

April 01, 2012

Restoring legal immigrants' state health insurance- the Finch Case

Wendy E. Parmet

Northeastern University School of Law

Lorianne Sainsbury-Wong

Health Law Advocates

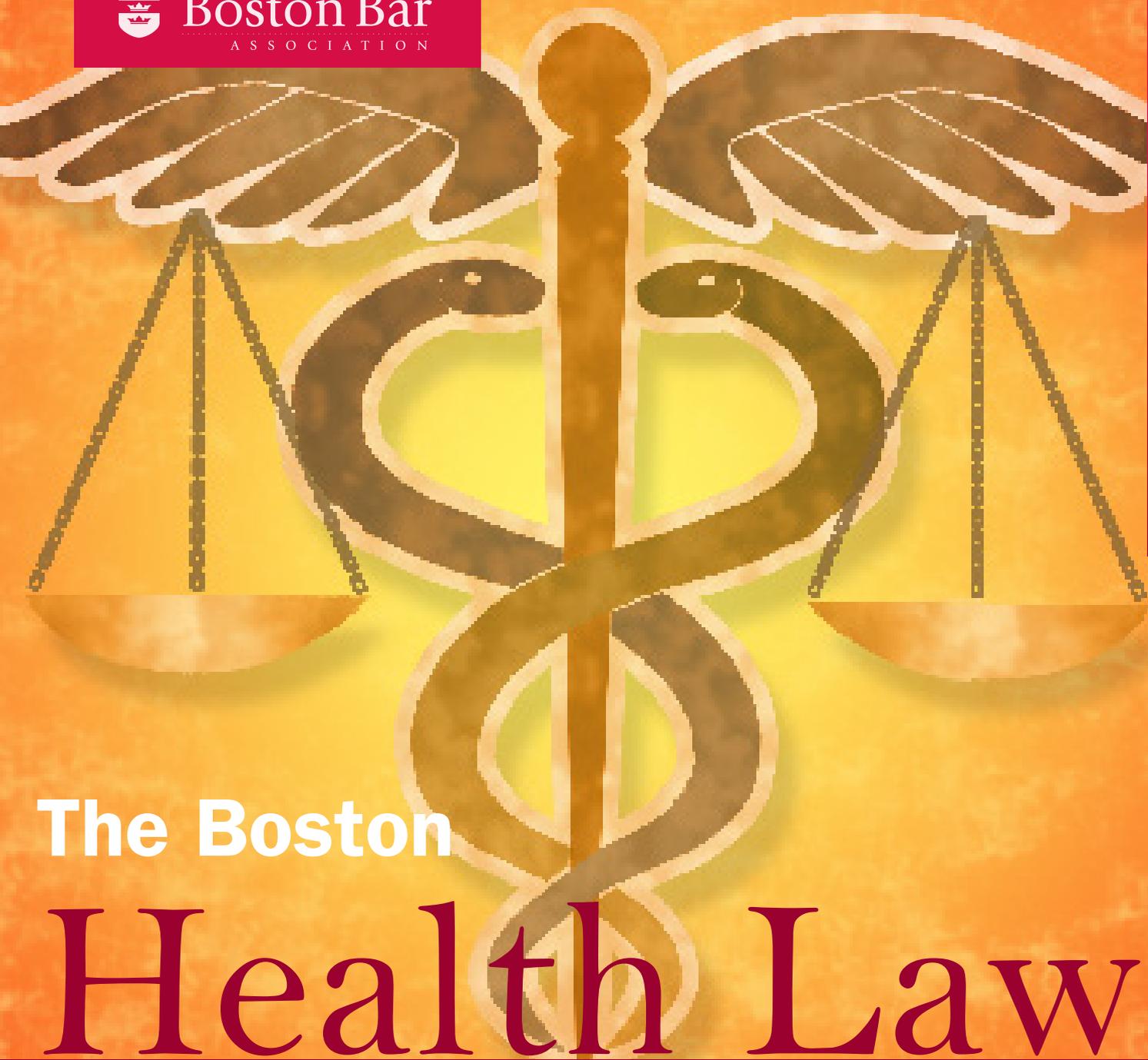
Recommended Citation

Parmet, Wendy E. and Sainsbury-Wong, Lorianne, "Restoring legal immigrants' state health insurance- the Finch Case" (2012). *School of Law Faculty Publications*. Paper 174. <http://hdl.handle.net/2047/d20004917>

This work is available open access, hosted by Northeastern University.



Boston Bar
ASSOCIATION



The Boston

Health Law Reporter

SPRING 2012

VOLUME 7, ISSUE 3

A PUBLICATION OF THE BOSTON BAR ASSOCIATION HEALTH LAW SECTION

VOLUME 7, ISSUE 3

SPRING 2012

Restoring Legal Immigrants' State Health Insurance – The *Finch* Cases

by Lorianne M. Sainsbury-Wong and Wendy E. Parmet

“In light of their particularly vulnerable status, it thus remains necessary to exercise heightened vigilance to ensure that the full panoply of constitutional protections are afforded to the Commonwealth’s resident aliens.”¹

Introduction

Last January in *Finch v. Commonwealth Health Insurance Connector Authority*,² (“*Finch II*”), the Massachusetts Supreme Judicial Court held that section 31(a) of chapter 65 of the Acts of 2009 (“§ 31(a)”),³ violated the state Constitution. The decision in *Finch II*, which followed the Court’s earlier *Finch I*⁴ decision determining that § 31(a) discriminated on the basis of alienage or national origin and was subject to strict scrutiny, paved the way for approximately 40,000 low-income legal immigrants to receive state-subsidized health insurance. By so ruling, the Court effectively reaffirmed the state’s commitment to near universal health insurance. The two decisions also clarified that legal immigrants are a protected class under the state Constitution and that in Massachusetts, strict scrutiny is indeed strict.

This Article presents our unique perspective as plaintiffs’ counsel. We focus on the pragmatic issues affecting the cases rather than the constitutional questions that were before the Court.

Section 31(a) - The Fiscally Motivated Law

In 2006 the legislature passed and Governor Romney signed landmark health care reform⁵ requiring nearly every state resident to have comprehensive health insurance so long as it is affordable.⁶ To support that requirement, the state established the Commonwealth Care Health Insurance Program (“Commonwealth Care”) which provides sliding scale premium subsidies for low and moderate income residents who otherwise lack access to insurance.⁷ When Commonwealth Care was established,⁸ legal immigrants were eligible to participate on the same basis as other residents.⁹

In 2009 the state faced a severe budget shortfall. Looking to save money, the legislature enacted § 31(a),¹⁰ which was expected to save over \$80 million by eliminating Commonwealth Care for legal immigrants who were ineligible for federal means-tested public benefits under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”).¹¹ This class was comprised of individuals with a variety of immigration statuses, including individuals who had green cards for less than five years.¹² Under PRWORA the state did not receive partial federal reimbursement for enrolling this class in Commonwealth Care, although it did receive federal support under a Medicaid waiver for enrolling U.S. citizens and other

federally-eligible aliens.¹³ The legislature therefore felt that this class was “more expensive for the state to insure” than other members of Commonwealth Care.¹⁴ And, of course, immigrants could not vote to voice their displeasure with their expulsion from Commonwealth Care.

In order to mitigate the hardship caused by § 31(a), the legislature appropriated \$40 million to create the Commonwealth Care Bridge Program (“Bridge”).¹⁵ Bridge provided less comprehensive coverage, with higher cost sharing to legal immigrants who had been on Commonwealth Care prior to July 2009, but were excluded due to § 31(a). Bridge, however, was never available to those who would have otherwise become eligible for Commonwealth Care after July 31, 2009, had § 31(a) not been enacted.¹⁶ For example, legal immigrants who lost access to employer-sponsored insurance after July 2009 could not join Bridge and were left uninsured.

Health Law Advocate’s Role

We work on behalf of Health Law Advocates (“HLA”), a not-for-profit law firm affiliated with Health Care For All (“HCFA”). HLA provides legal services to low-income, vulnerable individuals and families that have difficulty accessing or paying for health care. After legal immigrants were excluded from Commonwealth Care, HLA was inundated with calls presenting similar scenarios: “I’m afraid I won’t be able to pay for

specialty care services,” or “I was denied state insurance and am now uninsured.” Hearing these concerns, we became convinced we needed to do something. We also believed that § 31(a) undermined the promise of universal access to care made by the state’s health insurance reform. If legal immigrants could be denied health care when times got tough, so could other politically vulnerable groups. In this way, the fundamental commitment that the state made in 2006 was broken but not irretrievably lost.

Litigation was not our first choice. We knew it would be time consuming and expensive. Constitutional challenges to state laws are never easy; courts are reluctant to second-guess the legislature’s fiscal decisions. Our clients also preferred less adversarial methods. Thus in the fall of 2009, along with HCFA, HLA contacted other organizations committed to health reform, local health care providers, and community organizations. In addition, HCFA met with legislators. Although some expressed concern for the well-being of the excluded class, it soon became apparent that the legislature would not revisit its decision. We therefore began to focus on litigation.

As a small not-for-profit, HLA has very limited financial resources. But it does have a dedicated staff and a rich network of committed volunteers. Chief among the latter was HLA’s Volunteer Legal Advisor, Stephen Rosenfeld. Invaluable support was also provided by Lauren Barnes of Hagens Berman Sobel Shapiro LLP, and Jack Cushman, who was initially practicing solo but later joined Stern Shapiro Weissberg & Garin LLP. Northeastern University School of Law

also provided law students and a legal fellow. With their help, we researched the viability of a constitutional claim against § 31(a). As our research progressed, we became convinced that § 31(a) was unconstitutional.

During this period we also spoke with immigrant advocates around the country. Some believed that § 31(a) would withstand judicial scrutiny on the basis of *Doe v. Commissioner of Transitional Assistance*.¹⁷ In *Doe*, the Supreme Judicial Court appeared to affirm a state law excluding the same class affected by § 31(a) from the state’s federally-created transitional assistance program and establishing a separate cash program for that class which contained a six month durational residency requirement.¹⁸ However, as we studied *Doe*, we realized it supported our position. The durational residency requirement was upheld precisely because the program to which it was attached did not discriminate against legal immigrants; it benefitted them. The immigrants’ exclusion from the transitional assistance program, however, was not actually before the Court. In dicta the Court suggested that legal immigrants were a protected class in Massachusetts and that their exclusion from the cash assistance program was constitutional only because as a federal means-tested public benefit, the state was obligated to follow PRWORA. Comparing *Doe* with § 31(a), we believed that Commonwealth Care was not a federal public benefit and the state was not required to adhere to PRWORA’s eligibility requirements. Thus, the very factors that led the Court to find for the state in *Doe* would lead the Court to find for our clients. As a result, we decided to rely on *Doe*

in challenging § 31(a) as violating the state Constitution’s protections against discrimination.

Once we decided to bring a state constitutional challenge, numerous questions remained, including the identity of class representatives. Although many legal immigrants sought our help, some were reluctant to be class representatives. Given the anti-immigration movement that was sweeping the country (for example, Arizona was about to pass the nation’s harshest anti-immigration law),¹⁹ their hesitancy was understandable.

Eventually, four clients²⁰ who were harmed by § 31(a) agreed to be class representatives. Dorothy Ann Finch is a permanent resident who had to stop working due to a medical condition. Although initially approved for Commonwealth Care, she was denied coverage because of § 31(a). Lacking insurance, she incurred medical debt and faced a collection action. Roxanne S. Prince is a single parent with a family-based visa. Her employer did not offer health insurance. She had been enrolled in Commonwealth Care before being placed in Bridge. As a result, she lost the continuity of care with her providers. Another plaintiff, a domestic violence victim, is a political asylum applicant and mother of two U.S. citizen children. In 2006, she started receiving Commonwealth Care. When § 31(a) struck, she was placed in Bridge where she was unable to access culturally and linguistically appropriate care. A fourth class representative had been living and working in the U.S. for more than eight years under a visa based on her employer’s petition for an alien worker. She later became a law-

ful permanent resident but held her green card for less than five years. Because her employer did not offer insurance, she was enrolled in Commonwealth Care before being transferred to Bridge. When she was diagnosed with cancer, she had difficulty accessing oncologists and related providers in her area. The latter two class representatives insisted on anonymity because they feared retaliatory harm to themselves or their children.²¹

As in any litigation, we also had to consider who to sue, the specific claims we would raise, and where we would seek relief. We determined the appropriate defendants were the Commonwealth Health Insurance Connector Authority (“Connector Authority”), which administers Commonwealth Care, and its then Executive Director, Jon Kingsdale. Deciding upon the specific claims required more analysis. As noted above, because we believed that the case concerned a program unique to Massachusetts and that *Doe* supported our clients’ claims, we focused on the state Constitution’s commitment to equal protection. However, we believed that § 31(a) also violated the federal Constitution and knew that federal law allows for reasonable attorneys’ fees to the prevailing party.²² We therefore added a federal civil rights claim.

The choice of forum and relief sought proved to be challenging. We considered filing in a superior court, asking for a temporary restraining order and preliminary injunction. Doing so might have provided our clients relatively swift relief, but courts are generally reluctant to issue preliminary injunctions against public entities. We also knew that any order

issued by a trial court was likely to be appealed, and possibly stayed, pending appeal. After consultation with our clients, we therefore decided that initial review by the full Supreme Judicial Court offered the best chance of speedy relief. On February 25, 2010, we filed a declaratory judgment action before the Single Justice (Cordy, J.) asking him to report the case to the Full Court.²³ In addition, because we challenged the constitutionality of a legislative appropriation, we served the Attorney General,²⁴ who had the right to intervene.

***Finch I* – On and Off the Path to the Massachusetts Supreme Judicial Court**

As we probably should have anticipated, our path to the Supreme Judicial Court was not swift. After filing its answer, the Connector Authority removed the case to federal court. Although we could have remained in federal court, we believed that federal litigation would be delayed by a likely certification of questions to the Supreme Judicial Court and eventual appeal to the First Circuit. On the other hand, if we dropped our federal claims, thereby forfeiting attorneys’ fees, the federal court would have been able to exercise judicial discretion to return the case to state court. Concluding the latter was in our clients’ best interests, we exercised our right to delete the federal claims²⁵ and asked Judge Young to remand the case to Justice Cordy.²⁶ In June 2010, he agreed.

Once the case returned to Justice Cordy, we requested a reservation and report to the Full Court. In response, the Connector Authority argued that there were unresolved factual issues so that the

case should be sent to Superior Court. On July 21, 2010, Justice Cordy reported four questions of law to the Full Court but also required the parties to agree upon a statement of material facts about the funding and operation of Commonwealth Care pre- and post-§ 31(a). During the summer of 2010, we developed that statement of material facts with the Connector Authority through its legal counsel, Carl Valvo, Cosgrove, Eisenberg & Kiley, P.C., and Ken Salinger, the Massachusetts Attorney General’s Office, which had intervened.

The four questions reported focused on the appropriate standard of review for judging the constitutionality of § 31(a). Two issues were critical: (1) are legal aliens a protected class under the state Constitution?; and (2) even if they are, should the less stringent rational basis test be applied because § 31(a) borrowed its classification from PRWORA? We began working on our brief. HLA’s arguments were quite simple. First, the Massachusetts Constitution either under Article 106’s explicit protection against discrimination on the basis of national origin,²⁷ or under general principles of equal protection, recognizes legal immigrants as a discrete and insular, suspect class. Second, PRWORA does not require the state to discriminate in the provision of Commonwealth Care. As a result, under *Doe*, the discrimination effected by § 31(a) could not be saved by PRWORA; it had to be subject to strict scrutiny.

In making these arguments, we were generously supported by several amicus briefs²⁸ that expanded upon our arguments and

offered valuable background information to the Court.

Although we had hoped for a speedy ruling, that was not to be. However, on May 6, 2011, in a 3-2 decision, the Supreme Judicial Court held that § 31(a) discriminated on the basis of alienage or national origin and was subject to strict scrutiny.²⁹ Writing for the Court, Justice Spina rejected our argument that legal immigrants were protected by the national origin provision in Article 106.³⁰ He agreed, however, that legal immigrants were a suspect class under the state Constitution.³¹ He also found that Commonwealth Care is a state public benefit and that Congress was indifferent about whether it included or excluded legal immigrants.³² As a result, the state's actions would be subjected to strict judicial scrutiny.³³ The Court ordered the case be remanded to the Single Justice to determine whether § 31(a) could survive strict scrutiny.

Finch I - The Restoration of Coverage Nears

After receiving the Court's decision in *Finch I*, our clients were grateful. In its opinion, the Court recited the well-settled rule that a statute cannot survive strict scrutiny unless it is "narrowly tailored to further a legitimate and compelling governmental interest and [is] the least restrictive means available to vindicate that interest."³⁴ Because saving money is not a compelling state interest³⁵ and the state had always justified § 31(a) as a fiscal measure, we assumed that Justice Cordy would find § 31(a) unconstitutional. On May 23, 2011, we filed a motion for partial summary judgment. We were surprised by what happened next. The defendants argued that § 31(a) was designed

to further a compelling state interest in advancing federal immigration policies. Specifically, the defendants relied on PRWORA's preamble which identifies federal policy as promoting the self-sufficiency of aliens, and the denial of public benefits so that they do not serve as an incentive to immigration.³⁶ Defendants also argued that the merits of this defense should be decided by the Full Court. Justice Cordy agreed that the case should be reported to the Full Court. So in the fall of 2011, more than two years after our clients had lost Commonwealth Care, we were back before the Supreme Judicial Court. Once again, we were supported by powerful amicus curiae briefs.³⁷

Our arguments were straightforward. First, if strict scrutiny was to be strict, the Court had to consider the actual, not a hypothetical motive for § 31(a). If it did so, the answer would be clear: the appropriation was designed simply to save money. Second, furthering national immigration policy is not a compelling state interest. Finally, even if furthering national immigration policy were an actual purpose for § 31(a), and even if it were a compelling state interest, the appropriations bill was not narrowly tailored to further that interest.

On January 5, 2012, in a unanimous opinion written by Justice Cordy, the Supreme Judicial Court ruled that § 31(a) was unconstitutional.³⁸ The Court noted that the state's articulated purpose for its discrimination against our class of legal immigrants was fiscal; indeed, the record contained no evidence that the legislature thought about national immigration policy, nor had the legislature considered whether § 31(a)

was narrowly tailored to further the self-sufficiency of legal aliens in the Commonwealth. The mere fact that § 31(a) referenced PRWORA did not justify the discrimination against plaintiff class members. According to the Court, "the conclusory method does not satisfy strict scrutiny."³⁹

Conclusion

In March 2012, the Connector Authority began restoring state-subsidized Commonwealth Care coverage to our plaintiff class. Complete restoration is expected as of May 1, 2012.⁴⁰ Because of the Massachusetts Constitution and strict judicial scrutiny, our clients are now able to receive the state health insurance they were wrongfully denied. Once again Massachusetts has lived up to the commitment of equality in its Constitution and the promise of universal health insurance made in 2006.

(Endnotes)

1 *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 675 (2011) (declining to apply the rational basis review of aliens excluded from political functions to the plaintiff class of legal immigrants)("Finch I").

2 *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232 (2012)(Finch II).

3 An Act Making Appropriations for the Fiscal Year 2010 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, 2009 Mass. Acts ch. 65, § 31(a). The legislative appropriation provides that individuals eligible for Commonwealth Care "shall not include persons who cannot receive federally-funded benefits, under sections 401, 402, and 403 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996." As part of an outside appropriations bill, § 31(a) was in effect for only one year. In 2010 and 2011 the legislature reenacted the exclusion. 2010 Mass. Acts ch. 131, § 136; 2011 Mass. Acts ch. 68, § 166. In the discussion that follows, references to § 31(a) should be read to include, where

appropriate, references to these subsequent appropriations.

4 *Finch I*, 459 Mass. at 655.

5 An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts ch. 58, § 12. *See also* M.G.L. ch. 111M, § 2 (2006).

6 *Id.*

7 *Id.*

8 Commonwealth Care was created distinct from MassHealth, which is defined as a welfare program pursuant to federal law. *See* M.G.L. ch. 118E, § 9 and § 9A (2007). In fact, in order to be eligible for Commonwealth Care, a resident must *not* be eligible for MassHealth. M.G.L. ch. 118H, § 3(a).

9 For example, a ‘[r]esident’ eligible for Commonwealth Care was defined under the law as “a person living in the commonwealth, . . . including a qualified alien, as defined by section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 . . . or a person who is not a citizen of the United States but who is otherwise permanently residing in the United States under color of law; provided, however, that the person has not moved into the commonwealth for the sole purpose of securing health insurance under this chapter . . .” M.G.L. ch. 118H, § 1. *See also* M.G.L. ch. 118H, § 3; 956 C.M.R. 3.04 (2008); 956 C.M.R. 3.09 (2008).

10 *See* An Act Making Appropriations for the Fiscal Year 2010 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, 2009 Mass. Acts 65, § 31(a).

11 Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, 110 Stat. 2105 (1996).

12 8 U.S.C. § 1613 (1996).

13 Under PRWORA certain aliens are not eligible for federal welfare benefits. States may voluntarily provide benefits for alien residents but may not receive federal reimbursement. *See* Pub. L. 104-193, §§ 401-403 (1996) (codified as amended at 8 U.S.C. § 1601 and 8 U.S.C. §§ 1611-1612 (1996)).

14 461 Mass. at 239-40 (quoting Senator Steven Panagiotakos).

15 *See* 2009 Mass. Acts 65, § 31(b).

16 459 Mass. at 660 n.5 (noting that legal immigrants whose household income declined after August 31, 2009 to at or below 300% of the Federal Poverty Level were left without state coverage.)

17 *Doe v. Commissioner of Transitional Assistance*, 437 Mass. 521, 533-34 (2002) (concluding that the appropriate standard of review “depends on the nature of the classification that creates the

distinction between subgroups of aliens. If that classification were a suspect one such as race, gender, or national origin, we would apply a strict scrutiny analysis.”) 18 *Id.*

19 The Arizona law, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), modified by H.B. 2162 (Ariz. 2010), has been the subject of federal challenges, with the most recent decision issued by the Ninth Circuit in *U.S. v. Arizona*, 641 F.3d 339 (9th Cir. 2011), which has subsequently been appealed and is scheduled to be heard before the U.S. Supreme Court on April 25, 2012. *See Arizona v. U.S.* no. 11-182.

20 After filing the complaint, HLA was contacted by other legal immigrants who offered to provide further testimonies or affidavits in support of class action certification. *See* Chelsea Conaboy and Martin Finucane, *SJC Orders State to Cover Legal Immigrants*, BOSTON GLOBE, Jan. 6, 2012, at 1. (interviewing the parents of legal immigrant Samuel Goncalves).

21 HLA succeeded in obtaining a Court Order allowing two class representatives to proceed under the pseudonyms Jane Doe 1 and Jane Doe 2.

22 42 U.S.C. § 1988.

23 This process is permitted pursuant to M.G.L. ch. 214, § 1 and M.G.L. ch. 231A, § 1.

24 Plaintiffs gave notice to the Attorney General initially pursuant to M.G.L. ch. 231A, § 8 and subsequently under Fed .R. Civ. P. 5.1.

25 Fed .R. Civ. P. 15(a)(1). *See Carnegie Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) (a remand is within the discretion of the judge and is the preferred course of action when no federal claims remain and the federal court not invested substantial resources on the dispute.)

26 In hindsight it is quite plausible that we would have succeeded on the federal claim; however, our clients’ needs directed us to a more expedient process in state court.

27 Mass. Const. art. , as amended by Mass. Const. amend. art. 106.

28 The following organizations submitted amici curiae briefs on behalf of the plaintiffs in *Finch I*: the Irish Immigration Center (represented by Mary M. Calkins, W. Keith Robinson, and Vid Mohan–Ram, and Michael J. Tuteur); the Asian Pacific American Legal Center, Asian American Justice Center, and Asian American Institute (represented by Julie A. Su, Justin Ma, Daniel S. Floyd, Elaine Ki Jin Kim, Minae Yu, Meredith Higashi, and Ami Gandhi); Massachusetts Law Reform Institute, Health Care For All and the Massachusetts Immigrant and Refugee Advocacy Coalition (represented by Victoria Pulos); and the American Civil Liberties Union of Massachusetts

(represented by Anthony D. Mirenda, Ara B. Gershengorn, Thomas Ayres, Katie Marie Perry, and John Reinstein).

29 459 Mass. at 675.

30 *Id.* at 663. Justice Duffly disagreed with this conclusion. *Id.* at 690 (Duffly, J., concurring in part and dissenting in part).

31 *Id.* at 675-77.

32 *Id.*

33 *Id.* at 677-78. Not all the justices agreed. Concurring in part and dissenting in part, Justice Gants, joined by Justice Cordy, argued that § 31(a) was consistent with Congress policy in PRWORA and that as a result, the rational basis test should be applied. *Id.* at 684-86.

34 *Id.* at 669.

35 *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

36 *See* 8 U.S.C. § 1601. PRWORA, however, does permit states to exercise independent decision-making with respect to alien eligibility for state public benefits which may be provided at the state’s cost. 8 U.S.C. §§ 1621-1624.

37 The following organizations submitted amici curiae briefs on behalf of the plaintiffs in *Finch II*: the Asian Pacific American Legal Center *et al.* (represented by Doreena Wong, Justin Ma, Daniel S. Floyd, Minae Yu, Jordan Bekier, Christopher Punongbayan, and Kimberly Lewis, Andrew Kang, Miriam Yeung, Erin E. Oshiro, Jessica S. Chia, and Priscilla Huang, and Jacinta S. Ma); the Massachusetts Law Reform Institute, Health Care For All and the Massachusetts Immigrant and Refugee Advocacy Coalition (represented by Victoria Pulos); the American Civil Liberties Union of Massachusetts (represented by Ara B. Gershengorn, Katie Marie Perry, John Reinstein, and Laura Rotolo); and the Chinese Progressive Association *et al.* (represented by Sarah F. Anderson, Nancy J. Lorenz, and Jan M. Stiefel).

38 461 Mass. at 238-42.

39 *Id.* at 244.

40 In addition, under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1312(f), 1411, 124 Stat. 119, 183-84, 224-26 (2010), in 2014, lawfully residing individuals, such as our plaintiff class, will be eligible for federal subsidies to support the purchase of health insurance under the state exchanges, regardless of PRWORA.