ELLEN SUE KATZ, AZ Bar. No. 012214
WILLIAM E. MORRIS INSTITUTE FOR JUSTICE
3707 North Seventh Street, Suite 220
Phoenix, AZ 85014-5095
(602) 252-3432
eskatz@qwestoffice.net

Martha Jane Perkins (*pro hac vice* pending)
NATIONAL HEALTH LAW PROGRAM
200 North Greensboro St., Suite D-13
Carrboro, NC 27510
(919) 968-6308 (x101)
perkins@healthlaw.org

Corilee Racela (*pro hac vice* pending)
NATIONAL HEALTH LAW PROGRAM
3701 Wilshire Blvd., Suite 750
Los Angeles, CA 90010
(310) 204-6010
racela@healthlaw.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Aita Darjee on her own behalf and on behalf of her minor child N. D.; and Alma Sanchez Haro on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Thomas Betlach, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

No. 4:16-cv-00489-DTF

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Introduction

The Plaintiffs have moved the Court to certify this case as a class action pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class should be defined as: All immigrant residents of Arizona eligible for full-scope Arizona Health

Care Cost Containment System ("AHCCCS") benefits who, on or after January 1, 2015 have been or will be required to recertify their eligibility for AHCCCS and whose benefits have been or will be improperly reduced from full-scope AHCCCS to emergency-only AHCCCS. Undersigned counsel also moved this Court to appoint them class counsel pursuant to Rule 23(g).

The Supreme Court found class relief "peculiarly appropriate" when the issues involved are common to the class as a whole and turn on questions of law applicable in the same manner to each member of the class. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (citations omitted). This case neatly matches that description.

The named Plaintiffs and putative class members are participants in Arizona's Medicaid program, AHCCCS. They are immigrants who are eligible for full AHCCCS whose incomes are at or below the federal poverty level. They are often referred to as "qualified aliens." These immigrants, such as refugees, are entitled to full AHCCCS. Once eligible for full-scope AHCCCS, they continue to be eligible.

Plaintiffs allege that because of computer problems and the failure of AHCCCS to use *ex parte* reviews, thousands of immigrants have had their medical benefits improperly reduced from full-scope AHCCCS to emergency-only AHCCCS. The named Plaintiffs contend that, as a result of the Defendant's failure to adhere to federal law, eligible AHCCCS participants, including persons with significant medical conditions, persons with diabetes, depression, anxiety, high blood pressure and asthma, have been left without needed medical care. As a result of the improper transfers, Medicaid-eligible persons cannot fully participate in the AHCCCS Medicaid program and their health is being adversely affected. Complaint ¶ 3.

Plaintiffs' case challenges the improper reduction of medical benefits from full-scope AHCCCS to emergency only AHCCCS. In addition, Plaintiffs challenge the deficient notices of eligibility that the agency sent to the class. As set forth below, the requirements of Fed. R. Civ. 23(a) are met here, and, this case is appropriate for certification under Rule 23(b)(2) because the class has been subjected to a common set of

practices for which Plaintiffs seek only injunctive and declaratory relief.

Argument

I. The Court Should Certify the Class

As the moving party, the named Plaintiffs must satisfy the four provisions of Rule 23(a) and at least one of the subdivisions of Rule 23(b). *Blake v. Arnett*, 663 F.2d 906, 912 (9th Cir. 1981). Courts have certified classes of Medicaid recipients in numerous cases. *See, e.g., Beltran v. Meyers*, 677 F.2d 1317 (9th Cir. 1982); *Newton-Nations v. Rogers*, 221 F.R.D. 508 (D. Ariz. 2004). As explained below, Plaintiffs satisfy each requirement.

A. Rule 23(a)(1): Numerosity

The first prerequisite for class certification, Rule 23(a)(1), requires the class to be so numerous that joinder of all parties is impracticable. The prerequisite of numerosity is discharged if "the class is so large that joinder of all members is impracticable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) *quoting* Fed. R. Civ. P. 23(a)(1). Impracticability refers to the difficulty or inconvenience of joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964); *see Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated and remanded on other grounds*, 459 U.S. 810 (1982) ("[W]here a class is large in numbers, joinder will usually be impracticable."). Class size alone justifies class certification. One small clinic has seen 67 persons in the last 10 months who had their medical benefits improperly reduced and continues to see harmed immigrants. Declaration of Anne Ryan in Support of Plaintiffs' Motion for Class Certification ("Ryan Decl.") ¶ 21. The cases this one clinic saw were a small percentage of the 3,500 cases AHCCCS initially admitted it had identified as having improper reductions in benefits. Now there are cases that were improperly reduced to emergency-only benefits last year that have been improperly reduced again this year. Declaration of Aita Darjee in Support of Plaintiffs' Motion for Class Certification ("Darjee Decl.") ¶¶ 6-7; Ryan Decl. ¶ 17. In one case, the improper reduction of medical benefits occurred 2 times within a 3 month period. *Id.*

This is a population that typically has cultural and language barriers that impede their ability to successfully understand and navigate the medical, social service and legal systems in Arizona. Ryan Decl. ¶ 11. As an example, Plaintiff Darjee and her husband do not understand why AHCCCS has reduced their medical benefits 2 times in the last year. Darjee Decl. ¶¶ 7, 10. Thus, there could be hundreds of cases outstanding and new cases each day, where AHCCCS improperly reduced the immigrants' medical benefits. *See generally* Ryan Decl. ¶ 25.

The Ninth Circuit has upheld class certification in cases involving far fewer individuals than are affected here. Indeed, the Ninth Circuit has found the numerosity requirement is satisfied where there are fewer than 100 class members. *See, e.g.*, *Harik v. California Teachers' Ass'n*, 326 F.3d 1042, 1052 (9th Cir. 2003) (finding "judicial economy served" by certifying 60-member class where plaintiffs sought only prospective relief); *Jordan*, 669 F.2d at 1319 (stating inclination "to find the numerosity requirement . . . satisfied solely on the basis of the number of ascertained class members, i.e. 39, 64, and 71"); *Tietz v. Bowen*, 695 F. Supp. 441, 445 (N.D. Cal. 1987), *aff'd*, 892 F.2d 1046, (9th Cir. 1990) (finding a class of 27 retirees so numerous that joinder of all members was impracticable); *Escalante v. Cal. Physicians' Serv.*, 309 F.R.D. 612, 618 (C.D. Cal. 2015) ("[E]ven presuming a class of 19, numerosity is met. Because Plaintiff in this case is requesting declaratory and injunctive relief, allowing a class action to be brought would be in the interests of judicial economy.").

The Ninth Circuit considers other factors demonstrating impracticability, including geographic diversity of class members, the inability of individual claimants to institute separate suits, the inclusion of unknown individuals who will be affected in the future, and whether the plaintiffs' requests are for injunctive or declaratory relief. *Jordan*, 669 F.2d at 1319. All of these factors are present in this case. The class consists of immigrant residents who tend to live in the large geographical metropolitan areas of Tucson and Phoenix. Ryan Decl. ¶ 21. The class consists entirely of individuals who qualify for AHCCCS because they live at or below the federal poverty level with

financial resources that are insufficient to meet their health care needs; therefore, members of the class are by definition persons lacking the financial means to pursue separate legal actions. *Id.*; *see, e.g., Lynch v. Rank*, 604 F.Supp. 30, 36 (N.D. Cal. 1984) (finding joinder "is not feasible because of geographic factors, and because members of the class, who are by definition poor and disabled, do not have the economic means to pursue remedies on an individual basis."), *aff'd*. 747 F.2d 528 (9th Cir. 1984). The numerosity and impracticability of joinder requirements are clearly met in this case.

B. Rule 23(a)(2): Commonality

The second requirement under Rule 23(a) is that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To meet this requirement, the plaintiff must "demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 349-350 (2011) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). The claim must also depend upon a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

Nevertheless, Rule 23(a)(2) is "construed permissively," and "all questions of law or fact need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)); *Staton v. Boeing, Co.*, 327 F.3d 938, 953 (9th Cir. 2003). Even a common question suffices. *Wal-Mart*, 564 U.S. at 359 (citations omitted). Moreover, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. The Supreme Court has stated:

> Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." [citation omitted] For in such cases, "the class action device saves the resources of both the courts and the parties by permitting an issue potentially

> affecting every [class member] to be litigated in an economical fashion under Rule 23.

Falcon, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."). The test is qualitative rather than quantitative and one significant issue common to the class may be sufficient. *Hanlon*, 150 F.3d at 1019. Class actions that seek injunctive or declaratory relief by their very nature present common questions of law and fact. *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 26 (D.D.C. 2007).

Here, the Plaintiffs present several questions of fact common to all class members. All of the putative class members are eligible for the full-scope AHCCCS Medicaid program due to their immigration status and limited incomes and resources. As a result of Defendant's policies and practices, Plaintiffs and the class had or will have their AHCCCS benefits improperly reduced from full-scope to emergency-only services and are experiencing or will experience difficulties obtaining needed medical care. *See* Complaint ¶¶ 56-85. Plaintiffs and the class are unable to pay the appointment fees and medication costs that will be charged when they are on emergency-only AHCCCS. In their declarations, the Plaintiffs describe how not being able to afford the payment for needed medical care including doctor appointments and prescription medications will compromise their health. Declaration of Alma Sanchez Haro in Support of Plaintiffs' Motion for Class Certification ("Sanchez Haro Decl.") ¶¶ 21-24; Darjee Decl. ¶¶ 11-16. [1]

[1] As explained in the Complaint, because of the urgency of Dambar Darjee's health conditions and his need for medications, legal aid advocacy efforts were underway to restore his benefits to full–scope AHCCCS. The restoration of his benefits and those of Plaintiff Darjee and their minor son N. D. are imminent if not complete.

In addition, Plaintiffs and the class are entitled to a notice of benefits that meets the requirements of the Medicaid Act and due process. AHCCCS sent Plaintiffs and the class a deficient boilerplate notice regarding their reduced eligibility for emergency-only services that they could not understand. Sanchez Haro Decl. ¶ 6.

These common facts give rise to questions to law common to all proposed class members:

1. Whether Defendant Betlach's improper reduction of medical benefits for immigrants eligible for full-scope AHCCCS to emergency only benefits at recertification because of computer system errors and the failure to utilize the *ex parte* process violates the Defendant's obligation to process recertifications for immigrants with reasonable promptness pursuant to 42 U.S.C. §1396a(a)(8).

2. Whether Defendant Betlach's Benefits and Services eligibility notice that informs individuals of their eligibility for emergency services violates the Due Process Clause of the U.S. Constitution, U.S. Const. Amend. XIV, and the Medicaid Act, 42 U.S.C. § 1396a(a)(3).

Plaintiffs' prayer for relief, which seeks uniform declaratory and injunctive relief for the named Plaintiffs and all class members, evidences the significance of these common questions of law to the resolution of this lawsuit. *See* Complaint, pages 18-19. This case satisfies the requirements of Rule 23(a)(2).

C. Rule 23(a)(3): Typicality

Rule 23(a)(3), the "typicality" factor, requires that the claims or defenses of the representatives must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). The requirement "is designed to assure that the named representative's interests are aligned with those of the class," so that a representative "who vigorously pursues his or her own interests will necessarily advance the interests of the class." *Jordan*, 669 F.2d at 1321. Under the rule's "permissive standards," *Hanlon*, 150 F.3d at 1020, the Ninth

Circuit does not "insist that the named plaintiffs' injuries be identical with those of the other class members . . . ." *Armstrong*, 275 F.3d at 869. Rather,

> [a]s long as the named representative's claim arises from the same event, practice, or course of conduct that forms the basis for the class claims, and is based upon the same legal theory, varying factual differences between the claims or defenses of the class and the class representative will not render the named representative's claim atypical.

Jordan, 669 F.2d at 1321.

Commonality and typicality "tend to merge." *Falcon*, 457 U.S. at 157 n.13. The test of typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (citations and internal quotations omitted). This requirement serves to assure that the interest of the name representative aligns with the interests of the class members. *Hanon v. DataProducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

The typicality requirement is easily satisfied here. The named Plaintiffs allege similar injury: AHCCCS' reduction of their medical benefits means they cannot afford to see their doctors or get medications. Their injury results from the same alleged course of conduct, namely the Defendant's improper processing of eligibility recertifications for immigrants entitled to full-scope AHCCCS.

Plaintiff Sanchez Haro recently went 2-3 weeks without her medications and those weeks were "horrible" for her. She was trembling, shaking, vomiting and her head burned. She was suicidal and very depressed. Sanchez Haro Decl. ¶ 21. Her pharmacy could decide at any time to make her pay for her medications and she is worried that without her medications she "would die." *Id.* The program providing her mental health care also could stop providing her services. *Id*. at ¶ 22. She constantly worries about the future of her health and is very stressed over her situation. *Id*. at ¶ 24.

Without full-scope medical coverage, Plaintiff Darjee worries that she, her husband and her son will have to get so sick they need to go to the emergency room in order to get medications and see a doctor. Darjee Decl. ¶¶11-15. Even if their medical benefits are restored, she is very worried that this will happen again because this is the second time in one year that their benefits were reduced. Darjee Decl. ¶¶ 7, 18.

Experiencing similar injuries, the named Plaintiffs and putative class share the same legal theories. And, the requested injunctive relief will, if granted, benefit the class and the class representatives. The required nexus is present, and the typicality requirement is met.

D. Rule 23(a)(4): Adequacy of Representation

The final prong of Rule 23(a), the "adequate representation" factor, requires the Court to find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit asks two questions: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957 (citations omitted); *Hanlon*, 150 F.3d at 1020.

With regard to the first of the two adequacy questions, neither the named Plaintiffs nor their counsel have any conflicts of interest with other class members. The named Plaintiffs and class members raise similar claims giving rise to numerous common questions of law. They share the common interest in seeing that the Defendant's recertification policies and practices for immigrants and the eligibility notices adhere to the requirements of federal law. They seek the same relief. Similarly, Plaintiffs' counsel has no interest in conflict with other class members.

Second, the representative Plaintiffs and their counsel will vigorously pursue this case on behalf of the entire class. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel . . . ." *Hanlon*, 150 F.3d at 1021. Plaintiffs' counsel, Ellen Katz, with the William E. Morris Institute for

Justice, is experienced in class action and complex litigation, in particular, involving Social Security Act beneficiaries. A representative sample of cases in which Plaintiffs' counsel has acted as lead counsel include: *Newton-Nations v. Betlach*, 660 F.3d 370 (9th Cir. 2011); *Wood v. Betlach*, CIV 3:12-080898 PCT-DGC; *Padilla v. Rogers*, CV 02-176 TUC FRZ; *Brancatelli v. Berns*, CIV 04-421 TUC WBD. Declaration of Ellen Katz in Support of Plaintiffs' Motion for Class Certification ("Katz Decl.") ¶ 7.

Jane Perkins and Cori Racela, with the National Health Law Program, are experienced in Medicaid and complex litigation, in particular, involving Social Security Act beneficiaries. A representative sample of cases in which Plaintiffs' counsel has acted as lead counsel include: *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016), aff'g in part & vacating in part, 2013 WL 6451176 (W.D. N.Y. Dec. 9, 2013); *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016), *aff'g*, 2014 WL 4347807 (M.D. Tenn. Sept. 2, 2014); *K.C. v. Wos*, 716 F.3d 107 (4th Cir. 2013), *aff'g*, 2013 U.S. Dist. LEXIS 43822 (E.D.N.C. Mar. 29, 2012) (preliminary injunction requiring Medicaid due process in managed care program); *Newton-Nations v. Betlach*, 660 F.3d 370 (9th Cir. 2011); *McCartney v. Cansler*, 608 F.Supp.2d 694 (E.D.N.C. 2009), *aff'd*, 382 Fed.App'x 334 (4th Cir. 2010: *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006). Additional cases and experience are cited in the Declaration of Jane Perkins in Support the Plaintiffs' Motion for Class Certification ("Perkins Decl.") ¶ 5. Ms. Racela's cases include *Korean Community Center of the East Bay v. Kent*, No. RG14748387, 2014 WL 6518895 (Cal. Super. Ct. Nov. 17, 2014); *Rivera v. Douglas*, No. RG14740911 (Cal. Super. Ct. Sept. 17, 2014). Declaration of Cori Racela in Support of the Plaintiffs' Motion for Class Certification ("Racela Decl.") ¶ 5. The requirements of Rule 23(a)(4) are met.

E. Rule 23(b)(2)

The Plaintiffs must also satisfy one subdivision of Rule 23(b). This lawsuit meets the requirement of Rule 23(b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

. . . ." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) "does not require . . .[the court] . . . to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010).

As discussed previously, the Defendants' recertification policies are the same throughout the state and have equal application to all class members. The Plaintiffs allege that the Defendants have refused to act in compliance with federal law on grounds generally applicable to the class. Plaintiffs ask the Court to enter final injunctive and declaratory relief with respect to the class as a whole. This is precisely the kind of situation for which certification of a class under Rule 23(b)(2) is appropriate. *See Elliot v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom., Califano v. Yamasaki*, 442 U.S. 682 (1979). This action should be certified pursuant to Rule 23(b)(2).

II. The Court Should Designate Plaintiffs' Counsel as Class Counsel Pursuant to Rule 23(g)(1)

When a class is certified, the court must appoint class counsel, Fed. R. Civ. P. 23(g)(1), and the class certification order must list these counsel, Fed. R. Civ. P. 23(c)(1)(B). The court considers four factors in appointing class counsel:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

Pursuant to these four factors, Plaintiffs' counsel qualify for appointment in this case. As reflected by the Complaint [and Plaintiffs' soon to be filed Motion for Preliminary Injunction], Plaintiffs' counsel has committed extensive time and resources

to investigating and analyzing Plaintiffs' claims. Counsel is very experienced in class actions and complex litigation and has extensive knowledge of discrimination and benefits law. *See* Katz Decl. ¶¶ 7-8; Perkins Decl. ¶¶ 5-6; Racela Decl. ¶¶ 3, 5. The Court should appoint Plaintiffs' counsel as class counsel in its class certification order.

Conclusion

For the reasons stated above, the Plaintiffs ask this Court to certify this case as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) and pursuant to Rule 23(g), to appoint the following law firms to represent the class: the William E. Morris Institute for Justice and the National Health Law Program.

Respectfully submitted this 22nd day of July 2016.

NATIONAL HEALTH LAW PROGRAM

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/Ellen Sue Katz

Ellen Sue Katz
William E. Morris Institute for Justice
3707 North Seventh Street, Suite 220
Phoenix, Arizona 85014-5095

Attorneys for Plaintiffs