establish alienage classifications. The court held that state-imposed restrictions, even if purportedly "authorized" by PRWORA, are subject to strict scrutiny. *Id.,* 96 N.Y.2d at 436. The court found that the federal statute was not based on "a Congressional command for nationwide uniformity … as a matter of federal immigration policy," *id.* at 435, and instead "authorizes each State to decide whether to disqualify many otherwise eligible aliens," *id.* at 436. For these reasons, the court concluded that an optional, non-

uniform provision of PRWORA "can give [the state statute] no special insulation from strict scrutiny review." *Id.*

Because *Aliessa* concerned a challenge to the state's restriction of immigrant eligibility for a program funded solely with state funds, the provision of PRWORA that was at issue was 8 U.S.C. § 1622 rather than § 1612, the functionally identical provision applicable to federal Medicaid. The *Aliessa* court's analysis addressed both provisions of PRWORA, noting that § 1612 "is directly in the teeth of *Graham* insofar as it allows the States to 'adopt divergent laws on the subject of citizenship requirements for *federally* supported welfare programs.'" *Aliessa,* 96 N.Y.2d at 436. (quoting *Graham,* 403 U.S. at 382, and adding emphasis).

The district court erroneously dismissed *Aliessa* based on the constitutionally irrelevant ground that the case concerned a program funded solely with state funds. Under the rulings of *Graham* and *Mathews,* the critical inquiry is not the source of the funding but rather whether the federal government or a state chose to impose a restriction on immigrants. When the federal government imposes a nationally uniform restriction in the course of exercising its plenary power over immigration, the legislation is subject to rational basis review. But when a state decides to discriminate based on alienage, it is not exercising the federal immigration power, and the statute is subject to strict scrutiny.

In this case, the statute terminating Plaintiffs' Medicaid coverage is a state law enacted by the state legislature without any federal compulsion. Plaintiffs and the entire proposed class would continue to be eligible for Medicaid under federal law but for Colorado's enactment of SB03-176. The only relevant federal

law permits, but does not require, states to impose a restriction against immigrants in the Medicaid program. The federal statute does not in any way favor, much less compel, Colorado's decision to terminate Plaintiffs' Medicaid benefits. That decision was made and acted upon solely by Colorado. As the *Mathews* Court emphasized, "it is the business of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." *Mathews,* 426 U.S. at 84.

Rather than diminishing the protection afforded by the equal protection clause, § 1612 removes the federal preemption claims that would otherwise arise if a state were to impose such immigrant restrictions, without federal permission, in the face of the comprehensive Medicaid statute. Indeed, the language of PRWORA itself expressly demonstrates Congress's understanding that strict scrutiny applies in any case where a state seeks to impose a restriction under § 1612. In § 1601(7), Congress provided that "with respect to the State authority to make determinations concerning the eligibility of qualified aliens," state legislation restricting immigrant benefits in a manner consistent with PRWORA be "the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." That language plainly reflects the congressional understanding that the state statute must satisfy strict scrutiny by referring

specifically to "the least restrictive means" for achieving a "compelling governmental interest."[5]

In short, the district court's finding that Plaintiffs were not likely to prevail was based on fundamental legal errors. Colorado's statute terminating the benefits of legal immigrants must meet strict scrutiny to survive under the Supreme Court's equal protection case law. The state's interest behind SB03-176, which Defendant admits was "intended wholly to be a fiscal savings" (Tr.20:7-9) -- cannot satisfy strict scrutiny and thereby justify discrimination against indigent lawful immigrants, *Graham*, 403 U.S. at 375 ("Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*"); *Shapiro,* 394 U.S. at 633 ("The saving of welfare costs cannot justify an otherwise invidious classification.

2. The Order Ignores Defendant's Admissions that She is Implementing SB03-176 in Violation of the Medicaid Act and the Due Process Clause.

The Order ignores clear evidence, including Defendant's admissions, that she is implementing SB 03-176 in violation of the Medicaid Act and due process by failing to conduct full redeterminations of eligibility, give adequate notice,

[5] Insofar as this provision seeks to dictate the outcome of the strict scrutiny test as applied to a particular statute and thereby to prejudge the equal protection analysis by characterizing the circumstances giving rise to future state legislation, that attempt must fail. First, the specific purpose endorsed by the statute is not at issue here, because Colorado cannot claim that it is terminating Plaintiffs' Medicaid eligibility in order to promote their self-reliance. Furthermore, as previously noted, the Supreme Court has expressly rejected the concept that Congress can authorize the states to violate the Constitution. *See* n.2, *supra.*

and provide pre-termination hearings prior to terminating Medicaid to Plaintiffs and the putative class. Any one of these three separate violations of law mandates the issuance of an injunction to stop the terminations until the violation has been cured.

i. Failure to Conduct Full Redeterminations - Defendant admits that she did not provide full redeterminations of eligibility prior to terminating the Medicaid of Plaintiffs and the putative class. (Tr. 66). ("[W]e were not asking for a full redetermination of all aspects of eligibility.") By this admission alone, Plaintiffs established a likelihood of prevailing on that claim.

The federal Medicaid statute mandates that a state not terminate any recipient's Medicaid benefits unless the state first affirmatively determines that the recipient does not retain eligibility under an alternative ground. 42 U.S.C. § 1396a-a(8). Because Medicaid creates a single program, *id.* § 1396 *et. seq*., within which there are various eligibility groups, the state must determine that the recipient is not eligible under the rules of *any* eligibility group before benefits may be terminated, *Crippen v. Kheder*, 741 F.2d 102, 104-07 (6th Cir. 1984); *Mass. Ass'n of Older Ams. v. Sharp*, 700 F. 2d 749 (1st Cir. 1983); *Stenson v. Blum*, 476 F. Supp. 1331 (S.D.N.Y. 1979). It is undisputed among the Circuit courts that the mandate of 42 U.S.C. § 1396a(a)(8) requires states to continue to provide Medicaid until a full determination has been completed.

The state's obligation to redetermine a recipient's eligibility before terminating his or her Medicaid requires the state to engage in a complete and

probing search of eligibility under all relevant categories. Section 1396a(8), which is implemented, in part, by 42 C.F.R. § 435.930(b), requires "that, upon receiving notice of a recipient's termination from a sub-group of the categorically needy class, the state agency must redetermine the recipient's eligibility for Medicaid benefits." *Olson v. Reagen*, 1985 U.S. Dist. LEXIS 20823, *8 (S.D. Iowa April 11, 1985); *see also Crippen*, 741 F.2d at 104-07; *Sharp*, 700 F.2d at 753; *Stenson*, 476 F. Supp. at 1339-41.[6]

The Order disregards Defendant's deliberate noncompliance with the Medicaid Act's redetermination requirements which resulted in a truncated process that failed to ensure that eligible recipients would not lose their Medicaid, as mandated by law. Defendant's own evidence submitted at the preliminary injunction hearing demonstrates incontrovertibly that she unlawfully terminated the assistance of two of the eight named plaintiffs. Defendant's Exhibit "I" represents that Plaintiffs Perlman and Tatevosian are SSI eligible and, therefore, as Defendant admits, eligible for Medicaid pursuant to SB03-176. (Tr. 85).[7] Exhibit "I" also shows that both Plaintiffs' Medicaid was terminated effective March 31, 2003. Thus, the district court's Order ignores the fact that at

[6] For a detailed description of the mandated Medicaid redetermination process, see Center for Medicaid and Medicare Services ("CMS") "Dear Medicaid Director Letter", *at* http://www.cms.hhs.gov/states/letters/smd40700.asp (April 7, 2000).

[7] Medicaid must be provided to individuals who are eligible for SSI regardless of whether they are receiving SSI payments. Colo. Medicaid Manual §§ 8.110.11(a) & (b).

least 25% of the named Plaintiffs were, according to Defendant's own evidence, unlawfully terminated from Medicaid.

When faced with a state's failure to conduct the full redeterminations mandated by law, at least two other district courts have unequivocally granted preliminary relief. *See, e.g.*, *Olson*, at *8 (likelihood of success found and preliminary injunction granted where state failed to conduct full ex parte determinations); *Daniels v. Tenn. Dep't of Health & Env't*, 1985 U.S. Dist. LEXIS 12145 (M.D. Tenn. Feb. 20, 1985) (same).[8]

ii. Failure to Provide Due Process Hearings - The Order also ignores Defendant's concession that she deprived recipients of fair hearings to challenge county determinations that the recipient failed to provide requested verification documents. (Tr. 88-89). Medicaid recipients have the right to an administrative hearing *whenever* the state agency takes action to deny services or eligibility. 42 U.S.C. § 1396a(a)(3); *see* 42 C.F.R. §§ 431.200, 431.201; *Rosie D. v. Swift*, 310 F.3d 230, 237 (1st Cir. 2002); *Doe v. Bush*, 261 F.3d 1037, 1056-57 (11th Cir. 2001); *Parry v. Crawford*, 990 F. Supp. 1250, 1258 (D.Nev.1998). The Supreme Court mandates pre-termination hearings whenever the state proposes to

[8] The Defendant's failure to comply with proper termination procedures in this case is consistent with its adoption of previous measures that failed to ensure continued Medicaid for eligible recipients. *See* Tr. 51:1-5, 13-17; 52:1-12, 15-21(Defendant acknowledging multiple deficiencies in administration of Medicaid program involving failure to ensure that eligible families and individuals in Colorado receive Medicaid benefits). The evidence showed that despite Defendant's responsibility to ensure county offices compliance with applicable law, only two-thirds of the counties participated in the only schedule conference call instructing the counties on the implementation procedure for SB03-176. (Tr. 90:9-18).

terminate eligibility and there is a potential factual dispute. *Goldberg v. Kelly*, 397 U.S. 254 (1970). This is no less true when the recipient seeks to challenge a claim that he has not provided requested verification documents. *Id.* at 270.

iii. Failure to Provide Proper Notice - The Order completely overlooks that the termination notices Defendant issued were facially invalid. *See* Piché Decl. ¶¶ 16-21. This fact alone warranted the issuance of a stay. For example, the district court of Connecticut, just a few days ago, temporarily enjoined implementation of Medicaid reductions, finding that "because states are required to provide legally valid notice before terminating benefits, plaintiffs are likely to prevail on this basis alone." *Rabin v. Wilson-Coker*, 2003 U.S. Dist. LEXIS 67, *5 (D.Conn. April 21, 2003).

C. BALANCE OF HARM ANALYSIS FAVORS PLAINTIFFS.

The balance of hardships tips decidedly in favor of Plaintiffs. The district court concurred:

> Any financial harm to be suffered by the state in providing Medicaid benefits, the Plaintiffs argue, cannot compare to the irreparable and potentially life-threatening harm suffered by the Plaintiffs if they are denied Medicaid coverage.
>
> On balance, I conclude that the Plaintiffs have shown preponderantly that the threatened personal injuries they face outweighs the likely financial injury Defendant would suffer. (emphasis added).

Order at 14.

Budgetary harm to a state in delaying Medicaid changes has been found "not very significant in comparison to the irreparable harm that would be caused

. . . individual Medicaid beneficiaries . . . The state is in a much better position to absorb the budgetary impact of delayed implementation of the amendment as compared to individual Plaintiffs." *Kan. Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548, 1553 (D. Kan. 1993).

D. THE INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, the public interest is furthered by a temporary injunction that ensures that government officials comply with the Equal Protection Clause, the federal Medicaid law, and due process. *See, e.g., Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)(that a temporary injunction may increase government expenditures "does not outweigh the greater public interest in having government agencies abide by the federal laws"); *Kan. Hosp. Ass'n*, 835 F.Supp. at 1553 ("while achieving budgetary savings is also in the public interest of state and federal taxpayers, that interest must give way if it is in conflict with federal substantive law.")

E. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A BOND.

Plaintiffs, poor persons, are unable to furnish F.R.C.P. 65(C) security and, therefore, bond should be waived. *See Brown v. Callahan*, 979 F. Supp. 1357, 1363 (D.Kan. 1997); s*ee also Denny v. Health & Soc. Servs. Bd.*, 285 F. Supp. 526 (E.D. Wisc. 1968). Waiver of the bond requirement is particularly appropriate since Plaintiffs are suing to maintain their health care benefits. *See, e.g., Smith v. Newport News Shipbuilding Health Plan*, 148 F. Supp.2d 637, 653 (E.D. Va. 2001); *Wilson v. Off. of the Civilian Health & Med. Program of the Uniformed Servs.,* 866

F. Supp. 903, 910 (E.D. Va. 1994); *Montoya v. Johnston*, 654 F.Supp. 511, 514-515 (W.D. Tex. 1987) injunction against $50,000 cap on payments under Medicaid program for inpatient hospital expenses issued without bond).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that their motion for preliminary injunctive relief on appeal be granted.

Dated this 23rd day of April, 2003