No. 14-281

IN THE
# Supreme Court of the United States

TONY KORAB, *et al.*,
*Petitioners*,
v.

PATRICIA MCMANAMAN, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION


DAVID M. LOUIE
*Attorney General*
HEIDI M. RIAN
LEE-ANN N.M. BREWER
JOHN F. MOLAY
DEIRDRE MARIE-IHA
*Deputy Attorneys General*
STATE OF HAWAI'I
DEPARTMENT OF THE ATTORNEY GENERAL
465 South King Street
Room 200
Honolulu, HI 96813
(808) 587-3050

NEAL KUMAR KATYAL*
FREDERICK LIU
JACLYN L. DILAURO
*Special Deputy Attorneys General*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Counsel of Record

*Counsel for Respondents*

## QUESTION PRESENTED

The question as presented in the petition for a writ of certiorari is:

Whether a State's reduction of medical benefits to some categories of legal aliens but not others, conducted within the discretion afforded to the States by Congress under the cooperative Medicaid program, is subject only to rational-basis review when it is challenged as a denial of equal protection.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**CASES:**

**TABLE OF AUTHORITIES—Continued**

**TABLE OF AUTHORITIES—Continued**

IN THE
# Supreme Court of the United States

No. 14-281

TONY KORAB, *et al.*,
*Petitioners*,
v.

PATRICIA MCMANAMAN, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

## INTRODUCTION

Up until the mid-nineties, federal Medicaid benefits were available to both citizens and aliens legally residing in the United States. In the Welfare Reform Act of 1996, however, Congress barred certain legal aliens from receiving any federal public benefits, making them ineligible for Medicaid.

In response to Congress's decision, Hawai'i could have decided to do nothing. But instead, it created a new program, exclusively for aliens, to make up for the loss in federal benefits. That program, funded entirely out of the State's treasury, allowed aliens to maintain the same level of benefits they had received under Medicaid. In 2010, however, Hawai'i, like

many States, faced unprecedented budget deficits because of the recent fiscal crisis. And so it reduced the level of state-funded benefits provided to aliens, enrolling them in a new program called Basic Health Hawai‘i.

Petitioners, on behalf of a class of legal aliens, sued the State, claiming that the reduction in benefits violated the Equal Protection Clause of the Fourteenth Amendment. The District Court applied strict scrutiny to Hawai‘i's actions and entered a preliminary injunction, requiring that petitioners be given the same level of benefits available to citizens under Medicaid. The Court of Appeals for the Ninth Circuit vacated and remanded, concluding that the District Court erred in applying strict scrutiny. The Court of Appeals held that Hawai‘i's actions in attempting to mitigate the effects of the Welfare Reform Act should instead be reviewed under a rational-basis standard.

Petitioners now seek this Court's review of the Court of Appeals' decision. Their petition for certiorari should be denied, for three reasons.

First, the question presented in the petition was not pressed or passed upon below. In the courts below, petitioners argued that Hawai‘i violated the Constitution by treating them differently than *citizens* receiving Medicaid. But petitioners now ask this Court to consider the level of scrutiny that applies to a different constitutional claim: that Hawai‘i treated them differently than *other aliens* who are *not* eligible for Medicaid. That claim was not raised before or considered by the courts below. It should not be heard for the first time in this Court.

Second, the split alleged by petitioners is illusory. Every court to have considered the issue has held that when a State creates a state-funded program for the benefit of aliens ineligible for federal funding, the State's decisions regarding the scope of those state benefits are not subject to heightened scrutiny. The decisions petitioners cite are not to the contrary. Those decisions involved state programs for citizens *and* aliens, not aliens *only*; or they arose under *state* constitutional provisions, not the *federal* Equal Protection Clause.

Third and finally, the decision below is plainly correct. In order to provide *any* government health benefits to petitioners, Hawai'i had no choice but to create a separate program, distinct from Medicaid; in doing so, Hawai'i was simply abiding by the restrictions of Welfare Reform Act. And given that citizens are not eligible for any similar state-funded health benefit, petitioners cannot point to any similarly situated citizens who are being treated more favorably by the State. There are thus no grounds to justify strict scrutiny of Hawai'i's actions. The Court of Appeals properly held that rational-basis review applies.

For all of these reasons, this Court's review would be inappropriate and unwarranted. The Court should therefore deny the petition.

## COUNTERSTATEMENT

### A. The Federal Welfare Reform Act

In 1996, Congress passed—and the President signed—the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105. Also known as the "Welfare Reform Act," the statute did a number of things to reform

welfare—among them, "enact[ing] new rules" regarding the eligibility of aliens for public benefits. 8 U.S.C. § 1601(5). The purpose of those new rules was to "assure that aliens be self-reliant in accordance with national immigration policy"—which, according to Congress, "continues to be" that "aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *Id.* § 1601(2)(A).

The Welfare Reform Act established two sets of rules relevant here. The first deals with the eligibility of aliens to receive *federal* public benefits, including any health benefit funded by federal expenditures. *Id.* § 1611(c)(1)(B). The Act restricts such eligibility to "qualified" aliens, *id.* § 1611(a), who include legal permanent residents, asylees, refugees, parolees, and certain other aliens within narrow categories, *id.* § 1641(b), (c). In the case of a federal means-tested benefit, the Act further requires that a qualified alien have been in the country for at least five years. *Id.* § 1613(a). Non-"qualified" aliens are—with few exceptions—ineligible for any federal public benefit. *Id.* § 1611(a), (b).

The second set of rules deals with *state* public benefits, including any health benefit funded by state expenditures. *Id.* § 1621(c)(1)(B). With respect to state public benefits, the Act divides aliens into three categories. The first category consists of aliens who are neither qualified aliens, nor "nonimmigrant[s]," nor parolees; with limited exceptions, the Act *prohibits* them from receiving any state public benefit. *Id.* § 1621(a), (b). The second category consists of particular qualified aliens, including certain legal

permanent residents, veterans, and active-duty members of the military; the Act *requires* that they be eligible for any state public benefit. *Id.* § 1622(b). And the third category consists of all other qualified aliens, as well as nonimmigrants and parolees; as to their eligibility for state public benefits, the Act "authorize[s]" each State to decide. *Id.* § 1622(a).

### B. Medical Benefits for COFA Residents in Hawai'i

The United States has entered into Compacts of Free Association with the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), *amended by* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720; Joint Resolution, Pub. L. No. 99-658, 100 Stat. 3672 (1986). These compacts allow citizens of these other countries—known as "COFA residents"—to migrate freely to the United States and establish residence here as "nonimmigrants." 99 Stat. at 1804; 100 Stat. at 3682.

Before 1996, COFA residents were eligible for, and received, federal public benefits—including federal health benefits through Medicaid. Pet. App. 7a. "Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Federal funding through Medicaid is substantial, "constituting over 10 percent of most States' total revenue." *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2581 (2012).

When the Welfare Reform Act took effect in 1996, COFA residents became ineligible for all federal public benefits, including Medicaid. That is because COFA residents are "nonimmigrants," who are not "qualified" aliens under the Act. *See* 8 U.S.C. §§ 1611(a), 1641(b), (c). Accordingly, Hawai'i stopped using federal funds to provide health benefits for COFA residents through Medicaid. *See* Stipulated Facts, No. 1:10-cv-483, Doc. No. 29, ¶ 6 (D. Haw. Nov. 5, 2010).

With respect to state public benefits, nonimmigrants fall within the third category of aliens—commonly referred to as the "discretionary" category. Pet. App. 2a. So the Act authorized Hawai'i to decide whether to provide COFA residents with state health benefits, separate from Medicaid. *See* 8 U.S.C. § 1622(a). Exercising that discretion, Hawai'i created a "de facto state-funded medical assistance program" for aliens ineligible for federal funding. Pet. App. 93a n.4. That aliens-only program was funded entirely by state expenditures and provided COFA residents with the same level of health benefits they had received through Medicaid. *Id.*; Pet. App. 8a.

In recent years, Hawai'i—like many States—has faced a serious fiscal crisis. For budgetary reasons, Hawai'i determined in 2010 that it could no longer maintain the state-funded program it had created for COFA residents. Pet. App. 8a. Instead of denying COFA residents state health benefits altogether, however, Hawai'i enrolled them in a new state-funded program called Basic Health Hawai'i. *Id.* That program covers two groups of aliens "not eligible for federal medical assistance": "citizens of COFA nations and legal permanent residents admitted to the United States for less than five years." Haw.

Admin. R. §§ 17-1722.3-1, 17-1722.3-7(a)(2). It does not cover other nonimmigrants or parolees who also fall within the Welfare Reform Act's third, discretionary category. Pet. App. 14a. Benefits under Basic Health Hawai'i are more limited than benefits under the prior "de facto" program and Medicaid. *Id.* at 8a.

### C. The District Court Proceedings

In 2010, three COFA residents—petitioners here—filed a class action against officials in Hawai'i's Department of Human Services. Two of the plaintiffs—Tony Korab and Tojio Clanton—had been enrolled in Basic Health Hawai'i, following the discontinuation of the prior "de facto" program. Complaint, No. 1:10-cv-483, Doc. No. 1, ¶¶ 6-7, 11 (D. Haw. Aug. 23, 2010). The third plaintiff—Keben Enoch—had applied for, and been denied, benefits under Medicaid. Stipulation Regarding Pl. Keben Enoch, No. 1:10-cv-483, Doc. No. 38, ¶ 5 (D. Haw. Nov. 24, 2010). Petitioners claimed that the State violated the Equal Protection Clause of the Fourteenth Amendment by discriminating in the provision of health benefits. Complaint, *supra*, ¶¶ 55-57.

After the District Court denied the State's motion to dismiss, Pet. App. 117a, the parties agreed to certification of a class of COFA residents. Stipulation & Order Regarding Class Certification, No. 1:10-cv-483, Doc. No. 37 (D. Haw. Nov. 24, 2010). The District Court then granted a preliminary injunction, requiring the State to restore state-funded health benefits to pre-2010 levels. Pet. App. 85a-88a. According to the District Court, the State's "determination that COFA Residents should no longer receive

the same benefits as U.S. citizens" could not survive strict scrutiny. *Id.* at 82a-83a.

### D. The Court of Appeals Proceedings

1. On interlocutory appeal, 28 U.S.C. § 1292(a), the Court of Appeals vacated the preliminary injunction. Pet. App. 23a. In an opinion by Judge McKeown joined in full by Judge Bybee, the court began with the proposition that "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction." *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982); *see* Pet. App. 14a. The court held that the Welfare Reform Act establishes just such a "uniform" rule "for providing welfare benefits to distinct classes of aliens," Pet. App. 17a, and that "Hawai'i is merely following [that] federal direction" in this case, *id.* at 23a. Indeed, the court explained, given that "Congress has drawn the relevant alienage classifications," "Hawai'i's only action here is its decision regarding the funding it will provide to aliens in the third, discretionary category created by Congress—an expenditure decision." *Id.* at 21a.

The Court of Appeals therefore concluded that the District Court erred in applying strict scrutiny: "Even assuming *arguendo* that Hawai'i's discretionary decision not to provide optional coverage for COFA Residents constitutes alienage-based discrimination, that decision, which is indisputably authorized by the Welfare Reform Act, is subject to rational-basis review." *Id.* at 21a-22a. Accordingly, the Court of Appeals vacated the injunction and remanded the case to the District Court for further proceedings.

Judge Bybee concurred. He agreed with Judge McKeown that rational-basis review was appropriate under existing precedent. *Id.* at 52a. But he wrote separately to explain that, "[w]ere it within [his] power," *id.* at 51a, he would adopt an "alternative approach" in "alienage cases" based on "preemption analysis instead of equal protection analysis," *id.* at 27a.

Judge Clifton dissented. In his view, "Hawai'i has necessarily made a distinction on the basis of alienage: a similarly situated *citizen* is eligible to receive more benefits" than a COFA resident. *Id.* at 58a. And because "alienage is a suspect class," Judge Clifton would have upheld the District Court's application of strict scrutiny to Hawai'i's actions. *Id.* at 53a.

Petitioners sought rehearing en banc, but no judge called for a vote on their request. *Id.* at 71a. Accordingly, the Court of Appeals denied rehearing, without dissent. *Id.* The instant petition followed.

## REASONS FOR DENYING THE WRIT

### I. THE QUESTION PRESENTED WAS NOT PRESSED OR PASSED UPON BELOW

The petition suffers from a fundamental, threshold flaw: The question presented was not raised before or considered by the courts below. For this reason alone, the petition should be denied.

This Court's "traditional rule" is to deny certiorari "when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). The reason for this rule is straightforward: This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005).

And so absent "exceptional" circumstances, *Duignan* v. *United States*, 274 U.S. 195, 200 (1927), this Court will not consider a question "without the benefit of thorough lower court opinions to guide [its] analysis of the merits," *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012).

Petitioners in this case ask this Court to consider what level of scrutiny should apply to "a State's reduction of medical benefits to some categories of legal aliens but not others." Pet. I. In the first paragraph of their statement, petitioners provide additional context for this question. There, petitioners explain: "In the Welfare Reform Act of 1996, Congress withdrew federal Medicaid benefits for certain legal aliens, but gave States the discretion to determine whether to provide state benefits to *those aliens*. This case presents the question of which standard of review should apply when a court considers a claim that a State's decision to draw a *further* alienage-based classification *within that discretionary category of legal aliens* violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 2 (emphases added). The petition thus makes clear the line petitioners are challenging: not the line between those eligible for Medicaid benefits and those who are not, but rather "a *further* alienage-based classification *within*" the latter, "discretionary category of legal aliens."

The problem is that petitioners did not challenge any such classification in the courts below. Indeed, the Court of Appeals expressly noted petitioners' failure to do so. After observing that "Korab does not challenge directly the validity of the federal classifications in the Welfare Reform Act," the Court of Appeals continued: "Nor does he dispute Hawai'i's

*selective classification within the 'discretionary benefits' category of the Act*—COFA Residents and qualified aliens present in the United States for fewer than five years are eligible for Basic Health Hawai'i; all other nonimmigrants and parolees are ineligible under Hawai'i's plan, even though they are included in the Act's 'discretionary benefits' group." Pet. App. 14a (emphasis added). The question presented was not pressed below.

Nor was it passed upon. The District Court did not address the "classification *within* [the] discretionary category of legal aliens" that petitioners now ask this Court to consider. Pet. 2 (emphasis added). Instead, the District Court addressed a different issue altogether: whether "COFA Residents should * * * receive the same benefits as *U.S. citizens*." Pet. App. 82a (emphasis added). The Court of Appeals did the same, addressing only "the lack of parity in benefits COFA Residents receive through Basic Health Hawai'i as compared to the *benefits through Medicaid*." *Id.* at 14a (emphasis added). Neither the District Court nor the Court of Appeals addressed any "further" classification among "those aliens" ineligible for federal funding. Pet. 2.

In short, the question presented was not pressed or passed on below. That alone should preclude granting certiorari, particularly when, as here, "the new issue is a constitutional matter." *Turner* v. *Rogers*, 131 S. Ct. 2507, 2524-2525 (2011). Because there is no basis to depart from this traditional rule, this Court should deny the petition.

## II. THE ALLEGED SPLIT IS ILLUSORY

The Court of Appeals addressed a different question from the one now presented in the petition:

whether a State has a constitutional obligation to make up for Congress's withdrawal of federal funding by ensuring that aliens receive through state expenditures the same level of benefits U.S. citizens receive through Medicaid. Pet. App. 14a. In considering that question, the court held that when a State creates a state-funded program for the benefit of aliens ineligible for federal funding, the State's decisions regarding the scope of those state benefits are subject only to rational-basis review, not strict scrutiny. *Id.* at 21a-22a.

1. That holding accords with the decisions of every other court to address the issue. Indeed, petitioners acknowledge that the decision below is on all fours with the Tenth Circuit's decision in *Soskin* v. *Reinertson*, 353 F.3d 1242 (10th Cir. 2004), which applied rational-basis review in a similar situation. Pet. 20-21. What petitioners fail to mention is that the decision below is also in line with four other cases decided by the First Circuit and the highest courts of Connecticut, Massachusetts, and New York. *See Bruns* v. *Mayhew*, 750 F.3d 61 (1st Cir. 2014); *Hong Pham* v. *Starkowski*, 16 A.3d 635 (Conn. 2011); *Doe* v. *Commissioner of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002); *Khrapunskiy* v. *Doar*, 909 N.E.2d 70 (N.Y. 2009). Each of those cases, like this one, involved state-funded benefits for aliens ineligible for federal funding under the Welfare Reform Act. And in each, the court reached the same conclusion as the Court of Appeals did here: that the Equal Protection Clause of the Fourteenth Amendment does not require heightened scrutiny of a State's decisions regarding the scope of such benefits. *See Bruns*, 750 F.3d at 70; *Hong Pham*, 16 A.3d at 649;

*Doe*, 773 N.E.2d at 414-415; *Khrapunskiy*, 909 N.E.2d at 76-77.

2. Petitioners nevertheless contend that the decision below conflicts with the decisions of three state courts of last resort. The split petitioners allege is illusory. None of the decisions they cite is contrary to the Court of Appeals' decision here.

a. Start with the New York Court of Appeals' decision in *Aliessa ex rel. Al Fayad* v. *Novello*, 754 N.E.2d 1085 (N.Y. 2001). That case did not involve a state-funded benefits program exclusively for aliens ineligible for federal benefits. It involved instead a state-funded benefits program for *both* aliens *and* citizens, known as "State Medicaid." *Id.* at 1089-1090 & n.3. So when the State excluded certain aliens from that state-funded program, *id.* at 1091-1092, the State was discriminating on the basis of alienage, withholding from aliens certain benefits it conferred upon citizens. That "classifi[cation] based on alienage"—drawn by the State itself—is what led the court in *Aliessa* to apply strict scrutiny. *Id.* at 1098.

The present case is different, because Hawai'i has not deprived aliens of any state benefit provided to citizens. Hawai'i's "de facto state-funded medical assistance program," which Hawai'i created following enactment of the Welfare Reform Act, was a program exclusively for aliens ineligible for federal funding through Medicaid. Hawai'i has never provided a similar health benefit for citizens. So when Hawai'i later enrolled federally ineligible aliens in Basic Health Hawai'i, it was not depriving them of any benefit it gives citizens. On the contrary, it was providing aliens a benefit—state-funded medical assistance—that citizens do not receive at all. The

court below was therefore correct not to apply strict scrutiny.

The absence of any conflict with *Aliessa* is confirmed by the fact that when the New York Court of Appeals was presented with a set of facts similar to the instant case, it reached the same conclusion as the court below. At issue in *Khrapunskiy* was the State's decision to provide federally ineligible aliens state-funded "safety net assistance" at a level less than what was available to citizens through the federal Social Security program. 909 N.E.2d at 72-73. The New York Court of Appeals declined to apply strict scrutiny, distinguishing *Aliessa* on precisely the ground described above: Whereas *Aliessa* involved a state-funded "program which provided benefits to citizens but excluded assistance to aliens," there were *no* citizens receiving state-funded "safety net assistance" in *Khrapunskiy*. *Id.* at 77. That same distinction applies here. *See Bruns*, 750 F.3d at 69 n.2 (distinguishing *Aliessa* on this basis); *Hong Pham*, 16 A.3d at 655-656 (same); *Doe*, 773 N.E.2d at 412-413 (same). Because this case is like *Khrapunskiy*, not *Aliessa*, New York's highest court would not have decided it any differently.

b. The Massachusetts Supreme Judicial Court's decision in *Finch* v. *Commonwealth Health Insurance Connector Authority*, 946 N.E.2d 1262 (Mass. 2011) (*Finch I*), is distinguishable for the same reason. Like *Aliessa*, *Finch I* involved a "State program" for *both* aliens *and* citizens, known as "Commonwealth Care." *Id.* at 1267, 1275 n.16; *see also Finch* v. *Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 974, 981 (Mass. 2012) (*Finch II*) (describing Commonwealth Care as "entirely State-run" and "State-initiated" and as "an

independent State program, entirely under State control, and not bound by uniform Federal rules"). So when Massachusetts terminated certain aliens from that program, *Finch I*, 946 N.E.2d at 1267-1268, it was depriving aliens of a benefit it gave citizens, *id.* at 1274-1276 & n.16. The court concluded that strict scrutiny was appropriate to review that "voluntary decision" by Massachusetts. *Id.* at 1280.

This case is different, because, as explained above, Hawai'i has not deprived aliens of any state benefit it gives citizens. The Massachusetts high court's decision in *Doe* underscores the distinction. In that case, Massachusetts created a state-funded welfare program "available only to" aliens ineligible for federal aid. 773 N.E.2d at 407. To qualify for the state program, newly applying aliens had to have resided in Massachusetts for six months. *Id.* Although citizens applying for federal aid did not face the same restriction, the court declined to apply strict scrutiny under the Federal Constitution, explaining that "the only group to whom [state] benefits are available is aliens." *Id.* at 414; *see also Finch I*, 946 N.E.2d at 1274 n.14 (acknowledging that the program at issue in *Doe* "was open only to aliens"). Thus, by restricting the scope of a state program that benefitted only aliens, Massachusetts was "not discriminat[ing] against aliens and in favor of citizens." *Doe*, 773 N.E.2d at 411. So too here. This case likewise involves a restriction on the scope of an aliens-only program, so strict scrutiny is inappropriate. In light of *Doe*, Massachusetts' highest court would have decided this case the same way.

*Finch I* is inapposite for another reason: When it held that strict scrutiny should be applied, it did so as a matter of the Massachusetts Constitution, not

the federal Equal Protection Clause. *See* 946 N.E.2d at 1268, 1280. Accordingly, *Finch I* did not decide any federal question that conflicts with the decision below, *see* S. Ct. R. 10, and anything it might have said about the meaning of the Federal Constitution is mere dictum. *Cf. Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *Arizona* v. *Evans*, 514 U.S. 1, 9 (1995) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (internal quotation marks omitted)).

c. That leaves only the Maryland Court of Appeals' decision in *Ehrlich* v. *Perez*, 908 A.2d 1220 (Md. 2006). There, the court did apply strict scrutiny to a State's decision regarding expenditures for a state-funded, aliens-only benefits program. *Id.* at 1227-1228, 1243. But the court's holding rested on Article 24 of the Maryland Declaration of Rights, not the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1224, 1244. Thus, that holding does not conflict with the federal constitutional holding in this case.

Moreover, the State in *Perez* did not dispute that it had discriminated on the basis of alienage in terminating funding for the program. *Id.* at 1232. Accordingly, the Maryland Court of Appeals took for granted that the State had discriminated against aliens, and employed strict scrutiny. *Id.* at 1243. If, in a future case, a State were to dispute—as Hawai'i does here—that it had engaged in alienage-based discrimination, the court would not be bound by *Perez* to

apply strict scrutiny. The court would instead be free to decide that there was no alienage-based discrimination, and to apply only rational-basis review. The alleged conflict between *Perez* and the court's decision below is illusory.

In sum, there is no split of authority warranting this Court's review. When confronted with the federal question in this case, courts have uniformly declined to apply heightened review. The few cases petitioners cite are not to the contrary, for they either did not involve aliens-only programs or did not arise under the Federal Constitution.

## III. THE COURT OF APPEALS' DECISION IS PLAINLY CORRECT

Finally, this Court's review is unwarranted because the Court of Appeals' decision is plainly correct. Petitioners make no attempt to show otherwise; indeed, their petition has nothing to say about the merits of the decision below. This Court should take that silence for what it is: a tacit admission that the court below got it right.

It is an established principle of equal protection law that a State can be held responsible only for its own actions. *See* U.S. Const. amend. XIV, § 1 ("[N]or shall any *State* * * * deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)). Here, Hawai'i took two. First, it created state-funded health benefits programs for COFA residents and other federally ineligible aliens, separate from Medicaid. And second, it decided how much to fund those programs. Neither action warrants strict scrutiny.

1. The first of Hawai'i's actions was made necessary by the federal Welfare Reform Act. That Act

prohibits COFA residents from receiving any federal public benefit, including Medicaid. 8 U.S.C. § 1611(a). So if COFA residents were to be eligible for any government health benefit at all, Hawai'i had to create a program separate from Medicaid, funded entirely by state expenditures. That is what Hawai'i did—first in 1996, by creating a "de facto state-funded medical assistance program," and then again in 2010, by creating Basic Health Hawai'i.

In creating these programs, Hawai'i did not discriminate on the basis of alienage. The decision to make certain aliens ineligible for Medicaid was Congress's, and Hawai'i established programs that simply tracked the classifications drawn by Congress. *See* Haw. Admin. R. § 17.1722.3-7(a)(2) (extending state-funded coverage to aliens "not eligible for federal medical assistance"). So if Hawai'i "can be said to have 'discriminated' at all," it did so only "on the basis of federal Medicaid eligibility, a benign classification." *Bruns*, 750 F.3d at 70.

It follows that Hawai'i's creation of separate programs merits only rational-basis review. When "the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction." *Plyler*, 457 U.S. at 219 n.19; *see also Mathews* v. *Diaz*, 426 U.S. 67, 79-83 (1976). The federal direction in the Welfare Reform Act was that COFA residents could not receive benefits through Medicaid. And in ensuring that COFA residents received government health benefits only through state-funded programs distinct from Medicaid, Hawai'i was simply following that federal rule.

2. Having created separate programs for COFA residents and other federally ineligible aliens, Hawai‘i next decided how much to fund those programs—what the Court of Appeals called "an expenditure decision." Pet. App. 21a. Facing unprecedented budget deficits in 2010, Hawai‘i decided to provide a level of benefits through Basic Health Hawai‘i that is lower than what it had previously provided through the "de facto" program. To justify strict scrutiny of that decision, petitioners must show that Hawai‘i discriminated on the basis of alienage—*i.e.*, that it treated COFA residents less favorably than citizens similarly situated. *See Graham* v. *Richardson*, 403 U.S. 365, 371-372 (1971).

Petitioners cannot do so. As explained above, Hawai‘i created both the prior "de facto" program and Basic Health Hawai‘i exclusively for aliens ineligible for Medicaid. Hawai‘i does not offer any similar health benefit to citizens. So even after Hawai‘i reduced the level of benefits available to COFA residents through Basic Health Hawai‘i, it was not depriving COFA residents of any benefit it provides citizens.

It is true that some citizens receive a greater level of benefits through Medicaid than COFA residents do through Basic Health Hawai‘i. But citizens receiving Medicaid are not similarly situated to COFA residents receiving Basic Health Hawai‘i. Medicaid is a federal-state cooperative program funded by both federal and state expenditures. Basic Health Hawai‘i, by contrast, is a state program funded solely by the State. Pet. App. 21a n.8. Thus, the fact that COFA residents receive less coverage under Basic Health Hawai‘i says nothing about whether they have been treated differently by the

*State*. It is the *Federal Government*, after all, that has prohibited federal dollars from going toward their health benefits. *See Pimentel* v. *Dreyfus*, 670 F.3d 1096, 1106-1107 (9th Cir. 2012) (per curiam) (holding that recipients of benefits through "different programs" are "not similarly situated"); *Hong Pham*, 16 A.3d at 650 ("[T]he equal protection clause does not require the state to treat individuals in a manner similar to how others are treated in a different program governed by a different government.").

There are thus no grounds for subjecting Hawai'i's expenditure decision to heightened scrutiny. Because Medicaid and Basic Health Hawai'i are different programs governed by different sovereigns, citizens receiving Medicaid cannot be compared with COFA residents receiving Basic Health Hawai'i.

3. The Court of Appeals was therefore correct to hold that Hawai'i's actions do not warrant strict scrutiny. A contrary holding would have imposed on Hawai'i and other States a constitutional obligation to replace—entirely at their own expense—federal funding taken away from certain aliens by the Welfare Reform Act. And it would have meant that any time Congress reduces federal funding for a group of aliens in the future, States would have to make up the difference using their own funds.

"The Equal Protection Clause does not place the state in such a Procrustean bed." *Bruns*, 750 F.3d at 70. When Congress withdraws federal funding for a group of aliens, many States may choose to use state dollars to mitigate that loss. The Constitution, however, leaves that choice to the States; it does not force them to fill the gap created by the Federal Government's immigration policies. The Court of

Appeals properly held that Hawai'i's actions should be reviewed only for a rational basis.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID M. LOUIE
*Attorney General*
HEIDI M. RIAN
LEE-ANN N.M. BREWER
JOHN F. MOLAY
DEIRDRE MARIE-IHA
*Deputy Attorneys General*
STATE OF HAWAI'I
DEPARTMENT OF THE ATTORNEY GENERAL
465 South King Street
Room 200
Honolulu, HI 96813
(808) 587-3050

NEAL KUMAR KATYAL*
FREDERICK LIU
JACLYN L. DILAURO
*Special Deputy Attorneys General*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Counsel of Record

*Counsel for Respondents*

September 2014