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.	)

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PRELIMINARY STATEMENT

This case challenges the State of Colorado's termination of vital Medicaid benefits to approximately 3,500 lawful immigrants, who depend on Medicaid coverage for essential and life-sustaining care, solely because they are immigrants. It is indisputable – and the district court found – that termination of Medicaid will visit devastating and irreparable injury on the named Plaintiffs and other lawful immigrants.

Nonetheless, the district court denied preliminary relief principally on the ground that Plaintiffs could not demonstrate a likelihood of success on the merits. That erroneous ruling rests on (1) an unprecedented determination that a state decision to discriminate against lawful immigrants in eligibility for welfare programs is subject only to rational basis review, and (2) disregard of Defendant's dispositive testimonial concessions that she terminated Medicaid benefits in violation of unequivocal federally-mandated procedures.

The equal protection clause requires that a *state* decision to impose eligibility restrictions that are not mandated by Congress on lawful immigrants must be subject to strict scrutiny. That is the consistent teaching of the Supreme Court and Defendant offers no authority to the contrary. Instead, it rests on the novel contention that state-imposed discrimination should be subjected to a diminished level of constitutional scrutiny by virtue of a federal

statute that authorizes – but does not require – states to adopt discriminatory alienage restrictions. That contention is contrary to the principles underlying decades of Supreme Court jurisprudence and the considered analysis of *Graham v. Richardson*.

Similarly, Defendant's termination procedures violated long-established protections mandated by the Medicaid statute. Precisely because termination carries such drastic consequences, federal law requires a careful and searching assessment of alternative eligibility grounds before any individual is cut off. Moreover, the procedures a state employs must ensure that recipients understand the specific reasons for termination so that they have a meaningful opportunity to demonstrate error in the state's decision. In this case, Defendant failed on all those grounds by terminating individuals whom Defendant concedes remain eligible and by issuing termination letters that failed to give recipients the information they needed to rebut the state's decision.

In the face of these claims and the injury Plaintiffs will suffer, the district court committed legal error by failing to grant preliminary relief. Under any conceivable standard, a preliminary injunction is required here to prevent immediate injury.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, granting the district courts jurisdiction over civil actions arising under the laws of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1292, granting the appellate courts jurisdiction of appeals from orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions. The order and judgment of the district court below denied Plaintiffs' request for a preliminary injunction. ("Order") The district court's order was entered on April 16, 2003. The Plaintiffs filed their Notice of Appeal the same day.

STATEMENT OF THE ISSUES

1. The Equal Protection Clause requires that a state's decision to discriminate against lawful immigrants in welfare programs be subject to strict judicial scrutiny. The Colorado statute at issue here indisputably discriminates against such immigrants solely to achieve budgetary savings. Did the district court err by applying only rational basis review to the state statute and by finding thereby that it did not violate the Equal Protection Clause?

2. Before a state may terminate a recipient's Medicaid benefits, it must reassess the recipient's continuing eligibility, provide adequate notice, and provide the opportunity for a pre-termination administrative hearing. Here, the

state admittedly followed none of these mandatory procedures. Did the district court err in nevertheless finding that the state followed proper procedures in terminating Plaintiffs' Medicaid benefits?

STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

On March 5, 2003, Colorado Governor Owens signed Senate Bill 03-176 ("SB 03-176.") This measure provides, *inter alia,* that certain lawfully present immigrants living in Colorado, who satisfy all Medicaid eligibility criteria imposed on citizens, are nevertheless ineligible for Medicaid based solely on their status as non-citizens.

Of the approximately 345,000 persons who receive Medicaid in Colorado,[1] Defendant estimates that 3,500 immigrants will be terminated based solely on their immigration status as a result of SB 03-176. In addition, otherwise eligible immigrants not currently on Medicaid will be denied coverage due to the enactment of SB 03-176. The sole ground for the termination is the fiscal savings the State will accrue, as Defendant admits. Aplt. App. 388:7-9. That amount is estimated at approximately $5.9 million

[1] Colorado Joint Budget Committee, SB 03-258, Long Bill Narrative FY 2003-2004, at 55.

state funds in FY 03-04,[2] which is substantially less than one percent (0.67%) of the total $869 million in the state's budget deficit.[3]

The named Plaintiffs are legal immigrants who, as a result of the implementation of SB 03-176, have lost or will lose their Medicaid benefits. Plaintiff class members require Medicaid to pay for crucial medical care, including chemotherapy (see Aplt. App. 268 ¶ 6); nursing home care (see Aplt. App. 167, ¶4; 172 ¶ 2; 194 ¶ 2); home care (see Aplt. App. 160-61, ¶¶ 10-11; 269 ¶ 9, 184-85 ¶¶ 6,10), surgical care (see Aplt. App. 268 ¶¶ 6, 8) and life-sustaining prescription medications (see Aplt. App. 162 ¶ 16; 177 ¶ 6; 185-85 ¶ 7; 190 ¶ 4). Without Medicaid, none of the Plaintiffs will be able to pay for these necessary services, yet even a brief interruption in these essential medical services is injurious to patients and causes irreparable harm. Medicaid is critical to the health and well being of Plaintiffs. In many instances it may be the difference between life and death (see Aplt. App. 269-70 ¶¶ 9, 12; 159-60, 162 ¶¶ 5-6, 19; 206-08 ¶¶ 7, 8, 9, 12; and 265 ¶¶ 2, 3).

In the rush to implement SB 03-176, Defendant failed to provide full redeterminations of eligibility prior to terminating the Medicaid of Plaintiffs

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[2] Colorado Legislative Council Staff, State Fiscal Impact, SB 03-176 at 3 (January 2003).

and the putative class. Aplt. App. 436:22-25. ("[W]e were not asking for a full redetermination of all aspects of eligibility.") Defendant thereby unlawfully terminated the assistance of two of the eight named Plaintiffs who continued to be eligible for Medicaid based on their eligibility for Supplemental Security Income ("SSI") benefits. Aplt. App. 453.[4]

Defendant's implementation also deprived recipients of fair hearings to challenge county determinations that the recipient failed to provide requested verification documents, Aplt. App. 456-57, and issued termination notices that were facially invalid. These notices are defective insofar as they fail to provide an adequate explanation of the basis for the agency's action, fail to provide accurate, and in some cases any, information about hearings rights. Aplt. App. 100-02, 105 ¶¶; 15-21, 33.

B. PROCEEDINGS BELOW.

Plaintiffs filed this class action on March 27, 2003 to enjoin the implementation of SB 03-176 on grounds that (a) it violates the equal protection guarantee of the Fourteenth Amendment, and (b) Defendant's termination process violates procedures mandated by Medicaid law and due process. After

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[3] Joint Budget Committee Staff Presentation on FY 2003-04 Budget, to Special Joint Session of Colorado General Assembly, at 13 (February 24, 2003).

[4] 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).

Plaintiffs obtained a temporary restraining order, the district court denied preliminary injunctive relief in an Order dated April 16, 2003.[5]

In ruling on Plaintiffs' motion for a preliminary injunction, the district court determined that "even a temporary suspension of [Medicaid] coverage would result in irreparable injury to many of the Plaintiffs." Order, p. 13. The court also found that the threatened injuries faced by the Plaintiffs outweighed the likely financial injury defendant would suffer. *Id*. at p. 14. Notwithstanding these findings, the court denied injunctive relief on the grounds that the Plaintiffs failed to establish a likelihood of success on the merits and failed to demonstrate that the injunction would be in the public interest. The district court did not consider whether, in light of the nature of the threatened injury, injunctive relief was warranted based on a lesser showing of likelihood of success, namely that the Plaintiffs raised questions going to the merits that are "so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberative investigation." *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003)

[5] The temporary restraining order prevented Defendant from terminating benefits on the originally-scheduled date of April 1. After the restraining order was lifted, Defendant planned to terminate benefits on May 1. *See* Supplemental Declaration of Gregory R. Piché, filed with Plaintiffs'-Appellants' Motion for Injunction on Appeal (Aplt. App. 364-68).

(citations omitted). *See also* Court of Appeals Order of April 25, 2003 granting injunction pending appeal.

On April 24, 2003, after receiving no response to their request to the district court to stay the implementation of SB 03-176 pending appeal, Plaintiffs filed an emergency motion for injunction pending appeal with this Court. On April 25, 2003, this Court granted Plaintiffs' motion, expedited the underlying appeal and ordered the parties to file simultaneous briefs on April 30.

C. STATUTORY FRAMEWORK.

1. *THE MEDICAID STATUTE.*

Medicaid is a medical assistance program for the indigent, supported jointly by state and federal funds. 42 U.S.C. § 1396 *et seq.*; *see Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990). Medicaid provides coverage for a wide range of essential medical services, including inpatient and outpatient hospital care, physicians' services, prescriptions, home health services and nursing home care.[6] States are not required to participate in the Medicaid program, but if a state participates it must comply with the requirements of the federal Medicaid Act and regulations. *Wilder*, 496 U.S. at 502. The Medicaid programs of the states are implemented according to comprehensive written plans for medical assistance. 42 U.S.C. § 1396. State

[6] 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(1)-(5),(17) and (21).

plans must be submitted to the Secretary of U.S. Department of Health and Human Services (HHS) for approval, to ensure compliance with federal law.

The federal Medicaid program requires a state to establish or designate a single state agency that is responsible for administering or supervising the administration of the state's Medicaid program. 42 U.S.C. § 1396a (a)(5). Colorado has chosen to participate in the Medicaid program, and it accepts federal matching funds for its program expenditures. Colo. Rev. Stat. § 26-4-105. Colorado has designated the Colorado Department of Health Care Policy And Financing ("HCPF") as the single state agency responsible for administering and supervising the administration of Colorado's Medicaid program.

For decades, Colorado has provided Medicaid to all lawfully present immigrants eligible for such assistance under federal law on the same basis as U.S. citizens. This non-discriminatory approach ended abruptly with the March 5, 2003 enactment of SB 03-176, a bill that imposed unprecedented restrictions on lawful immigrants' eligibility for the State's Medicaid program. Denominated a "Budget Reduction Bill," SB 03-176 terminated Medicaid eligibility for thousands of lawfully present immigrants who are otherwise eligible under federal Medicaid law. The State has based its defense of its

action on a provision of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").

2. *THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 ("PRWORA").*

On August 22, 1996, PRWORA was enacted, overhauling the nation's welfare system.[7] Among other changes, PRWORA eliminated the Aid to Families with Dependent Children program entirely and established a new "block grant" program that imposed strict time limits and work requirements on recipients. PRWORA also restricted access to food stamps for able-bodied adults without children, and to SSI benefits for certain children with disabilities and other groups. In addition, PRWORA imposed new restrictions on immigrants' eligibility for federal benefit programs, principally by eliminating access to SSI and Food Stamps for most lawfully present immigrants.[8]

In relation to Medicaid specifically, PRWORA imposed two uniform prohibitions on immigrant eligibility. First, PRWORA excluded some classes of immigrants, deemed "not qualified," from eligibility altogether, 8 U.S.C. § 1611.[9] Second, PRWORA imposed a "five-year bar" on "qualified"

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[7] Pub. L. No. 104-193, 110 Stat. 2105 (1996).
[8] PRWORA § 402(a).

[9] 8 U.S.C. §1611 prohibits access to "federal public benefits" for immigrants who are "not qualified," with a few exceptions. PRWORA defines "qualified" immigrants to include lawful permanent residents (LPRs), refugees, asylees,

immigrants, with some exceptions, who entered the United States on or after August 22, 1996, the law's enactment date. *Id.* § 1613. That bar prohibits "qualified" immigrants from receiving Medicaid for the five-year period after their date of entry into the United States.

In addition to these mandatory federal restrictions and prohibitions, PRWORA contained a novel provision authorizing states to adopt state restrictions for Medicaid coverage of qualified immigrants. *Id.* § 1612.[10] PRWORA neither compels nor encourages states to impose any such additional restrictions. Under the provision, "qualified" immigrants remain eligible for Medicaid unless a state affirmatively acts to terminate their eligibility.

After PRWORA's enactment, Colorado continued to provide Medicaid to all immigrants who remained eligible for federal Medicaid until the enactment

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and certain other specified categories of lawfully present immigrants. 8 U.S.C. § 1641(b). All other immigrants are considered "not qualified" under the statute. The principal effect of those new definitions was to impose a uniform federal bar to Medicaid eligibility on many aliens who were previously eligible as "permanently residing in the United States under color of law." See 42 U.S.C. § 1396b(v); 42 C.F.R. § 435.408.

[10] Section 1612(b) provides that "a State is authorized to determine the eligibility of . . . a qualified alien" for Medicaid, as long as lawful permanent residents with credit for 40 quarters of work, and certain other designated categories of qualified immigrants remain covered. An analogous provision, 8 U.S.C. § 1622, provides that states may similarly limit the eligibility of qualified immigrants for state public benefits, as long as designated categories of immigrants remain eligible.

of SB 03-176.[11] Now, Colorado has terminated Medicaid eligibility for many lawful immigrants who continue to be eligible under federal law.

3. *FEDERAL MEDICAID TERMINATION AND HEARING REQUIREMENTS.*

The Medicaid statute and regulations impose specific procedures that must be followed in any proper termination of benefits. Thus, pursuant to 42 C.F.R. § 435.930(b), Colorado is required to "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." The Centers for Medicaid & Medicare Services (CMS), the agency within the Department of Health and Human Services (HHS) responsible for oversight of the Medicaid program, has interpreted 42 C.F.R. § 435.930(b), and 42 U.S.C. § 1396a-(a)(8), which it implements, to require that states determine each recipient's continuing eligibility on an *ex parte* basis, if possible.

In addition, applicants for, and recipients of, Medicaid have the right to an administrative hearing whenever the state agency "takes action to suspend, terminate, or reduce" services or eligibility. *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.200; *see also* 42 C.F.R. § 431.201. The state Medicaid agency's fair hearing system "must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and any additional standards specified in this

[11] *See generally,* Colo. Rev. Stat. § 26-4-301(m)(2)(2002).

subpart." 42 C.F.R. § 431.205(d). The state Medicaid agency must "issue and publicize its hearing procedures," which must inform every applicant or recipient in writing of the following: the right to a hearing; how to request a hearing; and that right of the beneficiary to represent herself or to use legal counsel, a relative, a friend or other spokesperson. *Id.* § 431.206. The notice to recipients must be provided ten days prior to the date of the adverse action. *Id.* § 431.211.

STANDARD OF REVIEW

The Court of Appeals reviews the district court's denial of a preliminary injunction for abuse of discretion, which is found when the district court commits a legal error, relies on clearly erroneous factual findings, or lacks a rational basis in the evidence for its ruling. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1110-11 (10th Cir. 2002). The district court's legal determinations are subjected to *de novo* review. *See id.* at 1111.

SUMMARY OF THE ARGUMENT

The district court fundamentally erred in denying a preliminary injunction of Colorado's discriminatory termination of Medicaid coverage for lawful immigrants. Plaintiffs established, and the district court was compelled to agree, that the termination of Medicaid would cause irreparable harm to Plaintiffs and the putative class, and that the balance of harms weighed in favor

of Plaintiffs. The court's errors were in failing to find that: (1) the state's decision to terminate Medicaid eligibility for lawful immigrants violates equal protection; (2) the state's implementation of the termination violates the Medicaid Act and due process; and (3) the requested injunction is in the public interest.

It is well established that a state's decision to discriminate against immigrants in a welfare program is inherently suspect and subject to strict equal protection scrutiny. *Graham v. Richardson,* 403 U.S. 365 (1971). The district court distinguished this controlling precedent because of its mistaken belief that *Graham* did not involve a federally-supported program. The court also erred in concluding, because of a provision of PRWORA that allows states to impose immigrant restrictions, that the rational basis test applies to Colorado's action. As *Graham* explained, a federal statute "allowing" states to impose divergent restrictions against immigrants cannot change the level of scrutiny applied to a state's discrimination. This is the case both because such a federal statute would not establish a uniform rule, and because Congress does not have the power to authorize individual states to violate the Equal Protection Clause.

While PRWORA contemplates that states may impose immigrant restrictions on Medicaid, equal protection requires that such restrictions be narrowly tailored to meet compelling state interests. Colorado's restriction is

based purely on fiscal considerations, and as a matter of law cannot satisfy strict scrutiny.

The district court also erred in failing to find that Plaintiffs are likely to prevail in their challenge to Colorado's violations of the Medicaid Act and due process in the implementation of the terminations. The court ignored Defendant's admissions that she did not conduct full redeterminations of eligibility for Plaintiffs and the putative class before terminating their Medicaid benefits. The district court also ignored the fact that the notices issued by Colorado concerning the terminations were wholly inadequate to apprise recipients of the potential bases on which they may still be eligible for Medicaid. In addition, the district court ignored Defendant's concession that she deprived recipients of fair hearings to challenge county determinations that recipients failed to provide requested verification documents.

Finally, the district court erred in finding that the public interest weighed against the issuance of an injunction based on Colorado's budget concerns. As a matter of law, such concerns cannot outweigh the public interest in government compliance with equal protection, due process, and federal Medicaid law.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

A. PLAINTIFFS ESTABLISHED THAT ABSENT AN INJUNCTION THEY WILL SUFFER IRREPARABLE INJURY AND THAT THE BALANCE OF HARMS WARRANTS ISSUANCE OF AN INJUNCTION.

Defendant agrees that if SB 03-176 is implemented Plaintiffs and the putative class will lose essential medical services and treatment. *See* Aplt. App. 405:11-406:17. 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."* Tab 1 (Order at 12-13) (emphasis supplied).

Even a brief interruption in medical services is deleterious to patients and constitutes irreparable harm. *See Nat'l Ass'n 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 constitutes 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.). Thus, Plaintiffs established beyond doubt that absent an injunction they will suffer irreparable injury.

Furthermore, Plaintiffs established that the balance of hardships tips decidedly in their favor. 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).

Tab 1 (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." *Kansas Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548, 1553 (D. Kan. 1993). Accordingly, these two prongs of the injunction standard are plainly satisfied.

B. THE DISTRICT COURT ERRED BY FAILING TO FIND THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

The principal basis for the district court's denial of injunctive relief was its erroneous legal rulings that SB 03-176 survives equal protection scrutiny on the ground that it is subject only to rational basis review and that Defendant's implementation of the statute's termination provisions did not violate the Medicaid statute's procedural safeguards. The court's rulings ignored or misapplied critical precedent and disregarded essential facts.

1. *SB 03-176 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.*

a. A State Decision to Discriminate on the Basis of Alienage is Subject to Strict Scrutiny.

The Fourteenth Amendment provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. XIV. In deciding an equal protection challenge more than thirty years ago, the Supreme Court expressly held that distinctions in state welfare programs between citizens and aliens, "like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (invalidating state-imposed welfare residence restrictions on immigrants).

In ruling that strict scrutiny applies to state imposed distinctions between citizens and lawful residents in welfare programs, the Court emphasized that "[I]t has long been settled . . . that the term 'person' [in the Equal Protection Clause] . . . encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." *Graham*, 403 U.S. at 371; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (terms of Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) (Fourteenth Amendment protects "'all persons' against state legislation bearing unequally upon them either because of alienage or color"). In *Graham*, the Court held that because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom heightened judicial solicitude is appropriate," *Graham*, 403 U.S. at 372 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)), state classifications based on alienage are inherently suspect and subject to strict scrutiny. The circumstances of this case, in which a population without representation in the legislature has been deprived of access to essential medical care as a means of reducing the state budget, graphically illustrate the appropriateness of heightened scrutiny.

In applying strict scrutiny to state welfare statutes, the *Graham* Court emphatically rejected the argument that the state's interests in reserving scarce fiscal resources for indigent *citizens* justified the discrimination against indigent *lawful residents*. Thus, the Supreme Court specifically held that a state's interests in fiscal savings do not permit discrimination against legal immigrants. "[A] State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify . . . making noncitizens ineligible for public assistance." *Id.* at 374. As the Court explained, "[a]liens like citizens pay taxes and may be called into the armed forces . . . aliens may live within a state for many years, work in the state and contribute to the growth of the state." *Id*. at 376 (internal quotation omitted); *see also id.* at 375 ("The saving of welfare costs cannot justify an otherwise invidious classification.") (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)); *cf. Takahashi*, 334 U.S. at 410 (invalidating state statute reserving commercial fishing licenses for citizens as violating equal protection clause); *Truax v. Raich*, 239 U.S. 33 (1915) (invalidating state statute reserving eighty percent of public jobs for citizens as violating equal protection clause).

In contrast to state-imposed restrictions, a nationally-uniform, federally-imposed rule excluding immigrants from welfare benefits is subject to lesser equal protection scrutiny. *Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976)

(upholding as "reasonable" a requirement that person be a lawful permanent resident for five years or a citizen to qualify for Medicare Part B supplemental medical insurance). The reason the Court applies a relaxed standard of review to mandatory federal prohibitions lies in the unique nature of the federal government's "broad power over naturalization and immigration." *Id.* at 79-80. In distinguishing between state and federal immigrant restrictions, *Mathews* strongly reaffirmed the holding of *Graham*, emphasizing that judicial review of a *state* classification that treats citizens and immigrants differently involves "significantly different considerations," than review of a similar *federal* classification. *Id.* at 84, *see also id.* 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") (footnote omitted and emphasis added); *id*. at 86-87 ("the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization").[12]

[12] State courts have likewise applied strict scrutiny review under the Fourteenth Amendment to invalidate alienage classifications in their state welfare programs. *See, e.g., Barannikova v. Town of Greenwich*, 643 A.2d 251 (Conn. 1994) (invalidating welfare method of counting income or "deeming" provision applicable only to immigrants); *El Souri v. Dept. of Social Services*, 414 N.W.2d 679 (Mich. 1987) (same); *State Dept. of Revenue v. Cosio*, 858 P.2d 621, 628 (Alaska 1993) (exclusion of resident immigrants from state budget

In the years since *Graham* and *Mathews*, the Supreme Court has unwaveringly affirmed its central holding that the Equal Protection Clause requires courts to apply strict scrutiny to state-imposed distinctions between citizens and immigrants. *See Sugarman v. Dougall*, 413 U.S. 634 (1973) (invalidating state law barring immigrants from state civil service jobs); *In re Griffiths*, 413 U.S. 717 (1973) (invalidating state requirement of citizenship for admission to bar); *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976) (invalidating state requirement of citizenship for license as civil engineer); *Nyquist v. Mauclet*, 432 U.S. 1, 8 n.9 (1977) (invalidating state restriction on financial aid to lawful resident students); *Bernal v. Fainter*, 467 U.S. 216 (1984) (invalidating state requirement of citizenship for service as notary public).[13]

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surplus dividend program would be subject to strict scrutiny under equal protection clause); *Minino v. Perales*, 79 N.Y.2d 883, 589 N.E.2d 385 (NY 1992) (invalidating, under state constitution, income "deeming" provision that applies only to immigrants).

[13] The Supreme Court has carved out a narrow exception to the rule of strict scrutiny when states adopt "laws that exclude aliens from positions intimately related to the process of democratic self-government." *Bernal*, 467 U.S. at 220. Even when applying what has been termed the "political function" exception, *see Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding as rational state bar to noncitizens serving as deputy probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (same as to public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (same as to state troopers), the Court has emphasized that it is "not retreating from the position that restrictions on lawfully resident aliens *that primarily affect economic interests* are subject to heightened judicial scrutiny."

The statute at issue here is a state provision that indisputably discriminates against lawful immigrants on the basis of alienage and must, therefore, be subject to strict scrutiny. The state has chosen to impose this restriction and has done so for the sole purpose of achieving budgetary savings. As Defendant has admitted, the legislation was "intended wholly to be a fiscal savings" to the State. Aplt. App. 388:7-9. Thus, Colorado has enacted a law that (1) draws the statutory distinction that *Graham* prohibits and (2) is based on the same legislative purpose that *Graham* ruled impermissible. Colorado remains free to adopt budgetary restrictions and may limit its expenditures. But "a state may not accomplish such a purpose by invidious distinctions" *Shapiro*, 394 U.S. at 633, that discriminate on the basis of alienage. Moreover, as a matter of law, fiscal savings cannot constitute a compelling state interest. *Graham,* 403 U.S. at 374-76.

b. The District Court Erred in Holding that Strict Scrutiny is Not Applicable to the Colorado statute.

The district court's denial of the preliminary injunction must be reversed because the court applied the wrong legal standard to Plaintiffs' equal protection claim. The court held that SB 03-176 is subject only to rational basis

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Cabell v. Chavez-Salido, 454 U.S. at 439 (emphasis added). *See also Bernal*, 467 U.S. at 222.

review and on that ground ruled that Plaintiffs are not likely to prevail on their equal protection claim.

1. The district court's threshold error was its misunderstanding of *Graham*. The district court dismissed the dispositive nature of *Graham* on the fundamentally erroneous assumption that the *Graham* Court's decision addressed only programs funded solely by the state. Order at 8. Thus, the court held that *Graham*'s ruling does not apply to state decisions to discriminate in programs that receive federal funds. The district court found that "the facts at issue here are distinguishable" because the Colorado program is "not a state-only funded program as in *Graham* . . . ." *Id*. In fact, and contrary to the district court's characterization, the Arizona statute declared unconstitutional in *Graham* applied to a federally-funded program 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. Thus, the district court's rejection of *Graham's* strict scrutiny standard rests on a critically mistaken factual premise.

More importantly, the district court failed to recognize that the critical inquiry is not the source of a program's funding but whether a restriction on immigrants' participation in the program has been imposed by federal mandate

or by state choice. 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. *Mathews,* 426 U.S. at 83-84. But when, as here, 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 district court ignored the critical fact that the statute terminating Plaintiffs' Medicaid coverage was 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 SB 03-176. Importantly, nothing in 8 U.S.C. § 1612 – the federal statute enacted as part of PRWORA on which the district court relied – compels or coerces a state to exclude the immigrants that Colorado has chosen to subject to the restrictions enacted by SB 03-176. In order for Colorado to implement these restrictions and to exclude federally eligible qualified immigrants from its Medicaid program, it must affirmatively amend state law and its Medicaid plan.[14] The federal statute does not in any way favor, much less require, Colorado's

[14] Notably, the district court's ruling erroneously suggests that Colorado's decision to discriminate is somehow required by federal law: "With respect to Medicaid the federal government specifically prescribes program parameters that the states must follow to receive matching federal funds. The federal law provides the sole basis for state action. In fact, if a state does not carefully

decision to terminate Plaintiffs' Medicaid benefits. That decision was made and acted upon solely by Colorado. *See Shapiro*, 394 U.S. at 641 ("it is the responsive state legislation which infringes constitutional rights. By itself [a federal statute authorizing state action] has absolutely no restrictive effect. It is therefore . . . only the state requirements which pose the constitutional questions").[15]

2. The district court further erred in concluding that the constitutional scrutiny to which Colorado's statute is subject under the Fourteenth Amendment has been diminished by 8 U.S.C. § 1612, a provision of PRWORA that purports to authorize states to impose their own restrictions on immigrants' eligibility for Medicaid. That conclusion is directly contrary to the Supreme Court's analysis in *Graham* and fundamentally inconsistent with the distinction the Supreme Court has repeatedly drawn between state and federal determinations concerning immigrants.

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conform to these federal mandates, the state risks losing federal financial participation." Tab 1 (Order at 9).

[15] Thus, Plaintiffs do not allege any injury resulting from the federal "authorization" for states to exclude lawfully present immigrants from Medicaid, and therefore they do not challenge PRWORA. It is Colorado's voluntary decision to impose by state law the restrictions at issue here that has deprived plaintiffs of life-sustaining medical benefits.

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. Referring initially 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).[16] As the Court explained in *Takahashi*, 334 U.S. at 419, the federal government "has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *See also Nyquist*, 432 U.S. at 10 ("Control over . . . naturalization is entrusted

[16] 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).

exclusively to the Federal Government, and a State has no power to interfere"). In short, the exclusively federal plenary power over immigration and naturalization insulates federal alienage classifications from strict scrutiny review, but by its very nature cannot be granted to the states for exercise in a non-uniform manner.

The district court sought to avoid this critical flaw in the Defendant's reliance on PRWORA by finding that Colorado's statute:

> does not threaten to proliferate divergent eligibility requirements throughout the participating states. Thus, the constitutional requirement of uniformity is not implicated by SB 03-176.

Tab 1 (Order at 8). The ruling provides no explanation for this conclusion, finding only that SB 03-176 is permitted by 8 U.S.C. § 1612 and that it supposedly does not implicate "the constitutional requirement of uniformity" because it represents "a limited option." *Id.* The Supreme Court made no exception for what the district court refers to as a "limited option." The district court's reasoning utterly disregards the critical constitutional question under *Graham:* 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 can be no doubt that § 1612 imposes no nationally-uniform obligation or mandate. Some states may enact the most stringent restrictions,

denying Medicaid to lawful immigrants who have lived in the United States for decades, as Colorado has done, and others could enact different restrictions or none at all. As a result, Plaintiffs and thousands of other lawful immigrants are barred from Medicaid eligibility solely because they are immigrants who happen to reside in Colorado. Because § 1612 tolerates precisely the lack of uniformity that *Graham* found constitutionally problematic, it cannot serve to diminish the level of scrutiny to which Colorado's discriminatory restriction must be subjected.

In short, the fact that federal law gives Colorado an "option" to terminate benefits cannot be of any constitutional significance. Indeed, the federal statute in *Graham* did not *compel* the state to provide welfare coverage to the lawful immigrants at issue in that case. If it had, there would have been no need to challenge the state's restriction on equal protection grounds, since it would have been preempted. Rather, the federal statute was silent, thereby creating an implicit "option" like that the state relies on here. In applying strict scrutiny to the Arizona provision in *Graham,* the Supreme Court necessarily rejected attributing any significance to the type of optional federal provision Colorado seeks to rely on here.[17]

[17] In the district court Defendant also argued that a state restriction on immigrants should be subject to rational basis review if the state action is "contemplated" by Congress, relying on language in *Toll v. Moreno,* 458 U.S. 1

Notably, the only ruling that has squarely addressed the effect of PRWORA's adoption of provisions allowing states to impose "optional" restrictions has rejected Defendant's argument. In *Aliessa v. Novello,* 96 N.Y.2d 418, 754 N.E.2d 1085 (N.Y. 2001), New York State's highest court unanimously rejected the contention that state classifications based on alienage should be evaluated with less than strict scrutiny when they are enacted pursuant to PRWORA's purported authorization. *See* 8 U.S.C. § 1622.[18] The court rejected the application of a lesser standard of scrutiny to the state-imposed classification, because the federal statute "does not impose a *uniform* immigration rule for States to follow, . . . producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics." *Aliessa*, 96 N.Y.2d at 435 (emphasis in original).

(1982). But the cited language in *Toll* concerned the Court's holding that a state statute was preempted, not whether it violated equal protection. *Toll,* 458 U.S. at 12-14. In the context of a preemption challenge, the significance of a federal permissive statute is entirely different for it evidences a congressional intent not to preempt state legislation. That federal allowance cannot answer the wholly distinct question of whether a state has legislated on impermissible grounds, such as adopting an unconstitutional classification. As Plaintiffs note *infra*, PRWORA's authorization removes a potential preemption challenge, but it cannot lower the standard of equal protection scrutiny applicable to a state-imposed discrimination.

The *Aliessa* court explained that PRWORA's apparent authorization for states to discrimine "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.'" *Id.* at 436 (quoting *Graham*, 403 U.S. at 382, and adding emphasis). Moreover, PRWORA "impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State [medical services]." *Id.* at 436. For these reasons, the court found that PRWORA "can give [the state statute] no special insulation from strict scrutiny review." *Id*. The court further held that the state statute was subject to strict scrutiny and violated the equal protection clauses of both the United States and New York State constitutions.[19] The district court disregarded the significance of *Aliessa* altogether and erroneously distinguished it on the constitutionally-irrelevant grounds that it concerned a program that used only state funds. As noted above, the critical inquiry for equal protection purposes is not the source of a program's funding, but rather whether a restriction on immigrants has been

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[18] This provision, which allows states to "determine" immigrants' eligibility for state programs, mirrors the authorization in § 1612 that is at issue in Colorado. The *Aliessa* court's analysis addressed both provisions of PRWORA.

[19] Similarly, in *Kurti v. Maricopa County*, 201 Ariz. 165, 33 P.3d 499 (Ct. App. Ariz. 2001), the court applied strict scrutiny to invalidate a state statute extending the bar to lawful permanent residents' receipt of state-funded medical care beyond the period of five years after their entry into the United States. The court dismissed the state's reliance on the option to impose restrictions of §

imposed by the choice of an individual state or by a federal rule that imposes a nationally-uniform standard.

3. Furthermore, Defendant cannot rely on PRWORA because a federal statute cannot give Colorado the power to violate the Constitution. As *Graham* stressed, "[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*." 403 U.S. at 382 (emphasis added) (citing *Shapiro,* 394 U.S. at 641). Congress cannot by statute modify the Supreme Court's constitutional jurisprudence, for "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 607, 524 (1997). In *City of Boerne*, the Court invalidated a congressional effort "to mandate some lesser test," *id*. at 534, for certain First Amendment claims than the standard announced in "a judicial interpretation of the Constitution already issued," *id*. at 536. Specifically with respect to the Fourteenth Amendment, the Court found that Congress lacks "the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id*. at 519. *See also Shapiro*, 394 U.S. at 641 ("Congress is without

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1622, noting that "such congressional authorization cannot excuse states from

power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause"); *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); *White v. Hart*, 80 U.S. 646, 649 (1872) (Congress may not by statute authorize violation of the Contract Clause).[20]

The Court recently affirmed this point in *Saenz v. Roe*, 526 U.S. 489, 507 (1999): "we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment." In *Saenz*, California argued that the state was entitled to limit the welfare benefits of newly arrived applicants because a provision of PRWORA explicitly authorized states to provide lower cash benefits to applicants who arrived from other states within the previous year. The Court emphatically rejected this contention and found the state statute unconstitutional, stating:

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compliance with the mandates of equal protection." *Id.,* 201 Ariz. at 171.

[20] The same principle applies to other congressional attempts to limit by statute the constitutional rights of aliens. *See Almeida-Sanchez v. United States*, 113 U.S. 266, 272 (1973) (in case involving Fourth Amendment rights of aliens, explaining "no Act of Congress can authorize a violation of the Constitution"). *See also* L. Tribe, *American Constitutional Law* (2d ed. 1988) at 525 ("nothing in the fourteenth amendment suggests that Congress has authority to deprive people of constitutional protection against discrimination by state government").

> 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.

Saenz, 526 U.S. at 508.[21]

4. In addition to disregarding the teachings of *Graham* and its progeny, the district court erred in relying on cases upholding *federal* statutes imposing *nationally-uniform* and *mandatory* restrictions, cases which actually support Plaintiffs' position. 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 SSI and Food Stamps. Those cases applied rational basis scrutiny because they involved federal statutes that imposed a *nationwide uniform federal* rule prohibiting welfare coverage for specified categories of noncitizens.

Similarly, in arguing for rational basis review in the district court, Defendant repeatedly relied on challenges to nationally-*uniform* federal statutes restricting immigrants.[22] These cases do not concern choices made by individual states, but rather were direct challenges to federally imposed

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[21] In the district court Defendant sought to avoid the significance of *Saenz* on the ground that it involved a citizen's right to travel. That misses the point that federal legislation cannot have the effect that Colorado seeks, namely to save from constitutional infirmity a state law that violates equal protection.

[22] In light of the expedited and simultaneous briefing schedule, plaintiffs briefly address the authorities on which Defendants have previously relied.

restrictions that applied on a uniform basis throughout the country. *See, e.g., City of Chicago v. Shalala,* 189 F.3d 598 (7th Cir. 1999) (challenge to uniform federal restrictions on immigrant eligibility for SSI and Food Stamps); *Rodriguez v. United States,* 169 F.3d 1342 (11th Cir. 1999) (same).[23]

The Defendant also cited as support challenges to state actions compelled by *uniform* federal requirements. These too are subject to rational basis review because the states are simply implementing uniform federal requirements that involve no *state* choices. In *Sudomir v. McMahon,* 767 F.2d 1456 (9th Cir. 1985), for example, Plaintiffs challenged California's denial of benefits to asylum applicants who were not members of any immigrant category required for eligibility under federal law. The Ninth Circuit rejected the Plaintiffs' assertion that the state was allowed to adopt a more lenient standard than the federal eligibility rules required, and that strict scrutiny should therefore apply to the state's decision not to do so. Rather, the court held that the federal statute imposed a mandatory restriction based on "a uniform federal policy regarding the appropriate treatment of a particular subclass of aliens," that "requires states

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[23] In these cases, upholding the federal government's authority under PRWORA to impose uniform nationwide immigrant restrictions on SSI and Food Stamps, the courts have reiterated that heightened scrutiny governs *state* determinations based on alienage. *See*, *e.g.*, *City of Chicago v. Shalala*, 189 F.3d at 603; *Rodriguez v. United States*, 169 F.3d at 1347.

not only to grant benefits to eligible aliens but also to *deny* benefits to aliens who do not satisfy [the federal statute's] test." *Id.,* 767 F.2d at 1466 (emphasis in original). The court expressly relied on the fact that "Congress has enacted a *uniform* policy regarding the eligibility of asylum applicants for welfare benefits." *Id.* (emphasis in original). In *Cid v. South Dakota Dept. of Social Services,* 598 N.W.2d 887 (S.D. 1999), which Defendant also cited below, the court applied rational basis review to South Dakota's termination of TANF, Medicaid and Food Stamp benefits to some immigrants because no state statute was at issue and the agency's rule was implementing a federal statute that *required* the termination. *Id*. at 892.[24]

Nor can Defendant derive any support if it again seeks to rely on *Doe v. Commissioner of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002). In that case, the court reviewed a six-month durational residency requirement in a state-funded program that was available only to immigrants. As the *Doe* court

[24] Defendant also relied below on *Alvarino v. Wing,* 690 N.Y.S.2d 262 (N.Y. App. Div. 1999), a lower court case that is no longer good law because it is directly contrary to the ruling of New York's highest court in *Aliessa*. *See* point b. 2, *supra*. The earlier ruling in *Alvarino* applied rational basis review to a state statute that provided food assistance to some but not all of the lawful immigrants who became ineligible for federal Food Stamps under PRWORA. That earlier decision was the basis for the *lower* court's decision in *Aliessa*, which the New York Court of Appeal overruled. *Aliessa,* 96 N.Y. 2d at 423. Thus, *Aliessa* is the *only* authoritative decision that addresses the proper equal protection standard to apply to a state statute implementing an immigrant benefits restriction that is allowed but not required by PRWORA.

recognized, the state program at issue covered only immigrants and hence, did not discriminate between citizens and aliens. Rather, it imposed a residency requirement on all qualifying immigrants. Because imposition of a residency requirement does not constitute invidious discrimination, the court properly concluded that rational basis review was appropriate. Moreover, the Court emphasized that the state statute, unlike Colorado's action to terminate Medicaid, had a "benign" purpose – to provide additional benefits to immigrants rendered ineligible under federal law. *Id*. *Doe* therefore provides no support for the discrimination at issue here.[25]

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[25] Finally, in the district court, Defendant also attempted to equate Congress's power over immigration and naturalization with Congress's role in governing relations with Indian tribes, citing *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463 (1979). However, the two bodies of law are distinct and the comparison is misguided. There is no obligation to legislate with national uniformity in relation to Native Americans, so the existence of divergent laws in different states poses no constitutional problem. Whatever powers the states may exercise under congressional sanction in the arena of tribal relations cannot inform an analysis that relates to immigration. In addition, *Yakima* does not concern alienage or racial classifications, or a suspect class at all, but rather "the unique legal status of Indian tribes." *Id.* at 500. *See also Morton v. Mancari,* 417 U.S. 535, 554 (1974) (in dismissing an equal protection challenge to a federal Bureau of Indian Affairs' employment preference for Native Americans, the Court applied a rational basis test because the preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.,* 424 U.S. 382, 390 (1976) (in dismissing an equal protection challenge to a Tribal Court ruling that denied tribal members access to Montana State courts in connection with an adoption proceeding arising on the reservation, the Court pointedly noted that "[t]he exclusive jurisdiction of

5. Indeed, Congress in PRWORA confirmed its understanding that strict scrutiny would apply to state determinations restricting benefits to lawful immigrants eligible for federal benefits. In 8 U.S.C. § 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 is "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."[26] Thus, the language of PRWORA expressly demonstrates Congress's understanding

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the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law").

[26] 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* section b. 3, *supra.*

that strict scrutiny applies in any case where a state seeks to impose a restriction under § 1612.[27]

c. SB 03-176 Is Not Narrowly Tailored To Achieve A Compelling State Interest.

It is plain that SB 03-176 bars lawfully present immigrants from essential health service programs that remain available to similarly situated citizens, thus mandating different treatment of similarly situated citizens and aliens. Accordingly, as shown above, the statute is subject to strict scrutiny. The only remaining question, therefore, is whether Colorado's discriminatory distinction is narrowly tailored to achieve a compelling state interest. The Supreme Court has squarely rejected consideration of a fiscal interest as a justification for invidious discrimination in welfare programs. *Shapiro*, 394 U.S. at 633 ("The saving of welfare costs cannot justify an otherwise invidious classification"); *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*"); *see also Sugarman*, 413 U.S. at 646.[28] Yet, the only purpose

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[27] In short, the effect of § 1612 cannot be to diminish the protection afforded by the equal protection clause. Rather, PRWORA removes the federal preemption claims that would otherwise arise if a state were to impose immigrant restrictions in the face of the comprehensive Medicaid statute.

[28] Even if less than strict scrutiny were applicable in light of PRWORA, the Colorado statute must at least be subjected to an intermediate level of review

underlying Colorado's statute is that of reducing the state's expenditure obligations at a time of fiscal difficulty.[29] Such a justification for discrimination against lawfully present immigrants cannot remotely survive strict scrutiny. Colorado has not, and cannot, demonstrate that the state statute's invidious discrimination against lawful immigrants is narrowly tailored to further a compelling state interest. Accordingly, SB 03-176 violates equal protection and Plaintiffs are substantially likely to succeed on the merits of their claim that the statute violates the Fourteenth Amendment.

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given the dictates of *Graham*. *Cf. Plyler v. Doe,* 457 U.S. 202 (1982); *see also Doe v. Reivitz,* 842 F.2d 194 (7th Cir. 1987). Even under intermediate scrutiny, fiscal concerns cannot be considered to justify the state's discrimination against immigrants. *Plyler,* 457 U.S. at 227 ("a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources"); *Darces v. Woods*, 35 Cal.3d 871 at 894, 679 P.2d 458 (Cal. 1984) ("Preservation of the fisc is an insufficient justification").

[29] The fiscal analysis that accompanied the bill in the legislature described SB 03-176 as a "Budget Reduction Bill." Colorado Legislative Council Staff, State Fiscal Impact: SB 03-176 (Jan. 23, 2003). Prior to the bill's passage, the Denver Post quoted its supporters as stating "Senate Bill 176 is necessary to balance the budget, which is about $850 million in deficit for the current fiscal year . . . . 'This is a difficult bill that brings into focus the state of our current budget difficulties,' said Rep. John Witner, R-Evergreen, a member of the Joint Budget Committee." *Bill Would Cut Medicaid to Legal Immigrants*, *Denver Post*, (Feb. 15, 2003).

2. *THE ORDER IGNORES DEFENDANT'S ADMISSIONS THAT SHE IS IMPLEMENTING SB 03-176 IN VIOLATION OF THE MEDICAID ACT AND THE DUE PROCESS CLAUSE.*

In its rush to implement SB 03-176 and discontinue Plaintiffs' Medicaid benefits by April 1, 2003, Defendant adopted procedures that unlawfully terminated the benefits of individuals who remain eligible for Medicaid. *See* Aplt. App. 96-107. The evidence adduced at the district court's preliminary injunction hearing confirmed that Defendant's procedures, both on their face, and by their implementation, fail to (1) determine whether Plaintiff class members remain eligible for Medicaid, as mandated by the Medicaid Act and implementing regulations; (2) provide necessary due process notice so that class members may know what steps to take to demonstrate that they remain eligible; and (3) provide all class members with the right to a constitutionally mandated pre-termination administrative hearing to demonstrate that the proposed reductions of eligibility ought not apply in their specific cases.[30] Any one of these three separate violations of law ought to have mandated the issuance of an injunction to stop Defendant's terminations of the Plaintiff class's Medicaid

[30] Moreover, the administration of SB 03-176 was so chaotic that despite Defendant's efforts to jump-start the implementation prior to signing by the Governor, Aplt. App. 424:4-25, many Colorado counties had failed to implement SB 03-176 by the April 1, 2003 target date, Aplt. App. 426:25 – 427:2, and were not scheduled to implement until May 1, 2003, Aplt. App. 462:16-17, undercutting Defendant's claim of budgetary urgency.

benefits until the violation has been cured. Plaintiffs therefore demonstrated a likelihood of success on the merits sufficient to warrant the issuance of an injunction until the violations have been cured.

a. Failure to Conduct Full Redeterminations.

It is undisputed among the Circuit courts that 42 U.S.C. § 1396a(a)(8) requires states to continue to provide Medicaid to a recipient slated for termination until a full determination of the recipient's continuing eligibility has been completed. *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).

Defendant admits that she did not provide full redeterminations of eligibility prior to terminating the Plaintiffs' Medicaid. Aplt. App. 436:22-23. The Medicaid Act and implementing regulations prohibit a state from terminating any recipient's Medicaid benefits unless the state first affirmatively determines, after a full and complete redetermination, that the recipient does not remain eligible under *any* basis of eligibility. 42 U.S.C. § 1396a(a)(8).[31] Thus,

[31] 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. Reagan,* 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.

by this admission alone, Plaintiffs established a likelihood of prevailing on that claim.

Because Medicaid creates a single program, *id.* § 1396 *et. seq*., within which there are various eligibility groups, the state must determine that a recipient is not eligible under the rules of *any* eligibility group before it can terminate the recipient's benefits,[32] *Crippen*, 741 F.2d at 104-07; *Sharp*, 700 F.2d at 749; *Stenson*, 476 F. Supp. at 1331.

Medicaid recipients, who are poor and often elderly or disabled, are rarely versed in the nuances of the complex Medicaid categories, nor is there any reason they should be; what is important to their lives is the federal requirement that their Medicaid continue for as long as they are eligible, *see* 42 U.S.C. § 1396a(a)8, not which category serves as the basis for their eligibility. Defendant violates Section 1396a(a)(8) by only reviewing its records of Plaintiffs' immigration status, and not conducting reviews to determine, for example, whether an individual was the dependent of a military

[32] This means, for example, that a disabled person might lose eligibility for Medicaid under category "A", but still be eligible under category "B." Once the recipient's right to receive Medicaid is placed in jeopardy, the state must now look to category "B" and all other categories to see whether the recipient might still be Medicaid-eligible. *See, e.g.*, *Crippen*, 741 F. 2d at 106 ("The most that was determined by the Department was that one of those bases for Medicaid eligibility, i.e., the receipt of SSI benefits, had been eliminated. Thus *Crippen* was no longer eligible for Medicaid as a categorically needy person.

veteran or might qualify for Medicaid based on the number of quarters worked by the immigrant or the immigrant's spouse or parent.[33] Defendant may claim that categories other than immigration were irrelevant to the implementation of SB 03-176, but SB 03-176 and Defendant's own instructions regarding its implementation, *see* Aplt. App. 123-39, demonstrate that other factors, such as SSI eligibility, quarters of work and military service, fall squarely within its ambit. Moreover, these factors were critical to the lives of Plaintiffs who would have been found eligible for continued Medicaid if Defendant had engaged in the legally-required redetermination process. For example, Defendant's Exhibit "I" represents that Plaintiffs Perlman and Tatevosian are SSI eligible and, therefore, as Defendant admits, eligible for Medicaid pursuant to SB 03-176. Aplt. App. 453:1-21.[34] Exhibit "I" also shows that both Plaintiffs' Medicaid was terminated effective March 31, 2003. Aplt. App. 277.

Thus, the district court's Order disregarded Defendant's deliberate noncompliance with the Medicaid Act's redetermination requirements. This

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There remained the possibility, indeed, in this case the fact, that she was still eligible as a medically needy person.")

[33] 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).

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

disregard resulted in a truncated process that failed to ensure eligible recipients would retain their Medicaid, and led to the unlawful termination of Medicaid for at least 25% of the named Plaintiffs.

Further, states are required to provide Medicaid benefits to all otherwise eligible legal permanent residents who can be credited with forty qualifying quarters of work history under the Social Security Act, which permits recipients to count quarters worked by their spouse, as well as by their parents when they were a minor. 8 U.S.C. §§ 1612(b)(2), 1645. However, Defendant's instructions to local counties directs them only to request a forty quarter work history for *those individuals appearing in the active case report*.[35] Defendant has not required the counties to request the work histories of spouses or parents, individuals who are unlikely to appear on the active case report unless they are themselves receiving Medicaid.

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[35] Aplt. App. 126. Defendant's agent's assertion that Defendant anticipated that the counties would check for quarters worked by parents and spouses is not credible. At the hearing, Defendant's agent testified that Defendant's computer system contains wage information regarding spouses and parents that can be searched by social security number ("SSN"). Aplt. App. 438:10 – 439:3. However, federal law and Colorado regulations provide that *only* the recipient of Medicaid must provide a SSN to qualify for Medicaid and that persons not receiving Medicaid need *not* provide a SSN. Since the counties are not instructed to obtain from the recipient the social security numbers of spouses or parents who themselves do not receive Medicaid prior to inquiring of the computer system, *see* Aplt. App. 123-39, there is no way that Defendant can insure that all relevant qualifying quarters are being counted.

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).[36]

The district court's finding and Defendant's assertion that Defendant took all necessary steps to instruct the counties as to their responsibilities concerning implementation, even if correct, cannot shield Defendant from the issuance of an injunction. Defendant must do more than just issue instructions; she has an absolute non-delegable duty to assure that the counties are following those instructions and that they determine a recipient is no longer Medicaid eligible *before* terminating her assistance. *See Hillburn by Hillburn v. Maher*, 795 F.2d 252, 261 (2d Cir. 1986); s*ee also Reynolds v. Giuliani*, 118 F. Supp.

[36] 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* Aplt. App. 419:1 – 421:16 (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 scheduled conference call instructing the counties on the implementation procedure for SB 03-176. Aplt. App. 460:21 – 461:5.

2d 352, 385 (S.D.N.Y. 2000); *Shifflett v. Kozlowski*, 843 F. Supp. 133, 136 (W.D. Va. 1994).[37] Here, Defendant's duty was to either explore all possible avenues of eligibility herself or ensure that the counties under her supervision did so in her stead. However, in the haste to implement SB 03-176, she did neither.

i. Failure to Provide Adequate Notice.

The federal Medicaid statute, its implementing regulations, and due process require that before terminating a recipient's Medicaid a state agency must provide the recipient with adequate notice of the proposed termination, including a statement detailing the reasons and legal basis for the action and an explanation of appeal rights and the circumstances under which benefits will be continued pending the appeal. 42 U.S.C.§1396a(a)(3); 42 C.F.R. §§ 431.210, 431.206(c)(2); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Numerous courts have invalidated notices that lacked an accurate statement of appeal rights or failed to provide sufficient individual facts to allow the individual to test the accuracy of

[37] In *Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992), the Fourth Circuit affirmed an order holding the State agency responsible for administration of the Food Stamp Act to ensure that the local administering agencies fully complied with the requirements of the Act. In rejecting the State's argument that it was not responsible for local agency compliance, the Fourth Circuit observed that "although the state is permitted to delegate administrative responsibility for the issuance of food stamps, 'ultimate responsibility' for compliance with federal requirements nevertheless remains at the state level." *Robertson*, 972 F.2d at 533.

the agency's decision and to decide whether to appeal. *See, e.g., Weston v. Cassata*, 37 P. 3rd 469 (Colo. Ct. App. 2001), *cert. denied*, (Colo.), *cert. denied*, 536 U.S. 923 (2002); *Buckhanon v. Percy*, 533 F. Supp. 822 (E.D. Wis. 1982), *aff'd in part, modified in part*, 708 F. 2d 1209 (7th Cir. 1983); *Rodriquez v. Chen*, 985 F. Supp. 1189 (D. Ariz. 1996); *Cherry v. Tompkins*, 1995 WL 502403 (S.D. Ohio Mar. 31, 1995); *see also Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974); *Moffitt v. Austin*, 600 F. Supp. 295 (W.D. Ky. 1984); *Jones v. Blinzinger*, 536 F. Supp. 1181 (N.D. Ill. 1982).

An agency's failure to provide legally required adequate notice renders the agency's termination of a recipient's Medicaid benefits invalid. This was recognized most recently by the district court of Connecticut, which 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. March 31, 2003).

Defendant sent various notices to Plaintiffs,[38] all of which are facially invalid because they fail to provide an adequate statement of appeal rights or an explanation of the basis for the termination sufficient to enable recipients to identify themselves as having been terminated erroneously. The district court's

[38] *See* Aplt. App. 99-102, ¶¶ 15-21).

Order completely overlooks these glaring deficiencies. Furthermore, the district court was clearly erroneous in finding that when counties provided insufficient notice to a recipient, "the Department instructed the county not to terminate benefits until the individual was provided with sufficient notice," Tab 1 (Order at 11). An examination of the record reveals no such instructions, nor is there evidence that this is Defendant's policy. At best, Defendant claimed that if a recipient received *untimely* notice, she would have a legal claim to have her case reopened. Aplt. App. 443:12-15.

For example, Defendant's sample termination letter[39] and the notice sent by La Plata County to Plaintiff Perlman[40] are inadequate because they fail to provide *any* information about fair hearing rights. Plaintiffs have a right under 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.200 *et seq.*, and due process to a hearing if they dispute the application of the law to the specific facts of their case or claim that the agency acted on the basis of incorrect facts. Given the inherently factual nature of the determinations made in this case, such disputes are likely. For example, Plaintiffs may assert that, contrary to Defendant's finding (1) they are within the category of immigrants that remain eligible because of highly specific factual issues including quarters of work credit,

[39] Aplt. App. 137.

[40] Aplt. App. 140-41

connections to military service, or duration of residence in the U.S.; (2) they have become citizens; or (3) they in fact provided information that defendant claims they did not. Defendant's own evidence indicates that Plaintiff Perlman remains eligible for Medicaid because she is SSI eligible,[41] but her notice had no information about fair hearing rights and no information that SSI linkage is a basis for eligibility.

The principle that the state need not grant a hearing where the *sole* issue is a change in state law requiring an automatic adjustment does not free Defendant of her obligation to grant a hearing whenever there is a factual dispute arising from the application on SB 03-176. *Benton v. Rhodes*, 586 F.2d 1 (6th Cir. 1978), which found no hearing was required to challenge the state's decision to eliminate certain medical services for all Medicaid recipients, is inapposite. In *Benton*, a hearing would have been pointless since there were no circumstances under which any recipient would remain eligible for the discontinued services. Unlike *Benton*, the State in this case is terminating the Medicaid eligibility of a certain category of individuals, while other recipients remain eligible. Whether a recipient belongs to a category of persons who remain eligible is a highly factual matter. Therefore, it is critical that Defendant provide Plaintiffs an opportunity to present facts that demonstrate their

continued eligibility. Plaintiffs and the class are entitled to adequate notice of their right to a hearing to challenge the application of the law to the specific facts of their case.

These notices also give an inadequate and misleading statement of the reason for termination by stating the new law "changed the citizenship requirements" for Medicaid eligibility, incorrectly suggesting that a person must be a citizen to qualify for Medicaid.[42]

The notices also state that the individual did not provide verification of immigration status, but do not tell her how she can cure the failure and establish eligibility, what immigration status the agency believes the individual has, or what factors other than immigration status may establish continuing eligibility. These omissions are critical as Plaintiff Perlman, and likely others, never received the redetermination form and therefore had no opportunity to document their immigration status and other factors that established their continued eligibility.[43]

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[41] Aplt. App. 277 (Def.'s Ex. "I"); Aplt. App. 452:24 – 453:7.

[42] Plaintiff Tatevosian's notice from Denver County inaccurately referred to the new state law changing the "citizenship requirement" and stated that he did not meet the new requirement. Aplt. App. 151-53. Defendant's own evidence indicates that he remains eligible for Medicaid because he is SSI eligible. Aplt. App. 277; 453:8-19.

[43] Aplt. App. 105-06, ¶ 34.

The notices used by Denver County likewise contain inadequate and misleading explanations of the reasons for termination of recipient's benefits. For example, the county sent a "40 quarter notice"[44] to individuals whom it identified as lawful permanent residents ("LPR"), who remain eligible if they have 40 quarters of work credit under the Social Security Act. The notice, which advises recipients that they are being terminated "because you and your spouse or parents do not have 40 qualifying quarters of work history in the United States,"[45] fails to communicate that a recipient can demonstrate work credit by aggregating the quarters worked by the recipient, the recipient's current or deceased spouse, and the recipient's parents while the recipient was a minor.

Moreover, the notice does not explain that the 40 quarters requirement applies only to LPRs, or that the agency has concluded the individual has LPR status. The notice assumes this is the only potentially relevant category and does not inform the individual about other eligibility categories. This is a serious omission. The agency may have incorrectly applied the LPR 40 quarters test to someone who is not an LPR, or who is eligible for other reasons, for example because she is on active duty with the U.S. Armed Services.

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[44] Aplt. App. 142-44
[45] *Id.*

Without the missing information, the individual cannot test the accuracy of the agency's decision.

A "7 year notice" used by the county has similar deficiencies. The notice advises recipients that their Medicaid is being terminated "because you have been in the United States more than seven years."[46] Nowhere does the notice advise the recipient that the agency has applied the seven year limit because it believes the recipient is a refugee, asylee, person granted withholding of deportation, Amerasian or Cuban/Haitian entrant,[47] or that other grounds of eligibility exist.

The notices also provide inaccurate and misleading information about hearing rights. For example, the 40 quarters notice incorrectly states that the person can *only* request a hearing if she believes that she or her spouse or parents have 40 quarters, instead of informing her that she can request a hearing if she thinks the agency acted incorrectly by using an incorrect immigration status or misapplying the rules to her case. The 7 year notice states that the recipient can request an appeal "*only* if you believe you have been in the United States *less* than seven years."

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[46] Aplt. App. 145-47.

[47] The notice also misstates the federal law upon which SB 03-176's seven year limit is based. Under 8 U.S.C. § 1612 (b)(2), the time limit begins to accrue when the individual is granted the immigration status, rather than when she enters the U.S.

As the *Rabin* court recently concluded, the failure to provide adequate notice warrants injunctive relief. In light of the numerous deficiencies in Defendant's notices, the district court's Order should be reversed.

ii. Failure to Provide Due Process Hearings.

The district court's 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. Aplt. App. 456:22 – 459:21. As discussed above, such hearings are crucial in light of the evidence that Defendant acted to terminate Plaintiff Perlman for failure to verify, even though its own evidence demonstrated that Ms. Perlman remained Medicaid eligible because she was SSI eligible.

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

to provide pre-determination hearings to all individuals seeking to contest factual issues concerning whether SB 03-176 applies to them is another basis for granting the preliminary injunction.

C. THE DISTRICT COURT ERRED IN FINDING THAT AN INJUNCTION WOULD NOT BE IN THE PUBLIC INTEREST.

Finally, the public interest is furthered by an injunction that ensures that government officials comply with the Equal Protection Clause, 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"); *Kansas 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.")

The district court applied the wrong standard and erred in failing to find that this prong tips strongly in favor of the Plaintiffs. *See Dominion Video Satellite, Inc.*, *v. Echostar Satellite Corp*., 269 F.3d 1149, 1153 (10th Cir. 2001) ("A preliminary injunction will be set aside for abuse of discretion if the district court applied the wrong legal standard in deciding whether to grant a motion for a preliminary injunction."). The proper inquiry under this prong is whether the public would be adversely affected by the grant of injunctive relief, *see, e.g.*,

Davis, 302 F.3d at 1111. The district court instead appeared to reverse this burden by deciding whether the public interest "would be better served by the issuance of a preliminary injunction." Tab 1 (Order at 15).

In any event, after finding that the threatened harm to Plaintiffs outweighed any potential financial harm to the State under the second prong, the district court nonetheless again relied on fiscal impact to conclude, without citing any authority, that the impact of an injunction on the State budget outweighed the public's interest in having the State comply with the constitution and federal Medicaid laws. If saving money were to trump compliance with the law, it would be virtually impossible to secure preliminary injunctive relief against the government. In fact, courts have consistently found that the public interest favors the faithful application of the laws and that this interest outweighs budgetary savings. *See also Washington v. Reno*, 35 F.3d at 1103; *Long Term Care Pharmacy Alliance v. Ferguson*, – F. Supp. 2d –, 2003 WL 1904554, *9 (D. Mass. Apr. 1, 2003) (issuing preliminary injunction against emergency rule reducing reimbursement rate for Medicaid prescriptions dispensed to nursing facility residents; finding that notwithstanding the state's fiscal crisis, the public interest was served by enforcement of the Medicaid laws and "maintain[ing] a Medicaid program that provides efficient, quality care"); *Kansas Hosp. Ass'n v. Whiteman*, 835 F. Supp. at 1553.

The requested injunctive relief would further serve the public interest by avoiding the devastating effects that will likely flow from terminating the Medicaid benefits of approximately 3,500 legal immigrants. Many will lose medically-essential and life-sustaining care that will cause their conditions to deteriorate and will compel them to seek emergency care from already overburdened hospitals and emergency care departments.

CONCLUSION

For the reasons and upon the authorities set forth above, Plaintiffs respectfully submit that the decision of the district court should be reversed and remanded with instructions that the injunction be granted.

STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs request, and the Court has granted, oral argument. Plaintiffs submit that oral argument will be helpful to the Court, particularly when no response or replies briefs will be filed in this appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel states that this brief complies with the type-volume limitation of less than 14,000 words set forth in Rule 32(a)(7)(B), because this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii) contains 13,149 words.

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CERTIFICATE OF SERVICE

I certify that on May 15, 2003, I served a copy of the foregoing document to the following by

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