UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HANS BRUNS, et. al. Plaintiffs v. MARY MAYHEW, Commissioner, Maine Department of Health and Human Services, Defendant.	)	Civil Action No.: 1:12-cv-00131-JAW

Plaintiffs' Opposition to Defendant's Motion to Dismiss

The Defendant seeks to justify her conduct on two bases. First, the Defendant urges this Court to look past the allegations in the Complaint to find that a separate medical assistance program and/or benefit for legal non-citizens existed and, because of this unnamed and undesignated program, Hans Bruns and the putative class are not similarly situated to other beneficiaries of the MaineCare program. As alleged in the Complaint and in reality, though, both citizens and non-citizens were enrolled in the same MaineCare program. The non-citizens entered the program by filling out the exact same MaineCare application; their eligibility was determined pursuant to the exact same eligibility guidelines; and they received the exact same MaineCare cards that entitled them to receive the exact same MaineCare benefits. The critical event that triggered this litigation was the receipt of a form letter from the Defendant informing the Plaintiff and the putative class of a change in their "MaineCare coverage." The Defendant therefore cannot justify her wrongful conduct by now claiming that Mr. Bruns and members of the putative class were enrolled in a separate unnamed, secret program.

Second, the Defendant attempts to shift the Court's focus from the allegations in the

Complaint that termination of legal non-citizens' eligibility for full MaineCare is a violation of the Constitution to an examination of the federal government's conduct in enacting the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). Congress's power to enact legislation addressing immigration is not at issue. Instead, the question is whether the Plaintiffs have made sufficient plausible allegations in the Complaint to state a claim that the Defendant violated the Plaintiffs' right to the equal protection of the law. The allegations in the Complaint more than suffice to state a claim against the Defendant.

ARGUMENT

In ruling on a motion to dismiss, a court is required to "accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff." *Knowlton v. Shaw*, 708 F. Supp. 2d 69, 74 (D. Me. 2010). To state a claim under 42 U.S.C. § 1983, the Plaintiffs must allege facts establishing that a state actor has deprived them of a right, privilege or immunity secured by the United States Constitution or statute. *Eldredge v. Town of Falmouth*, 662 F.3d 100, 104 (1st Cir. 2011); *Tobin v. Univ. of Maine Sys.*, 62 F. Supp. 2d 162, 165 (D. Me. 1999); 42 U.S.C. § 1983. In evaluating the Defendant's pending Motion to Dismiss, this Court must review the Complaint to determine whether the Plaintiffs have pled "sufficient facts to show that [they have] a plausible entitlement to relief." *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 41 (1st Cir. 2009) (internal citations omitted). The Plaintiffs' factual allegations here are both plausible and well-documented and, aside from the Defendant's attempt to create a factual dispute about whether MaineCare was a single, unified program, are essentially admitted by the Defendant.

A. The Allegations in the Complaint.

Hans Bruns is a lawful permanent resident who has received MaineCare, Maine's low-

income healthcare program, since December 2010. Complaint ¶¶ 1, 9, 29. He was diagnosed with adenoid cystic carcinoma of the right parotid gland in late 2011 or early 2012. *Id.* ¶ 30. Mr. Bruns requires medical care and treatment for his condition, including MRI imaging, resection of the lesion, radiation, and chemotherapy, and prescription medications, but cannot afford to pay for that care without state subsidy. *Id.* ¶¶ 30, 32. Without the necessary treatment, his condition will ultimately result in death. *Id.* ¶ 30.

In September of 2011, Mr. Bruns received a letter from the Department of Health and Human Services ("DHHS"), the State agency of which Defendant Mary Mayhew is the Commissioner, informing him that his MaineCare coverage was being reduced because of a change in state law. *Id.* ¶¶ 11, 31. This form letter terminating MaineCare benefits was sent to approximately 500 non-citizens. *Id.* ¶¶ 3, 15.

Since at least 1973, the State of Maine has provided full medical assistance benefits (now called MaineCare) to non-citizens lawfully residing in Maine. *Id.* ¶ 2. Full MaineCare benefits were offered to non-citizens lawfully residing in the State of Maine and citizens on the same terms through the same MaineCare program. *Id.* ¶ 27. In June 2011, however, the Maine Legislature passed P.L. 2011, ch. 380, § KK-4, which terminated full MaineCare benefits for all lawful permanent residents who had not resided in the United States for at least five years and certain other non-citizens lawfully residing in Maine. *Id.* ¶ 2. United States citizens were not affected by the enactment of this law. *Id.* The Defendant has acknowledged that the disparity in treatment was based on alienage. Def.'s Motion to Dismiss at 2, 8. Plaintiffs' Complaint alleges that DHHS's denial of benefits to non-citizens based solely upon their alienage and immigration status violates the Equal Protection guarantees of the United States Constitution. *Id.* ¶¶ 4, 36-40.

B. The Defendant impermissibly discriminated against the Plaintiffs on the basis of their alienage in violation of the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). *See also Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." (internal quotation marks omitted)). Non-citizens as a class are a "discrete and insular minority," and "classifications based upon alienage . . . are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (internal quotation marks and citations omitted). For that reason, state legislative action that treats non-citizens differently than citizens is subject to strict scrutiny, requiring the State to "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217.

Recognizing that the "formula for determining whether individuals or entities are 'similarly situated' . . . is not always susceptible to precise demarcation," *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortgage Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001), the First Circuit has provided helpful guidance in the form of the following "prudent person" standard:

> The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.

Id. (quoting *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 19 (1st Cir. 1989)). A complaint alleging an Equal Protection violation will survive a motion to dismiss "as long as the 'similarly situated' prong of the equal protection rubric is satisfied by an allegation that the plaintiff was a member of the class . . . thereby supporting the essential implication that class

members are similarly situated in all relevant aspects." *Id.* at 10 (citing *Interboro Inst., Inc. v. Maurer*, 956 F. Supp. 188 (N.D.N.Y. 1997)).

The State of Maine's discriminatory conduct in enacting P.L. 2011, ch. 380, § KK-4, and the Defendant's administration of that law is plainly a classification based upon alienage and therefore subject to strict scrutiny. *See Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984); *Graham*, 403 U.S. at 371-72. In an attempt to avoid the application of strict scrutiny, the Defendant utilizes word play, applying great effort to look past the allegations in the Complaint to contort the MaineCare program to support her claim that there are no similarly situated citizens and that the termination of legal non-citizens' MaineCare benefits was not because of their alienage. The fact of the matter is that citizens and legal non-citizens were eligible for and enrolled in the exact same program. As alleged in the Complaint, there was never a non-citizen-only program and, accordingly, no termination of such a non-existent program. Complaint ¶¶ 2, 23, 27-28. In reality, MaineCare was terminated for certain individuals based solely on their alienage and immigration status.

1. MaineCare was a single program providing the same benefits to both citizens and the putative class, including Hans Bruns, on the same terms.

The Defendant contends that Maine never offered a single, unified medical assistance benefit to both non-citizens and citizens, and then launches into an argument about the "semantics" of the term "MaineCare." Def.'s Motion to Dismiss at 13. Semantics do matter, but Plaintiffs have based their case on more than semantics. The Defendant wishes the Court to look beyond the allegations in the Complaint and resolve the factual dispute she is attempting to create surrounding whether MaineCare was a single program. This line of attack, whether viewed as requiring a heightened pleading standard or imposing a quasi-summary judgment

approach, is improper at this stage in the litigation. *See SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28, 34 (1st Cir. 2008) (noting that civil rights actions are not subject to a heightened pleading standard); *Interboro Inst., Inc. v. Maurer*, 956 F. Supp. 188, 200 (N.D.N.Y. 1997) (denying motion to dismiss and finding defendants' argument regarding the merits of the plaintiff's equal protection allegations improper because the defendants were trying to "compel the Court to treat th[e] motion as one for summary judgment"). Instead, the Court should review the facts as alleged in the Complaint to determine whether the Plaintiffs' claim is supported by "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Eldredge*, 662 F.3d at 104.

Read in the light most favorable to the Plaintiffs, as the Court is obligated to do when analyzing a motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6), the Complaint contains sufficient facts to establish that the Plaintiffs were selectively treated based upon their alienage when compared with others similarly situated. *See Barrington Cove Ltd. P'ship*, 246 F.3d at 5, 7. Until October 1, 2011, Mr. Bruns and other legal non-citizens were eligible for participation in the MaineCare program on the same terms as citizens. Complaint ¶¶ 1-2, 9, 27-32. Following passage of P.L. 2011, ch. 380, § KK-4, Mr. Bruns and other members of the putative class were terminated from the MaineCare program solely because of their alienage. *Id.* ¶¶ 9, 28, 31-33. The Defendant admits that the termination was based on alienage. Def.'s Motion to Dismiss at 2, 8. The termination was effected by the Defendant in her official capacity as the head of the department that administers MaineCare. Complaint ¶¶ 1, 11-12. These allegations are more than sufficient to establish that "compared with others similarly situated, [Plaintiffs were] selectively treated . . . based on impermissible considerations." *Barrington Cove Ltd. P'ship*, 246 F.3d at 7 (internal quotation marks omitted).

Even if this Court were to engage in the Defendant's factual argument regarding the merits of the allegations in the Complaint, the actual history and structure of MaineCare highlights the flaw in the Defendant's position. Contrary to the Defendant's suggestions, MaineCare is not just a meaningless label and DHHS's prior references to MaineCare benefits were not mistakes. Def.'s Motion to Dismiss at 13. As alleged in the Complaint, MaineCare is the one and only program that provided medical assistance benefits to Maine's medically indigent, and until 2011 it provided that assistance to both citizens and legal non-citizens on the same terms. Complaint ¶¶ 2, 18, 27-28. *See also* 10-144 C.M.R. chs. 101, 332. Although it is unclear whether the Defendant is arguing that the MaineCare program provided two different types of benefits, one to citizens and one to non-citizens, or whether there existed two different programs, one called MaineCare and one a nameless program, *see* Def.'s Motion to Dismiss at 13, 15, neither is true.

Previously known as the Maine Medical Assistance Program, MaineCare has provided medical assistance benefits to both citizens and legal non-citizens since at least 1973. *See* P.L. 1973, ch. 790, § 2. *See also* 10-144 C.M.R. ch. IV, § 1, Secretary of State Rule Log #78-22 (effective July 1, 1978) (Assistance Payments Manual). The 1973 legislation, codified at 22 M.R.S. §§ 3172-3282, authorized and empowered the Department of Health and Human Services to

> make all necessary rules and regulations, consistent with the laws of the State of Maine, for the administration of these programs [of aid, medical or remedial care and services for medically indigent persons] including, but not limited to, establishing conditions of eligibility and types and amounts of aid to be provided, and defining the term 'medically indigent,' and the type of medical care to be provided.

22 M.R.S. § 3173.

As authorized and empowered, DHHS created eligibility rules for the Medical Assistance

Program. *See* 10-144 C.M.R. ch. IV, § 1, Secretary of State Rule Log #78-22 (effective July 1, 1978) (providing scope and requirements of the Maine Medical Assistance Program within the Assistance Payments Manual); 10-144 C.M.R. ch. 332, Secretary of State Rule Log #88-64 (effective Feb. 29, 1988) (Medical Assistance Eligibility Manual). The citizenship section of the Medical Assistance Eligibility Manual remained surprisingly consistent throughout the years. In July 1990 and January 1996, for example, that section of the Manual provided, in relevant part:

> **1200 BASIC ELIGIBILITY REQUIREMENTS**
> 1210 Citizenship
> . . . .
> An individual must be a citizen of the United States or a lawfully admitted alien. An individual who is not a citizen of the United States must be an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under the color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203(a)(7), 207(c), 208 and 212(d)(s) of the Immigration and Nationality Act). An individual who has resided in the United States continuously from any date before January 1, 1972, is considered a legally admitted alien.

10-144 C.M.R. ch. 344, § 1210 (rev. 07/90); 10-144 C.M.R. ch. 344, § 1210 (rev. 01/96).

In 1996, Congress enacted PRWORA and altered the States' ability to seek federal reimbursement for benefits provided to certain non-citizens who did not meet a 5-year residency requirement. Pub. L. No. 104-193, 110 Stat. 2105 (1996); 8 U.S.C. § 1613(a). *See also* 42 C.F.R. § 430.30 (outlining Medicaid reimbursement process). Rather than prescribing a uniform rule for the treatment of non-citizens, however, PRWORA granted the States discretion to determine whether to provide services for non-citizens who did not meet the 5-year residency requirement, based solely on state funding. 8 U.S.C. § 1622(a).

In response to PRWORA, the Maine Legislature enacted P.L. 1997, ch. 530, which provided that DHHS must expend funds

> [t]o provide financial and medical assistance to certain noncitizens legally

> admitted to the United States. Recipients of assistance under this subparagraph are limited to the categories of noncitizens who would be eligible for the TANF or Medicaid programs but for their status as aliens under PRWORA. Eligibility for the TANF and Medicaid programs for these categories of noncitizens must be determined using the criteria applicable to other recipients of assistance from these programs.

P.L. 1997, ch. 530, § A-16 (codified at 22 M.R.S. § 3762(3)(B)(2)).[1] The Legislature's reference to "medical assistance" was no accident, and it was clearly referring to Maine's Medical Assistance Program. Importantly, this directive required DHHS to continue to determine legal non-citizens' eligibility for the TANF and Medical Assistance Programs pursuant to the standards applicable to "other recipients of the programs." *Id.*

The Defendant contends that the 1997 legislation created a new and different benefit. Def.'s Motion to Dismiss at 9, 13. Both before and after passage of this law, however, citizens and legal non-citizens were eligible for the exact same program and the exact same benefits pursuant to the exact same terms. *Compare* 10-144 C.M.R. ch. 344, § 1210 (rev. 07/90), *with* 10-144 C.M.R. ch. 344, § 1210 (rev. 12/98). There was no creation of a new program for only non-citizens and there was no delineation of different benefits for citizens and legal non-citizens. [2]

In 2002, the Maine Legislature enacted "An Act to Increase Access to Health Care" and changed the name of the Medical Assistance Program to MaineCare. P.L. 2001, ch. 450, § C-2. This legislation transferred everything from the prior program to MaineCare, including appropriation and allocation of funding, contractual arrangements, and "all assets, liabilities and

[1] In support of her argument that the 1997 legislation created a new benefit to non-citizens, the Defendant notes that the legislation did not mention MaineCare. Def.'s Motion to Dismiss at 13. Although this is technically true, the legislation could not have mentioned MaineCare because, as explained below, the program was not renamed "MaineCare" until 2002. P.L. 2001, ch. 450, § C-2.

[2] Interestingly, although the MaineCare Eligibility Manual does refer to five separate State-funded benefits administered by the Office for Family Independence, none are the alleged "separate medical benefits" provided only to legal non-citizens. The five separate benefits programs contained within the MaineCare Eligibility Manual are: (1) Health Insurance Purchase Option; (2) Low Cost Drugs for the Elderly and Disabled; (3) Maine Rx Plus; (4) State Supplement to SSI; and (5) Spousal Living Allowance. 10-144 C.M.R. ch. 332, Pt. 2, § 1 (rev. 09/2010).

responsibilities of the department." *Id.* As required, DHHS changed the program name to MaineCare when it "print[ed] new materials pertaining to the Medicaid program." *Id.* Although the Medical Assistance Eligibility Manual changed in name to the MaineCare Eligibility Manual, much of the relevant provisions and language remained the same. Following the change in name to MaineCare, the Eligibility Manual provided that to receive "Full Benefits an individual must be a citizen of the United States or be a lawfully admitted alien. . . . An individual who has resided in the United States continuously from any date before January 1, 1972, is considered a legally admitted alien." 10-144 CMR Ch. 344, § 1210 (rev. 12/2002).

Before it was amended in December 2011, as with all prior versions, the MaineCare Eligibility Manual provided that lawful non-citizens were eligible for full MaineCare benefits:

> **SECTION 3 CITIZENSHIP**
>
> To receive MaineCare benefits, an individual must be either a citizen of the United States or be a qualified alien in one of the groups listed in the charts below.
>
> I. Citizens
> . . . .
> II. Non-Citizens
>
> An individual who is not a citizen of the United States must be an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States. A lawfully admitted alien will include, either:
>
> A. an individual who has resided in the United States continuously from any date before 1/1/72; or
> B. an individual who meets the requirements and characteristics of the groups named in the chart below.
>
> . . . .
>
> **Below is a listing of non-citizen groups eligible for Full Benefits.**

10-144 C.M.R. ch. 332, pt. 2, § 3 (rev. 09/2010). Lawful non-citizens' eligibility for full MaineCare benefits continued until the Maine Legislature passed P.L. 2011, ch. 380, terminating their ability to receive medical assistance, and DHHS amended the MaineCare Eligibility

Manual to impose a 5-year wait period upon receipt of benefits for only non-citizens. *See* P.L. 2011, ch. 380, § KK-4; 10-144 C.M.R. ch. 344, § 1210 (rev. 12/2011).

Despite the functional reality of MaineCare, the Defendant contends that there existed two "programs," one providing benefits to citizens and one providing benefits to legal non-citizens, and points to a difference in funding structure. This is a red herring. The providers that render services to individuals enrolled in MaineCare were paid by the same entity: the State of Maine. 10-144 C.M.R. ch. 101, § 1.11-1 (rev. 02/2011) ("The Office of the State Treasurer issues all payments."). *See also U.S. ex rel. Feldman v. City of New York*, 808 F. Supp. 2d 641, 645 (S.D.N.Y. 2011) (noting that the Medicaid structure obligates each State to "directly pay[] health care providers for services). Although the State may be entitled to seek reimbursement from the federal government for some payments it has made to providers, *see* 42 C.F.R. § 430.30, that does not change the core characteristics of the Plaintiff and the putative class or somehow make them fundamentally different than the United States citizens who continue to be eligible for the MaineCare program.[3]

As this historical analysis reflects, and as alleged in the Complaint, citizens and legal non-citizens were always eligible for the same MaineCare program and the same MaineCare benefits. *See, e.g.,* Complaint ¶¶ 2, 27-28. A prudent person would certainly view the two classes as not only "roughly equivalent" but nearly identical in all respects but for alienage. *See Barrington Cove Ltd. P'ship*, 246 F.3d at 8. Everything that concerns or touches both classes of individuals are identical in all relevant aspects: they were eligible for participation in the MaineCare program pursuant to the same terms; they were eligible for the same covered benefits; all providers submitted their claims for payment to MaineCare; and, in response to

[3] As the Massachusetts Supreme Court described, this is merely a "financial impediment to State action." *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1277 (Mass. 2011).

claims, providers were paid by the State of Maine. 10-144 C.M.R. chs. 101, 332. In short, apples are being compared to apples. *See Barrington Cove Ltd. P'ship*, 246 F.3d at 8.

2. A comparison of the two similarly situated classes can only result in the conclusion that the Defendant denied benefits to non-citizens on the basis of their alienage.

The two similarly situated classes of MaineCare recipients are indistinguishable but for their alienage. Complaint ¶¶ 9, 27-28, 39. Public Law 2011, ch. 380, § KK-4 and the Defendant's administration of that law created these two classes and then imposed a five-year wait period on the non-citizens. *Id.* ¶¶ 28, 32. *See also* 10-144 C.M.R. ch. 332, pt. 2, § 3 (rev. 12/2011). Because the Defendant concedes that "similarly situated aliens and citizens in Maine now have unequal access to government-funded medical assistance" and that "there is no dispute that a subset of legal aliens has been denied benefits to which similarly situated citizens are entitled," Def.'s Motion to Dismiss at 2, 8, the Court must ultimately conclude that the Defendant's classification based on alienage is a violation of the Plaintiff's right to equal protection and deny the Defendant's Motion to Dismiss. *See, e.g., Unthaksinkun v. Porter*, No. C11-0588JLR, 2011 WL 4502050, at *25 (W.D. Wash. Sept. 28, 2011) (granting preliminary injunction and concluding that the state's voluntary imposition of "facially discriminatory federal Medicaid standards" to exclude non-citizens from a program that had existed for 20 years was likely an Equal Protection violation); *Korab v. Koller*, No. 10-00483 JMS/KSC, 2010 WL 4688824, at ** 2, 7, 11-12 (D. Haw. Nov. 10, 2010) (denying motion to dismiss and finding Complaint alleged Equal Protection violation when State of Hawaii terminated certain non-citizens from a unified medical assistance program and created a new, more narrow program containing only non-citizens); *Ehrlich v. Perez*, 908 A.2d 1220, 1243-45 (Md. 2006) (holding plaintiffs demonstrated a likelihood of success on the merits of their equal protection challenge

that the State of Maryland's failure to appropriate funds for medical benefits to certain immigrants was discrimination based upon alienage); *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1273-80 (Mass. 2011) (*"Finch I"*), *reported after remand,* 959 N.E.2d 970 (Mass. 2012) ("*Finch II"*) (describing the state's Commonwealth Care program as a unified program for citizens and non-citizens, addressing the state's decision to voluntarily adopt discriminatory eligibility requirements, and answering a reported question that state classification based on alienage should be subject to strict scrutiny); *Aliessa v. Novello*, 754 N.E.2d 1085, 1098-99 (N.Y. 2001) (holding New York statute requiring lawful permanent residents to wait five years for coverage under state-funded Medicaid to be discrimination based upon alienage and a violation of the state and federal equal protection clauses).

Although conceding disparate treatment, the Defendant attempts to justify her wrongful treatment by relying primarily[4] on two cases: *Pimentel v. Dreyfus*, 670 F.3d 1096 (9th Cir. 2012), and *Pham v. Starkowski*, 16 A.3d 635 (Conn. 2011). Neither case is supportive, however, because both involved the termination of entirely separate and distinct programs that included only non-citizens.[5] *See Pimentel*, 650 F.3d at 1107-08 (contrasting the state "FAP" program, a separate non-citizen-only food assistance program, to the federal "SNAP" program); *Pham*, 16 A.3d at 641-42 (contrasting the state medical assistance for noncitizens program, "SMANC," which was a separate program created in response to PRWORA that included only non-citizens, and the federal Medicaid program). Instead, the termination of the Plaintiff and the putative

[4] The Defendant also cites to *Doe v. Comm'r of Transitional Assistance,* 733 N.E.2d 404, 411 (Mass. 2002), and *Soskin v. Reinertson*, 353 F.3d 1242, 1255-56 (10th Cir. 2004). Those cases are also unsupportive of the Defendant's position because they involved separate programs created for and containing only non-citizens. *See Finch*, 946 N.E.2d at 1274 n.14 (describing *Doe* as involving "two separate programs"); *Soskin v. Reinertson*, 353 F.3d 1242, 1255-56 (10th Cir. 2004) (describing Colorado's state Medicaid program as containing two separate programs).

[5] Unlike Maine, Connecticut and Washington specifically provided for separate programs containing only non-citizens by statute or rule. *Compare* 22 M.R.S. § 3762(3)(B)(2), *with* RCW 74.08A.120(1) (12/31/2005) ("food assistance program for legal immigrants").

class from the MaineCare program mirrors the programs addressed in *Finch I, Finch II*, and *Aliessa*, which involved the exclusion of non-citizens from a single program providing a single benefit to all eligible individuals. *See Pimentel*, 670 F.3d at 1108, nn.12, 13 (distinguishing *Aliessa* by describing the New York program as providing benefits to "needy recipients without distinguishing between citizens and legal aliens" and distinguishing *Finch I* by noting that the Massachusetts program was a "single program distributing a single benefit to eligible individuals, with the federal government reimbursing Massachusetts for those recipients eligible for federal Medicaid").

Both as alleged in the Complaint and as supported by an historical review of its functioning, there was only one MaineCare program providing one type of benefits to citizens and non-citizens. The Defendant's creation of two classes that are indistinguishable but for their alienage, and categorical discrimination against the non-citizen class is a clear violation of the Equal Protection Clause of the United States Constitution. Because the allegations in the Complaint sufficiently allege this violation, this Court should deny the Defendant's Motion to Dismiss.

C. The federal government's actions do not authorize the violation of Plaintiffs' right to Equal Protection of the law.

The Defendant is correct that the Plaintiffs have not alleged any unconstitutional action by the federal government, but she wishes the Court to believe that this was an unstated acknowledgement that the Defendant's action was permissible under federal law. Def.'s Motion to Dismiss at 18. It is not. First, the Defendant, not the federal government, was the wrongful actor in terminating the Plaintiffs' participation in MaineCare, the State's medical assistance program. Complaint ¶¶ 2-4, 9-12, 27-28, 31-33. Second, the Plaintiffs recognize the differing standards that apply to the treatment of aliens by state and federal officials. *Compare Matthews*

v. Diaz, 426 U.S. 67, 80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."), *with Graham*, 403 U.S. at 372 ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." (internal citations and quotation marks omitted)).

Courts have recognized one and only one posture in which it is appropriate for state action to be reviewed in light of this more deferential federal standard—where states are implementing a national uniform immigration policy. *See Plyler*, 457 U.S. at 219 n.19 (striking down a state program that limited access to public education for aliens while acknowledging that "if the Federal government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction"). But, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Graham,* 403 U.S. at 382.

The federal government has not prescribed a national uniform immigration policy with regard to access to medical care. Instead, in PRWORA, the federal government authorized individual states to decide for themselves whether to provide medical care for medically indigent aliens who had been in the country less than five years. *See* 8 U.S.C. §1622(a) (providing that "a state is authorized to determine [a qualified alien's] eligibility for any State public benefits"). PRWORA embodies neither a national policy nor a uniform policy with regard to aliens. *Cf. Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985) (refusing to enjoin state officials from following federal direction with regard to providing welfare benefits to ineligible aliens). Congress did not even express a preference in PRWORA for how states would treat medically

indigent aliens within their jurisdiction. The Defendant has not identified a single provision in PRWORA suggesting enactment of a national uniform policy, nor can she.

Instead, the Defendant relies heavily on the Ninth Circuit's decision in *Pimentel v. Dreyfus*, 670 F.3d 1096 (9th Cir. 2012), which addresses the constitutionality of Washington's termination of a state food-assistance program. Def.'s Motion to Dismiss at 19. As addressed above in Part B.2, *Pimentel* is factually distinct, addressing separate state and federal programs involving food assistance. Further, whether or not Congress implemented a national uniform policy with regard to food assistance is outside the scope of this case, which concerns health care policy. Numerous courts have concluded that PRWORA did not enact a uniform national immigration policy for medical benefits.[6] *See, e.g., Unthaksinkun*, 2011 WL 4502050, at **26-27 (holding PRWORA did not enact a uniform federal policy); *Korab*, 2010 WL 4688824, at **10-12 (applying strict scrutiny and holding PRWORA does not establish a uniform rule); *Ehrlich*, 908 A.2d at 1241 (holding that PRWORA "prescribes no uniform rule . . . [r]ather, Congress has provided discretion to the States with regard to their decisions whether to provide State-funded medical benefits"); *Aliessa*, 754 N.E.2d at 1098 (concluding that PRWORA produces "not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics" and applying strict scrutiny to find a violation of the Equal Protection Clause). *Cf. Finch I*, 946 N.E.2d at 1277 (determining PRWORA was merely a statement by Congress regarding subsidization of the State's provision of medical

[6] Although not expressly argued, the Defendant cannot contend that she complies with Equal Protection by implementing the same standards as those contained in PRWORA. Strict scrutiny analysis requires consideration of the Maine legislature's motivation in enacting P.L. 2011, ch. 380, § KK-4, "rather than any purpose hypothesized post hoc during litigation." *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 981 (Mass. 2012). *See also United States v. Virginia,* 518 U.S. 515, 533 (1996). As the Massachusetts Supreme Court so aptly stated, "The Legislature may not lean on Federal policy as a crutch to absolve it of examining whether its own invidious discrimination is truly necessary." *Finch*, 969 N.E.2d at 244 (rejecting the Commonwealth's attempted reliance upon Congress's fact-finding and policies in PRWORA and holding the termination of non-citizens from the state medical assistance program was not supported by a compelling state interest in violation of the state constitution).

benefits rather than a mandate under the supremacy clause, and holding that strict scrutiny applied under the Massachusetts constitution).

One court has concluded that PRWORA reflected a national policy of granting discretion to the states. *See Soskin v. Robertson*, 353 F.3d 1242 (10th Cir. 2004). The Plaintiffs believe that *Soskin* was incorrectly decided because a national policy of granting discretion to individual states is, by definition, not a uniform policy, which puts the case at odds with the Supreme Court's direction in *Graham*. The District of Hawaii observed that *Soskin* "goes far off track by ignoring the Naturalization Clause's uniformity requirement." *Korab*, 2010 WL 468824, at *10. The absence of national, uniform policy forecloses the Defendant's position that her discriminatory action was consistent with Constitutional principles.

Finally, the Defendant has attempted to shift this case to what she believes might be stronger temporal postures, asking the Court to review whether Maine needed to provide health care to aliens in the first instance and not whether Maine had a valid basis for terminating MaineCare benefits for aliens in 2011.[7] Once Maine made the decision to include aliens in the MaineCare program, it was obligated to conduct that program in a manner that is consistent with the Constitution.

CONCLUSION

The Plaintiffs' Complaint more than adequately alleges that the Defendant violated the Equal Protection Clause of the United States Constitution in terminating lawful non-citizens' eligibility for the MaineCare program. For all of the reasons stated above, this Court should deny the Defendant's Motion to Dismiss.

[7] In *Finch I*, the Massachusetts Supreme Court addressed this very point, explaining that the "State was not required to establish the Commonwealth Care program, is under no obligation to continue it, and may expend as much or as little on the program as it wishes so long as benefits are distributed in a constitutionally acceptable manner." 946 N.E.2d at 1278.

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2012, I electronically filed Plaintiff's Opposition to Defendant's Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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