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More Doctors, More Problems: Exploring Brazil's Mais Médicos Program and the Legal Challenges it has Provoked

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MORE DOCTORS, MORE PROBLEMS: EXPLORING BRAZIL'S *MAIS MÉDICOS* PROGRAM AND THE LEGAL CHALLENGES IT HAS PROVOKED

I. INTRODUCTION

Brazil is among the growing number of countries that guarantee the right to health.¹ Its Constitution provides that the state has a duty to implement policies that promote universal access to health care services, with the ultimate goal of improving the health outcomes of all Brazilians.² Despite this constitutional guarantee and the creation of the Unified Health Service to facilitate its realization,³ access to health care services and medical personnel is unevenly distributed across the country, with a high concentration of physicians in wealthier urban zones and a comparatively low density of medical personnel in impoverished urban and rural areas.⁴ This uneven distribution of health care services and personnel is reflected in the disparity of health outcomes between the country's economically advantaged cities and its poorer urban and rural areas.⁵

In response to widespread public dissatisfaction with the state of access to health care in Brazil, President Dilma Rousseff introduced the *Mais Médicos* program in July 2013.⁶ The program provides for a range of measures to improve the provision of health care throughout the country;⁷ however, the most prominent and controversial component of the program calls for the importation of foreign-trained doctors, primarily from Cuba,

1. Jody Heymann et al., *Constitutional Rights to Health, Public Health and Medical Care: The Status of Health Protections in 191 Countries*, 8 GLOBAL PUB. HEALTH 639, 650–51 (2013), available at <http://www.tandfonline.com/doi/abs/10.1080/17441692.2013.810765#UmpqiZQwy50>. Heymann and her colleagues report that

There is a clear trend towards greater constitutional protection of health rights over time. While only 33% of the constitutions that were adopted prior to 1970 addressed at least one health right, 60% of those introduced between 1970 and 1979 included the right to health, public health and/or medical care. Three quarters of the constitutions introduced in the 1980s and 94% of those adopted in the 1990s protected at least one of these rights. Only one of the 33 constitutions adopted between 2000 and 2011 (3%) did not protect at least one health right.

Id.

2. *Infra* note 15 and accompanying text.

3. *Infra* notes 16–17 and accompanying text.

4. *Infra* Part II.B.

5. *Infra* notes 36–38 and accompanying text.

6. Paul Kiernan, *Brazil to Send Cuban Doctors to Underserved Regions*, WALL ST. J. (Aug. 21, 2013), <http://www.wsj.com/articles/SB10001424127887324619504579027590717311888>.

7. *Infra* notes 41–42.

to practice medicine in the country's underserved rural and urban regions.⁸ Criticism of the program has been widespread and varied,⁹ ranging from arguments that it does not solve the long-term problems endemic in the Brazilian health care system¹⁰ to charges by the medical profession that it illegally allows foreign doctors to practice medicine within the country's borders without requiring them to revalidate diplomas received in their home countries.¹¹

Given the controversy surrounding the program, it is probable that litigation over its legality, particularly the validity of importing foreign doctors, will determine the fate of *Mais Médicos*.¹² This Note argues that the Supreme Federal Court's recent jurisprudence, as well as its apparent commitment to challenging the status quo and promoting the rights of traditionally disadvantaged and marginalized members of Brazilian society, indicates that the Brazilian judiciary will likely uphold the *Mais Médicos* program, including the controversial provision that calls for the importation of foreign medical personnel. At the same time, it also suggests that more needs to be done in the long-term to resolve the health care system's inequities. Part II gives an overview of the constitutional and ideological foundations of the right to health in Brazil and provides an account of the current state of access to health care at both the national and regional levels. Part III outlines the basic measures established under *Mais Médicos*, focusing on the importation of foreign doctors, and describes the public's response to the program, namely the most ubiquitous criticisms. Part IV considers the likely future of *Mais Médicos* through the lens of the Supreme Federal Court, first considering past litigation over the right to health in the Brazilian legal system and then looking to the recent string of socially and politically liberal decisions that have defined the court in recent years.

8. *Infra* Part III.

9. *Infra* Part III.B.

10. *Infra* notes 72–73 and accompanying text.

11. *Infra* notes 69–71 and accompanying text.

12. Future litigation seems likely given that opponents filed lawsuits over the legality of the program within months of its announcement. *See infra* notes 76–77 and accompanying text.

II. "UNIVERSAL" HEALTH CARE IN BRAZIL

A. Constitutional and Ideological Underpinnings

Brazil is one of sixty-nine countries that guarantee the right to health.¹³ Its current constitution, adopted in 1988,¹⁴ states that "[h]ealth is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery."¹⁵ In furtherance of that right, Brazil's Unified Health System (UHS)¹⁶ was designed to promote four core principles: universality, integrality, decentralization, and equity.¹⁷

The ideology underlying Brazil's health care system can be better understood by examining the World Health Organization's (WHO) 1978

13. Heymann, *supra* note 1, at 645.

14. *Brazil Complete New Constitution*, N.Y. TIMES, Sept. 3, 1988, available at <http://www.nytimes.com/1988/09/03/world/brazil-complete-new-constitution.html>. Brazil's current constitution was drafted in 1988 as the country returned to civilian rule after 23 years under military control. *Id.* In the interest of "protect[ing] the weak and punish[ing] those who abuse power," its drafters included provisions covering everything from interest rates and the minimum wage to education, divorce, Indian rights, and health. *Id.*

15. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 196 (Braz.). English translation available at http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_3ed.pdf.

16. The Unified Health System (*Sistema Único de Saúde* [SUS] in Portuguese) is "a set of actions and services within the health area provided by public federal, state, and local agencies and institutions" established after the adoption of the federal Constitution in 1988 to "[ensure] full and free assistance to the whole population." Daniela Ikawa & Laura Mattar, *Racial Discrimination in Access to Health: The Brazilian Experience*, 57 U. KAN. L. REV. 949, 959 (2009). The public health system as it exists today is, at least in theory, "based on decentralized universal access, with municipalities providing comprehensive and free health care to each individual in need financed by the states and federal government." *Flawed but Fair: Brazil's Health System Reaches Out to the Poor*, 86 BULL. WORLD HEALTH ORG. 248 (2008), available at <http://www.who.int/bulletin/volumes/86/4/08-030408.pdf>. As of 2008, an estimated 70% of Brazilians received health care from the SUS, while those who can afford it typically receive private care. *Id.*

17. Ikawa & Mattar, *supra* note 16, at 960. Ikawa and Mattar define those principles as follows:

By universality it is understood that each and every Brazilian citizen must have access to the public health system; by integrality, that the supply of health services by the State must cover all illnesses, from basic care to the most advanced health practice. Decentralization is meant to be the participation of the different governmental spheres (federal, state, and local) in the provision of the health services, including by incorporating not only their own establishments but also those offering health assistance under an agreement with the government. The principle of equity indicates that the unequal must be treated unequally, in other words; providing the services to each according to his specific needs, considering that these may be, and quite frequently are, different.

Id.

Declaration of Alma-Ata (“Alma-Ata”),¹⁸ which influenced the formulation of Brazil’s constitutional right to health care.¹⁹ Alma-Ata’s approach emphasizes “[p]rimary health care ‘based on practical, scientifically sound and socially acceptable methods and technology made universally accessible through people’s full participation and at a cost that the community and country can afford,’”²⁰ and “[r]elies on health workers, including physicians, nurses, midwives, auxiliaries, and community workers as well as traditional practitioners, trained to work as a team and respond to [the] community’s expressed health needs.”²¹

Commentators are skeptical of Alma-Ata’s effectiveness in actually implementing its lofty goals and identify a number of factors that have prevented its approach to bringing health care to all from succeeding. In general terms, critics point to Alma-Ata’s lack of “workable mechanisms” to carry out its holistic approach to expanding access to health care.²² Specifically, they say it is “of little use in dealing with the practical health needs of the world’s poorest and most disenfranchised citizens.”²³ Additionally, Alma-Ata’s reliance on community health workers as opposed to traditional practitioners has been stymied by the entrenched interests of the medical profession.²⁴ These shortcomings are acutely reflected in the case of Brazil.

B. The Current State of Access to Health Care in Brazil

Despite the Brazilian constitution’s guaranteed right to health and the pervasive belief that more Brazilians have access to health care than did before enactment of the 1988 Constitution,²⁵ access to care, and, more precisely, access to medical professionals, remains elusive. Forty percent

18. For the full text of the Declaration, see Declaration of Alma-Ata, Int’l Conference on Primary Health Care, Alma-Ata, USSR (Sept. 6–12, 1978), *Declaration of Alma-Ata*, available at http://www.who.int/publications/almaata_declaration_en.pdf.

19. *Flawed but Fair*, *supra* note 16.

20. Stephen Gillam, *Is the Declaration of Alma Ata Still Relevant to Primary Health Care?*, 336 BRIT. MED. J. 536 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2265356/>, (quoting *Declaration of Alma Ata*, *supra* note 18).

21. Gillam, *supra* note 20, at 537.

22. Peter J. Hammer & Charla M. Burill, *Global Health Initiatives and Health System Development: The Historic Quest for Positive Synergies*, 9 IND. HEALTH L. REV. 567, 643–44 (2012).

23. *Id.* at 649.

24. Gillam, *supra* note 20, at 536.

25. See generally *Flawed but Fair*, *supra* note 16. Those who view the “health-care revolution” as relatively successful point to the Family Health Program, established in 1994 to promote primary care through the placement of community health workers in municipalities across the country, as one of the reasons for expanded access to health care, especially among the poor. *Id.* at 248.

of Brazilians lack access to primary care and instead rely on hospital emergency rooms for treatment.²⁶ The most recent statistics indicate that Brazil's physician density is 1.76 physicians per 1,000 people.²⁷ This number is below the level that the WHO suggests is necessary to meet a country's primary health care needs²⁸ and falls short as compared to other countries, including other Latin American countries with some form of universal health care.²⁹ The deficiency in the availability of doctors is likely a driving force behind growing national dissatisfaction with the Brazilian health care system.³⁰

Nevertheless, there are indications that the problem is not a lack of doctors in Brazil as a whole, but rather a lack of doctors where they are most needed. The majority of Brazilian physicians reside and practice in the country's major cities,³¹ leaving the country's remote rural areas, including the vast Amazon region, and its underserved urban areas³² with limited access to treatment.³³

26. *Health Care in Brazil: Flying in Doctors*, ECONOMIST (Aug. 31, 2013), <http://www.economist.com/news/americas/21584349-government-imports-foreigners-reach-parts-locals-dont-want-flying-doctors>. Another quarter seek private care. *Id.*

27. *Brazil*, *World Factbook*, CIA (Sept. 25, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html>. According to the Brazilian government, the country has approximately 360,000 active doctors but could use 160,000 more. Vincent Bevins, *Brazil's President Imports Cuban Doctors to Ease Shortage*, L.A. TIMES (Jan. 6, 2014), <http://www.latimes.com/world/la-fg-ff-brazil-doctors-20140106,0,4556449.story#axzz2q2E7lXRZ>.

28. The WHO "estimates that fewer than 2.3 health workers (physicians, nurses, and midwives only) per 1,000 would be insufficient to achieve coverage of primary healthcare needs." *Physicians Density*, *World Factbook*, CIA, (2013), <https://www.cia.gov/library/publications/the-world-factbook/fields/2226.html>.

29. As of 2009, the United States had a physician density of 2.42 physicians per 1,000 people. *Id.* Canada, by comparison, registered at 2.07 physicians per 1,000 people in 2010. *Id.* Among other Latin American countries with universal health care, Cuba led with 6.72 physicians per 1,000 people in 2010. *Id.* As of 2008, Uruguay had 3.74 physicians per 1,000 people, while Argentina followed with 3.16 physicians per 1,000 people in 2004. *Id.*

30. In a June 2013 national poll, 48% of respondents indicated that health care is Brazil's most significant problem. Seth Kugel, *Brazil's Plan Isn't What Doctors Would Order*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/world/americas/brazils-plan-isnt-what-doctors-would-order.html?pagewanted=all&_r=1&. Education came in a distant second at 13 percent. *Id.* Popular frustration with public services, including the health care system, was also prominently reflected in widespread street protests in Brazil in June 2013. *Health Care in Brazil: Flying in Doctors*, *supra* note 26.

31. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. Although this Note will primarily focus on the distribution of physicians, the relative unavailability of health care workers includes not only physicians but also nurses: the ratio of nurses to doctors in Brazil is 1:2, compared to 3:1 in efficient health care systems. *Id.*

32. Although discussions about the distribution of doctors in Brazil primarily center on the scarcity of doctors in rural regions, particularly the Amazon, the country's infamous slums have equally pressing needs. *See, e.g.*, Simon Romero & Victoria Burnett, *Brazil Forging Economic Ties with Cuba, While Hiring Its Doctors*, N.Y. TIMES (Dec. 29, 2013), http://www.nytimes.com/2013/12/30/world/americas/brazil-forging-economic-ties-with-cuba-while-hiring-its-doctors.html?_r=0. Medical

Brazil is not unique in its uneven distribution of health care personnel: the unequal concentration of health workers in wealthier, typically urban areas is endemic throughout the world.³⁴ In the case of Brazil, this phenomenon is attributable, at least in part, to the low incomes of the populations in poorer, often rural areas, which has deterred physicians from practicing there.³⁵

While choosing to practice in wealthier areas can provide personal benefits to physicians and other health care personnel, as well as the populations in those areas, it works to the detriment of those in less desirable regions. Research across countries shows that “imbalanced distribution of health personnel can contribute to great disparities in health outcomes between the rural and urban population.”³⁶ In Brazil, this has been reflected, for example, in the disparity in child mortality rates between urban and rural areas.³⁷ The implications of these disparities are far-reaching. In fact, some scholars suggest that this difference in the availability of health care and consequently the “health achievement” of

personnel tend to avoid the severe conditions of poverty in these areas, which include rampant drug deals, dilapidated buildings and infrastructure, stray animals, and unpleasant smells. *Id.*

33. One Brazilian doctor described the situation as follows: “What we have is not a lack of doctors but a lack of infrastructure and supplies that would allow for a better distribution of doctors where they are needed.” Kugel, *supra* note 30. This geographical disparity in physician density is reflective of Brazil’s overall population distribution, which is disproportionately concentrated in the eastern part of the country, particularly along the coast in and around its two largest cities, Rio de Janeiro and São Paulo. *South America: Population Density, 2010*, SOCIOECONOMIC DATA AND APPLICATIONS CENTER, <http://sedac.ciesin.columbia.edu/downloads/maps/nagdc/nagdc-population-landscape-climate-estimates-v3/place3-popdens-2010-south-america.pdf>. The country’s interior remains sparsely populated. *Id.* As a point of reference, the state of Rio de Janeiro has more than three doctors per 1,000 people. Bevins, *supra* note 27. By contrast, in the far-removed Acre region near the Bolivian and Peruvian borders, there is less than one physician per 1,000 people. *Id.*

34. See generally Giles Dussault & Maria Cristina Franceschini, *Not Enough There, Too Many Here: Understanding Geographical Imbalances in the Distribution of the Health Workforce*, 4 HUM. RESOURCES FOR HEALTH (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1481612/>.

35. *Id.* at 2. Relatedly, health care personnel are often more inclined to establish careers in urban areas given the social, cultural, educational and professional opportunities available in cities as compared to rural areas. *Id.* Others point to the medical education system in Brazil as a possible explanation for the inability of poorer areas to attract doctors. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. “Brazil finds it particularly hard: offering to pay off student loans, a common carrot in the United States, does not apply, since the public universities that train most of the doctors charge no fees. Most medical students are from better-off families and have few links to deprived communities.” *Id.*

36. Dussault & Franceschini, *supra* note 34.

37. See Ellen van de Poel et al., *What Explains the Rural-Urban Gap in Infant Mortality: Household or Community Characteristics?*, 46 DEMOGRAPHY 827, 828 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831359/>.

Brazilians in poorer rural or urban areas versus their wealthier counterparts casts doubt on the true success of democracy in Brazil.³⁸

III. THE *MAIS MÉDICOS* PROGRAM

A. *Background*

Ostensibly in response to the perceived inadequacies of her country's health care system,³⁹ namely the availability of doctors to all Brazilian citizens, President Dilma Rousseff announced plans in July 2013 for *Mais Médicos* (in English, "More Doctors"),⁴⁰ a program that, among other things,⁴¹ brings foreign physicians into the country with the broad goal of

38. Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH AND HUM. RTS. 33, 35 (2009). Ferraz suggests that

[T]he predicament of the majority of the Brazilian population whose health achievement is still so low (and significantly lower than the health achievement of the average and the better off) is mostly due to their lack of real opportunity to achieve good health rather than a personal free choice to disregard their health. In no truly democratic society—where most people have a reasonably wide range of opportunities—would health inequalities (and associated inequalities in wealth and living standards) achieve the levels currently present in Brazil.

Id.

39. Although most commentators agree that *Mais Médicos* was primarily a response to popular dissatisfaction with the national health care system, others posit that the program is also an attempt by Brazil to strengthen its position as a key player as Cuba begins to open its economy to market forces for the first time in five decades. Romero & Burnett, *supra* note 32. By providing employment for Cuban doctors, Brazil stands to strengthen its ties with the Cuban government and increase its profile on the island, opening the door for new business opportunities for Brazilian companies. *Id.* This is unsurprising given the fact that Brazilian exports to Cuba have quadrupled over the past ten years and Brazil currently ranks as Cuba's third largest trading partner, with only China and Venezuela ahead of it. *Id.* Although China's presence on the island is likely safe from competitors like Brazil, there are indications that Venezuela's economic ties with Cuba may be on the downswing as Venezuela faces its own economic challenges and cooperative projects between the two have been increasingly postponed or abandoned altogether. *Id.* Cuba is also poised to benefit from its economic ties with Brazil through *Mais Médicos*: the deal could be worth up to \$270 million a year to the Cuban government. *Id.*

40. Kiernan, *supra* note 6.

41. Law 12,871, which creates the *Mais Médicos* program, also outlines the following specific measures:

[T]he locations of medical courses and places for residency will be reorganized and priority will be given to regions with the lowest ratio of vacancies and physicians per capita that also have a structure of health services that can offer sufficient and quality field practice for medical students . . . ; new standards will be set for medical training in the country . . . ; and in [National Health Service] priority regions, improvement of the skills of primary health care doctors will be promoted through integration of teaching and provision of services, including by means of international exchanges.

Brazil: More Medical Doctors Program Launched, L. LIBR. OF CONG. (Oct. 30, 2013), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205403739_text [hereinafter *More Medical Doctors Program Launched*].

serving those regions that Brazilian doctors tend to avoid.⁴² The decision to turn abroad to find doctors willing to practice in the country's less attractive regions came after efforts to draw Brazilian doctors to those areas proved unsuccessful.⁴³ The program offers participating foreign physicians three-year contracts in family medicine⁴⁴ and pays 10,000 reais (US \$4,250) per month, plus room and board.⁴⁵ The first *Mais Médicos* participants arrived in late August 2013,⁴⁶ and President Rousseff's initial goal was to import approximately 13,000 foreign physicians by May 2014, some 11,000 of which were to come from Cuba.⁴⁷ The deal between Brazil and Cuba was made possible by an agreement between the two governments overseen by the Pan-American Health Organization.⁴⁸ The overwhelming reliance on Cuban doctors is unsurprising given Cuba's long history of exporting doctors abroad, a phenomenon known as "medical internationalism."⁴⁹

42. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. More specifically, article 1 of Law 12,871 states that the purposes of the program include

[D]evelop[ing] human resources in the medical field for the SUS [*Sistema Único de Saúde*, or National Health System] and decreas[ing] the shortage of medical doctors in priority regions for the SUS, in order to reduce regional inequalities in health; strengthen[ing] the provision of primary health care services in the country; improv[ing] medical education in the country and provid[ing] doctors with more medical experience in the field during the training process; enlarg[ing] the amount of medical training at the clinics of the SUS by developing their knowledge of the actual health situation of the Brazilian population; strengthen[ing] the policy of continuing education, through the integration of teaching and provision of services; promot[ing] the exchange of knowledge and experience between Brazilian health professionals and foreign-trained physicians; enhanc[ing] medical expertise in the area of public health policy and in the organization and functioning of the SUS; and encourag[ing] the development of research applied to the SUS.

More Medical Doctors Program Launched, *supra* note 41.

43. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. Only 938 Brazilian physicians expressed interest in the 15,460 open positions. *Id.*

44. *Id.* The emphasis on family medicine is a result of the fact that there are "too few . . . general practitioners," even in the cities and other wealthier areas where Brazil's physicians are concentrated. *Id.* This leads to a lack of prevention and early intervention for common health problems, central tenets of Cuban medicine. Bevins, *supra* note 27. The first doctors to arrive in Brazil through *Mais Médicos* have reported seeing numerous cases of frequently preventable conditions such as hypertension, diabetes, gastritis, and asthma. *Id.* In their view, doctors should treat the whole person, rather than respond to a specific condition or disease after it has already manifested itself. *Id.* Nonetheless, many Brazilians would like to see more specialists brought in from abroad. *Id.*

45. *Health Care in Brazil: Flying in Doctors*, *supra* note 26.

46. *Id.* These early arrivals primarily came from Argentina, Portugal and Spain, although the first wave also included some Cuban doctors. *Id.*

47. Bevins, *supra* note 27.

48. Shari Wejsa, *Program Designed to Address Medical Needs in Brazil Arouses Controversy*, AMERICAS Q. (Oct. 2, 2013), <http://www.americasquarterly.org/content/program-designed-address-medical-needs-brazil-arouses-controversy>.

49. Sarah A. Blue, *Cuban Medical Internationalism: Domestic and International Impacts*, 9 J. LATIN AM. GEOGRAPHY 31 (2010). The first Cuban doctors to be sent abroad by the Castro regime

The government has implemented various rules to control which foreign doctors can legally practice in Brazil under *Mais Médicos*.⁵⁰ Participants must come from countries with a physician density of more than 1.8 physicians per 1,000 people,⁵¹ i.e. countries with a higher physician density than Brazil. According to the Brazilian Ministry of Health, foreign trained doctors must have medical training that meets Brazilian standards, experience in family medicine, and possess Portuguese language ability in order to practice in the country.⁵² They also must undergo a three-week preparation course upon arriving in Brazil.⁵³ At the same time, *Mais Médicos* participants are exempt from the tests that foreign-trained doctors are typically required to take before practicing in Brazil.⁵⁴ There is a trade-off, though: foreign-trained doctors participating in the program will only be able to legally practice in their assigned clinics.⁵⁵ Further, the program explicitly prohibits firing Brazilian doctors

went to Chile in 1960 to provide services in response to an earthquake there. *Id.* Three years later, in 1963, doctors were sent to Algeria for Cuba's first long-term international medical aid program. *Id.* In 1984, the Cuban government announced it would train 10,000 new doctors with the specific goal of sending them abroad, the first such program in the world. *Id.* Cuba's international medical efforts have grown exponentially over the past five decades, with medical personnel serving throughout Latin America, Africa, Asia, and the South Pacific, often in poor, remote, and/or underserved regions. *Id.* As of 2008, there were over 37,000 Cuban doctors working in foreign countries, as compared to only 2,300 in 1978. *Id.* Cuba has also recently undertaken the training of foreign doctors within its borders at the Latin American School of Medicine in Havana. *Id.* According to one observer, "medical internationalism" has resulted in three primary outcomes for the Cuban state, in addition to spreading its vision of universal health care to other countries: (1) developing good will and solidarity for the government in the international community; (2) exporting socialist principles abroad and strengthening them at home; and (3) generating hard currency for the Cuban government and economic security for the individual doctors, who earn more abroad than they would working at home. *Id.*

50. The medical profession in Brazil is regulated by the *Associação Médica Brasileira* (in English, the "Brazilian Medical Association") and the *Conselho Federal de Medicina* (the "Federal Council of Medicine"). Wejsa, *supra* note 38.

51. *More Doctors for Brazil*, CONSULATE GEN. OF BRAZIL IN MIAMI, http://miami.itamaraty.gov.br/en-us/more_doctors_for_brazil.xml (last visited Jan. 3, 2015).

52. Kiernan, *supra* note 6.

53. *Id.*

54. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. As a point of comparison, foreign-trained doctors that are not a part of *Mais Médicos* must go through a five-step process to revalidate medical diplomas obtained abroad. *Revalidation of Diplomas*, BRAZILIAN ASS'N MED. EDUC., <http://www.abem-educmed.org.br/ingles/revalidacao.php> (last visited Jan. 3, 2015). This process includes registration, submission and review of required documents, a comparison of curriculum content and course load equivalency, a Portuguese language proficiency test, a written examination, and an oral and practical examination. *Id.* Some Brazilian officials speculate that the revalidation examination administered to foreign doctors "has been made needlessly difficult in order to keep foreigners out" and point to the fact that only 10% percent of test-takers pass as support for that claim. *Health Care in Brazil: Flying in Doctors*, *supra* note 26.

55. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. The government has imposed other limitations on participating foreign doctors in addition to the restrictions on where they can legally

and replacing them with foreign ones, even though some local officials contend that doing so would be a more effective solution.⁵⁶ Finally, foreign participants will only be permitted to request political asylum in limited circumstances, a particularly salient point for doctors coming to Brazil from Cuba.⁵⁷ Interestingly, in January 2014, the Brazilian government announced plans to draw even more foreign workers to the country, suggesting that regulations such as those currently in place for doctors coming to Brazil under *Mais Médicos* could be relaxed.⁵⁸ At this time, however, it appears that the aforementioned constraints on who may practice in Brazil, and where they may do so, still stand.

B. Response to *Mais Médicos*

Since President Rousseff announced *Mais Médicos* in July 2013, the program has generally been met with popular support, particularly in the underserved regions intended to benefit from the influx of medical personnel.⁵⁹ This positive reaction among Brazilian citizens is

practice. For example, Cuban doctors brought into the country through *Mais Médicos* are not allowed to bring their families with them. Romero & Burnett, *supra* note 32.

56. Bevins, *supra* note 27.

57. Romero & Burnett, *supra* note 32. In order to request asylum in Brazil, a doctor must present allegations of persecution for his or her political beliefs. *Id.* This is an interesting restriction in light of the program instituted by the United States' Department of Homeland Security in 2006, known as the Cuban Medical Personnel Parole program, which allows Cuban medical personnel "who study or work in a third country under the direction of the Cuban government" to travel to the United States legally. Mirta Otijo, *Doctors in Cuba Start Over in the U.S.*, N.Y. TIMES, Aug. 3, 2009, http://www.nytimes.com/2009/08/04/health/04cuba.html?pagewanted=all&_r=1&.. An estimated two percent of Cuban doctors working abroad defect while overseas. Blue, *supra* note 49. This has resulted in Cuban doctors not only accepting the opportunity to work abroad but in many cases actively seeking the chance to do so, regardless of where they may be sent by the Cuban government. Mirta Otijo, *supra*. Although many defecting Cuban doctors do not obtain licenses to work as physicians once in the United States due to language barriers and the perception in the United States that foreign medical schools are subpar as compared to American ones, they are typically able to earn more than they did practicing medicine in Cuba, either through other work in the medical field or in alternative professions. *Id.*

58. *Brazil Wants to Attract Foreign Workers*, ASSOCIATED PRESS, Jan. 16, 2014, <http://bigstory.ap.org/article/brazil-wants-attract-foreign-workers>. Specifically, the proposed plan, which bears some resemblance to *Mais Médicos*, would relax the process for obtaining a work visa for "highly qualified professionals," including doctors. *Id.*

59. A September 2013 survey revealed that 73.9% of Brazilians approve of the program, compared to 49.7% when it was initially announced in July 2013. *Mais Médicos Já Impulsiona Aprovação de Dilma, Diz CNT* [More Doctors Already Driving Approval of Dilma, says CNT], BRASIL 247, Sept. 10, 2013, <http://www.brasil247.com/pt/247/poder/114527/>. Many citizens in historically neglected areas have access to a local physician for the first time, and in some cases are being treated for previously undiagnosed ailments or conditions they were not aware needed professional attention. Bevins, *supra* note 27. One political commentator described the generally receptive attitude toward the incoming doctors as follows: "Millions that live in these cities [without

unsurprising given the overall dissatisfaction with the public health care system.⁶⁰

Nonetheless, not everyone in Brazil is pleased with President Rousseff's plans. On a broad level, President Rousseff's opponents contend that the program is overtly political and was designed to serve her strategy for reelection, rather than the nation's failing public health care system.⁶¹

The medical profession is the plan's most outspoken opponent, raising several arguments in an attempt to mount a legal challenge to *Mais Médicos*.⁶² One popular criticism calls attention to the nature of the agreement between the Brazilian and Cuban governments.⁶³ Instead of hiring foreign doctors directly, the Brazilian government left the deal to the U.S.-based Pan-American Health Organization (PAHO).⁶⁴ Critics liken

doctors] don't want to know if their doctor is from Bahia, Switzerland, or Cuba. They want doctors. And medicine. They know that a doctor is better than no doctor." Fernanda Canofre, *Racism Greets Imported Cuban Doctors in Brazil*, PUB. RADIO INT'L (Sept. 6, 2013), <http://www.pri.org/stories/racism-greets-imported-cuban-doctors-brazil-0>. Despite the generally positive response to *Mais Médicos* on the part of the Brazilian people, there were some initial negative reactions that received a lot of attention in the media both in Brazil and worldwide. *Id.* The first Cuban doctors to arrive in the country as a part of the program, many of whom are of African descent, were met by racist protesters and chants of "slave" upon their arrival in their assigned locations. *Id.*

60. See *supra* note 29 and accompanying text.

61. Rousseff narrowly won a run-off election in October 2014 and was sworn in for a second term on January 1, 2015. *Brazil's Dilma Rousseff Sworn in for a Second Term*, BBC NEWS (Jan. 2, 2015), <http://www.bbc.com/news/world-latin-america-30651898>. This victory came despite the fact that her approval rating suffered as a result of the same street protests over public services that led her to introduce *Mais Médicos*. *Kick-Off Approaches: Latin America's Largest Economy Enters An Unpredictable Election Year*, ECONOMIST (Jan. 4, 2014), <http://www.economist.com/news/americas/21592623-latin-americas-largest-economy-enters-unpredictable-election-year-kick-approaches?zid=305&ah=417bd5664dc76da5d98af4f7a640fd8a>. Although the potentially political motivations behind the program understandably raise some red flags, some in Brazil have opined that "[t]here is no reason to criticize governments for boosting their popularity by providing better public services" as "[that is] what politicians do." Bevins, *supra* note 27. Despite the fact that Rousseff's popularity declined in the wake of the June 2013 protests, her approval rating subsequently improved and she remained the frontrunner ahead of the 2014 presidential election. *Kick-Off Approaches, supra*. For example, a November 2013 poll revealed that 47% of Brazilian voters planned to vote for Rousseff, while her two challengers combined for only 30%. *Id.* According to observers, the likelihood of her winning reelection was contingent on her willingness to make large-scale policy changes, such as to the health care system, which two-thirds of respondents in the same poll indicated would be a key factor in their voting decision. *Id.*

62. One local health minister in a rural area of Brazil compared the medical profession's opposition to *Mais Médicos* to a corporation defending its economic interests. Bevins, *supra* note 27.

63. See, e.g., Wejsa, *supra* note 48.

64. Wejsa, *supra* note 48. According to its website, the Pan-American Health Organization, which serves as the World Health Organization's Regional Office for the Americas, "provides technical cooperation and mobilizes partnerships to improve health and quality of life in the countries of the Americas." *About PAHO*, PAN AM. HEALTH ORG., http://www.paho.org/hq/index.php?Itemid=220&id=91&option=com_content&view=article (last updated Nov. 18, 2014).

this to outsourcing and maintain that the Brazilian government should have hired the foreign doctors individually.⁶⁵

Another common argument against the legality of the program addresses the financial arrangement between the Brazilian and Cuban governments and participating physicians. Cuban doctors practicing in Brazil through *Mais Médicos* will only receive between 25% and 40% of their salaries, with the government in Havana receiving the rest.⁶⁶ Relatedly, critics also compare the program to slave labor based on the relatively low pay⁶⁷ and inability of *Mais Médicos* doctors to practice outside of their assigned clinics.⁶⁸

Perhaps the most widespread criticism of the program (and the one most likely to lead to legal action) relates to the fact that *Mais Médicos* physicians are not required to take the revalidation exam typically required of foreign-trained doctors.⁶⁹ Opponents of the program claim that this covers up the possibility that a large proportion of the foreign doctors would not be able to pass the test and thus would not meet Brazilian standards for physicians.⁷⁰ This, they say, could negatively affect the quality of health care available to Brazilians.⁷¹

Aside from these immediate concerns about *Mais Médicos*, some assert that the program's approach to expanding access to quality medical care to all Brazilians and closing the gap between urban and rural areas fails to

65. *Health Care in Brazil: Flying in Doctors*, *supra* note 26.

66. Wejsa, *supra* note 48. By contrast, Portugal and Bolivia, which also import Cuban doctors, pay the physicians directly. Bevins, *supra* note 27. Given the large monetary value of the contract (approximately \$150 million per year), the deal is very lucrative for the Cuban government. *Health Care in Brazil: Flying in Doctors*, *supra* note 26.

67. Wejsa, *supra* note 48. Foreign doctors in private practice in Brazil receive their full salary. *Id.*

68. *Health Care in Brazil: Flying in Doctors*, *supra* note 26. Some commentators suggest that the "slave labor" analogy is motivated by racial prejudice rather than a genuine concern with protecting the rights of the Cuban doctors. *See* Wejsa, *supra* note 48.

69. *See supra* note 54 and accompanying text.

70. Lourdes Garcia-Navarro, 'Castrocare' Divides Doctors in Cuba, Brazil [hereinafter *Castrocare*], NAT'L PUB. RADIO (Oct. 2, 2013), <http://www.npr.org/blogs/parallels/2013/10/02/228376356/castro-care-divides-doctors-in-cuba-brazil>. Those who call attention to the fact that foreign *Mais Médicos* doctors do not have to take the revalidation exam argue that "attracting a foreign doctor to Brazil without validating his diploma, is not importing him, but bootlegging him." Canofre, *supra* note 59.

71. Wejsa, *supra* note 48. In response to attacks on the relaxed requirements for foreign doctors to practice in Brazil under *Mais Médicos*, supporters of the program seem to imply that an underqualified physician is better than no physician at all for Brazilians who have historically not had access to necessary medical services, particularly primary and preventive care. *Castrocare*, *supra* note 70. Proponents of the program also point out that some 84 percent of the doctors coming to Brazil from Cuba already have at least 16 years of experience in practicing medicine and are therefore not as underqualified as the Brazilian medical establishment contends. Canofre, *supra* note 59.

provide a sustainable solution to the country's health care problems; instead, it merely offers a quick fix for the perceived inadequacies of the Brazilian health care system.⁷² According to these critics, it does not address problems such as aging medical equipment and a lack of medical facilities, especially in the underserved communities targeted by *Mais Médicos*.⁷³

Such claims that President Rousseff is ignoring the long-term viability of the health care system are not entirely true; they are narrowly focused on the most publicized and controversial of the program's components and ignore other provisions of *Mais Médicos*. At the same time that President Rousseff introduced plans to recruit foreign doctors, she also announced efforts to expand opportunities for medical education for Brazilians, as well as a proposal that would add two years of public service in underserved regions to medical students' training.⁷⁴ Unsurprisingly, this too has been met with criticism in the medical community,⁷⁵ which seems poised to oppose any proposed reforms that would upset the status quo in the health care system.

Thus far, these criticisms have primarily manifested themselves in the form of protests by members of the health care establishment,⁷⁶ however, one early lawsuit was filed on behalf of the medical profession against the government⁷⁷ and at least one more has followed with the arrival of more foreign doctors.⁷⁸ Although both lawsuits that have been attempted thus

72. See, e.g., Kugel, *supra* note 30 (quoting one Brazilian physician as saying, "You can be against Dilma's proposal . . . [b]ut not just because the doctors are foreign nor because it is an emergency program, but because it was not tied to adequate long-term projects").

73. *Castrocare*, *supra* note 70.

74. Kugel, *supra* note 30. Specifically, these long-term plans include proposals to open new medical schools to train thousands of new Brazilian doctors, as well as increasing the length of medical education from six years to eight, including two years of public service in remote or otherwise underserved regions. *Id.* This type of hands-on training in the public health care system is a key aspect of medical education in other countries with universal health care, including England and Switzerland. *Id.* See *supra* notes 41–42 and accompanying text for more on other provisions included in *Mais Médicos*.

75. Kugel, *supra* note 30. The National Federation of Physicians called proposals to send medical students to serve in remote areas through the public health care system a "form of exploitation." *Id.* Others point out that it is risky to send inexperienced medical students and new physicians to isolated communities with inadequate resources. *Id.*

76. One of the most reported protests took place in the northeastern city of Fortaleza, where members of *Sindicato dos Médicos do Ceará* (Ceará Doctors Union) chanted "slaves, slaves" at newly arrived Cuban doctors. Wejsa, *supra* note 48. See also *Castrocare*, *supra* note 70.

77. Wejsa, *supra* note 48. "On August 23, [2013], the [Brazilian Medical Association] and the [Federal Council of Medicine] filed a joint lawsuit in the [Federal Supreme Court] to suspend the program, claiming that the Cuban doctors' medical practice in the country was illegal." *Id.*

78. Canofre, *supra* note 59. Both early lawsuits were based on the argument that "contracting doctors without diploma revalidation is illegal." *Id.*

far were blocked before getting anywhere close to the country's highest court,⁷⁹ it is almost certain that further attempts to dismantle the program through the legal system will ensue. What is less certain is how the Brazilian courts will respond to such legal challenges to *Mais Médicos*.

IV. THE FUTURE OF *MAIS MÉDICOS* AND THE ROLE OF THE BRAZILIAN JUDICIARY

A. *The Right to Health and the Brazilian Legal System: Context*

Although lawsuits challenging *Mais Médicos* are only just beginning to arise, the Brazilian legal system is no stranger to litigation that implicates the constitutional right to health care and, on a much broader level, the rights of traditionally underrepresented segments of Brazilian society.

As in many other countries classified as “emerging markets,” Brazilians often perceive “law as an instrument of social policy.”⁸⁰ Members of the Brazilian legal community frequently describe the country's courts as an “alternative institutional voice for the poor, who are usually marginalized from the political process.”⁸¹ With that said, there is some disagreement as to the veracity of this view, as well as the meaning of this concept.⁸² On the one hand, some would argue that the rewards of litigating social rights disproportionately benefit wealthier members of Brazilian society who are already more likely to be involved in the political process by virtue of the fact that they have easier access to information and, importantly, to the legal system.⁸³ Consequently, the law “[falls] short as [a] means of rendering certain public services [namely health care] more democratic and accessible.”⁸⁴ This approach seems to view the impact of courts on social policy in terms of the direct effect they have on rights. By contrast, other scholars suggest that the Brazilian judicial system does play a role in making universal access to health care a

79. *Id.*

80. *The Law and the Poor: Courts in Emerging Markets Are Better for the Poor Than Many Assume*, ECONOMIST, Mar. 31, 2012, <http://www.economist.com/node/21551459> (last visited Jan. 30, 2015) (considering the use of “law as an instrument of social policy” in India, Indonesia, South Africa, Brazil, and Nigeria).

81. Virgílio Afonso da Silva & Fernanda Vargas Terrazas, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 L. & SOC. INQUIRY 825 (2011) [hereinafter *Claiming the Right*].

82. *See, e.g., id.* at 828 (understanding courts to be an institutional voice for the poor where “(1) [they] are formally open to everyone, (2) [] the poor have *effective access* to them, and (3) [] the judicial decisions *directly* and positively affect the poor”).

83. *Id.* at 848.

84. *Id.*

reality through the indirect, often long-term effects resulting from individual litigation.⁸⁵ Still others argue that the courts actually contribute to worsening health inequities and therefore perpetuate the existence of “two Brazils . . . so disparate as to resemble two different countries, one developed the other underdeveloped.”⁸⁶

It is important to note that much of the existing scholarship regarding the role of the court system and litigation involving the right to health care looks at cases in which individual citizens have claimed that the State failed to provide care it is constitutionally obligated to provide.⁸⁷ This type of health care litigation obviously differs in many significant respects from the type of legal challenges to *Mais Médicos* threatened by the medical profession. One key distinction is that it typically involves “individual claims (claims brought by or on behalf of single individuals) rather than collective claims (‘class actions’).”⁸⁸ However, it does provide some insight into the backdrop against which such future lawsuits will be brought and the prevailing interpretation of the constitutional right to health by Brazil’s Supreme Federal Court (SFC).⁸⁹

85. Mariana Mota Prado, *The Debatable Role of Courts in Brazil’s Health Care System: Does Litigation Harm or Help?* [hereinafter *Debatable Role of Courts*], 41 J.L. MED. & ETHICS 124 (2013). Prado posits that the “potential effects of litigation are threefold: (1) specific policy changes within the health care sector; (2) institutional changes within the health care sector; and (3) institutional changes outside the health care sector (especially in the judiciary).” *Id.* at 134.

86. Ferraz, *supra* note 38, at 34. The idea that there are “two Brazils” (*dois Brasís* in Portuguese) was proposed in 1959 by French geographer Jacques Lambert. *Id.*

87. See *Claiming the Right*, *supra* note 81. See also *Debatable Role of Courts*, *supra* note 85. Much of this litigation by individuals involves demands for particular medical treatments (e.g., drugs) and is characterized by a high success rate for litigants, including almost 100 percent success at the level of the Federal Supreme Court. Ferraz, *supra* note 38, at 34, 36. Interestingly, this model of “right-to-health litigation” developed largely as a result of efforts by HIV/AIDS patients in the 1980s to use the Brazilian court system to enforce their right to receive free treatments from the government. *Id.* at 35–36. It has since been replicated in other areas of health, including diabetes, Parkinson’s disease, Alzheimer’s, hepatitis C, and multiple sclerosis. *Id.* Preliminary studies show that “the phenomenon [of right-to-health litigation] is widespread, is growing exponentially, and is likely to be reaching (or to have already reached) significant levels in terms of volume and costs.” *Id.*

88. Ferraz, *supra* note 38, at 36.

89. According to one scholar, the predominant interpretation of the constitutional right to health, developed by the Supreme Federal Court in the late 1990’s, holds that “the right to health is an individual entitlement to the satisfaction of one’s health needs with the most advanced treatment available, irrespective of costs.” *Id.* at 34. This approach was summarized in a 2000 judicial decision by Justice Celso Mello:

The right to health—as well as a fundamental right of all individuals—represents an inextricable constitutional consequence of the right to life The interpretation of a programmatic norm cannot transform it into a toothless constitutional promise Between protecting the inviolability of the right to life, an inalienable fundamental right guaranteed by the Constitution itself . . . or ensuring, against this fundamental prerogative, a financial and secondary interest of the state, I believe—once this dilemma is established—ethical and legal reasons impose on the judge one single and possible option: unswerving respect for life.

B. *The Supreme Federal Court*

Given the weight of the controversy surrounding *Mais Médicos* and the fact that related litigation will almost certainly implicate the Constitution, there is a high probability that the Supreme Federal Court (SFC) will have a say in the outcome of such a legal challenge.⁹⁰ The prospect of the SFC being called to rule upon the legality of *Mais Médicos* is more likely and significant than it would have been in the past given two relatively recent reforms in the Brazilian legal system, which establish the equivalent of writ of certiorari and *stare decisis*.⁹¹

This comes at an interesting time for the Brazilian legal system and the SFC in particular, which appointed its first black president,⁹² Joaquim

Id. (citing Supremo Tribunal Federal [STF] [Federal Supreme Court] 2000, RE 271.286 (Braz.)). The same scholar argues that this approach is inherently flawed because it (1) ignores resource constraints that make it “impossible to provide everyone with the most advanced treatment for their health needs” and (2) fails to take the random and unequal access to courts among Brazilian citizens into account. Ferraz, *supra* note 38, at 34.

90. The Federal Supreme Court is the highest court in Brazil. Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUD. L. REV. 99, 109 (2006). Its principal responsibility is to safeguard the Constitution, although it receives most of its cases in its capacity as an appellate court of review. *Id.* The court has original jurisdiction over actions of unconstitutionality of a federal or state law or normative act and can also issue advisory opinions. *The Legal System of Brazil*, LIBR. OF CONG., <http://www.loc.gov/law/help/legal-research-guide/brazil-legal.php> (last updated Mar. 7, 2014) [hereinafter *Legal System of Brazil*].

91. Prior to the adoption of *súmula vinculante* (“all courts now have to follow the reasoning of the Supreme Court in similar cases”) and *requisito da repercussão geral* (“the Supreme Court only hears cases that are of general importance”), which are the rough Brazilian equivalents to *stare decisis* and the writ of certiorari in the United States legal system, respectively, the Brazilian legal system faced court congestion, a heavy caseload for the Supreme Federal Court, and questions regarding the authority of the SFC and other higher courts in establishing case law. Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, Abstract, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT’L L. REV. 555 (2012). The advent of *súmula vinculante* shifted the balance of power in the legal system toward the SFC, which is now endowed with “the power of concrete constitutional adjudication with a binding effect,” and thereby “reduce[d] the heterogeneity in legal doctrines across courts, therefore arguably impairing the independence of the lower courts.” Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT’L L. REV. 555, 557, 560 (2012). It is hoped that this reform will reduce the heavy caseload that has historically characterized both the SFC and the larger Brazilian judicial system and lead to a more “uniform disposition” of cases on the same issue. *Id.* at 562. *Requisito da repercussão geral*, for its part, requires that the SFC “consider whether a constitutional question is [of general importance] from an economic, political, social, or legal viewpoint, if the importance transcends the parties’ subjective interests in the litigation.” *Id.* at 567. This reform is aimed at making the SFC “more efficient and available to focus on meritorious cases in order to accomplish its institutional mission to safeguard the Constitution.” *Id.* at 565.

92. This position is the equivalent of the Chief Justice of the United States Supreme Court.

Barbosa, in 2012.⁹³ Barbosa unexpectedly announced his early retirement for personal reasons in May 2014;⁹⁴ however, during his time in office, Barbosa gained national and international attention for his progressive approach to the law and his penchant for challenging the traditionally conservative, elitist judicial establishment.⁹⁵ Since Barbosa was originally appointed to the SFC in 2003, and even during his time as its president, the court became increasingly inclined to adopt “socially liberal and establishment-shaking rulings.”⁹⁶ Although commentators see Barbosa as the main impetus for this shift in the court’s jurisprudence,⁹⁷ there are indications that his successor, Ricardo Lewandowski, is committed to carrying on the Barbosa court’s legacy, including through “more dialogue and engagement with civil society in the decisions of the court, particularly in cases involving human rights.”⁹⁸ This may seem surprising given that Lewandowski has at times been considered a part of the “conservative, pro-status quo and pro-impunity” judicial establishment.⁹⁹ However, some Brazilian legal scholars say that “it is unfair to portray him

93. *Barbosa Made First Black Head of Brazil’s Supreme Court*, BBC NEWS (Oct. 11, 2012), <http://www.bbc.com/news/world-latin-america-19904946>. Brazil’s highest court is composed of 11 justices who are appointed by the country’s president pending approval by an absolute majority of the Federal Senate. *Legal System of Brazil*, *supra* note 90.

94. *Brazilian Corruption Judge Joaquim Barbosa to Retire*, BBC NEWS (May 29, 2014), <http://www.bbc.com/news/world-latin-america-27629961>.

95. See Simon Romero, *A Blunt Chief Justice Unafraid to Upset Brazil’s Status Quo*, N.Y. TIMES, Aug. 23, 2013, http://www.nytimes.com/2013/08/24/world/americas/a-blunt-chief-justice-unafraid-to-upset-brazils-status-quo.html?pagewanted=all&_r=1& [hereinafter *Blunt Chief Justice*]. See also Sarah Cleveland, *The 2013 Time 100: Joaquim Barbosa*, TIME, <http://time100.time.com/2013/04/18/time-100/slide/joaquim-barbosa/> (last visited Jan. 4, 2015).

96. *Blunt Chief Justice*, *supra* note 95. Even before Barbosa was appointed to his current post as SFC President, the judiciary was headed in an increasingly liberal direction. For example, in April 2012, the court exempted abortions in the case of anencephaly, a life-threatening fetal congenital brain disorder, from the criminal penalties that typically apply to abortions. *Brazil: Supreme Court Abortion Ruling a Positive Step*, HUM. RTS. WATCH (Apr. 19, 2012), <http://www.hrw.org/news/2012/04/19/brazil-supreme-court-abortion-ruling-positive-step>. According to women’s rights activists, this decision represents “a positive step toward protecting women’s human rights” as “criminalizing the abortion of anencephalic fetuses is contrary to constitutionally protected rights of women in Brazil.” *Id.* In particular, the court was concerned with protecting a woman’s constitutional rights to “dignity, autonomy, privacy, and physical, psychological, and moral integrity.” *Id.* Many of these same rights are implicated in the case of the right to health.

97. See, e.g., *Blunt Chief Justice*, *supra* note 95.

98. *Supreme Court Presidency: Lewandowski Takes Over with the Promise of More Dialogue and Social Participation*, CONECTAS (Aug. 21, 2014), <http://www.conectas.org/en/actions/justice/news/25294-supreme-court-presidency>.

99. Shannon Sims, *Ricardo Lewandowski: Brazil’s Rising Chief Justice*, OZY (July 25, 2014), <http://www.ozy.com/rising-stars-and-provocateurs/ricardo-lewandowski-brazils-rising-chief-justice/32720> (citing Agência Estado, *Barbosa Critica “Mentalidade” dos Juizes Brasileiros*, GAZETA DO POVO (Mar. 1, 2013, 8:44PM), <http://www.gazetadopovo.com.br/vidapublica/conteudo.phtml?id=1349796&tit=Barbosa-critica-mentalidade-dos-juizes-brasileiros>).

as an anti-hero or as a defender of corruption” and that, ultimately, he will uphold his avowed commitment to ensuring the independence of a judiciary where “the judge or judges vote with their conscience and according to the laws.”¹⁰⁰ These considerations, combined with the fact that all of the justices currently sitting on the court served during Barbosa’s historic 2012-2014 presidency,¹⁰¹ suggest that the court is unlikely to reverse course under Lewandowski’s leadership.

Though the SFC’s most notorious “establishment-shaking” decisions cover a diverse array of seemingly unrelated legal and social issues, they do share an overarching commitment to furthering the rights and interests of groups that have historically lacked a voice in Brazilian society and politics, often challenging the entrenched power and privilege of the upper echelons of Brazilian society. In 2012, for example, the court unanimously upheld the University of Brasilia’s affirmative action policy, which requires the school’s admissions office to reserve 20 % of its spots for black and mixed-race students.¹⁰² There, the court found that the policy did not violate constitutional equal rights provisions.¹⁰³ Much like the *Mais Médicos* program, affirmative action in Brazil is aimed at eliminating the country’s vast inequality by affording largely poorer minority students the opportunity to access the same resources available to their more affluent counterparts.¹⁰⁴

In another recent decision, the National Council of Justice¹⁰⁵ effectively legalized same-sex marriage in Brazil by prohibiting notary publics from refusing to perform same-sex marriage ceremonies.¹⁰⁶ Although that ruling is not the final word on the legalization of same-sex marriage in Brazil, it does reflect the judiciary’s growing dedication to promoting minority

100. *Id.*

101. *Profile of the Justices of the Federal Supreme Court*, SUPREMO TRIBUNAL FEDERAL, http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120056 (last visited Jan. 4, 2015). The newest of the court’s justices, Luís Roberto Barroso, took office in June of 2013. *Id.* Lewandowski, for his part, took office in March of 2006. *Id.*

102. Whitney Kramer, *Brazil and the Law of Social Quotas: Whether Brazil’s Recent Affirmative Action Law Would Survive Review Under U.S. Constitutional Standards*, 42 J.L. & EDUC. 373 (2013).

103. *Affirmative Action in Brazil: Slavery’s Legacy*, ECONOMIST (Apr. 26, 2013), <http://www.economist.com/blogs/americasview/2013/04/affirmative-action-brazil>.

104. Simon Romero, *Brazil Enacts Affirmative Action Law for Universities*, N.Y. TIMES (Aug. 30, 2012), available at http://www.nytimes.com/2012/08/31/world/americas/brazil-enacts-affirmative-action-law-for-universities.html?_r=1&.

105. The National Council of Justice is a fifteen-member judicial agency charged with the administrative and financial control of the judiciary and the supervision of judges. *Legal System of Brazil*, *supra* note 90.

106. Simon Romero, *Brazilian Court Council Removes a Barrier to Same-Sex Marriage*, N.Y. TIMES, May 14, 2013, available at <http://www.nytimes.com/2013/05/15/world/americas/brazilian-court-council-removes-a-barrier-to-same-sex-marriage.html>.

rights, in this case the rights of historically marginalized gay citizens in a country increasingly influenced by evangelical Christian political interests.¹⁰⁷ Similarly, the Supreme Federal Court made clear in a 2011 ruling that it interprets the Brazilian Constitution as protecting a “plurality of family arrangements.”¹⁰⁸ In both instances, the court demonstrated a dedication to “social inclusion” and eliminating “structural forms of inequality.”¹⁰⁹

The most significant case adjudicated by the SFC in recent memory—known as the *mensalão* (“big monthly allowance”)—drew international attention precisely because of the SFC’s unprecedented willingness to challenge the status quo.¹¹⁰ There, the court considered allegations that senior Brazilian officials used public funds to buy votes for former President Luiz Inacio Lula da Silva (“Lula”), ultimately convicting twenty-five out of thirty-seven defendants.¹¹¹ Most Brazilians saw the court’s approach to the scandal as a sign of increasing accountability for both the judicial and political branches of their government, and commentators have described the decision as restoring public faith in the legal system.¹¹² Although the SFC agreed against popular opinion in September 2013 to hear appeals in the *mensalão* case,¹¹³ its original decision remains a symbol of its general movement toward leveling the playing field as between the politically and economically advantaged

107. *Id.* This decision could still face opposition in the courts and Congress. *Id.*

108. Adilson José Moreira, *We Are Family! Legal Recognition of Same-Sex Unions in Brazil*, 60 AM. J. COMP. L. 1003, 1004 (2012).

109. *Id.* at 1004–05.

110. Q&A: *Brazil’s ‘Big Monthly’ Corruption Trial*, BBC NEWS: LATIN AM. & CARIBBEAN, Nov. 16, 2013, <http://www.bbc.co.uk/news/world-latin-america-19081519>.

111. *Id.* Specifically, the *mensalão* was an alleged scheme in which “public funds were used to buy political support for the then-Lula government and to pay off debts from election campaigns. The central accusation was that politicians from coalition parties were given large payments each month to support the minority government led by the Workers’ Party.” *Id.* For a concise description of the *Mensalão* scandal and trial and an explanation of its historic significance, see *What is Brazil’s Mensalão*, ECONOMIST (Nov. 18, 2013), <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14>.

112. Simon Romero, *Brazilian Corruption Case Raises Hopes for Judicial System*, N.Y. TIMES, Oct. 9, 2012, available at <http://www.nytimes.com/2012/10/10/world/americas/brazilian-corruption-case-raises-hopes-for-judicial-system.html?pagewanted=all>. One Brazilian law professor went so far to point to the *mensalão* trial as proof that “Brazil’s institutions are functioning with vigor” and praised the court for pursuing the case in the first place as part of “the fight for an ethical democracy.” *Id.* At the same time, however, others are reluctant to put all of their faith in Brazil’s legal system just yet, pointing to the judiciary’s historical lack of accountability and tendency to provide special treatment for the country’s elite. *Id.*

113. John Lyons and Matthew Cowley, *Brazil Court Allows Corruption Case Appeals*, WALL ST. J., Sept. 18, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323808204579083571863389380>.

members of Brazilian society and their poorer, historically marginalized compatriots.

Assuming that the SFC continues in the direction it followed under Barbosa's guidance, the determinative factor in how it would decide a legal challenge to *Mais Médicos* is how it interprets the best interests of the people intended to benefit from the program, i.e. traditionally underrepresented, underserved members of Brazilian society.

On the one hand, it could determine that having access to any health care—even if of questionable or at the very least unknown quality—is better than the status quo and fulfills the constitutional right to health, albeit in a less than ideal way. Such a decision would be in line with the Court's recent tendency to challenge “the establishment,”¹¹⁴ in this case the medical profession and its unions.

On the other hand, it could determine that the Constitution, in calling for “universal and equal access to actions and services for . . . [the] promotion, protection and recovery [of health],”¹¹⁵ requires the government to work to provide all with a certain level of quality health care. This approach recognizes that suspending the importation of foreign doctors through *Mais Médicos* would delay the delivery of health care to remote areas but adopts the view that it would be better in the long run to focus on the other measures provided for under *Mais Médicos*¹¹⁶ and explore other options that would ensure a higher level of quality in the provision of health care. In the short term, such a decision would favor the medical establishment; however, it could also arguably be in the best interests of the Brazilian people moving forward.

V. CONCLUSION

Given the Court's recent jurisprudence, and its apparent commitment to challenging the status quo and promoting the rights of the disadvantaged and marginalized,¹¹⁷ it seems likely that the Brazilian judiciary will uphold the *Mais Médicos* program, including the controversial provision that calls for the importation of foreign medical personnel.¹¹⁸ That said, although such a decision would allow Cuban and other foreign-trained doctors to reach previously underserved regions of Brazil, it is unlikely to be a long-

114. *Supra* notes 101–12 and accompanying text.

115. CONSTITUTION, *supra* note 15, and accompanying text.

116. *More Medical Doctors Program Launched*, *supra* notes 41–42; *Health Care in Brazil: Flying in Doctors*, *supra* note 41.

117. *Supra* Part IV.B.

118. *Supra* Part III.A.

term solution to the shortage of physicians and unequal access to health care.¹¹⁹ Instead, a solution to the problem more likely lies in the training of physicians and other health care providers who represent those underserved regions, i.e. racial and other minorities, namely through the affirmative action programs that have increasingly been endorsed by the Brazilian judiciary,¹²⁰ as well as those less-publicized aspects of the *Mais Médicos* program that emphasize medical education and practical training.¹²¹

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119. *Supra* Part II.B.

120. *Supra* notes 102–03 and accompanying text.

121. *More Medical Doctors Program Launched*, *supra* notes 41–42; *Health Care in Brazil: Flying in Doctors*, *supra* note 26.

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