

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FLOR P., et al.

Plaintiffs,

vs.

ROBERT L. EHRLICH, JR., GOVERNOR, et al.

Defendants.

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Case No. _____

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

COMES NOW Plaintiffs, Flor P. and Ana P. (by their father and next friend, F.P.), Braynan H., Osvaldo H., Leslie H. (by their mother and next friend, M.H.), and Gabriel N., Henry A., and Vitalis A., (by their mother and next friend, A.P.N.), by and through their undersigned attorneys, Bregman, Berbert, Schwartz & Gilday, LLC and the Legal Aid Bureau, Inc., and hereby submit this Memorandum of Points and Authorities in Support of the accompanying Motion for Preliminary Injunction.

I. INTRODUCTION

This case arises from the State of Maryland’s (the “State”) discriminatory and unconstitutional decision to deny certain persons legally living in and contributing to the economy of the State access to health care. For a paltry savings of approximately 0.0875% of the total Medical Assistance Program budget (\$7 million out of an overall Medical Assistance Budget of over \$4 billion),¹ the State terminated the healthcare eligibility of vulnerable children and pregnant women who are legal immigrants living in the country for fewer than five years. As the State relied on one criterion, alienage, in making the decision to eliminate Medical Assistance for this needy group of individuals, the State’s act must be examined under an exacting “strict scrutiny” test. This discriminatory treatment cannot survive a strict scrutiny analysis because application of well-

¹ The State estimates that “\$3.5 million will be saved in State general funds during FY2006 by deleting coverage for this category of Medical Assistance.” *See* Medical Assistance Eligibility, Md. Reg. (Sept. 2, 2005).

established state and federal law demonstrates that the State's action cannot be justified by a compelling state interest. Thus, the State's action violates Maryland's fundamental guarantee of equal protection. It flies in the face of years of well-established public policy and threatens the Plaintiffs with irreparable and potentially life-threatening harm. It is not only illegal, but it is likely to cause the State to expend far more in future emergency medical care and other services than its immediate purported savings. Plaintiffs seek a declaration from this Court that the State's act of eliminating this class of residents from coverage is unconstitutional and an injunction requiring the State to provide medical assistance to the Plaintiffs.

II. FACTUAL BACKGROUND

A. The Plaintiffs

Plaintiffs are low-income legal immigrant children who need preventative, routine and special medical care that their families cannot afford to provide. Although Plaintiffs' families legally work and pay taxes to the State, they cannot afford sufficient private health insurance and cannot afford to pay out-of-pocket for the care the children need. Prior to the State's discriminatory act, the children were receiving medical treatment and care under the Medical Assistance program.

Flor P. ("Flor"), sixteen years old, suffers from a serious condition, the West Nile virus, which requires extensive medical treatment. Following Flor's diagnosis with the West Nile virus in August 2005, Flor was hospitalized for a week in Children's Hospital. Thereafter, she was sent to the National Rehabilitation Hospital, where she began to experience mental confusion. On September 8, 2005, Flor had a series of seizures and returned to Children's Hospital, remaining until September 17, 2005. Currently, Flor is having difficulty communicating, and she needs speech therapy, follow-up treatment and monitoring, and seizure and tuberculosis medications. Flor's family received multiple

bills from Children's Hospital, totaling over \$137,500, for which they cannot afford to pay. *See P. Aff. at ¶ 11-22.*²

Ana P., eight years old, received regular medical check-ups, including immunizations and early screening for illnesses and developmental problems through the Medical Assistance program prior to July 1, 2005. Ana's family is financially unable to pay for well-child care, preventive screenings, immunizations, and other ongoing care that children typically require. Ana requires dental work and eye glasses, which her family cannot afford to pay. *See id. at ¶ 23.*

Seven-year old Brayan H. ("Brayan") has a diagnosed serious health condition, Histiocytosis, and a suspected health condition, vonWillebrand Disease. *See Seibel Aff. at ¶ 5, 12.*³ Histiocytosis, an immune system disorder which causes the formation of tumors, is typically treated by chemotherapy, among other treatments. While Brayan's disease is in remission, his condition needs constant medical monitoring because the illness commonly reoccurs. *See id. at 12.* Prior to July 1, 2005, Brayan's condition had been monitored at Children's National Medical Center, where he was receiving ongoing care, including blood work, every few months. His family cannot afford the continued monitoring of Brayan's condition as medical protocol requires, so Brayan has not returned to Children's National Medical Center since the State terminated his Medical Assistance coverage. *See H. Aff. at ¶ 16.*⁴

Recently, Brayan has been experiencing troubling new symptoms that raise serious concerns regarding his health. He has recurrent nose bleeds, weakness, and dark patches have formed on his skin. Due to frequent nose bleeds and other symptoms, Brayan's doctors believe that he may also have vonWillebrand Disease, a blood clotting disorder which causes excessive bleeding. *See Seibel Aff. at ¶ 10.* Initial tests were inconclusive, and medical protocol requires additional investigatory tests. These tests were ordered, but were not performed because Brayan's medical coverage was

² The Affidavit of F. P. is attached hereto as Exhibit 1.

³ The Affidavit of Nita Seibel, MD is attached hereto as Exhibit 2.

⁴ The Affidavit of M.H. is attached hereto as Exhibit 3.

terminated, and his family cannot afford to pay for these tests. *See* H. Aff. at ¶ 16. In short, Brayan's family cannot afford to pay for the comprehensive treatment that his condition requires.

Oswaldo H., fifteen years old, and Leslie H., eleven years old, both require routine medical care, health screenings, and immunizations which both had received through the Medical Assistance program, prior to July 1, 2005. They have not received any care or monitoring since that time because their family cannot afford to provide this care. The family is financially unable to pay for well-child care, appropriate immunizations, preventive screenings, and other ongoing care that children require. *See* H. Aff. at ¶ 19-20.

Gabriel N. ("Gabriel"), three years old, Henry A., five years old, and Vitalis A., thirteen years old, all require regular check-ups, screenings, and immunizations. Prior to the State's termination of their medical benefits, the children had received these regular medical services. *See* N. Aff. at ¶ 13.⁵ On or about July 20, 2005, Gabriel suffered from a high fever and other symptoms which did not respond to over-the-counter medications. His parents took him to Children's National Medical Center's Emergency Room, where he was treated and released the same day. His family incurred a large medical bill which they cannot afford to pay. *See id.* at ¶ 18. He has not received any additional treatments. Since Plaintiffs' family cannot afford sufficient private insurance and cannot pay out-of-pocket for this care, the children have not received routine care and immunizations called for by accepted medical standards.

B. Brief History of Essential Health Care Coverage for Legal Aliens in Maryland

Maryland has a long history of providing medical assistance to low income residents, regardless of citizenship. The State's inclusionary policy dates back to the Medical Assistance Program's inception in 1943.⁶ In 1967, Maryland opted into the federal Medicaid system and began

⁵ The Affidavit of A.P.N. is attached hereto as Exhibit 4.

⁶ In 1945, Maryland forged a program that would provide medical care to the "medically indigent." No distinction was made as to citizens versus non-citizens. In fact, in planning for the program, the State studied the

receiving federal money to help cover the costs of providing healthcare to low income persons. At that time, legal immigrants were included in the coverage. It was not until the passage of the federal Personal Responsibility and Work Opportunity Reconciliation Act in 1996 that Maryland again examined the scope of coverage for legal immigrants, and once again concluded that retention of its long-standing policy of providing this critical health care to immigrant pregnant women and children was appropriate.

C. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. §1601 *et seq.* (“PRWORA”). The PRWORA eliminated *federal* funding under the Medicaid program for legal immigrants who had entered the United States after August 22, 1996, or had resided in the United States for fewer than five years. *See* 8 U.S.C. §§1601-1646. Maryland responded by immediately opting to continue coverage in state programs for all populations for which it received a federal match. Thereafter, the Governor convened a task force to study the loss of Supplemental Security Income⁷ benefits for legal immigrants in Maryland.

The Governor’s Task Force issued a report discussing healthcare for legal immigrants excluded from federal coverage by PRWORA.⁸ The Task Force recommended that Maryland provide medical assistance for legal immigrants and expressed particular concern for two subsets: “those in need of prenatal care and children.” GOVERNOR’S TASK FORCE ON THE LOSS OF SSI BENEFITS FOR LEGAL IMMIGRANTS, REPORT OF THE GOVERNOR’S TASK FORCE ON THE LOSS OF SSI BENEFITS FOR LEAL IMMIGRANTS IN MARYLAND 11 (1997) [hereinafter REPORT OF THE GOVERNOR’S

scope of the need for medical care in the State and specifically included “both native and foreign born persons.” *See* MD. STATE PLANNING COMM’N, INITIAL REPORT OF THE COMMITTEE ON MEDICAL CARE, Mar. 1943, at 6.

⁷ PRWORA’s restrictions affected all welfare programs receiving federal money. One of these programs is the Supplemental Security Income benefit (“SSI”), a subsistence cash benefit program for impoverished disabled people. People who receive SSI are automatically eligible for Medical Assistance. For this reason, the Task Force’s report on SSI also examined access to healthcare for legal immigrants after PRWORA.

⁸ *See generally* GOVERNOR’S TASK FORCE ON THE LOSS OF SSI BENEFITS FOR LEGAL IMMIGRANTS, REPORT OF THE GOVERNOR’S TASK FORCE ON THE LOSS OF SSI BENEFITS FOR LEAL IMMIGRANTS IN MARYLAND 10- 11 (1997) (providing the Task Force’s opinions and conclusions).

TASK FORCE]. Its members collectively exhibited a comprehensive understanding of the intersection between immigration and governmental benefits.⁹ The Task Force properly noted: “Surely it makes economic sense to pay for prenatal care and delivery, rather than to risk the birth of unhealthy babies which will require far greater entitlement expenditures after birth.” *Id.* at 11. The Task Force went on to conclude that there was no policy objective to be fulfilled by excluding legal immigrants in the state from such fundamental healthcare protections. The Task Force noted:

It is quite clear that the combined forces of the Welfare Act and the Immigration Act produced a harsh legislative framework as it relates to legal immigrants. The new Acts’ treatment of legal immigrants is not justified by any legitimately articulated policy goal...By electing not to abandon some of the most vulnerable segments of its population, Maryland has not only made a wise economic decision, but also has demonstrated that, at least in our State, compassion in government remains a cherished American virtue.

Id. at 17.

D. The Welfare Innovation Act of 1997

The General Assembly echoed the conclusions of the Governor’s Task Force when it responded to the federal changes and passed Senate Bill 499, the Welfare Innovation Act of 1997. The floor report indicated that “federal welfare reform law left certain decisions regarding benefits to legal immigrants up to the states. We are electing in SB499 to ... provide medical assistance to legal immigrants in the country before enactment of the federal bill and to legal immigrant children and pregnant women who enter later.” MD. S., FLOOR REPORT SB499 (1997). The bill later became codified in the Medical Assistance statute that identifies services and populations covered by the Medical Assistance Program. This statute, MD. CODE ANN., HEALTH-GEN., § 15-103(a)(1)(2)(viii), states as follows:

The Program shall provide, subject to the limitations of the State budget and any other requirements imposed by the State, comprehensive medical care and other health care

⁹ Members included representatives from the Immigration and Naturalization Service, the Office on Aging for the State of Maryland, the Maryland House of Delegates, the Senate of Maryland, the Montgomery County Public Schools, as well as leading advocacy groups in the field. See REPORT OF THE GOVERNOR’S TASK FORCE, *supra*, at 21.

services for all legal immigrant children under the age of 18 years and pregnant women who meet Program eligibility standards and who arrived in the United States on or after August 22, 1996, the effective date of the federal Personal Responsibility and Work Opportunity Reconciliation Act.¹⁰

Thus, in passing this bill, Maryland created a State-funded program for vulnerable populations and reaffirmed the State's public policy to provide healthcare benefits to legal immigrants.

E. Budget Cuts: Maryland Terminated Medical Assistance for Legal Immigrant Pregnant Women and Children

In January 2005, Governor Ehrlich presented his Budget Bill for fiscal year 2006 to the General Assembly.¹¹ The Governor's Budget Bill incorporated cost containment measures purportedly designed to address growth in the Medicaid program.¹² The General Assembly approved the Governor's Budget Bill, but set aside \$1.5 million to provide limited coverage for pregnant women who are legal immigrants, which was substantially less than the monies previously set aside for this group. The funds that the General Assembly set aside for prenatal care will only cover the care of those women who were already in the program on July 1, 2005, the start of the new fiscal year. While these women will have coverage through their pregnancies, any woman seeking coverage on or after July 1, 2005 will not be eligible for healthcare coverage. Shockingly, no money was set aside by either the Governor or the General Assembly for legal immigrant children.¹³ As of July 1, 2005, these children were no longer covered under Maryland's Medical Assistance program. The elimination of coverage will impact thousands of women and children.¹⁴

¹⁰ The language which restricts the program to the limitations of the State budget is included in every provision of the Medical Assistance Program statute and applies to all medical assistance services. *See, e.g.*, MD. CODE ANN., HEALTH-GEN., § 15-103(a)(2)(i)-(x).

¹¹ Under the Maryland Constitution, the General Assembly may not alter the budget bill except to strike out or reduce items listed therein. *See* M.D. CONST. art. III, § 52

¹² *See* MD. GENERAL ASSEMBLY, THE 90 DAY REPORT: REVIEW OF THE 2005 LEGISLATIVE SESSION PART A, 17 (2005) [hereinafter THE 90 DAY REPORT]

¹³ *See id.*

¹⁴ The State's own calculations show that 3,718 children and pregnant women were enrolled in this program as of May 2005. *See* Medical Assistance Eligibility, Md. Reg. (Sept. 2, 2005).

Prior to the close of the legislative session, the outlook for revenue improved and the Governor proposed a Supplemental Budget that increased spending by \$342.9 million.¹⁵ However, funding was not restored for the coverage of legal immigrant children and pregnant women in the Medical Assistance program. On July 19, 2005, new budgetary predictions showed even more favorable anticipated revenue and resulted in an expected surplus to the overall state budget of 1 Billion Dollars.¹⁶ Despite this considerable surplus, legal immigrant children and pregnant women who have been in the country for fewer than five years are still without healthcare coverage.

III. ARGUMENT

A. Summary of Argument

The State's discriminatory termination of healthcare benefits for Plaintiffs, who are legal immigrant children who have been in the United States for fewer than five years, violates the equal protection guarantees of the Maryland Declaration of Rights. The State terminated healthcare coverage for this particularly vulnerable population on the basis that these children are not U.S. citizens and have not been in the country for five years. Since the State's action classifies persons according to alienage, which is a suspect class, both federal constitutional jurisprudence (which the Maryland courts follow when interpreting Maryland's equal protection guarantees) and Maryland law require an examination of the State's action under strict scrutiny analysis. In order to survive strict scrutiny, the State must prove that the different treatment of this suspect class is "necessary" to serve a "compelling state interest." In order to show that the action is "necessary," the State must show that there is no less restrictive means available to achieve the compelling state interest. *See generally Murphy v. Edmonds*, 325 Md. 342 (1992). Appropriate state interests for purposes of this analysis are very limited. For instance, the courts, including the United States Supreme Court, have expressly held that fiscal concerns, even where legitimate, are not a sufficient justification for

¹⁵ See THE 90 DAY REPORT, *supra*, at 7.

¹⁶ See David Abrams, *Maryland has an extra billion to spend*, THE CAPITAL, July 19, 2005.

discriminatory state action that adversely affects a suspect class. In this case, the State's action cannot survive the demanding strict scrutiny analysis because it does not serve a compelling state interest. As a result, not only is the State's action antithetical to Maryland's well-established policy to protect the health of the legal immigrant population, but it is also illegal because it fails to satisfy strict scrutiny review. Plaintiffs are seeking a declaration from this Court that the State's action is unconstitutional and an injunction requiring the State to provide medical assistance to the Plaintiffs.

B. The Court Should Enter a Declaratory Judgment that the State's Action Discriminates Against Immigrants And Is Unconstitutional Under the Maryland Declaration of Rights

1. Maryland Wrongfully Targeted Legal Immigrant Children in Cutting Their Medical Assistance Coverage Under the Guise of Fiscal Responsibility

In the fall of 2004 and early spring of 2005, the Governor drafted his Budget Bill. At that time, since the economic forecast for the upcoming year was somewhat less promising than in past years, the Governor decided that cost containment measures were appropriate. Such measures included the elimination of some Medical Assistance program funding, resulting in termination of coverage for a particular group of needy people—legal immigrant pregnant women and legal immigrant children who have resided in the United States for fewer than five years. As pregnant immigrant women and immigrant children were the only group affected in this manner, it is clear that the Governor's Medical Assistance program cuts were made according to alienage classification. Secretary McCann of the Department of Health and Mental Hygiene explained the rationale behind the spending cuts in his report to the General Assembly on July 26, 2005. He stated that all funding for healthcare for these legal immigrants was cut due to the need to contain the cost of the Medical Assistance program.¹⁷ Thus, the State tried to justify its differential treatment of legal aliens by

¹⁷ See Mary Otto, *Pregnant Immigrants Feeling the Pinch*, WASH. POST, July 27, 2005 (reporting about the action taken against immigrant children and pregnant women and recounting Secretary McCann's justification for this State action).

citing purported financial savings. Such State action is contrary to the constitutional mandate that the State must observe. The Maryland Constitution demands more.

2. The Maryland Constitution Protects Against Discrimination Based on Alienage

The Maryland Constitution's Declaration of Rights, Article 24 states:

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

The Maryland courts' interpretation of Article 24 explains that Maryland residents enjoy the right of equal protection under the law. *See Attorney General of Md. v. Waldron*, 289 Md. 683, 704 (1981). (“Although the Maryland Constitution contains no express equal protection clause, we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights.”)

In defining the scope of equal protection embodied in Article 24, Maryland courts look to interpretations of the equal protection provisions of the Fourteenth Amendment of the U.S. Constitution for guidance. In fact, the Maryland Court of Appeals has explicitly noted that such reliance on the U.S. Constitutional jurisprudence is appropriate, stating: “We have. . . long recognized that decisions of the Supreme Court interpreting the equal protection clause of the federal constitution are persuasive authority in cases involving the equal treatment provisions of Article 24.” *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 640 (1983). *See Murphy*, 325 Md. at 353 (“Although the Maryland Constitution contains no express equal protection clause, it is settled that the Due Process Clause of the Maryland Constitution, contained in Article 24 of the Declaration of Rights, embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment”).

3. Claims of Discrimination on the Basis of Alienage Must Be Examined Under a Strict Scrutiny Test

Maryland courts examine state actions that are alleged to violate the equal protection provisions of the Maryland Constitution under one of three levels of scrutiny. These are: (1) strict scrutiny (which is the most exacting standard); (2) an intermediate level of scrutiny; and (3) rational basis review (which requires only a rational basis to justify the state action).

State action that creates distinctions among people according to certain suspect classifications, including alienage, national origin, and race, triggers the most exacting strict scrutiny review. The Court of Appeals explained in *Hornbeck*:

“Strict scrutiny” is required of a legislative classification when it creates a distinction based upon “suspect” criteria or when it deprives, infringes upon, or interferes with personal rights or interests deemed to be fundamental. Laws which are subject to this rigorous standard violate equal protection unless the State can demonstrate that the statute is necessary to promote a compelling state interest. A suspect class is a category of people who have experienced a history of purposeful unequal treatment or been the basis of stereotyped characteristics not truly indicative of their abilities. Classifications based on race, national origin and ancestry are several examples of such a suspect criteria.

295 Md. at 641. Thus, when the State uses a suspect classification, including alienage, as the criteria for the termination of a benefit, strict scrutiny must be applied. *See Murphy*, 325 Md. at 356 (“Where, however, a statutory classification burdens a “suspect class” or impinges upon a “fundamental right,” the classification is subject to strict scrutiny. Such statutes will be upheld under the equal protection guarantees only if it is shown that they are suitably tailored to serve a compelling state interest.”) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”))

There is no doubt that strict scrutiny applies to state classifications based on alienage. In fact, the U.S. Supreme Court has specifically examined the status of aliens and held that aliens constitute a suspect class, triggering strict scrutiny review of allegedly discriminatory state actions. In *Nyquist v.*

Mauclet, 432 U.S. 1 (1977), resident aliens challenged the New York statute barring them from obtaining certain state financial assistance for college. In applying a strict scrutiny standard to examine whether the state’s justification could pass muster, the Supreme Court stated that:

the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn. Alienage classifications by a State that do not withstand this stringent examination cannot stand.

Nyquist, 432 U.S. at 7 (internal citations omitted). *Nyquist* reaffirms and is consistent with the long line of Supreme Court cases that apply the strict scrutiny standard to state statutes that create alienage classifications when distributing economic benefits or regulating economic activity. *See also Bernal v. Fainter*, 467 U.S. 216, 227-228 (1984) (invalidating a Texas statute that required citizenship for notaries); *In re Griffiths*, 413 U.S. 717, 718-722 (1973) (invalidating a Connecticut statute that prohibited persons who were not U.S. citizens from taking the Connecticut bar examination); *Graham*, 403 U.S. at 370-376 (invalidating statutes in Arizona and Pennsylvania that limited welfare benefits to aliens); *Takahashi v. Fish & Game Comm’n.*, 334 U.S. 414, 418-422 (1948) (invalidating a California statute that allowed citizens to obtain fishing licenses, but prohibited aliens from receiving such licenses).

The Maryland courts have noted that strict scrutiny is a demanding analysis. The Maryland Court of Appeals has stated that since survival of this test requires the State to show that the statute is necessary to promote a compelling state interest “a statute subject to strict scrutiny is nearly always struck down under an analysis which is ‘strict’ in theory and fatal in fact.” *Waldron*, 289 Md. at 707-08. *See Hornbeck*, 295 Md. at 641. The Maryland courts have determined that in order to show sufficient necessity, the State must prove that the statute is narrowly tailored to serve the State’s interest, meaning that it is the least restrictive means to achieve the state’s compelling interest. *See, e.g., Murphy*, 325 Md. at 356. (citing *Graham*, 403 U.S. at 372). In fact, since 1944 the U.S. Supreme Court has only upheld one statute that it reviewed under strict scrutiny. In *Korematsu v.*

U.S., 323 U.S. 214 (1944), the Supreme Court upheld the federal discriminatory statute at issue largely because the government’s compelling interest in preventing espionage and sabotage during a time of world war justified the statute. The Supreme Court also determined that this discrimination was adequately narrowly tailored to achieve the goals of the statute. It is very rare that a statute will satisfy this analysis.

4. The State’s Discrimination Against Immigrant Children Does Not Survive Strict Scrutiny Analysis

As noted above, the State’s action in this matter is subject to strict scrutiny review because the State is discriminating against certain people on the basis of their alienage, a suspect class. This State action affects only one particular suspect class—legal immigrants. The State made this classification by examining only one criterion, immigration status, when determining eligibility for the Medical Assistance program.¹⁸ Therefore, the State must show that its action is necessary to achieve a compelling state interest. In this case, the State cannot make such a showing

The State’s own justification for this action, as Secretary McCann of the Department of Health and Mental Hygiene expressly represented, is to “save” the State money. However, Maryland state courts and even the U.S. Supreme Court (which the Maryland courts look to on constitutional issues) have specifically opined that preservation of a state’s financial resources does not constitute a “compelling state interest.”

The courts have held that fiscal constraints or concerns do not constitute a “compelling state interest” sufficient to justify treating persons in a suspect category differently from others. In fact, the U.S. Supreme Court, which instructs the Maryland courts on constitutional issues, has examined the issue of financial savings as a justification for discriminatory state action. The Supreme Court has repeatedly found that where, as here, strict scrutiny is applied, budgetary defenses cannot serve as the underlying compelling government interest necessary to survive strict scrutiny. Thus, fiscal

¹⁸ The State ostensibly determines eligibility according to another criterion, five year residency in the United States, but this criterion only applies to legal immigrants and no other populations.

concerns are inadequate justification for treating members of a suspect class differently. *See Plyer v. Doe*, 457 U.S. 202, 227 (1982) (finding that preserving the state’s limited public resources was not a legitimate basis for excluding undocumented immigrant children from public schools); *see also Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) (“a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens, so appellees must do more than show that denying free medical care to new residents saves money. . .”).

In fact, the Supreme Court has analyzed budgetary justifications in the context of public assistance programs and determined that financial justifications are inadequate under strict scrutiny. For instance, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court examined certain states’ distribution of welfare benefits according to classifications based on length of residency. The statutes in question required individuals to reside in the state for one year before they were eligible for public benefits. The Court stated:

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes or its citizens. . . The savings of welfare costs cannot justify an otherwise invidious classification.

Shapiro, 394 U.S. at 633 (emphasis added).

The Supreme Court confirmed that financial savings cannot justify denial of benefits to particular groups in *Graham v. Richardson*, 403 U.S. 365 (1971). In *Graham*, the Court examined two state laws that conditioned receipt of state welfare benefits on U.S. citizenship and imposed durational residency requirements. The Court applied the strict scrutiny standard, stating that “[t]he classifications involved in the instant cases . . . are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired.” *Graham*, 403 U.S. at 376. The Supreme Court held that financial concerns cannot serve as a compelling interest that might justify this discriminatory treatment. It found that “a State’s desire to preserve limited welfare benefits for its own citizens is inadequate to justify . . . making noncitizens ineligible for public

assistance benefits and restricting benefits to citizens and longtime resident aliens.” *Graham*, 403 U.S. at 374 (emphasis added). The Supreme Court further highlighted the injustice of the states’ action in saying that “[w]e agree that the ‘justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces.’” *Id.* at 376.

In 1948, the Supreme Court invalidated a discriminatory state statute that was enacted ostensibly to preserve the state’s wealth in natural resources. In *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410 (1948), Taro Takahashi challenged the State of California’s denial of his application for a fishing license. The statute in question limited the issuance of commercial fishing licenses to persons eligible for U.S. citizenship. As an immigrant from Japan, Takahashi was ineligible for citizenship because the U.S. Congress had recently passed legislation proclaiming that citizenship was not available to Japanese immigrants. Finding for Takahashi, the Supreme Court stated that “the Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.” *Id.* at 420. The Court specifically rejected the “special public interest” California asserted in preservation of valuable natural resources of the state.

While it appears that the Maryland Court of Appeals has not had an opportunity to expressly adopt the U.S. Supreme Court’s settled jurisprudence regarding fiscal justifications, the Court of Appeals has similarly suggested that fiscal concerns are inadequate as constitutional justifications for discriminatory treatment, even under a less exacting standard. In *Attorney General of Md. v. Waldron*, 289 Md. 683 (1981), a retired judge challenged the prohibition against collecting his pension while practicing law for compensation. The Court ultimately held that the statute violated the equal protection provisions of both Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. While it did not fully consider the State’s

“*post hoc* rationalization” for the statute (*i.e.*, fiscal concerns), the Maryland Court of Appeals did emphasize that, even under the deferential “rational basis” analysis, financial concerns may not be an adequate justification for discriminatory treatment. The court stated:

[a]lmost every enactment, no matter how invidious, can be justified on the grounds of fiscal restraint. For example, no one can dispute that a statute which denied the non-fundamental right of education to members of a non-suspect class of our citizens would reduce the costs of education, yet neither would anyone dispute that this action, undertaken to serve that sole purpose, would represent a manifest breach of the principles of equal protection.

Id. at 724.

5. Similar Medical Assistance Restrictions Based on Alienage Have Failed to Survive Strict Scrutiny Analysis in Other Jurisdictions and the Same Result Is Required Here

Courts in other jurisdictions have reviewed state medical assistance programs that limit eligibility based on alienage and found them to be unconstitutional. Legal immigrants in New York State successfully raised a similar challenge to that state’s Medicaid program’s exclusion of legal immigrants. In *Aliessa v. Novello*, 96 N.Y.2d 418 (2001),¹⁹ the New York plaintiffs were faced with a state action terminating the non-emergency Medicaid benefits of legal immigrants who had been in the country for fewer than five years, which action is essentially identical to the State’s action in the case at hand. The court determined that the State’s action was unconstitutional under New York’s equal protection guarantees and the U.S. Constitution. The court’s analysis is persuasive here.

First, the *Aliessa* court considered the degree of deference that should be accorded a state policy denying benefits based on an alienage classification, and, consistent with settled Maryland law regarding discriminatory treatment of aliens, it determined that such a decision is subject to a strict scrutiny standard of review. It underscored the U.S. Supreme Court’s rationale that a searching

¹⁹ The *Aliessa v. Novello* opinion is attached hereto as Exhibit 5.

standard was important to remedy discrimination against “discrete and insular minorities” of which aliens are “a prime example.” *Aliessa*, 96 N.Y.2d at 432 (quoting *Graham*, 403 U.S. at 372).²⁰

The Court emphasized that, in contrast to the federal government, states may only discriminate against immigrants if the federal government has “by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass.” *Id.* at 433 (citing *Plyer*, 457 U.S. at 219 n. 19). In the case of PRWORA, which triggered the New York decision and prompted Maryland to continue to provide state Medicaid coverage for legal immigrants even in the absence of a federal match, the federal government did not establish a uniform rule regarding the benefits available from the various states to legal immigrants. Lacking a compelling state interest justification, the New York statute terminating Medicaid eligibility for legal immigrants did not pass strict scrutiny review and, therefore, violated the Equal Protection Clauses of the U.S. and New York State Constitutions.

The same result is required here. Plaintiffs are challenging a Maryland law that targets legal immigrant pregnant women and children for elimination from the basic health care benefits afforded in the Medical Assistance program. The Medical Assistance program had provided coverage to them under Maryland state law, following Maryland’s longstanding commitment to provide coverage to this important and especially vulnerable segment of our community. *See* MD. CODE ANN., HEALTH GEN., §15-103. However, the Governor eliminated funding for the immigrant program in his Budget Bill, citing the need for fiscal austerity as the reason to eliminate a portion of the Medical Assistance program that costs the state approximately \$7 million annually, while leaving in place more costly provisions of the Medical Assistance statute that provide funding for other Maryland residents.

²⁰ The *Aliessa* court addressed the fallacious argument that discriminatory state action should be accorded deference because the state action might reflect or was not inconsistent with federal policy. The *Aliessa* court noted that the federal government could distinguish between aliens and citizens in the allocation of welfare benefits, but stressed that states have no comparable latitude. The *Aliessa* court called into question the underpinnings of PRWORA, remarking that the federal law “[flies] 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 434- 36 (citing *Graham*, 403 U.S. at 382). Plaintiffs here are not challenging PRWORA or any other federal law.

Despite the fact that Maryland is expected to enjoy more than \$503 million in surplus revenue in fiscal year 2006 and more than a \$1.717 billion dollar surplus in the 2007 fiscal year,²¹ the benefits to legal immigrants have not been reinstated. As a result, legal immigrant children and pregnant women are in danger of unnecessary, life-threatening health complications which are ultimately likely to result in greater costs for the State than the cost of inclusion of pregnant legal immigrants and immigrant children in the Medical Assistance program.

C. Plaintiffs Are Entitled to a Preliminary Injunction

In addition to a declaration from this Court that the State's action is unconstitutional, Plaintiffs are seeking an injunction requiring the State to provide health coverage to legal immigrant children. Under Maryland law, a movant is entitled to a preliminary injunction upon satisfying a four factor test:

'(1) the likelihood that the plaintiff will succeed on the merits; (2) the 'balance of convenience' determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.'

Fogle v. H & G Restaurant, Inc., 337 Md. 441, 455-56 (1995) (quoting *Dept. of Transp. v. Armacost*, 299 Md. 392 (1984) (citations omitted)). In this case, Plaintiffs readily satisfy all four factors, and, as such, are entitled to an injunction to protect them from further irreparable harm.

1. **Plaintiffs Are Likely to Succeed on the Merits.**

Plaintiffs are likely to succeed on the merits of their claim. As noted above, the State's denial of basic healthcare benefits to Plaintiffs solely on the basis of alienage is unconstitutional under the Maryland Declaration of Rights. See discussion, *supra* Part III.B. Equal protection

²¹ Comptroller of Maryland William Donald Schaefer reported that: "The more than \$1.717 billion in possible surplus stems from \$603 million in FY 2005 revenue not yet designated for spending in FY 2006, as well as \$503 million in surplus revenue over FY 2006 and \$611 million in FY 2007." News Release, Comptroller of Maryland, Comptroller Schaefer Reports Maryland on Pace to Have \$1.7 Billion in Extra Funds for FY 07 Budget, (Sept. 27, 2005), available at <http://www.comp.state.md.us/publications/nr/current/pr132.asp> (last visited Oct. 24, 2005) [hereinafter Comptroller's News Release].

jurisprudence demands that such discrimination on the basis of alienage must withstand strict scrutiny analysis. *See generally Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Murphy v. Edmonds*, 325 Md. 342 (1992). Under strict scrutiny analysis, the State has the burden of showing that the discrimination is necessary to serve a compelling state interest, and that the State used the least restrictive means available. *See Hornbeck*, 295 Md. at 641-42. As demonstrated above, fiscal concerns – even were they justified in fact – are insufficient to meet this exacting test. *See* discussion *supra* Part III.B.4. It is patently clear that the State’s discriminatory targeting of legal immigrant children does not pass strict scrutiny analysis, and, thus, is unconstitutional.

Plaintiff respectfully directs this Honorable Court to pages 8-18, *supra*, which discuss in greater detail why Plaintiffs will prevail on the merits of this case.

2. The Balance of Convenience or Hardships Supports the Issuance of a Preliminary Injunction

Greater injury will result to Plaintiffs by a refusal of the preliminary injunction than will result to the State by granting of the preliminary injunction. The Maryland Court of Appeals has described this factor as “[t]he principle of comparative hardship.” *State Dept. of Health and Mental Hygiene v. Baltimore County*, 281 Md. 548, 557 (1977). The principle requires the court to “[c]onsider whether greater injury would be done to the defendant by granting the injunction than would result to the plaintiff from its refusal.” *Id.* Such a comparison lends further support to Plaintiff’s request for a preliminary injunction because denial of the injunction will cause Plaintiffs significant tangible harm, which cannot be remedied, while granting the injunction will cause the State minimal hardship or inconvenience.

As explained above, Defendants’ unconstitutional discrimination denies Plaintiffs access to necessary healthcare. Plaintiffs are suffering and will continue to suffer great harm as a result of the State’s action because they can no longer receive the regular treatments and other healthcare that they require and cannot otherwise afford. For instance, Dr. Nita Seibel, Brayan’s treating physician,

states that the “[i]nterruption of [Brayan’s] care and testing seriously jeopardizes his health in ways that may not be reparable.” Seibel Aff. at ¶ 12. Specifically, medical protocol calls for additional laboratory tests and monitoring in order to treat his serious conditions of Histiocytosis and possible condition of vonWillebrand Disease. *Id.* at ¶ 10-12. As Brayan’s family cannot afford to provide this care that would have been covered under the Medical Assistance program. Brayan is at great risk for recurrence of his condition. *See* H. Aff. at ¶ 9. He is suffering from other untreated symptoms. All of the Plaintiffs need well-child care, preventive screenings, immunizations, and other ongoing care that children typically require. *See* H. Aff.; N. Aff.; P. Aff. Plaintiffs cannot afford this care and treatments, and are subject to great risk to their health and other harm without this care. In the absence of an injunction, Plaintiffs will suffer serious physical harm that is not compensable in monetary damages as a result of the State’s action.

In comparison, the State will suffer far less hardship or inconvenience than the Plaintiffs if this Honorable Court grants the injunction. Prior to the illegal and discriminatory cut-off, the State funded this healthcare through its well-established Medical Assistance program for almost a decade. The cost of the program is minimal, particularly in light of the significant budget surplus the state enjoys. *See* discussion *supra* Part II.E. In fact, Comptroller Schaefer has called on the State to restore the funding for health care for immigrant pregnant women and children. Comptroller Schaeffer urged the Governor to “[p]lan responsibly for the future [by] giving back to some very important programs.” Comptroller’s News Release, *supra*. Accordingly, the Comptroller highlighted that the State should “restore[] \$7 million in health care funding for pregnant legal immigrant mothers and their children” because “restoring some of the budgetary costs most in need, now, is smart and will save the state money in the long-run.” *Id.*²² Thus, it is clear that the Comptroller – as the financial watchdog for the State – is in agreement that it is in the State’s interest to provide this

²² The Comptroller also recommended reinstating approximately \$80 million in health care cuts in total. *See* Thomas Dennison, *State Surplus Up to \$1.7 Billion*, THE GAZETTE, Sept. 28, 2005, available at http://www.gazette.net/stories/092805/montcou203010_31905.shtml (last visited Oct. 21, 2005).

medical care to individuals like the Plaintiffs. Also, since the State had been administering these benefits until July 1, 2005 under its Medical Assistance program, the infrastructure is in place to restore coverage and provide the benefits.²³ Thus, in light of the State's strong financial situation and the fact that an injunction merely seeks to restore benefits within an ongoing program that already has all of the administrative apparatus it needs to provide them, an injunction requiring continuation of these benefits imposes minimal inconvenience on the State.

3. Plaintiffs Will Suffer Irreparable Injury Unless the Injunction is Issued

Plaintiffs will suffer irreparable harm without the issuance of a preliminary injunction in this matter. As the U.S. Supreme Court suggests in *Elrod v. Burns*, 47 U.S. 347 (1976), when a plaintiff is deprived of a constitutional right, like the Plaintiffs here, no further showing of irreparable injury is required to show entitlement to injunctive relief. Thus, the violation of Plaintiffs' rights under the Maryland Declaration of Rights is sufficient to resolve this matter in Plaintiffs' favor. *See* discussion, *supra* Part III.B (explaining how the State has violated Plaintiffs' rights under the Maryland Declaration of Rights).

In addition to deprivation of their rights, the Plaintiffs are suffering and will continue to suffer tangible, physical harm that cannot be remedied later in the absence of the requested injunction. The State's illegal discrimination has deprived Plaintiffs of healthcare that they desperately need. Their need for medical care is immediate and significant. For instance, Flor suffers from a very serious condition of West Nile virus, which required extensive hospitalizations and treatments. *See* Aff. P. at ¶ 16, 21-22. Her doctors have indicated that she still needs significant follow-up treatment and care, including speech therapy. *See* Aff. P. at ¶ 16, 21-22. Additionally, she

²³ In fact, proposed regulations implementing the discriminatory eligibility qualification were expressly rejected by the Maryland General Assembly's Administrative, Executive and Legislative Review Committee which voted 8-3 against them. As a result, the State does not have any regulations in place that implement this new eligibility standard, leaving the local Department of Social Service workers responsible for applying the new law without any guidance whatsoever since the State does not have any permanent regulations in place that implement this new eligibility standard.

also requires medications to prevent additional seizures and will need tuberculosis medications for the next nine months. *See id.* at ¶ 22. Her doctors have suggested that this treatment is necessary to prevent Flor's condition from further deterioration and to recover her speech abilities. Her family cannot afford to provide this care that would have been covered if Flor's Medical Assistance benefits had not been terminated. *See id.* at ¶ 8. Brayan's disease is currently in remission, but his condition needs constant monitoring. Without such treatment that the State had previously provided, this seven year old boy's condition could return undetected and severely sicken him and possibly result in a fatal illness. His treating physician attests that the "[i]nterruption of [Brayan's] care and testing seriously jeopardizes his health in ways that may not be reparable." Seibel Aff. at ¶ 12. Dr. Seibel noted that Brayan's condition is life-threatening, explaining "[l]eft untreated, Histiocytosis can be fatal." *Id.*, at ¶ 8. Medical protocol indicates that this serious disease should be monitored very carefully. *See id.* at ¶ 9. Brayan should be undergoing additional laboratory tests and monitoring in order to treat his Histiocytosis and possible condition of vonWillebrand Disease. *See id.* However, Brayan's family cannot afford to provide this care that would have been covered under the Medical Assistance program, and Brayan's health suffers in the absence of care. All of the Plaintiffs will suffer irreparable harm in the absence of well-child care, preventive screenings, immunizations, and other ongoing care that children require and to which they are entitled under one of the most important provisions of the Medical Assistance program. According to the Maryland Chapter of the American Academy of Pediatrics, "[c]hildren require 20 doses of vaccine before they are 2 years old to protect them from 11 diseases vaccines prevent." Lichenstein Aff. at ¶ 5; Levy Aff. at ¶ 5.²⁴ Additionally, the Maryland Chapter of the American Academy of Pediatrics recommends "[a] series of annual examinations including a full physical examination, developmental assessment and vision and dental examinations" to maintain the health in children. *Id.* The American Academy of

²⁴ The Affidavit of Richard Lichenstein, MD is attached hereto as Exhibit 6. The Affidavit of Daniel Levy, MD is attached hereto as Exhibit 7.

Pediatrics notes that such care is particularly important at this time because “Recently, in the national news, threats of infectious diseases have been highlighted, including the Avian Flu. Young children are vulnerable to preventable infectious diseases like this one. In this time potentially increased risk of infectious diseases, health care for all children, including those who are most vulnerable is considered best practice.” *Id.* at ¶ 8. As Plaintiffs’ families cannot afford to provide this care and treatments in the absence of State assistance, the Plaintiffs will suffer great risk and potentially irreparable harm to their health. The risk of harm, even death, in this matter is great and entirely unjustified and unreasonable because the State’s act is unconstitutional and repugnant to established public policy.

4. The Public Interest Supports the Issuance of the Injunction

The public interest unquestionably supports the issuance of a preliminary injunction in this case. The General Assembly has spoken on this issue on many occasions, finding that support for this program is both morally required and financially sound. As described above, the 1997 Governor’s Task Force on the loss of federal coverage for legal immigrant pregnant women and children identified the public policy considerations and found: “The new Acts’ treatment of legal immigrants is not justified by any legitimately articulated policy goal...By electing not to abandon some of the most vulnerable segments of its population, Maryland has not only made a wise economic decision, but also has demonstrated that, at least in our State, compassion in government remains a cherished American virtue.” REPORT OF THE GOVERNOR’S TASK FORCE, *supra*, at 17. Recently, Maryland General Assembly’s Administrative, Executive and Legislative Review Committee reaffirmed that the public interest requires health care for legal immigrant children and legal immigrant pregnant women. This body voted against the State’s proposed regulations implementing the new eligibility criteria. Sen. Robert J. Garagiola’s statement suggests that the Review Committee was concerned about the long-term financial costs to the State and the consequences to the affected populations. He stated: “In the end, it is going to cost the state and

health care system more by eliminating health coverage for these pregnant women and children, and will also lead to negative health consequences for them.” Press Release, Senator Robert J. Garagiola, Garagiola Successfully Leads Effort to Reject Ehrlich Administration Regulations (Sept. 28, 2005). Thus, the Review Committee endorsed Maryland’s consistent recognition that the public interest requires compassionate support of immigrant pregnant women and immigrant children by insuring that they will continue to have access to basic healthcare.

It is clear that a relatively small investment in healthcare coverage for immigrant children is a fiscally sound policy. Delaying the diagnosis and treatment of children’s medical needs until they have lived in the United States for five years will result in greater suffering and other human costs, and greater monetary costs to the State. This delay in treatment will permit conditions that might have been treated immediately and easily with minimal costs to develop into costly, chronic conditions with significant consequences to the affected child and greater financial costs to the State. For instance, Dr. Ulder Tillman, Health Officer for Montgomery County, Maryland, who “oversee[s] the delivery of health services to county residents, including legal immigrant children and pregnant women,” explains that “[c]ommon illnesses, left untreated, can become much more harmful to the child. For example, common ear infections that are left untreated can develop into meningitis, a serious and potentially deadly illness.” Tillman Aff. at ¶ 3 and 13.²⁵ Plaintiffs’ families do not have the financial means to provide the necessary medical care for their children. Belying the legitimacy of the State’s purported interest, its own chief financial officer, the Comptroller, has concluded that fiscal considerations weigh in favor of restoring, rather than eliminating the program. Issuance of an injunction is thus in keeping with well established medical, fiscal and public policy that dictate that legal immigrant children should be afforded health care coverage under the Medical Assistance program and it is therefore in the public interest.

²⁵ The Affidavit of Ulder Tilman, MD, MPH is attached hereto as Exhibit 8.

IV. CONCLUSION

The State’s discriminatory action of eliminating all funding for healthcare coverage for legal immigrant children who have resided in the United States for fewer than five years violates Plaintiffs’ equal protection rights under the Maryland Declaration of Rights. The State’s failure to provide basic and specialized health care coverage to Plaintiffs has harmed Plaintiffs, caused unnecessary suffering, and will result in irreparable injury if Plaintiffs are not granted injunctive relief in this matter. Issuance of an injunction is appropriate in this matter because the likelihood of success on the merits, together with the balance of convenience and public interest factors fall decisively in the Plaintiffs’ favor. Immediate, injunctive relief will prevent further irreparable harm to these young, vulnerable members of our society.

Respectfully submitted,

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