IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No.03-RB-0529

VALENTIN SOSKIN, BEI DEI HOWE, EVA ROSENTHAL, VATCHAGAN TATEVOSIAN, GINDA K. GELFAND, YAKOV GELFAND, DUBALE SHIBESHI, and SARIN PERLMAN, on their own Behalf and on Behalf of All others Similarly Situated,

Plaintiff,

vs.

KAREN REINERTSON, In her official capacity as Executive Director of the Colorado Department of Health Care Policy And Financing,

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY EQUITABLE RELIEF

The Plaintiffs, through their attorneys, respectfully submit the following Memorandum in support of their Motion For Temporary Restraining Order and Preliminary Injunction.

INTRODUCTION

This case concerns the imminent termination of Medicaid benefits to more than 3,500 current recipients who will be denied vital medical services in violation of the United States Constitution and federal law. On April 1, 2003, Colorado will terminate medical assistance benefits ("Medicaid") to the named plaintiffs and thousands of other impoverished individuals who depend on Medicaid coverage for essential medical care.

There is one reason and one reason only why Colorado has singled out these Medicaid recipients for termination of coverage: they are not United States citizens. For decades, Colorado has provided Medicaid to lawfully present immigrants who reside in the state and meet all federal eligibility criteria. Now, under a new state law enacted as a "budget reduction bill," Colorado plans to eliminate that essential medical protection. These terminations are required by Senate Bill 03-176 ("SB 03-176").

As set forth below, Colorado's termination of Medicaid to immigrant recipients solely on the ground that they are not United States citizens is in direct violation of the Equal Protection guarantee of the Fourteenth Amendment and federal civil rights law. As the Supreme Court definitively ruled more than 30 years ago, state denial of welfare benefits to lawful immigrants constitutes invidious discrimination in violation of the Constitution.

In its frantic haste to implement the terminations, Colorado plans to terminate medical assistance to thousands of individuals without conducting appropriate determinations of eligibility. The legislature passed the bill on March 5, 2003 and Governor Owens signed it into law the same day. The State now intends to impose the cut-off on April 1, just 26 days after the law's enactment, and without providing the legally required advance notice and opportunity for a hearing. The defective manner in which Colorado proposes to implement the new restriction, even assuming it could withstand constitutional scrutiny, violates federal statutes and regulation as well as decades of settled case law governing the due process rights of individuals whose medical care might be interrupted or terminated. The State of Colorado thus threatens to terminate erroneously the medical benefits of immigrants who remain entitled to assistance even under the terms of SB 03-176.

Accordingly, plaintiffs and the class of legal immigrants they represent respectfully request the Court to issue an immediate temporary restraining order and to grant preliminary and permanent injunctive relief to enjoin Colorado from terminating their Medicaid benefits on the ground that SB03-176 violates the Equal Protection Clause and federal law and on the further ground that the State's implementation of the restriction violates the Due Process Clause and the federal Medicaid statute and regulations.

STATUTORY AND REGULATORY SCHEME

A. The Medicaid System.

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.[1] States are not required to participate in the Medicaid program, but if a state chooses to participate, it must comply with the requirements of the federal Medicaid Act and its implementing regulations. *Wilder*, 496 U.S. at 502. State Medicaid programs are implemented according to comprehensive written plans for medical assistance. 42 U.S.C. § 1396. State 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. Colorado Stat. 26-4-105. Colorado has designated 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.

B. The Prohibitions of SB03-176.

For decades, Colorado, like all other states, provided federally supported Medicaid to lawful permanent residents and most other lawfully present immigrants on the same basis as U.S. citizens. After the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996,[2] Colorado continued to provide Medicaid to all categories of legal immigrants (such as the plaintiffs) who remained eligible for federal Medicaid participation.[3]

This non-discriminatory approach ended abruptly on March 5, 2003. On that date, the Colorado legislature passed and Governor Owens signed SB03-176, a bill that imposed unprecedented restrictions on legal immigrants' eligibility for the state's Medicaid program. Denominated a "Budget Reduction Bill," SB03-176 terminated Medicaid eligibility for most lawfully present immigrants who are eligible under federal Medicaid law. The statute represents the first time in Colorado history that the state has terminated Medicaid for eligible immigrants solely on account of their non-citizen status.

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[1] 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(1)-(5),(17) and (21).
[2] Pub. L. No. 104-193, 110 Stat. 2105 (1996).
[3] Under PRWORA, federal Medicaid remained available for "qualified" immigrants, and a few other categories of lawfully present immigrants, except those subject to a mandatory "five-year" bar on services. 8 U.S.C. §1611, 1613. PRWORA defines the term "qualified" immigrant to include lawful permanent residents (LPRs), refugees, asylees, and certain other specified categories of lawfully present immigrants. 8 U.S.C. § 1641. Colorado continued to provide

C. 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), one of the federal regulations that governs operation of each state's Medicaid program, Colorado is required to "[C]ontinue 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 subpart." 42 C.F.R. § 431.205. The state Medicaid agency must "issue and publicize its hearing procedures" which inform every applicant or recipient in writing of: his right to a hearing; how to request a hearing; and that the beneficiary may represent herself or use legal counsel, a relative, a friend or other spokesperson. 42 C.F.R. § 431.206. The notice to recipients must be provided 10 days prior to the date of the adverse action. 42 C.F.R. § 431.11.

Medicaid to all "qualified" immigrants eligible under federal law. See generally, Colorado Revised Statute 26-4-301(m)(2) (2002).

STATEMENT OF FACTS

Plaintiffs respectfully refer this Court to the declaration of Gregory R. Piche, dated March 27, 2003, submitted in support of the motion for a temporary and preliminary injunction.

ARGUMENT

DEFENDANTS SHOULD BE PRELIMINARILY ENJOINED FROM TERMINATING PLAINTIFFS' AND PLAINTIFF CLASS MEMBERS' MEDICAID BENEFITS.

The party seeking a preliminary injunction must establish: (1) a substantial likelihood of success on the merits (2) irreparable harm unless the injunction is issued, (3) that the threatened injury outweighs the harm the preliminary injunction may cause the opposing party, and (4) that the injunction, if issued, will not adversely affect the public interest. *Prairie Band of Potowatomi Indians v. Pierce*, 253 F.3d 1234,1246 (10th Cir. 2001); *Fed. Lands Legal Consortium v. U.S.*, 195 F.3d 1190, 1194 (10th Cir. 1999); *Otero Sav. & Loan Ass'n. v. Fed. Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981).[4] Here, plaintiffs seek a prohibitory injunction that will preserve the status quo and thereby ensure that they do not lose vital medical care pending this Court's determination of the merits.

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[4] Because plaintiffs have established the last three factors listed above, "then the first factor becomes less strict - i.e., instead of showing a substantial likelihood of success, the party need only prove that there are 'questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Potowatomi*, 253 F.3d at 1246 (quoting *Fed. Lands Legal Consortium*, 195 F.3d at 1194); *see also Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002); *Otero Sav. & Loan*,

A. The Loss of Medicaid Will Cause Plaintiffs and Plaintiff Class Members Irreparable Harm.

Medicaid is essential to the health and well being of plaintiffs and the members of the plaintiff class.. As the declarations of the named plaintiffs vividly illustrate, plaintiffs and plaintiff class members rely on Medicaid to pay for medical care and treatment, including long-term care, nursing home coverage, doctor's visits, life-saving medications, and surgical procedures. Without Medicaid, none of the plaintiffs or plaintiff class members, among the poorest members of our society, will be able to afford to pay for necessary treatments and services. Even a brief interruption in these medical services is deleterious to patients and constitutes irreparable harm. *National Assoc. of Psychiatric Treatment Centers v. Weinberger*, 661 F.Supp. 76 (D. Colo. 1986) (enjoining proposed changes to terms and conditions of reimbursement for expenses incurred pursuant to Civilian Health and Medical Program of the Uniformed Services); *Lee v. McManus*, 543 F.Supp. 386, 392 (D. Kan. 1982) (holding that "[W]ithout question, such physical pain or injury [due to the denial of medical care] constitutes the type of irreparable harm upon the threat of which preliminary injunctive relief may be predicated.")

An injury is irreparable if it "cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coalition, et al., v. Flowers*, 2003 U.S. App. LEXIS 3168, *21 (10th Cir. 2003), quoting, *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000). District courts within the Tenth Circuit have recognized that prospective pain and physical injury caused by the denial of appropriate medical care are not repaired by an award of compensatory

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665 F.2d at 278. Because plaintiffs demonstrate a substantial likelihood of success on the merits

damages and constitute irreparable injury. *Lee*, 543 F.Supp. 386, 392. Likewise, injuries stemming from the abrupt cancellation of supportive services cannot be remedied by money damages. *Ireland v. Kansas Dist. of the Wesleyan Church*, 1994 U.S. Dist. LEXIS 11367 (D. Kan. 1994). Finally, when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Because the elimination or denial of Medicaid services poses grave risks to health, courts within the Tenth Circuit have found irreparable injury in Medicaid termination cases. *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). In light of the severe and imminent harm occasioned by threatened Medicaid terminations, courts outside the Tenth Circuit have also frequently found the irreparable injury element satisfied and have entered injunctions in such cases. *See Skubel v. Fuoroli*, 113 F.3d 330 (2d Cir. 1997) (affirming order enjoining defendants from denying members of plaintiffs' class Medicaid funding for medically necessary home health nursing services provided outside the home); *Caldwell v. Blum*, 621 F.2d 491 (2d Cir. 1980).

B. Plaintiffs Are Likely to Succeed on the Merits.

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

a. State Discrimination Based on 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

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they easily satisfy the more lenient standard.

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 Arizona and Pennsylvania welfare statutes).

In concluding that distinctions in state welfare programs between citizens and lawful residents constitute invidious classifications, the Court recalled 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"). 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)), the Court reasoned that state classifications based on alienage are inherently suspect. Indeed, the very circumstances of this case, in which a population without representation in the legislature has been deprived of access to essential medical care as a politically expedient means of reducing the budget, graphically illustrate the appropriateness of heightened scrutiny.

Applying strict scrutiny to the Arizona and Pennsylvania welfare statutes before it, the *Graham* Court rejected the arguments that the States' interests in reserving scarce fiscal resources for indigent *citizens* justified the discrimination against indigent *lawful residents*. *Graham*, 403 U.S. at 374 ("we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify… making noncitizens ineligible for public assistance"). After all, explained the Court, "[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*, *supra* (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).

Five years after *Graham*, the Supreme Court again reviewed a welfare statute that discriminated based on alienage. This time, however, the law at issue was a *federal* welfare statute, a distinction which the Court found to be critical in concluding that the *federal* statute should be reviewed only under the "rational basis" test. *Mathews v. Diaz*, 426 U.S. 67, 83-84 (upholding as "reasonable" requirement that person be a lawful permanent resident for five years or citizen to qualify for Medicare Part B supplemental medical insurance). Compare *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (applying rational basis analysis to federal agency's ban on hiring of legal residents).

The *Mathews* Court strongly reaffirmed, however, the holding of *Graham*. It emphasized that judicial review of a *state's* classification that treats citizens and immigrants differently involves "significantly different considerations," 426 U.S. at 84, than review of a similar *federal* classification. The critical distinction is that only the federal classification implicates "our relations with foreign powers," "changing political and economic circumstances," and Congress' "broad power over naturalization and immigration." Id. at 79-80, 81. *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").

In the years since *Graham* and *Mathews*, the Supreme Court has unwaveringly affirmed its central holding that the Equal Protection Clause requires courts strictly to scrutinize any distinction drawn by a State 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 Board 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). As the author of the Court's opinion in Graham later elaborated, "disparate treatment accorded a class of 'similarly circumstanced' persons who historically have been disabled by the prejudice

of the majority... led the Court to conclude [in *Graham*] that alienage classifications 'in themselves supply a reason to infer antipathy'... and therefore demand close judicial scrutiny." *Toll v. Moreno*, 458 U.S. 1, 19 (1982) (Blackmun, J., concurring) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).[5]

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

Of particular relevance to this litigation, in reviewing state alienage classifications subsequent to the enactment of PRWORA, courts consistently have reaffirmed the principle that

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[5] Although the Supreme Court has carved out a narrow exception to the rule of strict scrutiny for use when states adopt "laws that exclude aliens from positions intimately related to the process of democratic self-government," *Bernal*, 467 U.S. at 220, it has insisted on the vitality of the general rule that state alienage classifications are inherently suspect. Thus, 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." *Cabell v. Chavez Salido*, 454 U.S. at 439 (emphasis added). *See also Bernal*, 467 U.S. at 222.

such classifications are subject to strict scrutiny. In *Aliessa v. Novello*, 96 N.Y.2d 418, 754 N.E.2d 1085 (N.Y. 2001), the court applied strict scrutiny to invalidate a state statute, enacted in the wake of PRWORA, that restricted immigrant eligibility for state-funded medical assistance. 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.[6]

B. Federal Statutory "Permission" for States to Deny Medicaid to Immigrants Does Not Alter the Application of Strict Scrutiny to SB 03-176.

Colorado may contend that a provision of the PRWORA "authorizes" its decision to cut off the Plaintiffs' Medicaid benefits. *See* PRWORA 402(b)(1).[7] Importantly, nothing in PRWORA compels or coerces a state to exclude the immigrants who are subject to the new restrictions enacted by SB03-176. There can be no contention that the federal statute compels Colorado to impose the restrictions of SB 03-176 in its Medicaid program. In order for Colorado to implement these restrictions and exclude federally eligible qualified immigrants from its Medicaid program, it must act affirmatively, and amend the state's Medicaid plan.[8] *See also*

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[6] In reviewing the federal government's authority to restrict immigrants' eligibility for SSI and Food Stamps imposed by PRWORA, courts have uniformly affirmed in *dicta* that heightened scrutiny would apply to a state alienage classification. *See*, *e.g.*, *City of Chicago v. Shalala*, 189 F.3d 598, 603 (7th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000); *Rodriguez v. United States*, 169 F.3d 1342, 1347 (11th Cir. 1999).

[7] "A State is authorized to determine the eligibility of an alien who is a qualified alien … for any designated Federal program …" 8 U.S.C. § 1612(b)(2).

[8] After PRWORA's passage, HHS confirmed that any changes in immigrants' eligibility for Medicaid must be implemented through an amendment to the state's Medicaid plan. Letter

Shapiro v. Thompson, 394 U.S. 618, 641 (1969) ("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").[9] Nevertheless, Colorado may be expected to argue that its discrimination on the basis of alienage should be subject to less stringent scrutiny because the federal statute purports to "permit" such a restriction.

Any such contention must fail. It is elementary that 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. Thus, this Court must reject any suggestion that the PRWORA has "mandate[d] some lesser test" for state discrimination against immigrants than the strict scrutiny required by *Graham*.

More specifically, the Supreme Court has expressly rejected the argument that a federal statute could "authorize" states to discriminate against lawful immigrants in welfare programs.

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from Judith D. Moore, Health Care Financing Administration, to State Medicaid Directors (October 4, 1996).

[9] Plaintiffs emphasize that they do not allege any injury resulting from the federal "authorization" for states to exclude lawfully present immigrants from Medicaid, and therefore

In *Graham*, the Court explained that a state's choice to discriminate against lawful permanent residents could not be immunized by a federal statute:

> Although the Federal Government admittedly has broad Constitutional power to determine what aliens shall be admitted to the United States, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.

403 U.S. at 382. *See also Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) ("Congress is without 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).[10]

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 the PRWORA explicitly authorized states to provide lower cash benefits to applicants who arrived from other states within the previous year. The Court flatly rejected this contention, stating:

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they do not challenge any provision of the PRWORA. It is only Colorado's voluntary decision to impose these restrictions that has deprived plaintiffs of life-sustaining medical benefits.

[10] 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.

The *Graham* Court gave a second reason for its conclusion that Congress cannot by statute authorize a State to discriminate between citizens and lawful residents: the Naturalization Clause, which empowers Congress "[t]o establish an uniform Rule of Naturalization… throughout the United States." U.S. Const., Art. I, § 8, cl. 4.

In *Graham*, the Court explained that a "congressional enactment construed so as to permit state legislatures to adopt divergent state laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." 403 U.S. at 382. 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." Because "under the Constitution the states are granted no such powers... [s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration." *Id*. *See also Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) ("Control over… naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere"). In short, the exclusively federal plenary power over immigration and naturalization on the one hand insulates federal alienage

classifications from strict scrutiny review, but on the other hand, by its very nature, cannot be delegated to the states or exercised in a non-uniform manner.

The highest tribunal of the State of New York has ruled expressly that PRWORA does not lessen the scrutiny that applies for equal protection purposes to a state's decision to impose a welfare restriction against lawfully present immigrants that PRWORA does not require. In *Aliessa*, 96 N.Y.2d 418, 754 N.E.2d 1085 (N.Y. 2001), the court in a unanimous decision emphatically rejected the contention that state classifications based on alienage should be evaluated with less than strict scrutiny when they are enacted pursuant to PRWORA. The *Aliessa* plaintiffs challenged a state statute that denied eligibility for state-funded medical assistance benefits to some, but not all, lawfully residing immigrants who became ineligible for federal benefits under PRWORA. Rejecting the contention that PRWORA justified application of a less strict standard of scrutiny to the state-imposed classification, the court noted that the federal statute "does not impose a *uniform* immigration rule for States to follow," and instead leaves states "free to discriminate in either direction – producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics." *Id*., 96 N.Y.2d at 435 (emphasis in original). Thus, "we address this case outside the context of a Congressional command for nationwide uniformity in the scope of Medicaid coverage for indigent aliens as a matter of federal immigration policy." *Id*.

The *Aliessa* court found that PRWORA "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). Moreover, PRWORA "impermissibly authorizes each State to decide whether

to disqualify many otherwise eligible aliens from State [medical services]." *Aliessa*, 96 N.Y.2d at 436. For these reasons, the court concluded that PRWORA "can give [the state statute] no special insulation from strict scrutiny review." *Id*. The court held that the state statute violated the Equal Protection Clauses of both the United States and New York State Constitutions.

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

It is plain that SB 03-176 mandates different treatment for similarly situated lawfully present immigrants and citizens. The Colorado statute bars lawfully present immigrants from essential health service programs that remain available to similarly situated citizens. As discussed in the preceding section, nothing in PRWORA requires Colorado to impose this restriction. It is purely Colorado's decision, subject to strict scrutiny.

The only question before this Court, therefore, is whether Colorado's distinction between citizens and lawfully present immigrants is narrowly tailored to achieve a compelling state interest. The answer is no. SB 03-176 was passed as one of a package of measures designed to reduce a state budget deficit. The only interest reflected in sponsoring legislators' statements about the bill was reducing the state's expenditure obligations.[11] The fiscal analysis that

[11] 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). Following passage of the bill, Sen. Dave Owen, chairman of the Joint Budget Committee and sponsor of SB 03-176 stated with reference to the bill, "It was something that we had to do….Maybe my colleagues don't understand that we have a $870 million budget deficit…I wish those Democrats

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). Such a justification for discrimination against lawfully present immigrants cannot remotely survive strict scrutiny. The Supreme Court has squarely rejected consideration of a fiscal interest as a justification for invidious discrimination in welfare programs. *Shapiro v. Thompson*, 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 v. Dougall*, 413 U.S. at 646. 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, plaintiffs are substantially likely to succeed on the merits of their claim that the statute violates the Fourteenth Amendment.

2. *DEFENDANTS' FLAWED IMPLEMENTATION OF THE SENATE BILL 176 WILL UNLAWFULLY TERMINATE THE MEDICAID OF INDIVIDUALS WHO REMAIN ELIGIBLE.*

In a rush to cut off Medicaid benefits by April 1, defendants have adopted procedures that will terminate the benefits of individuals who remain eligible for Medicaid. Defendant's procedures, *inter alia*, fail to (1) determine whether recipients remain eligible for Medicaid due to other eligibility factors, (2) provide proper 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

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that are complaining would come in and help us slash the budget." Eric Schmidt, *Lawmakers protest Medicaid cut for immigrants,* DENVER POST (March 10, 2003).

to a pre-termination administrative hearing to demonstrate that the proposed reductions of eligibility ought not apply in their specific facts. As is set forth below, any one of these failures is sufficient to warrant the issuance of an injunction until the violations have been cured.

a. Defendant May Not Terminate Plaintiffs' and the Class Members Medicaid Without Determining Whether They Remain Eligible for Medicaid Pursuant to Senate Bill 03-176.

42 U.S.C. § 1396a(a)(8) requires that Medicaid continue to be provided to all eligible individuals. This section is mandatory on the states. *See, e.g., Bryson v. Shumway*, 308 F.3d 79, 88 (1st Cir. 2002); *Antrican v. Odom*, 290 F.3d 178, 187 (4th Cir. 2002)*; Westside Mothers v. Haveman*, 289 F.3d 852, 863 (6th Cir. 2002); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 976-77 (10th Cir. 2001); *Doe by & through Doe v. Chiles*, 136 F.3d 709, 717 (11th Cir. 1998).

While the federal statute creates a single Medicaid program, there are over a dozen Medicaid eligibility groups. 42 U.S.C.§ 1396 *et. seq*. 42 U.S.C. 1396a-a(8)'s mandate has been held to provide that a recipient's Medicaid may not be terminated simply because the recipient ceases to be eligible under the rules of one eligibility group until it has been determined that the recipient is not eligible under the rules of *any* eligibility group. *Crippen v. Kheder*, 741 F.2d 102, 104-07 (6th Cir. 1984); *Stenson v. Blum*, 476 F. Supp. 1331 (S.D. N.Y. 1979), *aff'd without opinion*, 628 F.2d 1345 (2d Cir. 1980), *cert. denied*, 449 U.S. 239 (1980).

Individual Medicaid recipients, who are poor and often elderly or disabled, cannot be expected to learn and navigate the arcane contours of Medicaid eligibility categories. This responsibility lies with the state. Consequently, 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."[12] *Olson v. Reagen*, 1985 U.S. Dist. LEXIS 20823, *8 (S.D. Iowa 1985); *see also Crippen*, 741 F.2d at 104-07; *Sharp*, 700 F.2d at 753; *Stenson*, 476 F. Supp. at 1339-41.

As a first step, the agency must engage in an *ex parte* review of eligibility. *Id*.[13] The *ex parte* review mandate requires the state agency to review the information to which it has access and determine whether the recipient remains qualified for Medicaid, despite the proposed cuts in eligibility. The decisions finding a duty to conduct reviews also recognize that the fact that an individual is no longer eligible to receive Medicaid under one basis of eligibility does not necessarily render the person ineligible under the myriad of other bases of eligibility. *See Crippen*, 741 F. 2d at 106.[14]

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[12] The statute also requires that eligibility "be determined . . . in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396(a)(19).

[13] In *Phillips v. Noot*, 728 F.2d 1175 (8th Cir. 1984), the state was not required to do the redeterminations *ex parte* because the State required information that was in the possession of the recipients and the State extended eligibility for three additional months while eligibility was determined.

[14] What this means is that a recipient might lose eligibility for Medicaid under category "A", but still retain eligibility under category "B." The state will not have considered whether the recipient was eligible under category "B" when eligibility was first established, since no need to do so existed. However, once the recipient's right to receive Medicaid is placed in jeopardy, the state must look to category "B" and all other eligibility categories to see whether the recipient might still be eligible for Medicaid. *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. There remained the possibility, indeed, in this case the fact, that she was still eligible as a medically needy person.")

In addition, while the redetermination (*ex parte* or otherwise) of a recipient's eligibility is pending, the State *must* continue to furnish Medicaid benefits to the recipient. *Crippen*, 741 F. 2d. at 107 ("the Department must promptly determine *ex parte* the individual's eligibility for Medicaid independent of his eligibility for SSI benefits. While this determination is being made, the state must continue to furnish benefits to such individuals."); *Sharp*, 700 F.2d at 754 ("The order of the district court denying preliminary injunctive relief to the subclass of plaintiffs is vacated. The case is remanded to the district court with instructions to issue forthwith a preliminary injunction reinstating the Medicaid benefits of the subclass of plaintiffs until the defendant complies with the statutory and regulatory provisions requiring redetermination of Medicaid eligibility prior to termination of benefits") *Stenson*, 476 F.Supp. at 1343 ("For the foregoing reasons, New York State is hereby enjoined to restore Medicaid benefits to Stenson and members of her class until such time as New York State determines whether the individual class members remain eligible for Medicaid on a ground other than categorical eligibility"); *Reagan*, 1985 U.S. Dist. LEXIS 20823, at *14 (State "is enjoined from terminating Medicaid benefits to plaintiffs pending an *ex parte* redetermination of plaintiffs' Medicaid eligibility.")[15]

[15] The duty to continue a recipient's Medicaid uninterrupted pending the complete redetermination of the recipient's eligibility and the steps for effectively redetermining eligibility are set forth in several HHS policy issuances. *See* 5/2/97 State Medicaid Director Letter Regarding Naturalization Process and Medicaid (WF) (http://www.cms.gov/states/letters/wrdl52a.asp); 4/22/97 State Medicaid Director Letter Regarding Redetermination of Eligibility (Clarification of February 6, 1997 letter) (WF) (http://www.cms.gov/states/letters/wrdl422.asp); 2/6/97 State Medicaid Director Letter Regarding Redetermination of Eligibility (WF) (http://www.cms.gov/states/letters/wrdl2697.asp).

In the instant case, because defendant has failed to insure that complete and proper redeterminations have been conducted, she may not terminate the Medicaid of any member of the plaintiff class. Specifically, defendant is implementing SB 03-176 in a manner that will terminate the benefits of plaintiff class members who remain eligible under the terms of SB 03-176.[16] The redeterminations are flawed in several significant ways.

First, many class members with credit for 40 or more quarters of work history remain eligible for Medicaid. Class members can earn credit for quarters of work through their own work, the work of their spouse, and work performed by their parents while they were minor children. 8 U.S.C. § 1645. However, in selecting the individuals who will receive termination notices pursuant to SB 03-176, defendant relies solely on its review of the individual's work history in the State Verification and Exchange System (SVES), a government database, to establish the number of credited quarters. See Piche Dec. ¶11. This ignores the fact that the recipient may also be entitled to count quarters worked by his or her spouse or parent. Consequently, defendant will terminate the Medicaid benefits of recipients who have credit for 40 quarters of work through the combined earnings of either a spouse or parent.

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[16] .Colorado apparently intends to provide Medicaid eligibility only to those immigrants for whom 8 U.S.C. § 1612(b)(2) mandates coverage. These are: refugees, asylees, persons granted withholding of deportation/removal, and Cuban/Haitian entrants during the first seven years after the individual was granted the specified status, and Amerasians during the first five years after being admitted with this status; LPRs who can be credited with 40 qualifying quarters of work history under the Social Security Act, veterans and active members of the armed forces and their dependents, certain American Indians, and persons who are receiving Supplemental Security Income (SSI) in the states that link Medicaid eligibility to SSI. Because of defects in defendant's notice and hearing procedures, many persons in these categories, who remain eligible under SB 03-176, will have their Medicaid benefits terminated without being provided advance notice and an opportunity for a pre-termination hearing.

Second, when the defendant's review of the SVES database fails to reveal credit for 40 quarters of work, defendant does not provide class members an opportunity to demonstrate that they in fact have credit for 40 quarters.[17]

Third, recipients may remain eligible for Medicaid if a spouse or parent is a veteran or on active military service. The redetermination process fails to accurately capture all recipients who may meet this eligibility qualification.

Fourth, defendant fails to give recipients an adequate opportunity to demonstrate that they have an immigration status that provides continued eligibility. In cases where the defendant seeks additional information from recipients, the recipients receive a redetermination form that instructs them to send a copy of their "INS Card" to an eligibility office. As reflected on the list of acceptable immigration documents distributed to HCFP to its eligibility offices, the documentation of an individual's immigration status may take the form of a stamp in a passport, a code on a form, a court order, or a variety of other documents not properly described as a 'card.' The use of this term, provided as it is without clarification, fails to communicate to the recipient what is required. In addition, the list of acceptable documents developed by HCFP omits documents that would demonstrate an individual is eligible for Medicaid under the rules imposed by SB 03 176, including more recent INS forms, receipts for applications for replacement or renewal documents, and other verification of status from the INS.

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[17] Significantly, the Medicaid Requirements Documentation form (annexed as Exhibit D to Piche Dec.) does not provide aliens an opportunity to list quarters of work. Consequently, individuals are deprived of the opportunity to demonstrate that they remain eligible for Medicaid under SB 03-176.

In summary, in a rush to implement SB 03-176, defendant ignored her duty to protect the Medicaid eligibility of plaintiffs and plaintiff class members. This Court should stay the implementation of SB 03-176 until such time as defendant demonstrates that she has completely redetermined the eligibility of all persons she has targeted to lose benefits as a result of SB 03-176.

b. Defendants Have Failed to Provide Plaintiffs Adequate Notice of Medicaid Termination as Required by the Federal Medicaid Statute and Implementing Regulations and Due Process.

Defendant has violated clear and longstanding requirements of federal Medicaid law and implementing regulations and the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide the plaintiffs adequate notice of their Medicaid termination. The multiple defects in the termination notices used in connection with SB 03-176's implementation thwart the very purpose of the notice requirement - to inform the individual of the reason for the action so that she can determine its correctness and whether to appeal. The notice fails to provide the immigration status information for the individual that the agency relied upon for its decision to terminate. Nor does the notice provide sufficient and accurate information about eligibility categories to enable plaintiffs to determine whether the agency's decision is correct. The notice fails to provide plaintiffs the legally required advance time to plan for the loss of Medicaid or to determine whether to challenge the agency's action. Moreover, the notice fails to provide accurate information about plaintiffs' right to challenge the correctness of the agency's decision.

Federal Medicaid regulations require that states provide adequate notice of proposed termination and the right to a fair hearing. 42 C.F. R. 431.200 *et seq*. These regulations

specifically implement 42 U.S.C. 1396 a(a)(3) which requires states to grant ". . . an opportunity for a fair hearing to any individual whose claim for medical assistance under the plan is denied or not acted upon with reasonable promptness." 42 C.F.R. 431.200. Federal regulations require that before terminating Medicaid, the state or local agency must mail "a notice at least 10 days before the date of the action" except in situations not relevant here. 42 C.F.R. 431.211. The notice must contain the following information:

(a) A statement of what action the State...intends to take;
(b) The reasons for the intended action;
(c) The specific regulations that support, or the change in Federal or State law that requires, the action;
(d) An explanation of -
    (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
    (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 C.F.R. 431. 210; 431.206 (c) (2). Colorado law contains the same provisions. Colorado Staff Manual 8.057; C.R.S. 26-4-402.

These regulatory requirements of adequate notice implement the due process requirements of *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1001 (1970) and its progeny. In its landmark holding in *Goldberg* that due process requires that welfare recipients have an opportunity for a hearing prior to the termination of benefits, the United States Supreme Court emphasized that:

> The fundamental requisite of due process of law is the opportunity to be heard [citations omitted]. . . . In the present context these principles require that a recipient have timely and adequate notice *detailing* the reasons for a proposed termination and an effective

> opportunity to defend by confronting any adverse witnesses and by presenting his own evidence and arguments orally.

Goldberg 397 U.S. at 267-268 (emphasis added). See also *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976).

The requirement of adequate notice is at the core of due process and reflects the principle that notice must be reasonably calculated to inform the individual of the action and to give him or her time to challenge the action. *Mullane v. Central Hanover Bank and Trust Co.* , 339 U.S. 306, 313, 70 S. Ct. 652, 657 (1950). Courts have recognized that administrative regulations providing minimum notice standards "serve as the minimum notice required for due process. [citation omitted]" *Weston v. Cassata*, 37 P. 3rd 469, 477, *cert. denied*, *Cassata v. Weston*, 2002 Colo. Lexis 12, 22 (Colo., Jan. 14, 2002), *cert. denied*, U.S. Sup. Ct., June 17, 2002, 2002 U.S. Lexis 4491.

Numerous courts have held that adequate notice under the federal regulation and Due Process requires an explanation of the individual facts relevant to the eligibility determination and adequate information about the eligibility standard at issue. Medicaid termination notices that provide only a generic explanation of the basis for the action without individual facts and computation relevant to the determination have been invalidated. In *Rodriquez v. Chen*, the court invalidated Medicaid termination notices with such general language as "Carlos Rodriquez is now in a new category for his age and no longer eligible due to household excess income" and with respect to another plaintiff "net income exceeds maximum allowable." 985 F. Supp 1189, 1192 (D. Az. 1996). The court characterized these reasons as "so vague in as much as they fail to provide any basis upon which to test the accuracy of the decision." 985 F. Supp at1194.

In *Cherry v. Tompkins* the court addressed the adequacy of termination notices after the agency changed the level of care criteria for nursing facilities and other types of care. It concluded that notice stating "a generic reason - 'you do not have an appropriate level of care' - along with a legalistic citation to the applicable section of the Ohio Public Assistance Manual" was inadequate notice "because it fails to detail the specific factual reasons supporting the proposed termination" 1995 WL 502403 (S.D. Ohio), p. 16. According to the court, the assessment of eligibility was "largely factual in nature and is therefore open to questions of accuracy and fairness." Id. *Moffitt v. Austin*, 600 F. Supp. 295, 298 (W.D. Ky. 1984) (holding that Medicaid termination notices were inadequate, finding that they are "exceedingly generic and sparse in their statement of intended action, and their reasons given for change are boiler-plate."

Likewise in *Buckhanon v. Percy*, 533 F. Supp. 822, 833-834 (E.D. Wisc. 1982), *aff'd in part, modified in part*, 708 F. 2d 1209 (7th Cir. 1983), the court granted preliminary relief in a challenge to the validity of notices implementing numerous eligibility rule changes that affected cash assistance and Medicaid recipients. Plaintiffs received general notices and a foldout with additional information about the changes. The court analyzed the notices and found them inadequate because they did not provide case specific information for the individual to determine the correctness of the decision. For example, those who were terminated for excess income did not receive information about the individual's gross income upon which the agency based its decision and other relevant case specific information. Notices indicating that a recipient's vehicles exceeded the asset limit did not contain information that the equity value of the recipient's car made him ineligible or the equity value used in the determination. *See also Jones*

v. Blinzinger, 536 F. Supp. 1181 (N.D. Ind. 1982) (granting preliminary relief in challenge to adequacy of notices where notices implementing new welfare rules failed to include calculations on which the determinations were based and did not inform recipients that they would lose Medicaid if welfare was terminated); *Vargas v. Trainor,* 508 F. 2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S 1008, 95 S. Ct. 1454 (1975)*, Dilda v. Quern*, 612 F. 2d 1055 (7th Cir.)*, cert. denied sub nom. Miller v. Dilda*, 447 U.S. 935, 100 S. Ct. 3039 (1980).

Courts have also invalidated notices that do not contain an accurate statement of appeal rights. In *Weston v Cassata*, supra, the court held that welfare sanction notices had multiple defects, including the failure to provide an accurate statement of the time in which to appeal.

Defects in the Denver County Notices

Denver County sent several variations of notice to members of the plaintiffs' class to implement SB 03-176. The notices included some generic text and one of several formulations of a reason for the termination, apparently based on whether the agency concluded that a person was ineligible because she was: 1) a legal permanent resident without credit for the 40 qualifying quarters of work history ("40 quarters notice"); 2) within the group of immigrants limited to seven years of Medicaid ("7 year notice"); or 3) did not provide verification of immigration status on the Redetermination form ("failure to verify").

The notices sent to plaintiffs failed to comply with federal Medicaid regulations and Due process because they 1) did not contain an adequate explanation of proposed action and the basis for the action; and 2) provide misleading and confusing information about fair hearing rights.

Each of the notices sent by Denver County, titled Notice of Proposed Action, includes

both boilerplate language and text purporting to explain the reason for the decision. The text provides in relevant part:

Boilerplate text:

> This action affects your cash assistance and/or medical benefits. If you disagree with this proposed action that will deny, suspend reduce, or stop your benefits, you may appeal this action....
> The Action is Planned to Be Effective on: April 1, 2003

Reason text [text varies; the following is for the "40 quarters" notice]:

> Reason: Information in your Medicaid case record shows that you no longer qualify for Medicaid effective March 31, 2003 because you and your spouse or parents do not have 40 qualifying quarters of work history in the United States. [legal citation omitted]
> Because this is a change in state law and regulations you may request a State Appeal only if you believe that you or your spouse or parents do have 40 qualifying quarters of work history in the United States.

Boilerplate text:

> Further Appeal of this Notice of Medicaid Closure may be directed to an appropriate state or federal court. [citation omitted]
> If you have questions about this Notice please contact Medicaid Customer Service at (303) 866-3513 or 1-800-221-3943.
> If you have any questions about this letter, please contact Medicaid Customer Services at (303) 866-3513 or 1-200-221-3943.

This notice fails to meet the 42 C.F.R. § 431. 211 (b) requirements for the following reasons. First, the notice fails to clearly explain that Medicaid will be terminated. The title only explains that some unspecified action will be taken, and the first sentence states that the action affects "cash assistance and/or medical benefits." The "reason" indicates that the person "no longer qualif[ies] for Medicaid" but this does not clearly explain to a lay person that Medicaid will stop. The only reference to termination is buried further down in the notice explaining that

"Further Appeal of this Notice of Medicaid Closure may be directed to an appropriate state or federal court" where an individual is very likely to miss the reference to closure.

Second, the notices do not provide an adequate explanation of the reason for the proposed action. None of the notices explain what information the agency used to determine the individual's immigration status. Nor do they inform the individual about the categories of lawfully present immigrants that remain eligible for Medicaid. For example, the "40 quarter notice" partially describes one eligibility category - that of legal permanent residents (LPR) with 40 qualifying quarters of work history - without mentioning that HCFP has concluded that the recipient is a lawful permanent resident. The notice assumes that this is the only category that is potentially relevant and does not inform an individual about other potential bases for eligibility. The agency may have incorrectly applied this category to someone with another status altogether, to an individual who is on active duty with U.S. Armed Forces, or to a naturalized citizen.

Likewise, the "7 years notice" only tells the individual that the issue is whether she has been in the country for seven years, incorrectly assuming that this eligibility category is the only one that might be relevant for her and misleading her into thinking that there is no other potential eligibility basis. For example, the immigrant may have adjusted her status to LPR, or she might be eligible as someone on active duty with the U.S. Armed Forces. The "failure to verify" notice invites the individual to provide the information to establish eligibility but does not inform the individual of the information needed. For example, the individual has no information about the possibility of establishing 40 quarters of work history based on her record or that of her parent or spouse. In sum, the agency's notices leave an individual completely in the dark as to

the eligibility rules and whether she meets them, despite the agency's determination to the contrary.

Third, some of the notices give inconsistent information, saying that the action is effective on April 1, 2003 but then indicating that the person no longer qualifies for Medicaid effective March 31, 2003.

Fourth, the notice gives inconsistent, confusing, and perhaps inaccurate information about administrative appeal rights. While the second sentence states that the individual can appeal if she disagrees with the decision, later text provides that the individual can request an administrative appeal only if she or her parents or spouse have 40 quarters (or in the case of the "7 year notice" "only if you believe that you have been in the United States for less than 7 years.") If the individual disputes the factual basis for the agency's determination or believes that the agency incorrectly applied the new law to her facts, then the statement is inaccurate. For example, the individual may want to contest the determination on the grounds that she is in one of the other categories of individuals who remain eligible. Whether or not the notice accurately reflects agency policy, it provides a confusing and contradictory statement of the individual's appeal rights, because the second sentence and the reverse side of the notice contain a broader statement of the individual's right to appeal.

The statement that the individual can call the agency for more information does not cure the deficiencies of the notice, and courts have repeatedly rejected such arguments. In *Vargas v. Trainor*, the court recognized that plaintiffs, many of whom were aged or disabled, would be unable to take the necessary action to find out the specific reasons for the termination by calling the caseworker:

> Within what was left of the ten days after they received the notice, they were required to either meet with their caseworkers and learn the reasons for the proposed action and then decide whether to appeal, or to appeal without knowing whether an appeal might have merit. If they failed to do either, their benefits were reduced or terminated without their being advised why. Under such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action. The meek and submissive remain in the dark and suffer their benefits to be reduced or terminated without knowing why the Department is taking that action.

508 F. 2d 485, 489-490 (7th Cir. 1974), *cert. denied* 95 S. Ct. 1454 (1975). *See also*, *Rodriquez v. Chen*, 985 F. Supp. 1189, 1195; *Buckhanon v. Percy*, 533 F. Supp. 822, 835. Likewise in this case, plaintiffs include aged individuals and those with serious health problems whose condition makes it extremely difficult for them to break through the bureaucratic wall to obtain the information necessary to understand the reason for the termination and to take appropriate action.

Requiring that the notice provide an accurate statement of the intended action, a detailed explanation of the reason for the termination, and an accurate statement of appeal rights is clearly appropriate under the balancing test of *Matthews v. Eldridge*, which considers: 1) the private interest at stake; 2) the risk of erroneous deprivation through the procedures used and the probable value of additional safeguards; and 3) the government's interest, including the function involved and the fiscal and administrative burden of additional procedures. 424 U.S. 319, 334. Low-income individuals have a great interest in retaining Medicaid health coverage to secure access to desperately needed medical care for often life-threatening conditions. There is a significant risk of erroneous termination resulting from the agency's incorrect determination of the individual's status or the misapplication of the rule to the individual's circumstances.

Including in the notices information that is readily on-hand is well within the agency's capacity. It serves both the agency's and individual's interest in enabling individuals to challenge incorrect decisions and promoting Medicaid access for eligible individuals. These interests far outweigh any minimal inconvenience to the agency in including the information.

c. Defendant Violates the Medicaid Act and Implementing Regulations and the Due Process Clause by Failing to Provide all Plaintiffs and Plaintiff Class Members with Pre-Termination Administrative fair Hearings.

Applicants for and recipients of Medicaid 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; *see also* 42 C.F.R. 431.201. As the First Circuit has observed, 1396a(a)(3) "requires states to provide Medicaid beneficiaries with a fair hearing to contest an agency decision." *Rosie D. v. Swift*, 310 F.3d 230, 237 (1st Cir. 2002). *See also Doe v. Bush*, 261 F.3d 1037, 1056-57 (11th Cir. 2001); *Parry v. Crawford*, 990 F. Supp. 1250, 1258 (D.Nev.1998) ("The Medicaid Act clearly provides for notice upon the denial of an application . . . . In addition to denial of a claim for services, certain other actions, such as termination, reduction, or suspension of services also entitle the applicant to a hearing."); *Catanzano v. Dowling*, 847 F. Supp. 1070, 1081 (W.D.N.Y.1994) ("Under federal regulation, the State Medicaid agency must provide a proper notice to the patient informing him of the proposed change and his right to a hearing both at the time that the individual initially applies for Medicaid and at any time the Medicaid agency takes 'any action affecting his claim.'"); *Miller v. Ibarra*, 746 F. Supp. 19, 24 (D. Colo. 1990).

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 subpart." 42 C.F.R. §431.205. The state Medicaid agency must "issue and publicize its hearing procedures" which inform every applicant or recipient in writing of: his right to a hearing; how to request a hearing; and that the beneficiary may represent herself or use legal counsel, a relative, a friend or other spokesperson. 42 C.F.R. § 431.206. The notice to recipients must be provided ten days prior to the date of the adverse action. 42 C.F.R. §431.211. If the notice has been mailed at least ten days prior to the adverse action and the hearing is requested prior to the adverse action taking effect, then the recipient is entitled to continue have medical assistance continue unchanged pending the outcome of the fair hearing.

Here, defendant does not provide the right to a hearing to all persons seeking to show that he or she is a person to whom SB 03-176 doesn't apply. Considering the hurried, chaotic, and slipshod manner in which defendants are implementing the legislation, basic due process protections are crucial to ensuring that otherwise eligible individuals do not lose access to basic health care.

C. The Balance of Hardships Favors Plaintiff

The balance of hardships tips decidedly in favor of plaintiff and plaintiff class members. If the relief requested is not granted, plaintiffs and members of the plaintiff class will suffer irreparable harm. In contrast, the plaintiffs seeks only that the defendant complies with the plain language of controlling federal law and affords them the benefits to which they are so clearly entitled. As stated by the Seventh Circuit,

> Because the defendants are required to comply with the [law in question], we do not see how enforcing compliance imposes any burden on them. The Act itself imposes the burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it.

Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986) (granting preliminary injunction requiring defendant's compliance with federal timeliness standards for processing food stamp applications). *See also, Massachusetts Association of Older Americans v. Sharp,* 700 F.2d 749, 754 (1st Cir. 1983) (In light of the strong likelihood that plaintiffs would prevail on the merits, "[d]efendant's claimed injury from the loss of public funds to ineligible individuals is, in reality, no injury at all, just a remote possibility of injury.")

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

Dated: March 28, 2003
Denver, Colorado