

Jennifer B. Condon
Baher Azmy
SETON HALL UNIVERSITY
SCHOOL OF LAW
CENTER FOR SOCIAL JUSTICE
One Newark Center
Newark, NJ 07102
(973) 642-8700

Lawrence S. Lustberg
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102-5310
(973) 596-4500

Attorneys for Plaintiffs

MANUEL GUAMAN, MARIA GUAMAN,
NADIA CHERY, DEYINIRA VALENZUELA,
AND KEITHON BLAKE,

Plaintiffs,

v.

JENNIFER VELEZ, COMMISSIONER
OF NEW JERSEY DEPARTMENT OF
HUMAN SERVICES and JOHN GUHL,
DIRECTOR, DIVISION OF
MEDICAL ASSISTANCE AND
HEALTH SERVICES,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO: **L-1608-10**

Civil Action

**VERIFIED AMENDED CLASS ACTION
COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

MANUEL GUAMAN, MARIA GUAMAN, NADIA CHERY, DEYINIRA
VALENZUELA, AND KEITHON BLAKE (hereinafter “Class Representatives” or “Class
Plaintiffs”), by way of verified Complaint, hereby allege as follows:

PRELIMINARY STATEMENT

1. Class Representatives and all other similarly situated Class Members are immigrant parents and guardians, and lawful permanent residents of the United States. Many Class Members work at low-wage jobs and do not earn enough money to afford health insurance. Because of their low income, Class Members were, until recently, deemed eligible to receive State-funded medical assistance known as New Jersey FamilyCare (“NJFC”).

2. On March 2, 2010, the New Jersey Department of Human Services, Division of Medical Assistance and Health Services (“DHS” or the “Agency”) issued Medicaid Communication No. 10-01 (Ex. A), which provided that, effective March 31, 2010, NJFC assistance would be terminated for all lawful permanent residents in New Jersey who have not possessed that status for at least five years. On March 31, 2010, the Agency terminated some Class Members’ NJFC assistance, even after counsel for the Class wrote to the DHS Commissioner and expressed concern about the legality of Medicaid Communication No. 10-01. Although the Agency delayed terminating other Class Members’ NJFC assistance, the vast majority of lawful permanent residents who received that temporary reprieve were later disenrolled from the NJFC program on June 30, 2010.

3. On June 29, 2010, Plaintiffs filed a Verified Class Action Complaint and Order to Show Cause for a preliminary injunction alleging that Medicaid Communication No. 10-01 violates the equal protection guarantees of the United States and New Jersey Constitutions, and is inconsistent with the statutory and regulatory law governing the NJFC program. Shortly thereafter, on July 6, 2010, the Agency sought to amend the eligibility criteria for NJFC assistance through regulation, publishing in the New Jersey Register what it described as a

“Special Adoption.” 42 *N.J.R.* 1404(a). In doing so, the Agency invoked the State Fiscal Year 2009-2010 Appropriations Act, approved by the Legislature on June 29, 2009, which delegated authority to the DHS Commissioner to modify the NJFC program to ensure that spending would not exceed the fiscal year appropriation. *L. 2009, c. 68*. Like Medicaid Communication 10-01, the Agency’s Special Adoption states that “restricted aliens”—defined as persons lawfully admitted for permanent residence who have “lived in the United States for less than five full years after such lawful admittance”— are “ineligible for enrollment in, or benefits from, the NJ FamilyCare Program.” *N.J.A.C. 10:78-3.2(e)(1)* [hereinafter *Special Amendment N.J.A.C. 10:78-3.2*].

4. The Agency’s denial of health care to otherwise eligible persons based solely upon their immigration status violates the equal protection guarantees of the United States and New Jersey Constitutions, both of which prohibit the state from discriminating in the distribution of benefits or services on the basis of alienage and immigration status. That decision, which was undertaken without the deliberation, notice and comment normally required for agency rulemaking by the New Jersey Administrative Procedures Act, *N.J.S.A. 52:14B-1 et seq.*, is also inconsistent with the plain terms of the statute governing the NJFC program, *N.J.S.A. 30:4J-11*, which defines individuals who have “been lawfully admitted for permanent residence into and remain[] lawfully present in the United States” as “qualifying applicants,” if they meet the other eligibility requirements. And to the extent the Special Amendment to the Agency’s regulations published on July 6, 2010, was undertaken pursuant to the Fiscal Year 2009-2010 Appropriations Act, such regulations are nevertheless invalid because the Appropriations Act lacks clear standards to guide agency decision-making; as such it constitutes an improper, invalid delegation of legislative authority in violation of the separation of powers doctrine embodied

in the New Jersey Constitution. Thus, the Agency's denial of state-funded Medicaid to Class Members is inconsistent with the NJFC enabling statute, which does not distinguish between citizens and lawful permanent residents, nor impose any requirement that to be eligible for NJFC assistance lawful permanent residents must possess that status for at least five years.

5. Alternatively, even if the Appropriations Act were deemed to contain a permissible delegation to the agency, the termination of Class Members' NJFC assistance and Special Amendment *N.J.A.C. 10:78-3.2* are nevertheless *ultra vires* and unlawful because the Agency failed to comply with the conditions for modifying the NJFC program set forth in the delegating statute. The 2009-2010 Appropriations Act requires that any change to the NJFC eligibility criteria be made pursuant to a determination that such changes are necessary to avoid exceeding the fiscal year appropriation, in accordance with a plan approved by the Director of the Division of Budget and Accounting, and made pursuant to regulation. Here, the Agency failed to comply with these requirements.

6. The State estimates that approximately 12,000 persons will be affected by the immigration-based changes to the NJFC eligibility criteria. Without NJFC assistance, Class Members are unable to pay for the cost of necessary health care, such as regular health screenings, preventive care, and treatment for serious illnesses, including inpatient and outpatient hospital care, emergency room services, and medical transportation assistance. The denial of healthcare poses health consequences for Class Members as well as their children. Not only does the denial of preventive health care and treatment in the case of serious illness impair parents' ability to care for their children, as the Legislature has also recognized, when parents lack health insurance, they are less likely to prioritize preventive care and regular health screenings for their children.

7. These harms are experienced only by immigrants. Indeed, the Agency has singled out the Plaintiff Class for disparate treatment solely because of their alienage and immigration status.

8. Plaintiffs seek a declaration from this Court that: (1) the Agency's denial of state-funded Medicaid to lawful permanent residents on the basis of their alienage violates the equal protection guarantees of the Federal and State Constitutions; (2) that the delegation of authority to the Agency contained in the Fiscal Year 2009-2010 Appropriations Act, *L. 2009, c. 68*, upon which the Agency relied in terminating Class Members' benefits—as well as the Fiscal Year 2010-2011 Appropriations Act, *L. 2010, c. 35*, which contains identical delegating language—lack clear standards to guide Agency decision-making and thus constitute unconstitutional delegations of legislative authority in violation of the separation-of-powers doctrine under the New Jersey Constitution; (3) that, absent a valid delegation or legislative repeal of the NJFC enabling statute, the Agency's alienage-based modification of the state Medicaid eligibility criteria is contrary to the NJFC statute and is therefore invalid; and (4) alternatively, even if the Appropriations Act delegation is deemed valid, the Agency's termination of Class Members' NJFC assistance and Special Amendment *N.J.A.C. 10:78-3.2* are *ultra vires* and unlawful because the Agency failed to comply with the Appropriations Act's requirements for changes to the eligibility criteria of the NJFC program. Plaintiffs further seek a temporary injunction ordering the Agency to provide state-funded medical assistance in a nondiscriminatory manner and a permanent injunction restoring Class Members' NJFC assistance.

JURISDICTION AND VENUE

9. This Court has personal jurisdiction over Defendants pursuant to *R. 4:4-4 (a)(7)* because Defendants are properly-served public officials of the state of New Jersey.

10. Venue is proper in Mercer County pursuant to *R. 4:3-2(a)* because the cause of action arose there.

PARTIES

11. Plaintiffs Manuel and Maria Guaman are married, lawful permanent residents of the United States who currently reside at 640 American Legion Drive, Teaneck, New Jersey. Mr. and Mrs. Guaman, who both became lawful permanent residents in 2006, have received state-funded medical assistance under the New Jersey FamilyCare program for approximately three years. On April 2, 2010, Manuel Guaman received notice that, on June 30, 2010, he would be terminated from the NJFC program because he has not been a lawful permanent resident for at least five years. (Ex. B.) Mr. Guaman has since been terminated from the NJFC program.

12. Maria Guaman, who gave birth on April 29, 2010, has not yet received a letter informing her that her medical assistance will be terminated. *N.J.A.C. 10:49-2.2(b)(13)* grants assistance to pregnant women who are eligible for NJFC at the time of pregnancy “[f]or a period lasting through the end of the month following the 60th day following delivery.” Because her 60-day extension of eligibility due to her pregnancy has expired, Maria is no longer eligible for NJFC assistance because she has not been a lawful permanent resident for at least five years. Without state-funded medical assistance, the Guamans cannot afford preventive health care, routine check-ups and treatment for serious illnesses and injuries.

13. Plaintiff Nadia Chery is a lawful permanent resident of the United States who resides at 123 Moffatt Avenue, Hamilton, New Jersey. Ms. Chery became a lawful permanent resident in July of 2008 and has received NJFC assistance since December of that year. On

June 30, 2010, Ms. Chery was terminated from NJFC assistance because she has not been a lawful permanent resident for at least five years. Without state-funded Medicaid, she cannot afford necessary healthcare, including treatment for the ongoing side effects and complications she has experienced after receiving a medically administered contraceptive injection nearly a year ago.

14. Plaintiff Deyinira Valenzuela is a single mother of two children and currently resides at 2714 Cleveland Avenue, Camden, New Jersey. A lawful permanent resident for approximately three years, Ms. Valenzeula began receiving New Jersey FamilyCare in 2008. After suffering from kidney problems for more than a decade, in 2007, Ms. Valenzuela underwent surgery to remove one of her kidneys. Ms. Valenzuela was terminated from the NJFC program on March 30, 2010. Should Ms. Valenzuela experience additional health problems relating to her kidney or otherwise, she will be unable to afford medical treatment.

15. Plaintiff Keithon Blake is a native of Jamaica who resides at 285 Carlton Avenue, Piscataway, New Jersey. Mr. Blake has been a lawful permanent resident since 2008, and for some time prior to and up until March 31, 2010, Mr. Blake received State-funded health insurance through the NJFC program. On March 5, 2010, Mr. Blake received a letter from the Agency, informing him that because of his immigration status he “no longer qualif[ied] for NJ FamilyCare and [would] be disenrolled from the program effective March 31, 2010.” (Ex. C.) The letter advised him to contact the Division of Medical Assistance and Health Services if he “disagree[d] with [his] immigration status on file with NJ FamilyCare.” *Id.* Mr. Blake no longer receives NJ FamilyCare and cannot afford to pay for private medical insurance.

16. Class Representatives bring this action on behalf of themselves and as representatives of the class of all similarly- situated persons who, because of their alienage,

are no longer eligible for NJFC assistance.

17. Defendant Jennifer Velez is Commissioner of the New Jersey Department of Human Services, which administers state-funded medical assistance, including the New Jersey FamilyCare program. She is sued in her official capacity.

18. Defendant John R. Guhl is the Director of the Division of Medical Assistance and Health Services, the Division of the Department of Human Services that administers the New Jersey FamilyCare program. He is sued in his official capacity.

CLASS ALLEGATIONS

19. Plaintiffs bring this class action under *R. 4:32-1(a)* and (b)(3) of the New Jersey Rules of Court on behalf of themselves and all other similarly-situated lawful permanent residents of New Jersey who are, because of their alienage and immigration status, being denied state-funded medical assistance provided to other needy, lawful permanent residents and citizens of the State. The Plaintiff Class consists of non-pregnant parents and guardians who are being denied state-funded medical assistance because they have been lawful permanent residents for less than five years.

Numerosity

R. 4:32-1(a) (1)

20. The members of the class are so numerous that joinder of all members is impracticable. The State has acknowledged that 12,000 residents of New Jersey will ultimately lose their NJFC assistance because they are lawful permanent residents who have possessed that status for less than five years. Moreover, because the putative class also includes all lawful permanent residents of New Jersey who are statutorily eligible for NJFC assistance, but who, on account of their alienage and immigration status, have been denied admittance to the program

since April 1, 2010, the size of the class is likely larger than the 12,000 persons whom the State has acknowledged will be effected by the alienage-based cuts to the NJFC program.

Common Questions of Law and Fact

R. 4:32-1(a)(2)

21. Questions of law and fact are common to the class because all Plaintiffs assert that in terminating or denying them their medical assistance, Defendants have violated applicable statutory and regulatory law and the equal protection guarantees of the State and Federal Constitutions.

22. Specifically, the Plaintiff Class contends that distinguishing between Class Members and other needy New Jersey residents on the basis of their alienage and immigration status violates the equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States and Article I, Paragraph 1 of the New Jersey Constitution of 1947.

23. The Plaintiff Class also contends that the provision of the Fiscal Year 2009-2010 Appropriations Act, *L. 2009, c. 68*, upon which the Agency relied in terminating Class Members' benefits—as well as the Fiscal Year 2010-2011 Appropriations Act, *L. 2010, c. 35*, which contains identical language—constitute unconstitutional delegations of legislative authority in violation of the separation-of-powers doctrine under the New Jersey State Constitution. Plaintiffs therefore contend that the Agency's alienage-based change to the state Medicaid eligibility criteria is contrary to *N.J.S.A. 30:4J-11*, which provides that a person "lawfully admitted for permanent residence" is qualified for NJFC assistance. In the alternative, Plaintiffs claim that even if the Appropriations Act delegation is deemed valid, the Agency's termination of Class Members' NJFC assistance and Special Amendment *N.J.A.C. 10:78-3.2* are *ultra vires* and unlawful because the Agency failed to comply with the Appropriations Act's requirements

regarding changes to the eligibility criteria of the NJFC program.

24. Each of these claims present questions of law common to the class.

25. Moreover, because class membership extends only to those individuals whom the State has determined meet the financial and other statutory criteria for NJFC assistance, the facts pertinent to this action are common to all Class Members.

Typicality

R. 4:32-1(a)(3)

26. Additionally, the claims of the Class Representatives are typical of the claims of the class. Plaintiffs contend that the Agency's termination of their NJFC assistance because they have not been lawful permanent residents for at least five years is contrary to *N.J.S.A. 30:4J-11* and *N.J.A.C. 10:78-3.2(b)(1)*, and improperly distinguishes between them and other similarly-situated, lawful permanent residents and citizens in New Jersey in violation of the equal protection guarantees of the Federal and State Constitutions. This claim is identical to the claims raised by the class as a whole.

Representative Plaintiffs

R. 4:32-1(a)(4)

27. The Class Representative will fairly and adequately protect the interests of the class because their interest in seeking declaratory and injunctive relief is similar to that of other Class Members. Thus, by prosecuting their own claims, Class Representatives will at the same time advance the identical claims and interests of the other Class Members. Moreover, the Class Representatives have no conflict of interest with other members of the class, and have retained experienced counsel competent to handle the class action and assert the claims of the class as a whole.

28. Plaintiffs' counsel, Seton Hall Law School's Center for Social Justice and the

Gibbons Fellowship in Public Interest and Constitutional Law at Gibbons P.C., are qualified to handle class actions because counsel have substantial expertise representing plaintiffs in civil rights and constitutional litigation generally, as well as in class action litigation specifically. Plaintiffs' counsel will vigorously prosecute this action on behalf of all Class Members.

Class Action Maintainable

R. 4:32-1(b)(3)

29. This matter is maintainable as a class action because the questions of law and fact common to all class members predominate over any potential questions affecting only individual members and because class litigation is superior to other available methods for the fair and efficient adjudication of the controversy given that the common questions of statutory and constitutional law make it desirable to litigate Class Members' complaints in one forum. Additionally, because the Class consists of numerous individuals with modest financial resources, members of the Class cannot afford to litigate this lawsuit on their own and will likely be unable to redress their loss of State-funded medical assistance unless they are part of a class. Additionally, Counsel are aware of no other litigation concerning this controversy already commenced by or against members of the class, and there is little difficulty likely to be encountered in the management of the matter as a class action

STATUTORY AND REGULATORY FRAMEWORK

30. In 1968, the New Jersey Legislature adopted the New Jersey Medical Assistance and Health Services Act, *N.J.S.A.* 30:4D-1 to -19.5, which created the Division of Medical Assistance and Health Services and endeavored to provide medical assistance to the extent possible to "persons whose resources are determined to be inadequate to enable them to secure quality medical care at their own expense." *L.* 1968, *c.* 413. That Act also sought to secure "all

benefits for medical assistance” available under the Federal Social Security Act of 1965. *N.J.S.A.* 30:4D-2.

31. In accordance with that mandate, on January 1, 1970, New Jersey began participating in the federal Medicaid program and, pursuant to the Social Security Act, began receiving funds to provide health care to certain medically and financially needy individuals. Pursuant to this program, low-income and medically-needy individuals—both citizens and immigrants alike—long received medical assistance jointly funded by the state and federal governments.

32. In 1996, however, when Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), Pub. L. No. 104-193, it eliminated federal public assistance, such as federal Medicaid, for most non-citizens, including most lawful permanent residents who have resided in the United States for fewer than five years. 8 U.S.C. § 1612, 1613, 1641. Congress deemed persons lawfully admitted for permanent residence and other specified groups, such as asylees and refugees, as “qualified aliens.” *See* 8 U.S.C. § 1641(b)-(c). All persons not considered to be “qualified aliens,” such as undocumented immigrants, were deemed ineligible for federal Medicaid. 8 U.S.C. § 1611(a).

33. Congress then parsed immigrants’ eligibility for federal Medicaid even further, designating “qualified aliens” into each of two additional subgroups: those lawfully residing in the United States before August 22, 1996, some of whom could receive federal Medicaid, and those who arrived lawfully in the United States after that date, for whom federal Medicaid would be largely unavailable until those individuals resided in the United States with a qualifying status for at least five years. *See* 8 U.S.C. § 1613(a).

34. In adopting this federal scheme, Congress asserted that the federal government

had a compelling interest in “assur[ing] that aliens be self-reliant in accordance with national immigration policy” and in “remov[ing] the incentive for illegal immigration provided by the availability of public assistance.” 8 U.S.C.A. § 1601. To further these unique federal goals, Congress conditioned receipt of federal assistance upon compliance with federal restrictions on certain uses of state monies.

35. For example, Congress prohibited states that receive federal funding from providing state-funded medical assistance to non-qualified aliens (*i.e.*, undocumented immigrants). But recognizing that state funding of health care for lawful permanent residents like Class Representatives does not implicate the same federal policy concerns—and that the states do not possess plenary power over immigration matters, as does the federal government—Congress expressly provided that states could extend state-funded medical assistance to qualified aliens residing in the United States for less than five years. In other words, Congress recognized that the states might do what Congress determined the federal government should not: provide state-funded Medicaid to lawful permanent residents who have not held that status for at least five years. 8 U.S.C. § 1622(a).

36. Following PRWORA, in 2000, New Jersey adopted the NJ FamilyCare Program, through which the Legislature aimed to provide affordable, subsidized health insurance coverage to qualifying children, pregnant women, and low-income parents and guardians. *N.J.S.A. 30:4J-12*.¹ NJFC provides “preventive services, hospitalization, physician care, laboratory and x-ray services, prescription drugs, mental health services, and other services as determined by the commissioner,” *N.J.S.A. 30:4J-12(a)*, to qualifying parents and caregivers.

¹ Placed under “the supervision of the Division of Medical Assistance and Health Services,” *N.J.A.C. 10:78-1.3*, the NJFC program provided state-funded medical assistance to parents of dependent children. At the time of its creation, NJFC was combined under one name with the pre-existing NJ KidCare program, a program established in

37. To be eligible for health insurance coverage pursuant to NJFC, an individual must be a “qualified applicant” as defined under state law. In accordance with *N.J.S.A. 30:4J-11*, a qualified parent or caretaker is a person: “(1) whose gross family income does not exceed 200% of the poverty level;” (2) “who has no health insurance, as determined by the commissioner, and is ineligible for Medicaid;” (3) “who is a resident of this State;” and (4) “who is a citizen of the United States, or has been lawfully admitted for permanent residence into and remains lawfully present in the United States.” *N.J.S.A. 30:4J-11*. Thus, in providing assistance under NJFC, the Legislature did not distinguish between citizens and lawful permanent residents, and rejected any provision similar to the federal requirement that, in order to receive benefits, lawful permanent residents must possess that status for at least five years. In other words, in enacting NJFC in 2000, the Legislature accepted Congress’s invitation to provide state-funded medical assistance to all lawful permanent residents excluded from federal Medicaid by virtue of PRWORA.

38. In accordance with that statutory scheme, until recently, the New Jersey Administrative Code similarly provided that all otherwise qualified lawful permanent residents of the state should have access to NJFC assistance, irrespective of the length of time that they have been permanent residents. *N.J.A.C. 10:78-3.2(b)(1)* stated that “regardless of the date of entry into the United States,” aliens lawfully admitted for permanent residence “are entitled to NJ FamilyCare assistance” so long as “they otherwise meet the eligibility criteria.”

39. On June 29, 2009, the New Jersey Legislature approved the fiscal year 2009-2010 Appropriations Act for the year ending June 29, 2010. *L. 2009, c. 68*. That Act provided that the Commissioner of the DHS could modify the NJFC program in order to avoid spending in excess of the funds appropriated by the Legislature for fiscal year 2009-2010. The 2011 Fiscal

1997 in accordance with the federal State Children's Health Insurance Program (SCHIP), under Title XXI of the

Year Appropriations Act contains identical delegation language. *L. 2010, c. 35*. To modify the NJFC program pursuant to the Appropriations Acts, however, the Agency was required to satisfy certain requirements. Specifically, the Acts provide that:

Notwithstanding the provisions of the “Administrative Procedure Act,” P.L.1968, c.410 (C.52:14B-1 et seq.), to the contrary, the Commissioner of Human Services shall adopt immediately upon filing with the Office of Administrative Law such regulations as the commissioner deems necessary to ensure that monies expended for the NJ FamilyCare program do not exceed the amount hereinabove appropriated. Such regulation may change or adjust the financial and non-financial eligibility requirements for some or all of the applicants or beneficiaries in the program, the benefits provided, 27 cost-sharing amounts, or may suspend in whole or in part the processing of applications for any or all categories of individuals covered by the program.

L. 2009, c. 68, at 108; L. 2010, c. 35, at 111.

40. Thus, to the extent that the 2010 Act, which has been relied upon by the Agency in terminating Class Members’ NJFC assistance, authorized modifications to the program’s eligibility criteria, it only did so provided that: 1) the Commissioner made a determination that such changes were necessary to ensure that spending would not exceed the amount appropriated for the fiscal year ending June 30, 2010; 2) the Commissioner’s determination was made in accordance with a plan approved by the Director of the Division of Budget and Accounting; and (3) and that such changes were made pursuant to regulation.

FACTUAL ALLEGATIONS

41. On March 2, 2010, prior to the issuance of any regulations modifying the NJFC program, DHS issued Medicaid Communication No. 10-01, which provided that, effective March 31, 2010, NJFC assistance would be terminated for all lawful permanent residents in New

federal Social Security Act. *See N.J.S.A. 30:4J-9d* (Legislative findings and declarations).

Jersey who have not possessed that status for at least five years. Although Medicaid Communication No. 10-01 cited an “unprecedented financial crisis” in New Jersey and noted generally that the “budget appropriation language grants authority to the Commissioner of the Department of Human Services to modify enrollment levels in the NJ FamilyCare program,” it did not address, in accordance with the Appropriations Act requirement, whether changes to the NJFC eligibility criteria were, in fact, necessary to ensure that spending for NJFC would not exceed the appropriation for the fiscal year ending June 30, 2010. Additionally, Medicaid Communication 10-01 failed to address whether those program changes were made in accordance with a plan approved by the Director of the Division of Budget and Accounting.

42. On March 8, 2010, John R. Guhl, Director of the Division of Medical Assistance and Health Services, sent a letter to “valued stakeholders in the development of NJ FamilyCare,” which stated that all NJFC recipients who are lawful permanent residents and have held that “status for less than five years” are ineligible for the NJFC healthcare program “due to their immigration status.” (Ex. D.) As in Medicaid Communication 10-01, the Agency cited “an unprecedented financial crisis” in New Jersey as the sole justification for singling out this class of needy New Jersey residents for termination of medical assistance on the basis of their alienage.

43. In March 2010, counsel for Class Plaintiffs wrote to the Commissioner of DHS and expressed concern about the legality of Medicaid Communication No. 10-01. On March 31, 2010, the Agency nevertheless terminated certain Class Members’ NJFC assistance. However, the Agency subsequently wrote to other Class Members and informed them that the Agency would be extending their NJFC assistance until June 30, 2010.

44. Class Representatives Manuel and Maria Guaman, who are married,

immigrated to the United States from Ecuador in 1992 and 2000 respectively, and moved to New Jersey shortly thereafter. Manuel obtained lawful permanent resident status in March of 2006 and Maria became a lawful permanent resident in November of 2006.

45. The Guamans have three small children, all of whom are U.S. citizens. Manuel's employment as a cook provides the sole source of income for the family. Because of their low-income, the Guamans cannot afford to pay for private health insurance and began receiving NJFC approximately three years ago. Both Manuel and Maria require medical care and treatment, but cannot afford to pay for such care without state subsidies. Maria, who gave birth to the couple's third child by cesarean section on April 29, 2010, has required follow-up care and medication while recovering from that major surgery. Last year, Maria also sought medical treatment for pain in her abdomen and, on multiple occasions, went to a hospital for testing. Although doctors did not determine whether Maria suffers from any particular problem or affliction, if her pain returns, she will not be able to afford medical attention. Manuel suffers from high cholesterol and has experienced problems with his prostate. He has also utilized his medical assistance for vision care.

46. Earlier this year, Manuel received a letter from the Agency informing him that his medical assistance would be terminated on March 31, 2010, because NJFC would "no longer cover immigrant adults/parents here for less than five (5) years." On April 2, 2010, however, Manuel received a second letter, stating that his eligibility for New Jersey FamilyCare was "being extended to June 30, 2010."

47. Having only possessed the status of permanent resident for the last three years, as of June 30, 2010, Manuel and Marial Guaman are no longer eligible for NJFC. Without state-funded Medicaid, the couple cannot afford necessary medical care, including monitoring

of Manuel's prostate and cholesterol problems and follow-up care to ensure Maria's ongoing recovery from cesarean surgery. The couple also cannot afford to pay for emergency and diagnostic treatment.

48. For example, in July of 2010, Manuel suffered from an allergic reaction that led him to seek emergency medical treatment. Knowing that he could no longer afford medical care without State-funded Medicaid, Manuel agonized over whether he should seek treatment for his severe rash and headache, thereby incurring medical expenses he would not be able to afford, or whether to wait and see if his condition would improve without treatment. Manuel ultimately decided to seek treatment at a hospital, concluding that if his condition became worse it might interfere with his ability to work and provide for his family. Although Manuel was treated and prescribed certain medications, his medical problem has not been completely ameliorated. And, although Charity Care subsidized part of the cost of Manuel's visit to the hospital, he does not know how he will manage to pay the portion for which he has been billed by the hospital. The inability to pay for this medical treatment, has discouraged Manuel from seeking follow-up care for his remaining rash and pain in his joints, which is exacerbated by exposure to air conditioning and cold temperatures.

49. Maria has faced a similar dilemma: she has refrained from seeking a mammogram in spite of symptoms that concern her because she fears she will not be able to afford this diagnostic procedure.

50. As the parents of three small children, the Guamans are fearful about what will happen to them and their family if one or both of them becomes seriously ill or is injured in a car accident or otherwise. Without medical insurance to pay for hospitalizations, medication and treatment, in the event of sickness or injury, the Guamans will not be able to properly care for

themselves, and thus provide and care for their children.

51. Class Representative Nadia Chery immigrated to the United States from Haiti in July of 2008. She has lived in New Jersey as a lawful permanent resident ever since then. Ms. Chery, who is married to a U.S. citizen and has two small children, began receiving NJFC assistance in December of 2008. After giving birth to her second child in July of 2009, Ms. Chery was medically administered a contraceptive injection. Although she only received a one-time dose, that medication has caused her lasting and painful side-effects, including uncontrollable menstrual bleeding, severe back pain, and anemia. Ms. Chery has sought medical treatment for these ailments on several occasions since the summer of 2009.

52. On June 30, 2010, Ms. Chery was terminated from NJFC assistance because she has not been a lawful permanent resident for at least five years. Although Ms. Chery is employed as a home healthcare aide, she cannot afford health insurance without state-funded medical assistance. After being cut from NJFC, Ms. Chery again experienced severe back pain, excessive bleeding, and dizziness and sought emergency medical assistance in July 2010. Because she no longer receives state-funded Medicaid, Ms. Chery cannot afford to pay for this or future emergency room visits or other medical appointments that she may require.

53. Class Representative Deyinira Valenzuela immigrated to the United States from the Dominican Republic in 2006 and has been a lawful permanent resident since July of 2007. After years of suffering with pain and persistent kidney infections, in 2007, Ms. Valenzuela underwent surgery to remove one of her kidneys.

54. Ms. Valenzuela began receiving NJFC after moving to New Jersey in 2008. A single mother of two children, one of whom is an infant, Ms. Valenzuela, in addition to caring for her own children, works part-time as a babysitter. In light of her meager income, Ms.

Valenzuela cannot afford to pay for health insurance or medical care without State-funded medical assistance.

55. In March 2010, Ms. Valenzuela was informed by a social worker that she was no longer eligible for New Jersey FamilyCare because she has not been a lawful permanent resident for at least five years. In June of 2010, Ms. Valenzuela was billed for a routine doctor's visit because she no longer receives NJFC assistance. Having been terminated from the NJFC program, Ms. Valenzuela can no longer afford preventive care and monitoring and, in the event of further infection in her remaining kidney, Ms. Valenzuela will not be able to afford critical medication and treatment.

56. Class Representative Keithon Blake immigrated to the United States from Jamaica in 2008. He has lived in New Jersey ever since. Mr. Blake, who obtained lawful permanent resident status at the time he immigrated to America, is married and has three dependent children. His wife and children are lawful permanent residents as well.

57. Although Mr. Blake is employed as a truck driver, he cannot afford medical care without state subsidies. Because of his low-income, for some time prior to and up until March 30, 2010, Mr. Blake received State-funded health insurance through the NJFC program.

58. On March 5, 2010, however, Mr. Blake received a letter from the Agency informing him that his medical assistance would be terminated on March 31, 2010, because of his immigration status. According to the letter, "the immigrant status requirements for enrollment in the NJ FamilyCare program have changed" and "parents/caretakers who have not been in a legal permanent residency status for at least five (5) years can no longer enroll in NJ FamilyCare." (Ex. C.) Mr. Blake's medical assistance was terminated on March 31, 2010 because he has only been a permanent resident for approximately two years. Although he was

diagnosed as having high cholesterol, he can no longer afford follow-up medical care and monitoring. Mr. Blake also has several risk factors for Diabetes, in light of his age of 51 and the fact that his father suffered from the disease.

59. On June 29, 2010, Plaintiffs filed a verified class action complaint for injunctive and declaratory relief, along with an Order to Show Cause seeking to enjoin the Agency from terminating additional Class Members' benefits on June 30, 2010.

60. Shortly thereafter, on July 6, 2010, the Agency published in the New Jersey Register, what it deemed a "Special Adoption," including "Special Amendment" *N.J.A.C. 10:78-3.2*.

61. *N.J.A.C. 10:78-3.2(e)* provides that "[o]n and after April 1, 2010, applicants or beneficiaries who are adult restricted aliens shall be ineligible for enrollment in, or benefits from, the NJ FamilyCare Program." The regulations define "restricted alien," as "an alien lawfully admitted for permanent residence, who has lived in the United States for less than five full years after such lawful admittance." *N.J.A.C. 10:78-3.2(e)(1)*.

62. The Special Adoption further provides that "restricted aliens" who enrolled in the NJFC program between October 1, 2009 and March 25, 2010 and "received a medical service that was actually covered by NJ FamilyCare" during that time, would be deemed ineligible for NJFC on "July 1, 2010, rather than April 1, 2010." Moreover, the regulations state that as of July 1, 2010, the Agency may "extend medical service coverage to any such restricted alien still enrolled who is being treated for a life threatening illness or receiving on-going life sustaining treatment." *N.J.A.C. 10:78-3.2(e)2*. Such extensions of coverage, however, which only extend to those who are already seriously ill, are wholly dependent upon the discretion of the Commissioner. The regulations state that "any such decisions regarding extending coverage,

the duration of any such coverage, the extent of services covered and the reimbursement methodology used for service coverage shall all be vested in the on-going sole discretion of the Division, based upon the Division's assessment of the necessity of such coverage, use of resources and/or available options.” *Id.*

63. According to the regulation, the amendments were “adopted” by the DHS Commissioner on May 28, 2010, with an “effective date” of June 1, 2010. 42 *N.J.R.* 1404(a). Although the “Special Adoption” states that it has an “expiration date” of September 1, 2011, it also purports to have “made amendments regarding enrollment in NJ FamilyCare now and in the future.” *Id.*

64. Although the 2010 Appropriations Act—cited by the Agency in the July 6, 2010 Special Adoption—required that regulations setting forth program changes be “adopt[ed] immediately,” *L. 2009, c. 68*, it is undisputed that the Agency did not “adopt” the “Special Amendments” to *N.J.A.C* 10:78-3.2 until approximately a year after the Legislature passed that statute, and only after the Agency had already terminated a substantial number of Class Members’ NJFC assistance. Moreover, although the Special Adoption suggests that the regulations were “adopted” on May 28, 2010, they were not published until July 6, 2010, after the end of the 2009-2010 fiscal year.

65. In addressing the social impact of the NJFC changes, the Special Adoption states that the Agency “estimates that, effective April 1, 2010, approximately 4,000 restricted alien adults [would] be terminated from the program as a result of the amendments.” *Id.* The Agency further “estimates that, effective July 1, 2010, a significant portion of the roughly 8,000 restricted alien adults remaining [would] also be terminated.” *Id.*

66. While acknowledging that these program cuts would likely have a “negative

social impact” on affected individuals “in that medical services that would have been covered under NJ FamilyCare may be more difficult to access for those individuals,” the regulations suggest that that burden is “outweighed by the benefits to the State, its residents and other NJ FamilyCare beneficiaries[.]” *Id.* In other words, the Agency determined that immigrants who cannot otherwise afford healthcare would endure a “negative social impact” in order to “serve the needs of the majority of those persons who are currently enrolled in NJ FamilyCare.” *Id.*

67. After publication of the “Special Adoption,” Plaintiffs requested that the Agency make available to them any Agency plan approved by the Director of the Division of Budget and Accounting to ensure that monies expended for the NJ FamilyCare program would not exceed the fiscal year appropriation. As noted, such a plan is referenced in the regulations and required by the Appropriations Act as a prerequisite for NJFC modifications. On July 22, 2010, the Agency provided a copy of that “plan” to Plaintiffs.

68. The document provided by Defendants is a “Memorandum” dated July 21, 2010, from DHS Commissioner Jennifer Velez to Charlene Holzbauer, Director of the Office of Management and Budget, entitled “Final Approved Plan for Restricted Immigrant Adults.” (*See* Ex. E). It states, without identifying the officials or agency involved, that “[i]t was recommended and agreed upon that the approximately 12,000 restricted immigrant adults who are lawfully admitted to the U.S., but have not yet been here 5 years would be disenrolled from NJ FamilyCare program effective March 31, 2010.” *Id.* The “plan,” which is only slightly more than a page long, then describes how the Agency extended coverage until June 30, 2010, for certain NJFC recipients affected by the alienage-based program cuts and that a “special amendment to the New Jersey Administrative Code 10:78-3.2(e)(2) was adopted to address the change in the termination date.” *Id.*

69. The plan merely describes the Agency's termination actions after-the-fact and does not establish that the Commissioner determined that spending on NJFC would exceed the amount appropriated for the 2010 fiscal year. In fact, the memorandum is dated nearly three weeks after June 30, 2010—the end of the fiscal year during which the vast majority of Class Plaintiffs' NJFC assistance was terminated.

70. Because over forty-four percent of New Jersey's spending on Medicaid goes to acute care services, defined as inpatient, physician, lab, X-ray, outpatient, clinic, and prescription drugs services, *see* Kaiser Family Foundation, New Jersey Medicaid Spending, statehealthfacts.org/profileind.jsp?cat=4&sub=47&rgn=32 (last visited August 30, 2010), there is no question but that eliminating New Jersey FamilyCare benefits for 12,000 lawful permanent residents will deny sick individuals access to necessary, acute medical care. Consistent with this reality, in the analysis of likely "social costs" resulting from the Agency's changes to the Medicaid eligibility criteria, the Special Adoption states that "[h]ospitals will likely experience an increase in the amount of uninsured medical care that they provide, and will therefore likely experience a negative economic impact." 42 *N.J.R.* 1404(a) (summary). In addition to acute care services, the Agency's cuts will also deny lawful permanent residents access to annual medical check-ups, other forms of preventive care and the peace of mind that accompanies having health insurance.

71. Class Members have no adequate remedy at law. While monetary relief may compensate some plaintiffs for the out-of-pocket healthcare costs and other injuries resulting from the wrongful denial of their NJFC assistance, damages will provide no relief against the ongoing or future violations of Class Members' constitutional and statutory rights. Unless enjoined by the Court, the State will continue to deny NJFC assistance to otherwise statutorily

qualified Class Members who have already lost their healthcare coverage, denying Class Members equal protection of the law and causing them immediate and irreparable harm through the loss of healthcare coverage. Furthermore, the inevitable consequences that flow from denying parents and caregivers access to preventive health care, routine medical check-ups and treatment for serious illnesses, only compound the substantial injury to Class Members as a result of termination of their NJFC assistance.

FIRST CAUSE OF ACTION

CLAIM UNDER 42 U.S.C. § 1983 FOR VIOLATION OF EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION

72. Class Representatives repeat and reallege the foregoing paragraphs as if fully set forth herein.

73. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1.

74. In denying Class Members NJFC assistance because they have not been lawful permanent residents for at least five years, while continuing to provide such aid to other, similarly-situated citizens and lawful permanent residents of the State, Defendants have improperly, and without sufficient justification, singled out Class Members for disparate treatment on the basis of their alienage and immigration status in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as made actionable by 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION

**CLAIM FOR VIOLATION OF EQUAL PROTECTION UNDER
THE NEW JERSEY CONSTITUTION**

75. Class Representatives repeat and reallege the foregoing paragraphs as if fully set forth herein.

76. Article I, paragraph 1 of the New Jersey Constitution of 1947 guarantees all persons the equal protection of the law.

77. In denying Class Members NJFC assistance because they have not been permanent residents for at least five years, while continuing to provide such aid to other similarly-situated, low-income citizens and lawful permanent residents of the State, Defendants have improperly, and without sufficient justification, singled out Class Members for disparate treatment on the basis of their alienage in violation of the equal protection guarantees of Article 1, paragraph 1 of the New Jersey Constitution.

THIRD CAUSE OF ACTION

**VIOLATION OF SEPARATION OF POWERS DOCTRINE UNDER
ARTICLE 3, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION**

78. Class Representatives repeat and reallege the foregoing paragraphs as if fully set forth herein. In terminating Class Members' NJFC assistance and later promulgating *N.J.A.C. 10:78-3.2*, the Agency relied upon an unconstitutionally vague delegation of power in the State's Fiscal Year 2010 Appropriations Act. *L. 2009, c. 68*.

79. Article 3, Paragraph 1 of the New Jersey Constitution provides: "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the

powers properly belonging to either of the others, except as expressly provided in this Constitution.”

80. The NJFC eligibility criteria are set forth by the Legislature in the program’s enabling statute, *N.J.S.A. 30:4J-11 et seq.* Yet, in the 2010 and 2011 Appropriations Acts, the Legislature provided unlimited authority to the DHS Commissioner—an executive branch officer—to modify the NJFC program in any manner and to any extent the Commissioner chose. In so doing, the Legislature failed to specify whether, through that delegation of authority, it intended to negate the long-standing, clear statutory provisions governing NJFC eligibility that deem lawful permanent residents eligible for State-funded Medicaid. Only the Legislature has the power to repeal or modify its statutes, and when it does so, it must make its intent explicitly clear.

81. By delegating authority to the Agency over all aspects of the NJFC program, including the program’s eligibility criteria, without expressing its intention to repeal the NJFC enabling statute, the Legislature improperly provided the agency with unlimited power. The Legislature’s failure to provide sufficiently definitive standards to guide the Agency in exercising that discretion violates the separation of powers doctrine of Article 3, Paragraph 1 of the New Jersey Constitution.

82. Accordingly, the provisions of the Fiscal Year 2009-2010 and Fiscal Year 2010-2011 Appropriations Acts that delegate authority to the Agency with respect to the NJFC eligibility criteria are unconstitutional and invalid. And because the Agency’s termination of Class Members’ NJFC assistance and its enactment of *N.J.A.C. 10:78-3.2* relied upon an unconstitutional delegation of power, the Agency’s actions are unauthorized, unlawful, and invalid.

FOURTH CAUSE OF ACTION

**CLAIM FOR VIOLATION OF NEW JERSEY FAMILYCARE STATUTE,
N.J.S.A. 30:4J-11**

83. Class Representatives repeat and reallege the foregoing paragraphs as if fully set forth herein. *N.J.S.A.* 30:4J-11 defines “qualified applicants” for NJFC healthcare as including both citizens of the United States and persons “lawfully admitted for permanent residence.”

84. The statute does not distinguish between citizens and lawful permanent residents, nor impose any requirement that lawful permanent residents possess that status for at least five years. Absent an express statutory repeal by the Legislature or a valid delegation of legislative authority, the Agency had no power to act in contravention of the NJFC statute’s plain terms.

85. Accordingly, in denying to otherwise qualified, lawful permanent residents NJFC assistance clearly provided for by statute, the Agency violated *N.J.S.A.* 30:4J-11.

FIFTH CAUSE OF ACTION

CLAIM OF *ULTRA VIRES* AGENCY ACTION

86. Alternatively, even if the 2009-2010 or 2010-2011 Fiscal Year Appropriations Acts constitute permissible delegations of legislative authority, because the Agency failed to comply with conditions of the Legislature’s delegation, its termination of Class Members’ NJFC assistance and its Special Amendment to *N.J.A.C.* 10:78-3.2 are unauthorized, *ultra vires*, and invalid.

87. To the extent the 2010 Appropriations Act, which was cited by the Agency in Medicaid Communication 10-01 and the July 6, 2010 Special Adoption, authorizes agency modifications of the NJFC eligibility criteria it only does so for the 2009-2010 fiscal year, and sets forth three preconditions for such changes: 1) that the DHS Commissioner make a

determination that such changes are necessary to ensure that spending for NJFC does not exceed the amount appropriated for that fiscal year; 2) that the Commissioner's determination is made in accordance with a plan approved by the Director of the Division of Budget and Accounting; and 3) the such changes are only made upon filing of regulations with the Office of Administrative Law.

88. The Agency has not complied with these requirements. In terminating Class Members' NJFC assistance and in enacting the July 6, 2010 "Special Adoption," the Agency failed to demonstrate that the Commissioner's determination was made in accordance with a plan approved by the Director of the Division of Budget and Accounting in order not to exceed the 2009-2010 fiscal year appropriation. The "plan" identified by Defendants, a Memorandum dated July 21, 2010, is patently insufficient as it merely describes the Agency's termination of Class Members' NJFC assistance after-the-fact and is devoid of the information or analysis required by the 2009-2010 and 2010-2011 Fiscal Year Appropriations Acts.

89. Additionally, the Agency adopted changes to the NJFC eligibility criteria effective March 31, 2010 through Medicaid Communication 10-01, terminating thousands of Class Members from the NJFC program before it filed regulations changing the eligibility criteria as required by the Appropriations Act. The July 6, 2010 Special Adoption cites the 2009-2010 Appropriations Act as its authorizing statute, but that statute only authorized regulatory changes in the 2009-2010 fiscal year. The July 6, 2010 Special Adoption was published in the 2010-2011 fiscal year.

90. Accordingly, because the Agency failed to comply with conditions of the Legislature's delegation, its termination of Class Members' NJFC assistance and its Special Amendment to *N.J.A.C.* 10:78-3.2 are unauthorized, *ultra vires*, and invalid.

PRAYER FOR RELIEF

WHEREFORE, cause having been shown, Class Representatives demand judgment against Defendants and request that the Court order the following relief:

- (a) Certify this action as a class action, pursuant to *R. 4:32-1(a)* and (b)(3);
- (b) Issue a temporary and preliminary injunction
 - i. directing Defendants to restore NJFC assistance to Class Members whose NJFC assistance was terminated solely on the basis that they have not held the status of lawful permanent resident for at least five years;
 - ii. enjoining Defendants from terminating any other Class Members' NJFC assistance on the basis that they have not been a lawful permanent resident for at least five years;
 - iii. enjoining Defendants from denying NJFC assistance to any applicant who applies for NJFC assistance, on the basis that they have held that status for less than five years;
- (d) Issue an injunction ordering permanent relief with respect to (b)(i) to (b)(iii)

above, as well as directing Defendants

- i. to provide retroactive coverage to Class Members' whose NJFC assistance was wrongfully terminated because they have held the status of lawful permanent resident for less than five years, including payment by the State for the costs of medical care for which Class Members have paid or been billed as a result of the wrongful termination of their medical assistance;
- ii. directing Defendants to locate applicants who were denied NJFC assistance on the basis of their alienage or prior beneficiaries who have been

wrongfully terminated from the NJFC program and to notify those individuals of the invalidity of those denials or terminations, establishing a process whereby those individuals can be enrolled or reenrolled in the program;

(e) Issue a judgment declaring that Defendants' termination of Class Members' NJFC assistance on account of the fact that they have been lawful permanent residents for less than five years and its enactment of *N.J.A.C. 10:78-3.2* is: (i) unconstitutional under Article I, paragraph 1 of the New Jersey Constitution of 1947, and the Fourteenth Amendment of the United States Constitution; (ii) unauthorized, unlawful, and invalid because Defendants relied upon a standardless and impermissibly vague delegation of power, in violation of the separation of powers doctrine embodied in the New Jersey Constitution; (iii) unlawful under the statute governing the NJFC program; and, alternatively, (iv) *ultra vires* and unlawful because the Agency failed to comply with conditions of the Legislature's delegation under the 2010 Fiscal Year Appropriations Act.

(f) Award attorneys' fees, interests, and costs of suit; and,

(g) Grant such other relief as is just and proper.

**SETON HALL UNIVERSITY
SCHOOL OF LAW
CENTER FOR SOCIAL JUSTICE**

Dated: September 1, 2010
Newark, New Jersey

By: _____
Jennifer B. Condon

Baher Azmy
One Newark Center
Newark, NJ 07102
(973) 642-8700

GIBBONS P.C.
Lawrence S. Lustberg
One Newark Center
Newark, NJ 07102
(973) 596-4500

Attorneys for Class Plaintiffs

CERTIFICATION PURSUANT TO N.J.Ct.R. 4:5-1

I hereby certify that to the best of my knowledge, no other actions or arbitration proceedings relating to the matters in dispute in the above-captioned litigation are presently pending and no such other Court proceedings or arbitration proceedings are presently contemplated by Class Representatives or their counsel. In addition, I recognize the continuing obligation of each party to file and serve all parties and the Court an amended certification if there is a change in the facts stated in the original Certification.

**SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE.**

By: _____
Jennifer B. Condon

Attorneys for Plaintiffs

Dated: September 1, 2010

JURY DEMAND

Plaintiffs demand trial by jury with respect to all issues that are so triable.

**SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE**
Attorneys for Plaintiffs

By: _____
Jennifer B. Condon

Dated: September 1, 2010