No.

In the Supreme Court of the United States

TONY KORAB, ET AL., PETITIONERS

v.

PATRICIA MCMANAMAN,
DIRECTOR, DEPARTMENT OF HUMAN SERVICES,
STATE OF HAWAII, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDING

Petitioners are Tony Korab, Tojio Clanton, and Keben Enoch. Respondents are Patricia McManaman, Director, Department of Human Services, State of Hawaii, and Kenneth Fink, Med-QUEST Division Administrator, Department of Human Services, State of Hawaii.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Tony Korab, Tojio Clanton, and Keben Enoch respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-70a) is reported at 748 F.3d 875. The order of the district court granting petitioners' motion for preliminary injunction (App., *infra*, 73a-88a) is unreported. The earlier order of the district court denying respondents' motion to dismiss (App., *infra*, 89a-117a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2014. A petition for rehearing was denied on May 12, 2014 (App., *infra*, 71a). On August 3, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 9, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case presents a critical and fundamental question involving equal protection—a question left unresolved by this Court's precedents and on which the federal courts of appeals and state courts of last resort are in conflict. 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.

In this case, petitioners, three individuals, filed a class action challenging the constitutionality of a Hawaii regulation that dramatically reduced state medical benefits to aliens legally residing in Hawaii under the terms of compacts between the United States and former trust territories in the Pacific. Petitioners, who are suffering

from potentially life-threatening medical conditions requiring treatment no longer covered by state law, sought a preliminary injunction preventing respondents, state officials, from reducing their medical benefits. The district court granted the preliminary injunction, concluding that petitioners were likely to succeed on their claim because the State's alienage-based classification was subject to strict scrutiny. App., *infra*, 73a-88a.

The Ninth Circuit vacated and remanded. App., *infra*, 1a-70a. In a badly splintered decision with three separate opinions, the court held that Hawaii's alienage-based classification was subject only to rational-basis review. At the same time, however, two members of the panel acknowledged that, under this Court's equal protection precedents, the classification would likely be invalid. And they also acknowledged that the court's decision deepened a conflict among the federal courts of appeals and state courts of last resort on the question of which standard of review should apply to States' alienage-based classifications within their Medicaid programs. Because this case presents an ideal vehicle for resolving that conflict on a question both of legal importance and of potentially life-and-death significance to petitioners, the petition for a writ of certiorari should be granted.

1. a. Many low-income residents of the United States, including petitioners, depend on government assistance to cover the cost of their necessary medical care. Medicaid is a cooperative program in which the federal government approves a State's plan to fund medical services for low-income residents and then reimburses a portion of the State's expenses in financing those services. See Social Security Amendments of 1965, Pub. L. No. 89-97, Tit. XIX, 79 Stat. 343; *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498, 502 (1990). While

participation by States in Medicaid is voluntary, States must comply with a variety of statutory and regulatory requirements in order to receive federal funds. See *Wilder*, 496 U.S. at 502.

As a condition of participation in Medicaid, States must cover certain populations and provide certain services. See 42 U.S.C. 1396a(a)(10)(A)(i). States, however, may expand coverage to additional populations and services and receive federal funds to provide that coverage. See 42 U.S.C. 1396a(a)(10)(A)(ii). States may also choose to extend Medicaid eligibility to "expansion populations" by creating "experimental, pilot, or demonstration" projects that, upon approval, are partially funded by the federal government. 42 U.S.C. 1315(a).

The State of Hawaii provides Medicaid benefits through a managed-care program known as QUEST. See *AlohaCare* v. *Hawaii Department of Human Services*, 572 F.3d 740, 743 (9th Cir. 2009). Under that program, which was approved as a "demonstration" project, Hawaii contracts with health maintenance organizations to "provide health care coverage to populations outside the normal reach of Medicaid." *Ibid.*

b. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act or Act), Pub. L. No. 104-193, 110 Stat. 2105. Title IV of the Act generally restricts the eligibility of non-citizens to receive federal funds for welfare benefits to "qualified aliens." 8 U.S.C. 1611(a). Qualified aliens—a category that includes permanent residents, asylees, refugees, and certain parolees—are generally eligible to receive federal funds if they entered the United States after August 22, 1996, and have been present in the country for five years. See 8 U.S.C. 1613, 1641(b)-(c). Aliens who are not qualified aliens, however, are ineligible for all federal public benefits, with only limited ex-

ceptions such as for emergency medical assistance. See 8 U.S.C. 1611(a)-(b).

Of particular relevance here, the Welfare Reform Act recognizes three categories of aliens relevant to the provision of state Medicaid benefits:

- First, the Act requires participating States to provide benefits to certain qualified aliens, including permanent residents who have worked 40 qualifying quarters; veterans and members of the military on active duty; and, for a fixed period, refugees, asylees, aliens being withheld from removal, and entrants under certain specified statutes. See 8 U.S.C. 1622(b).
- Second, the Act gives States discretion to determine eligibility for benefits for all other qualified aliens, as well as nonimmigrants and aliens paroled into the United States for less than one year. See 8 U.S.C. 1612(b), 1622(a).
- Third, the Act classifies as ineligible for benefits aliens who are not qualified aliens, nonimmigrants, or parolees. At the same time, however, the Act gives States discretion to provide benefits even to aliens not lawfully present in the United States, provided that a State does so pursuant to a subsequently enacted law that affirmatively provides for such benefits. See 8 U.S.C. 1621(a), (d).

2. a. This case involves the second category of aliens recognized by the Welfare Reform Act: specifically, nonimmigrants as to whom States have discretion to determine eligibility for Medicaid benefits. Petitioners are suing on behalf of a class of citizens of the Republic of the Marshall Islands, the Federated States of Microne-

sia, and the Republic of Palau, sovereign states that were previously part of the trust territory of the Pacific Islands. Each of those countries has entered into a compact of free association (COFA) with the United States. See Compact of Free Association Act of 1985 (COFA Act), Pub. L. No. 99-239, 99 Stat. 1770 (1986) (Marshall Islands and Micronesia); Joint Resolution of Nov. 14, 1986 (Joint Resolution), Pub. L. No. 99-658, 100 Stat. 3672 (1986) (Palau). Pursuant to those compacts, the United States enjoys full military control in each country, as well as some authority over its airspace and waters and input regarding its foreign affairs. See COFA Act § 201, 99 Stat. 1800, 1802, 1804, 1822, 1824-1825. In exchange for those privileges, and as compensation for the damage caused by nuclear testing conducted by the American military on the Marshall Islands in the 1940s and '50s, see *id.* §§ 103, 201, 99 Stat. 1778-1787, 1812, the compacts provide certain accommodations for citizens of those countries.

As is relevant here, citizens of the COFA countries may freely "enter into, lawfully engage in occupations, and establish residence as * * * nonimmigrant[s] in the United States." COFA Act § 201, 99 Stat. 1804; Joint Resolution § 201, 100 Stat. 3682. Those individuals—known as "COFA residents"—may remain indefinitely in the United States. See COFA Act § 201, 99 Stat. 1804; Joint Resolution § 201, 100 Stat. 3682. States, including Hawaii, receive federal funds to defray the cost of providing COFA residents with public services. See Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 104(e), 117 Stat. 2720, 2737, 2739-2742.

b. Before the Welfare Reform Act, COFA residents were eligible for medical benefits through Hawaii's managed-care plan on the same terms as American citizens

and other aliens, and Hawaii received federal Medicaid reimbursement for part of the cost of covering COFA residents. App., *infra*, 7a. After Congress made non-immigrants ineligible for federal Medicaid reimbursement in the Welfare Reform Act, Hawaii continued to provide the same medical benefits to COFA residents without federal reimbursement. *Id.* at 8a.

In 2010, however, Hawaii disenrolled most COFA residents from its managed-care plan and offered them only a plan with greatly reduced coverage, known as Basic Health Hawaii (BHH).[1] Among other things, BHH limits patients to ten days of inpatient hospital care per year, twelve outpatient visits per year, and four prescriptions per month. Haw. Admin. R. § 17-1722.3-18. The plan does not cover organ transplants or surgeries such as heart surgery, and it covers dialysis only as an emergency service. *Id.* § 17-1722.3-19; App., *infra*, 77a.

BHH was designed specifically for aliens who are "citizens of COFA nations and legal permanent residents admitted to the United States for less than five years who are age nineteen years and older and lawfully present in the [S]tate." Haw. Admin. R. § 17-1722.3-1. Because the BHH program is capped at 7,000 participants—fewer than the number of COFA residents who had previously participated in the State's managed-care program—new COFA residents were unable to enroll in BHH. App., *infra*, 59a n.5, 77a n.3; see Haw. Admin. R. § 17-1722.3-10.

c. Petitioners are three COFA residents who were previously eligible for medical benefits through Hawaii's

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[1] The State did not disenroll COFA residents who were pregnant, under age 19, recipients of long-term care, or recipients of recent organ transplants. See App., *infra*, 76-77a.

managed-care program but were either enrolled in BHH or denied coverage altogether. They suffer from serious illnesses that could not be treated in their home countries and now, because of BHH, will not be adequately treated in Hawaii. For example, petitioner Tony Korab, a dialysis patient, was not able to receive the dialysis services and the numerous prescription medications he needs in his home country of the Marshall Islands. But because of his transfer to BHH, Mr. Korab could no longer afford all of his medications and was ineligible for a kidney transplant. Similarly, petitioner Tojio Clanton came to Hawaii to receive necessary dialysis and eventually underwent a kidney transplant. But because of his transfer to BHH, he had to stop taking necessary medications, went into kidney failure as a result, and had to spend two weeks in the hospital. Mr. Clanton used up all of his BHH-allotted doctor visits and could not afford to pay for further visits or medications. App., *infra*, 78a; Pet. C.A. Supp. E.R. 261-263, 266.

In 2010, petitioners filed suit against respondents, the director of Hawaii's Department of Human Services and the administrator of its medical-assistance division, in the United States District Court for the District of Hawaii. As is relevant here, petitioners alleged that Hawaii violated the Equal Protection Clause of the Fourteenth Amendment by providing fewer health benefits to COFA residents than to citizens and certain other legal aliens.[2] On the stipulation of the parties, the district

[2] Petitioners also brought claims under the Americans with Disabilities Act and on behalf of the other group of legal aliens covered by BHH, but they did not seek a preliminary injunction on those claims. See App., *infra*, 75a n.2. Accordingly, those claims are not before the Court.

court certified a class consisting of "all non-pregnant adults residing in Hawaii under the Compact of Free Association with the United States who are ineligible for the same health benefits as other Hawaii residents." App., *infra*, 80a.

Petitioners moved for a preliminary injunction, and the district court granted the motion. App., *infra*, 73a-88a. Relying on its reasoning in an earlier order denying respondents' motion to dismiss, the district court held that Hawaii's determination that "COFA [r]esidents should no longer receive the same benefits as citizens and other aliens" was subject to strict scrutiny. *Id.* at 82a, 109a. In its earlier order, the court had explained that "courts have fallen on both sides of the issue" of whether strict scrutiny should apply to state classifications of aliens under the Welfare Reform Act. *Id.* at 104a. After reviewing those decisions, the district court had reasoned that Hawaii's reduction of medical benefits for COFA residents "fell somewhere in between" the facts of this Court's decisions in *Graham* v. *Richardson*, 403 U.S. 365 (1971), and *Mathews* v. *Diaz*, 426 U.S. 67 (1976). App., *infra*, 110a (internal quotation marks and citation omitted). Because the State was not following a "uniform rule established by federal law" in treating COFA residents differently, the district court had held, its decision to draw an alienage-based classification was subject to strict scrutiny. *Id.* at 112a-113a.

Applying strict scrutiny in considering petitioners' motion for a preliminary injunction, the district court concluded that petitioners had shown a "high degree of likelihood of success on the merits," because Hawaii's proffered justification for its decision—reducing the costs of medical coverage—was "particularly inappropriate and unreasonable when the discriminated class consists of aliens." App., *infra*, 82a-83a (citation omitted).

The court also concluded that equitable considerations supported the issuance of a preliminary injunction, because petitioners had "submitted compelling evidence that BHH's limited coverage for doctors' visits, prescriptions, and other critical services [was] causing COFA [r]esidents to for[go] much needed treatment because they cannot otherwise afford it." *Id.* at 83a.

4. A divided court of appeals vacated and remanded, holding that Hawaii's alienage-based classification was subject only to rational-basis review. App., *infra*, 1a-70a.

a. In an opinion written by Judge McKeown, the court of appeals acknowledged at the outset that, under this Court's precedents, "state classifications based on alienage are subject to strict scrutiny," whereas federal classifications based on alienage are subject to rational-basis review. App., *infra*, 10a. The court asserted, however, that "[t]his case presents a conundrum that does not fit neatly within these broad rules." *Ibid.* Citing the Tenth Circuit's decision in *Soskin* v. *Reinertson*, 353 F.3d 1242 (2004), the Ninth Circuit reasoned that the Welfare Reform Act established a "uniform federal structure for providing welfare benefits to distinct classes of aliens," and it added that the States' discretion over particular categories of aliens "does not defeat or undermine [that] uniformity." App., *infra*, 17a. In the court's view, "Congress has authorized [S]tates to do exactly what Hawai'i has done here—determine eligibility for, and terms of, state benefits for aliens" within the discretionary category established by the Welfare Reform Act. *Id.* at 4a. As a result, the court of appeals concluded, even if "Hawai'i's discretionary decision not to provide optional coverage for COFA [r]esidents constitutes alienage-based discrimination," its decision was subject to rational-basis review. *Id.* at 22a.

While "acknowledg[ing] the rhetorical force" of the argument that the State's decision should not be subject to rational-basis review because "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause," the court of appeals refused to apply that principle. App., *infra*, 22a. According to the court, the constitutional question was "not whether Congress may authorize Hawai'i to violate the Equal Protection Clause but rather what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens." *Ibid.* (internal quotation marks and citation omitted). Because the court concluded that "Hawai'i [was] merely following the federal direction set forth by Congress under the Welfare Reform Act," it held that rational-basis review applied. *Id.* at 23a.

b. Judge Bybee filed an opinion concurring and concurring in the judgment. App., *infra*, 25a-52a. At the outset, he stated that he was joining Judge McKeown's opinion, which, in his view, "capture[d] the unsettled nature of the current state of the law and offer[ed] a way through the morass of conflicting approaches." *Id.* at 25a. At the same time, however, Judge Bybee ultimately agreed with petitioners that, if the court were to look "exclusively" to this Court's equal protection precedents, it was "unlikely that Hawai'i's scheme can muster constitutional scrutiny," because "Hawai'i's law discriminates between citizens and aliens, and, for that reason * * *, Hawai'i must satisfy strict scrutiny." *Id.* at 49a-50a.

Judge Bybee wrote separately, therefore, to propose a "better approach." App., *infra*, 25a. He noted that the federal courts of appeals and state courts of last resort are "divided over the proper *standard of review* for classifications based on alienage" made by States within the cooperative Medicaid program. *Id.* at 26a. In his view,

that split demonstrated that the "equal protection principle announced in *Graham* has proven unsustainable." *Id.* at 51a. Accordingly, he proposed that courts "employ[] preemption analysis instead of equal protection analysis in alienage cases," with state alienage-based classifications being invalidated only where those classifications conflict either expressly or impliedly with federal law. *Id.* at 27a.

c. Judge Clifton dissented. App., *infra*, 53a-70a. He agreed with the "majority of courts that have considered this question" and "applied strict scrutiny under the Equal Protection Clause to strike down state statutes that purported to exclude certain aliens from Medicaid because they were aliens." *Id.* at 68a-69a (citing *Ehrlich* v. *Perez*, 908 A.2d 1220 (Md. 2006); *Finch* v. *Commonwealth Health Insurance Connector Authority*, 946 N.E.2d 1262 (Mass. 2011); and *Aliessa ex rel. Al Fayad* v. *Novello*, 754 N.E.2d 1085 (N.Y. 2001)).

At the outset, Judge Clifton explained that, in light of *Graham* and *Mathews*, this case turned on "[t]he question * * * whether the denial of equal benefits to COFA [r]esidents is ultimately the responsibility of the [S]tate or of Congress." App., *infra*, 57a. Judge Clifton reasoned that "it is the State of Hawai'i that is ultimately responsible," on the ground that "there is no federal direction regarding how to treat COFA [r]esidents and others" within the discretionary category established by the Welfare Reform Act. *Id.* at 58a. Instead, "[t]he decision as to how a given group of aliens is to be treated is simply left to each [S]tate," and Congress "does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* at 65a, 67a (citation omitted). Because Hawaii used its discretion to "classif[y] COFA [r]esidents on the basis of alienage," Judge Clif-

ton concluded, its action was subject to strict scrutiny. *Id.* at 58a-59a.

4. The court of appeals subsequently denied rehearing. App., *infra*, 71a. The court, however, granted petitioners' motion for a stay of the mandate pending the filing of this petition for a writ of certiorari. *Id.* at 72a. The district court's injunction therefore remains in place, and petitioners and other COFA residents are entitled to benefits under Hawaii's managed-care plan, as long as this petition is pending.

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question of constitutional law, left open by this Court's precedents, on which the federal courts of appeals and state courts of last resort are divided. The question whether strict scrutiny or rational-basis review applies to a claim challenging an alienage-based classification is an important and ordinarily outcome-dispositive one. But lower courts have struggled to apply this Court's precedents on the standard of review to cooperative programs such as Medicaid. While the Ninth Circuit was badly fractured in the decision below, a majority of the panel acknowledged that the decision deepened a preexisting conflict.

This case, moreover, is an ideal vehicle in which to resolve that conflict, because it is hard to imagine a case of greater practical importance. If the court of appeals' decision is allowed to stand, thousands of COFA residents in Hawaii will immediately lose vital health benefits, with potentially life-threatening consequences. And as the three divergent opinions from the court of appeals in this case demonstrate, the lower courts have thoroughly addressed all aspects of the question presented. Given the exigent circumstances of this case, not only is further percolation unnecessary, it is affirmatively unde-

sirable. Because this case satisfies the criteria for further review, the petition for certiorari should be granted.

A. The Question Presented Is An Important Question Of Federal Constitutional Law Left Unresolved By This Court's Precedents

By applying different levels of scrutiny to state and federal alienage-based classifications, the Court's equal protection precedents have created the gray area in which this case falls. See, *e.g.*, App., *infra*, 10a (referring to the "conundrum" presented by this case); *id.* at 25a (Bybee, J., concurring and concurring in the judgment) (noting the "unsettled nature of the current state of the law" and the "morass of conflicting approaches"). As Judge Bybee lamented in his concurring opinion, it is "remarkable" that, some 75 years after the Court announced the need for more exacting judicial scrutiny for classifications affecting minority groups, and over 40 years after the Court first held that alienage-based classifications are subject to strict scrutiny, the lower courts are still divided over the appropriate standard of review in cases such as this one. *Id.* at 26a. The Court should intervene to address and resolve that fundamental question of federal constitutional law.

1. In *Graham* v. *Richardson*, 403 U.S. 365 (1971), the Court considered equal protection challenges to two state welfare programs, one of which was federally supported, that denied benefits to resident aliens. *Id.* at 367-368. The Court held that state classifications based on alienage are subject to "close judicial scrutiny" because "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Id.* at 372 (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). Applying that searching standard of review, the Court invalidated both of the state laws at is-

sue, reasoning that "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify * * * making noncitizens ineligible for public assistance [or] restricting benefits to citizens and longtime residents aliens." *Id.* at 374. Following *Graham*, the Court applied strict scrutiny to invalidate other state laws distributing benefits, including federally subsidized benefits, in a manner that discriminated on the basis of alienage. See, *e.g.*, *Nyquist* v. *Mauclet*, 432 U.S. 1, 7-12 (1977).

Five years after *Graham*, in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), this Court considered the constitutionality of distinctions drawn by the federal government on the basis of alienage, in the context of eligibility for Medicare benefits. *Id.* at 69-70. The Court distinguished *Graham* on the ground that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." *Id.* at 84. Because "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," the Court concluded that Congress may constitutionally enact laws that discriminate on the basis of alienage, as long as those laws are supported by a rational basis. *Id.* at 81-83.

2. This case falls somewhere on the spectrum between *Graham* and *Mathews*, presenting the question of the appropriate standard of review for a "hybrid" case—*viz.*, where a State discriminates between groups of legal aliens within a cooperative program in which the federal government has authorized States to exercise discre-

tion.[3] The Court has not provided definitive guidance on that question. On the one hand, in *Graham*, the Court rejected Arizona's argument that federal law "authorize[d] discriminatory treatment of aliens at the option of the States," and it warned that Arizona's position would raise "serious constitutional questions" because "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." 403 U.S. at 382. On the other hand, in *Plyler* v. *Doe*, 457 U.S. 202 (1982), the Court observed 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." *Id.* at 219 n.19. The Court should grant review to reconcile those conflicting statements (especially where, as here, the supposed "uniform rule" is a grant of complete discretion) and to provide clarity to the lower courts on the question presented.

B. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort

As a majority of the panel recognized, see App., *infra*, 25a-26a (Bybee, J., concurring and concurring in the judgment); *id.* at 68a-69a (Clifton, J., dissenting), the Ninth Circuit's decision in this case deepens a conflict among the federal courts of appeals and state courts of last resort regarding which standard of review applies to

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[3] This case presents no occasion for the Court to consider the constitutionality of a State's refusal to provide benefits to *illegal* aliens. The Court has already made clear that illegal aliens, unlike legal aliens, do not constitute a "suspect class" for equal protection purposes. See *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982) (internal quotation marks omitted).

a claim challenging a classification based on alienage in the context of the cooperative Medicaid program. That split of authority has also been acknowledged elsewhere. See, *e.g.*, *Soskin* v. *Reinertson*, 353 F.3d 1242, 1252, 1255 (10th Cir. 2004); Roger C. Hartley, *Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique*, 2 Duke J. Const. & Pub. Pol'y 93, 93, 102-103 (2007). The Court's intervention is necessary to resolve that conflict.

1. As Judge Clifton noted in his dissenting opinion, see App., *infra*, 68a-69a, three state courts of last resort have held that strict scrutiny applies to state statutes that discriminate against certain aliens in the provision of Medicaid benefits.

The earliest of the decisions addressing the question presented was the New York Court of Appeals' decision in *Aliessa ex rel. Al Fayad* v. *Novello*, 754 N.E.2d 1085 (2001). In that case, certain permanent residents within the discretionary category established by Congress in the Welfare Reform Act challenged a New York statute terminating their state Medicaid coverage as, *inter alia*, a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1091-1092. The plaintiffs argued that strict scrutiny should apply because the statute denied benefits on the basis of alienage, whereas the State argued that rational-basis review should apply because the statute implemented federal immigration policy. *Id.* at 1094.

After analyzing this Court's precedents, the New York Court of Appeals concluded that strict scrutiny applied because the Welfare Reform Act did not impose a uniform rule for States to follow and thus could give the state statute "no special insulation from strict scrutiny review." 754 N.E.2d at 1098. The court explained that "Congress has conferred upon the States * * * broad

discretionary power to grant or deny aliens [s]tate Medicaid"; that discretion, the court continued, "produc[ed] not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics." *Ibid.* As a result, the court evaluated the statute "as any other [s]tate statute that classifies based on alienage," and held that the statute was invalid. *Id.* at 1098-1099.

The Maryland Court of Appeals agreed with that reasoning in *Ehrlich* v. *Perez*, 908 A.2d 1220 (2006). There, the plaintiffs challenged Maryland's decision to defund a program created to provide state Medicaid benefits to resident alien children and pregnant women who arrived in the United States after the effective date of the Welfare Reform Act—both groups over which Congress had given the States discretion. *Id.* at 1227-1228. Relying on *Graham* and its progeny, the plaintiffs argued that strict scrutiny should apply; relying on *Mathews* and the "uniform rule" statement in *Plyler*, the State argued that rational-basis review should apply. *Id.* at 1231-1232.[4]

In agreeing with the plaintiffs, the Maryland Court of Appeals first noted that this Court has never adopted or applied "[t]he 'uniform rule' foundation for application of a relaxed scrutiny review of [s]tate action under equal

[4] Although the plaintiffs brought their challenge under Article 24 of the Declaration of Rights of the Maryland Constitution, the Maryland Court of Appeals looked to "cases interpreting and applying the Equal Protection Clause of the Fourteenth Amendment" in determining the appropriate standard of review, on the ground that "Article 24 and the Equal Protection Clause of the Fourteenth Amendment are *in pari materia*[] and [the court] generally appl[ies] them in like manner and to the same extent." *Perez*, 908 A.2d at 1234; cf. *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983).

protection attack." 908 A.2d at 1238. But even assuming that the existence of a uniform federal rule could justify a lower degree of scrutiny, the Maryland Court of Appeals concluded that the Welfare Reform Act did not establish such a rule because "[t]he grant of discretion, without more, is not a uniform rule for purposes of imposing only a rational basis test." *Id.* at 1241. Accordingly, the court reviewed Maryland's decision not to provide benefits under strict scrutiny, and affirmed the entry of a preliminary injunction on that basis. *Id.* at 1243-1245.

Most recently, in *Finch* v. *Commonwealth Health Insurance Connector Authority*, 946 N.E.2d 1262 (2011), a divided Massachusetts Supreme Judicial Court held that strict scrutiny applied to a challenge to a state decision not to provide Medicaid benefits. As in the other cases, the plaintiffs in *Finch* challenged the termination of their state Medicaid benefits on account of their alienage, urging that strict scrutiny should apply; the State contended that rational-basis review should apply because the State had adopted federal alienage classifications to determine who should receive state benefits. *Id.* at 1265, 1274.[5]

Analyzing this Court's precedents, the Massachusetts Supreme Judicial Court reasoned that, where the federal

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[5] The plaintiffs in *Finch* were pursuing a claim under Article 106 of the amendments to the Massachusetts Constitution. 946 N.E.2d at 1268-1269. The Massachusetts Supreme Judicial Court has interpreted Article 106 to be "coextensive" with the Equal Protection Clause of the Fourteenth Amendment in "matters concerning aliens." *Doe* v. *Commissioner of Transitional Assistance*, 773 N.E.2d 404, 408 (Mass. 2002). Accordingly, the court's analysis in *Finch* relied heavily upon decisions from this Court concerning the Equal Protection Clause. See 946 N.E.2d at 1273-1280.

government has made a "binding decision regarding the treatment of aliens," that decision will be reviewed under a rational-basis standard "even though the immediate actor may be a State." 946 N.E.2d at 1276. But where "the State acts on its own authority," its action is subject to strict scrutiny. *Ibid.* The court concluded that, because the Welfare Reform Act afforded Massachusetts discretion as to the aliens at issue, it was not a "mandate to the States" that would entitle the State to invoke the lower degree of scrutiny applicable to actions of the federal government. *Id.* at 1276-1277. Accordingly, the court held that the State's "selection amongst th[e] [available] options" should be subject to strict scrutiny. *Id.* at 1277.[6]

2. By contrast, as the Ninth Circuit noted in joining it, App., *infra*, 16a, the Tenth Circuit—in yet another divided opinion—has held that a State's decision to terminate or reduce state Medicaid benefits to certain aliens should be subject only to rational-basis review. In *Soskin*, *supra*, the plaintiff aliens challenged Colorado's termination of their state Medicaid coverage, which had been left to the State's discretion under the Welfare Reform Act. 353 F.3d at 1246. The court noted that the parties' arguments "mirrored" those made in *Aliessa*, but explicitly disagreed with the New York Court of Appeals' analysis. *Id.* at 1252, 1255.

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[6] Dissenting in relevant part, Justice Gants would have held that strict scrutiny was appropriate "only where the State's per capita expenditures for the plaintiff aliens are substantially less than the per capita amount contributed by the State" to Medicaid for citizens and certain qualified aliens. *Finch*, 946 N.E.2d at 1281 (emphasis omitted). He concluded that the limited record in that case did not include such a showing. *Ibid.*

Relying on this Court's decision in *Mathews*, the Tenth Circuit held that rational-basis review applied because state laws that deny benefits to aliens within the discretionary category "reflect national policy that Congress has the constitutional power to enact." *Soskin*, 353 F.3d at 1255. Specifically, the court explained that, in exercising its discretion to deny benefits to certain aliens, the State was "addressing the [c]ongressional concern * * * that individual aliens not burden the public benefits system." *Ibid.* (internal quotation marks omitted). The court added that, because Congress had already distinguished between citizens and aliens in the Welfare Reform Act, a State's "exercise of the option to include fewer aliens in its aliens-only program" was "not based on a suspect classification" and thus was not subject to strict scrutiny. *Id.* at 1256. The court ultimately affirmed the denial of a preliminary injunction on the plaintiffs' equal-protection claim. *Id.* at 1264-1265.

Judge Henry dissented. 353 F.3d at 1265-1276. He contended that, under the majority's interpretation, "there would be few if any limits to a [S]tate's ability to discriminate against legal immigrants once given the 'option.'" *Id.* at 1275. In his view, the majority had gone astray by "misappl[ying] * * * *Graham*'s central tenet": namely, that strict scrutiny applies to state laws creating alienage-based classifications. *Id.* at 1270.

As matters currently stand, therefore, three state courts of last resort (one in a divided opinion) have held that a State's alienage-based classifications for purposes of Medicaid benefits are subject to strict scrutiny, and two federal courts of appeals (both in divided opinions) have held that the same type of state laws are subject only to rational-basis review. The resulting conflict warrants this Court's intervention.

C. The Question Presented Warrants Review In This Case

To the extent there is any lingering doubt, the circumstances of this case weigh heavily in favor of certiorari. Even beyond its legal importance, the question presented in this case is of extraordinary practical importance to petitioners and the class they represent. Put bluntly, the resolution of that question is potentially a matter of life and death for the thousands of COFA residents legally residing in Hawaii who will be deprived of essential medical care if the stay is lifted and the district court's injunction vacated. This case, moreover, presents an ideal vehicle in which to resolve the question. Further review is therefore warranted.

1. First and foremost, the question presented is of obvious and exceptional practical importance to low-income COFA residents living in Hawaii, whose access to potentially life-saving medical treatment depends on the outcome of this case.

According to a 2008 estimate, approximately 12,000 COFA residents live in Hawaii, and that estimate is "widely considered to be underrepresentative of the actual numbers of COFA migrants residing in the State." Letter from Governor Neil Abercrombie to Nikolao I. Pula, Jr., Director, Office of Insular Affairs, Department of the Interior 1 (Aug. 9, 2011) <tinyurl.com/cofaresidents>. Most COFA residents come to the United States seeking to obtain employment or to accompany relatives. See Government Accountability Office, *Compacts of Free Association: Improvements Needed to Assess and Address Growing Migration* 17-18 (2011) (GAO Report). COFA residents pay federal and state taxes on their earnings. *Id.* at 33. But because they primarily occupy low-skilled jobs, *ibid.*, a significant number of COFA residents in Hawaii need assistance to cover their

medical costs: as of 2009, more than 7,700 COFA residents in Hawaii were receiving state-funded acute or preventive medical care. Pet. C.A. Supp. E.R. 382.

Notably, COFA residents suffer from a relatively high prevalence of certain diseases, including cancer, diabetes, and various radiation-induced diseases that are thought to be related to the nuclear testing conducted by the American military in the Marshall Islands. See Seiji Yamada, *Cancer, Reproductive Abnormalities, and Diabetes in Micronesia: The Effect of Nuclear Testing*, 11 Pacific Health Dialog 216, 217-219 (2004). The loss of agricultural land because of residual nuclear contamination, along with greater integration into the global economy, has also been linked to dietary and behavioral changes—and concomitant health problems—among citizens of the COFA countries. *Id.* at 219-220. The inadequate health-care systems of the COFA countries only exacerbate the problems facing their citizens: there are no facilities for chemotherapy or radiation therapy, and only a few dialysis machines, in those countries. GAO Report 26; App., *infra*, 76a.

It is undisputed that BHH provides far fewer health benefits to COFA residents than Hawaii provided before 2010, and that BHH's limited coverage will be inadequate to meet the medical needs of many COFA residents in Hawaii, including those with life-threatening conditions. For example, as the district court found, "cancer patients will exhaust BHH's yearly limit of only twelve outpatient visits within three to four months," and individuals "with chronic illnesses are typically prescribed more than the four-prescriptions-per-month limit imposed by BHH," causing some patients to go without necessary medications. App., *infra*, 78a. Unsurprisingly, "doctors have found that they cannot provide adequate care to COFA [r]esidents through BHH." *Id.* at

77a. The practical importance of this case is therefore beyond question.

2. This case is also an ideal vehicle for resolving the question presented. To begin with, this case presents the question in a straightforward context. COFA residents are a discrete and easily identifiable minority that is defined exclusively by alienage, as opposed to length of time in the country or any other factor. Hawaii previously provided COFA residents with the same health benefits as citizens and other aliens before it removed those benefits, identifying the adversely affected class expressly in terms of alienage. This case therefore presents the question of the appropriate standard of review for alienage-based classifications without any potential factual complications.

In addition, the multiple opinions below, along with the previous opinions addressing the issue, set out the full range of options for resolving the question presented. The federal courts of appeals and state courts of last resort have comprehensively analyzed the arguments for applying the different standards of review in this context; in addition, Judge Bybee's concurring opinion below offers an alternative, preemption-based mode of analyzing state alienage-based classifications. See App., *infra*, 25a-52a. There would therefore be no benefit to further percolation in the lower courts, as the conflict on the question presented is fully developed and ripe for the Court's review.

Finally, the Court's resolution of the question presented regarding the appropriate standard of review would be outcome-dispositive in this case. The only justification that the State has offered for its discriminatory treatment of COFA residents is budgetary. As members of the otherwise divided panel below agreed, that rationale would be sufficient to survive rational-basis re-

view but not strict scrutiny. See, *e.g.*, App., *infra*, 49a-51a (Bybee, J., concurring and concurring in the judgment); *id.* at 70a (Clifton, J., dissenting). Resolution of the question presented would thus effectively determine petitioners' entitlement to an injunction preserving their access to essential health care.

The legal importance of the question presented cannot be denied. Nor can it be disputed that there is a clear conflict on that question. And petitioners in this case, like the thousands of other COFA residents legally residing in Hawaii, cannot afford to wait for further percolation. Because this case is an ideal vehicle in which to consider the question presented, and because so much depends upon the answer, the Court should grant certiorari and resolve the conflict on a fundamental question of federal constitutional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-15132

TONY KORAB; TOJIO CLANTON; KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiff-Appellees,

v.

KENNETH FINK, in his official capacity as State of Hawai'i, Department of Human Services, Med-QUEST Division Administrator, and PATRICIA MCMANAMAN, in her official capacity as Director of the State of Hawai'i, Department of Human Services, Defendants-Appellants.

Argued and Submitted: September 18, 2012
Filed: April 1, 2014

Before: McKEOWN, CLIFTON and BYBEE, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

This case presents yet another challenge to the complex area of state-funded benefits for aliens. In enacting

comprehensive welfare reform in 1996, Congress rendered various groups of aliens ineligible for federal benefits and also restricted states' ability to use their own funds to provide benefits to certain aliens. *See* 8 U.S.C. § 1601 et seq. As a condition of receiving federal funds, Congress required states to limit eligibility for federal benefits, such as Medicaid, to citizens and certain aliens. For state benefits, such as the Hawai'i health insurance program at issue here, Congress essentially created three categories of eligibility. The first category—full benefits—requires states to provide the same benefits to particular groups of aliens, including certain legal permanent residents, asylees, and refugees, as the state provides to citizens. *Id.* § 1622(b). Recipients in this category also benefit from federal funds. *Id.* § 1612(b)(2). The second category—no benefits—prohibits states from providing any benefits to certain aliens, such as those who are in the United States without authorization. *Id.* § 1621(a). The third category—discretionary benefits—authorizes states to determine the eligibility for any state benefits of an alien who is a qualified alien, a nonimmigrant, or a parolee. *Id.* § 1622(a).

Within the third category are nonimmigrant aliens residing in Hawai'i under a Compact of Free Association with the United States, known as COFA Residents.[1] Al-

[1] The Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau have each entered into a Compact of Free Association ("COFA") with the United States, which, among other things, allows their citizens to enter the United States and establish residence as a "nonimmigrant." 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; *see also* 48 U.S.C. § 1901 (joint resolution approving the COFA).

though this group was not eligible for federal reimbursement under the cooperative state-federal Medicaid plan, Hawai'i initially included them in the state health insurance plans at the same level of coverage as individuals eligible for federal reimbursement under Medicaid, and Hawai'i assumed the full cost of that coverage. Then, in the face of declining revenues, in 2010 Hawai'i dropped COFA Residents from its general health insurance plans and created a new plan with more limited coverage—Basic Health Hawai'i—exclusively for COFA Residents and legal permanent residents who have lived in the United States for less than five years. Haw. Code R. § 17–1722.3–1. Hawai'i did not adopt a plan for other aliens excluded from federal coverage under the third category.

In this class action suit on behalf of adult, non-pregnant COFA Residents, Tony Korab, Tojio Clanton, and Keben Enoch (collectively "Korab") claim that Basic Health Hawai'i violates the Equal Protection Clause of the Fourteenth Amendment because it provides less health coverage to COFA Residents than the health coverage that Hawai'i provides to citizens and qualified aliens who are eligible for federal reimbursements through Medicaid. Korab does not challenge the constitutionality of the federal law excluding COFA Residents from federal Medicaid reimbursements. Rather, the claim is that the prior, more comprehensive level of state coverage should be reinstated so that COFA Residents are on equal footing with those covered by Medicaid.

We are sympathetic to Korab's argument but cannot accept the rationale. The basic flaw in the proposition is that Korab is excluded from the more comprehensive Medicaid benefits, which include federal funds, as a con-

sequence of congressional action. Congress has plenary power to regulate immigration and the conditions on which aliens remain in the United States, and Congress has authorized states to do exactly what Hawai‘i has done here—determine the eligibility for, and terms of, state benefits for aliens in the narrow third category, with regard to whom Congress expressly gave states limited discretion. Hawai‘i has no constitutional obligation to fill the gap left by Congress's withdrawal of federal funding for COFA Residents.

The district court thought otherwise. As Hawai‘i put it in its brief, "the district court ruled that the [Hawai‘i] Department [of Human Services] is constitutionally required to set up a state-only funded program that completely 'fills the void' created by the Federal Welfare Reform Act's discrimination against aliens." We vacate the district court's grant of a preliminary injunction preventing Hawai‘i from reducing state-paid health benefits for COFA Residents because Hawai‘i is not obligated to backfill the loss of federal funds with state funds and its decision not to do so is subject to rational-basis review.

BACKGROUND

I. THE WELFARE REFORM ACT AND ALIENS

As part of welfare policy reforms enacted in 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Welfare Reform Act" or "the Act"). Pub. L. 104–193, 110 Stat. 2105 (1996). Title IV of the Welfare Reform Act restricts public benefits for aliens, based on the rationale that aliens should "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." 8 U.S.C. § 1601(2)(A). Congress declared the reforms to be "a compelling government interest" that is "in accordance with national immigration policy." *Id.* § 1601(5)-(6).

With regard to federal benefits,[2] Congress created two categories of aliens: "qualified aliens," who may be eligible for federal benefits, and all other aliens, who are ineligible for federal benefits. *Id.* §§ 1611–13, 1641. "Qualified aliens" are defined as legal permanent residents, asylees, refugees, certain parolees, and aliens who fall within other limited categories specified in the statute.[3] *Id.* § 1641(b)-(c). The Act renders aliens who are not qualified aliens ineligible for all federal public benefits, with only limited exceptions, such as the provision of emergency medical assistance. *Id.* § 1611(b).

With regard to state benefits,[4] such as Basic Health Hawai'i, Congress further subdivided aliens into three

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[2] The Welfare Reform Act defines "[f]ederal public benefit" in relevant part as "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." *Id.* § 1611(c)(1)(B).

[3] With some exceptions, the Act requires qualified aliens to have been present in the United States for at least five years before they are eligible for any federally funded benefit. *Id.* § 1613(a)-(b).

[4] The Welfare Reform Act defines "[s]tate or local public benefit" in relevant part as "(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and (B) any retirement, welfare, health, disability, public

categories: one category of aliens who are eligible for any state public benefits (particular qualified aliens, such as refugees, asylees, certain legal permanent residents, veterans and members of the military on active duty), *id.* § 1622(b); a second category to whom states may not give any benefits at all (aliens who are not qualified aliens, nonimmigrants, or parolees), *id.* § 1621(a); and a third category for whom Congress authorizes states to make their own eligibility determinations (qualified aliens, nonimmigrants, and aliens paroled into the United States for less than a year), *id.* § 1622(a). In articulating the immigration policy advanced by the Welfare Reform Act, Congress emphasized that a state that "follow[s] the Federal classification in determining the eligibility of . . . aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(7).

II. MEDICAID AND COFA RESIDENTS

Medicaid is a cooperative state-federal program in which the federal government approves a state plan to fund medical services for low-income residents and then reimburses a significant portion of the state's expenses in financing that medical care. *See* Pub. L. No. 89–97, 79 Stat. 286, 343 (1965) (codified as amended at 42 U.S.C. § 1396 et seq.); *see also Wilder v. Virginia Hosp. Ass'n*,

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or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* § 1621(c)(1).

496 U.S. 498, 502 (1990). Participation by states is voluntary, but in order to receive federal funds, participating states must comply both with the statutory requirements of the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services. *See Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.,* 424 F.3d 931, 935 (9th Cir. 2005). In 1993, Hawai'i obtained a waiver from compliance with some of the guidelines pursuant to § 1115 of the Social Security Act so that it could create a privatized managed care demonstration project that allows Hawai'i to contract with health-maintenance organizations ("HMOs") for the provision of state health insurance. *AlohaCare v. Hawaii Dep't of Human Servs.,* 572 F.3d 740, 743 (9th Cir. 2009).

Before the Welfare Reform Act, COFA Residents were eligible for federal Medicaid subsidies and received medical services through Hawai'i's state-sponsored managed care plans. The Welfare Reform Act changed the landscape dramatically by rendering nonimmigrants and others ineligible for federal public benefits. As nonimmigrants, COFA Residents are thus ineligible for Medicaid.[5] For purposes of state benefits, however, nonimmi-

[5] The Immigration and Nationality Act defines "nonimmigrant" as any alien who has been admitted pursuant to one of the various visas set out in 8 U.S.C. § 1101(a)(15). With some exceptions, these visas generally admit aliens only temporarily and for a specific purpose, such as tourist visas, student visas, transit visas, or specialized work visas. COFA Residents, however, are entitled to reside in the United States as nonimmigrants indefinitely. Although there is no provision in 8 U.S.C. § 1101(a)(15) for COFA Residents, the Compact expressly provides for their admission as "nonimmigrants," without regard to the provisions of the Immigration and Nationality Act relating to

grants fall within the category of aliens for whom states are authorized to set their own eligibility criteria.

After Congress made nonimmigrants ineligible for federal reimbursement through Medicaid, Hawai‘i initially continued to provide the same medical benefits to COFA Residents as before, but funded the shortfall exclusively through state funds. The parties agree that COFA Residents received the same benefits as citizens and qualified aliens, but quibble over whether the benefits were technically provided under the same plan.

Citing budget concerns, Hawai‘i in 2010 dropped COFA Residents and qualified aliens who had resided in the United States for less than five years from the existing managed care plans. The state enrolled them instead in more limited coverage provided by Basic Health Hawai‘i, a new state plan created exclusively for these two groups. Haw. Code R. § 17–1722.3–1. Benefits under Basic Health Hawai‘i are limited with respect to physician visits, hospital days and prescription drugs, and recipients do not qualify for the state's organ and tissue transplant program or its insurance plans covering long-term care services. *Id.* § 17–1722.3–18–19.

III. PROCEEDINGS IN THE DISTRICT COURT

Korab, a dialysis patient who had been seeking a kidney transplant, sued to stop the diminution in benefits. He alleged that removing COFA Residents from the state's comprehensive insurance plans and enrolling them instead in Basic Health Hawai‘i constituted dis-

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labor certification and nonimmigrant visas. Compact of Free Association Act of 1985, Pub. L. No. 99–239, § 141, 99 Stat. 1770, 1804.

crimination based on alienage in violation of the Equal Protection Clause of the Constitution and in violation of the Americans with Disabilities Act ("ADA"). Korab sought a preliminary injunction based solely on the constitutional claim.

The district court reasoned that Congress's power to pass the alienage restrictions in the Welfare Reform Act flows from the powers enumerated in the Naturalization Clause of the Constitution, which authorizes Congress to "establish an uniform Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4. The district court concluded that the Welfare Reform Act is not sufficiently uniform because it grants states some discretion with regard to the provision of state benefits to aliens. Accordingly, the district court found that strict scrutiny applied to Hawai'i's decision to treat COFA Residents differently from citizens and qualified aliens. Strict scrutiny requires the government to prove that any classifications based on protected characteristics "'are narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). Applying strict scrutiny, the district court concluded that Hawai'i had not identified any valid state interest advanced by the removal of COFA Residents from the existing state-funded benefit plan. The district court denied Hawai'i's motion to dismiss and granted a preliminary injunction blocking Hawai'i from reducing benefits for COFA Residents.

The preliminary injunction standard is well known: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of pre-

liminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although we review the district court's grant of injunctive relief for an abuse of discretion, *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004), a court would necessarily abuse that discretion if it "'based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence,'" *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). This is another way of saying that "interpretation of the underlying legal principles, however, is subject to de novo review." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam).

ANALYSIS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Accordingly, states must generally treat lawfully present aliens the same as citizens, and state classifications based on alienage are subject to strict scrutiny review. *See In re Griffiths*, 413 U.S. 717, 719–22 (1973). In contrast, federal statutes regulating alien classifications are subject to the easier-to-satisfy rational-basis review. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). This case presents a conundrum that does not fit neatly within these broad rules. Although Basic Health Hawai'i is a state-funded program directed to a certain class of aliens, it is part of a larger, federal statutory scheme regulating benefits for aliens.

To understand the framework for resolving this case, it is helpful to start with the two key Supreme Court cases on benefits for aliens. In *Graham v. Richardson,* 403 U.S. 365, 367 (1971), the Supreme Court considered an equal protection challenge to two state statutes that denied welfare benefits to resident aliens. One statute imposed a residency requirement to become eligible for benefits, and the other statute excluded aliens from benefits altogether. *Id.* at 367–69. The Court emphasized that state classifications based on alienage are inherently suspect and subject to strict scrutiny, like classifications based on race or nationality. *Id.* at 372. "Aliens as a class," the Court determined, "are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Id.* (quoting *United States v. Carolene Prods. Co.,* 304 U.S. 144, 153 n.4 (1938)). In the light of this searching judicial review, "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify . . . making noncitizens ineligible." *Id.* at 374. The Court struck down both statutes as violations of the Equal Protection Clause. *Id.* at 376. Continuing to apply strict scrutiny to state laws discriminating on the basis of alienage, the Court has repeatedly struck down an array of state statutes denying aliens equal access to licenses, employment, or state benefits. *See, e.g., Bernal v. Fainter,* 467 U.S. 216, 217–18 (1984); *Nyquist v. Mauclet,* 432 U.S. 1, 12 (1977); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 601 (1976); *Sugarman v. Dougall,* 413 U.S. 634, 643 (1973).[6]

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[6] One limited exception to the application of strict scrutiny to state alienage classifications is the "political function" exception, which applies rational-basis review to citizenship requirements that states

In the context of eligibility for the federal Medicare program, in *Mathews v. Diaz,* 426 U.S. 67, 82 (1976), the Court considered the constitutionality of congressional distinctions on the basis of alienage. Because "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," the Court concluded that Congress may enact laws distinguishing between citizens and aliens so long as those laws are rationally related to a legitimate government interest. *Id.* at 81–82 (concluding that the Constitution "dictate[s] a narrow standard of review of decisions made by the Congress or the President in the area of immigration"); *see also Hampton,* 426 U.S. at 103 (holding that "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest").

Although aliens are protected by the Due Process and Equal Protection Clauses, this protection does not prevent Congress from creating legitimate distinctions either between citizens and aliens or among categories of aliens and allocating benefits on that basis. *Mathews,* 426 U.S. at 78 (explaining that "a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other"). The difference between state and federal distinctions based on al-

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enact for elective and nonelective positions whose operations go to the heart of a representative government. *See Cabell v. Chavez–Salido,* 454 U.S. 432, 437–41 (1982).

ienage is the difference between the limits that the Fourteenth Amendment places on discrimination by states and the power the Constitution grants to the federal government over immigration. *Id.* at 84–85; *see also Nyquist,* 432 U.S. at 7 n.8 ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."). The Court in *Mathews* concluded that, given the federal government's extensive power over the terms of immigrants' residence, "it is unquestionably reasonable for Congress to make an alien's [benefit] eligibility depend on both the character and the duration of his residence." 426 U.S. at 82–83.

Recognizing that *Graham* and *Mathews* present pristine examples of the bookends on the power to impose alien classifications—a purely state law eligibility restriction in the case of *Graham* and a federal statute without state entanglements in the case of *Mathews*—it is fair to say that Basic Health Hawai'i presents a hybrid case, in which a state is following a federal direction. This variation was foreshadowed, however, by *Graham*. 403 U.S. at 381–82.

In its examination of Arizona's residency requirement for alien eligibility for welfare benefits, the Court in *Graham* considered whether a federal statute prohibiting state requirements based on the length of citizenship, but not explicitly prohibiting requirements based on alienage, could be "read so as to authorize discriminatory treatment of aliens at the option of the States" and concluded that it did not. *Id.* at 382. The Court addressed the issue of states following congressional direction only elliptically, suggesting that a federal law granting wide discretion to the states "to adopt divergent laws on the

subject of citizenship requirements . . . would appear to contravene [the] explicit constitutional requirement of uniformity" arising out of the Naturalization Clause. *Id.* Expanding on the reference to the uniformity requirement in *Plyler v. Doe,* 457 U.S. 202, 219 n.19 (1982), the Court explained: "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."

Korab does not challenge directly the validity of the federal classifications in the Welfare Reform Act. 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. (This latter group is not part of this suit.) Instead, Korab challenges the lack of parity in benefits COFA Residents receive through Basic Health Hawai'i as compared to the benefits provided through Medicaid. As part of this argument, Korab essentially brings a backdoor challenge to the federal classifications, arguing that the state cannot provide differing levels of benefits through different programs because the uniformity requirement of the Naturalization Clause prohibits Congress from granting states any discretion in the immigration or alienage contexts. We begin with the federal classifications established by the Welfare Reform Act and then address the appropriate level of constitutional scrutiny applicable to Hawai'i's decision to exercise the discretion afforded it by the Act.

I. THE FEDERAL CLASSIFICATIONS: A UNIFORM NATIONAL POLICY

The Supreme Court has consistently held that the federal government possesses extensive powers to regulate immigration and the conditions under which aliens remain in the United States. *See Arizona v. United States,* 132 S. Ct. 2492, 2498 (2012) ("This authority [to regulate immigration and the status of aliens] rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations. . . ." (citations omitted)). The reference to naturalization has been read broadly to mean federal control over the status of aliens, not just criteria for citizenship. *Id.* ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *see also Takahashi v. Fish & Game Comm'n,* 334 U.S. 410, 419 (1948) (noting congressional power under the Naturalization Clause to regulate the conduct of aliens).

In the Welfare Reform Act, Congress announced a "national policy with respect to welfare and immigration." 8 U.S.C. § 1601. Congress determined that immigrant self-sufficiency was an element of U.S. immigration policy and that there was a compelling national interest in assuring both "that aliens be self-reliant" and that the availability of public benefits does not serve as an "incentive for illegal immigration." *Id.* § 1601(5)-(6). To accomplish these objectives, the statute sets out a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits. Federal benefits are, of course, strictly circumscribed by desig-

nated categories. Even for wholly state-funded benefits, the Act establishes three categories that states must follow: one category of aliens to whom states must provide all state benefits, a second category of aliens for whom states must not provide any state benefits, and a third category of aliens for whom Congress authorizes states to determine eligibility for state benefits. *Id.* §§ 1621–22. The limited discretion authorized for the third category, which includes COFA Residents, does not undermine the uniformity requirement of the Naturalization Clause.

On the federal level, only the Tenth Circuit has considered this issue. *Soskin v. Reinertson*, 353 F.3d 1242, 1256–57 (10th Cir. 2004). Like Hawai'i, Colorado initially chose to provide wholly state-funded health insurance coverage to all aliens in the third category. *Id.* at 1246. When Colorado did an about-face in 2003 and dropped this coverage, Soskin sued, arguing that letting states determine benefit eligibility was unconstitutional because it was not a sufficiently uniform federal rule. *Id.*

Looking to the origin of the Naturalization Clause, the Tenth Circuit concluded that "the uniformity requirement in the Naturalization Clause is not undermined by the [Welfare Reform Act's] grant of discretion to the states with respect to alien qualifications for Medicaid benefits." *Id.* at 1257. The uniformity requirement was a response to the tensions that arose from the intersection of the Articles of Confederation's Comity Clause and the states' divergent naturalization laws, which allowed an alien ineligible for citizenship in one state to move to another state, obtain citizenship, and return to the original state as a citizen entitled to all of its privileges and immunities. *See Gibbons v. Ogden*, 22 U.S. 1, 36 (1824); The Federalist No. 42 (James Madison). The

court in *Soskin* determined that because "the choice by one state to grant or deny . . . benefits to an alien does not require another state to follow suit," the purpose of the uniformity requirement is not undermined by states' discretion under the Welfare Reform Act. 353 F.3d at 1257.

We agree. Considering the Welfare Reform Act as a whole, it establishes a uniform federal structure for providing welfare benefits to distinct classes of aliens. The entire benefit scheme flows from these classifications, and a state's limited discretion to implement a plan for a specified category of aliens does not defeat or undermine uniformity. In arguing to the contrary, the dissent ignores that "a state's exercise of discretion can also effectuate national policy." *Id.* at 1255. As the Tenth Circuit explained in *Soskin*,

> When a state . . . decides against optional coverage [for certain noncitizens under the Welfare Reform Act], it is addressing the Congressional concern (not just a parochial state concern) that "individual aliens not burden the public benefits system." 8 U.S.C. § 1601(4). This may be bad policy, but it is Congressional policy; and we review it only to determine whether it is rational.

353 F.3d at 1255. We are not in accord with the dissent's myopic view that the Welfare Reform Act establishes no federal direction and conclude that Hawai'i's discretionary decision to deny coverage to COFA Residents effectuates Congress's uniform national policy on the treatment of aliens in the welfare context.

This reading of the uniformity requirement finds an analog in the Supreme Court's interpretation of the

Bankruptcy Clause, which similarly calls for uniformity. *See* U.S. Const. art. I, § 8, cl. 4 (empowering Congress "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"). In *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902), the Court considered a challenge to the 1898 Bankruptcy Act on the ground that its incorporation of divergent state laws failed to "establish uniform laws on the subject of bankruptcies" and unconstitutionally "delegate[d] certain legislative powers to the several states." *Id.* at 183. The Court held that the incorporation of state laws "is, in the constitutional sense, uniform throughout the United States" because the "general operation of the law is uniform although it may result in certain particulars differently in different states." *Id.* at 190.

The principle that "uniformity does not require the elimination of any differences among the States" has equal traction here. *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982). As in the bankruptcy context, although the "particulars" are different in different states, the basic operation of the Welfare Reform Act is uniform throughout the United States.[7] *Stellwagen v.*

[7] In an effort to distinguish the Bankruptcy Clause from the Naturalization Clause, the dissent argues that the Equal Protection Clause places constitutional constraints on states that are not present in the bankruptcy context. This argument misunderstands the analogy to the Bankruptcy Clause. We reference the Bankruptcy Clause only to show that uniformity is not undermined where states adopt different paths in effectuating a larger federal scheme or policy. That the Naturalization Clause is and has historically been subject to constitutional constraints not applicable to the Bankruptcy Clause says nothing about the more relevant question of whether uniformity is undermined by the existence of differences among the

Clum, 245 U.S. 605, 613 (1918) (holding that bankruptcy law may be uniform and yet "may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states"). The overarching national policy and alienage classifications set out in the Welfare Reform Act have repeatedly been upheld by the federal courts on rational-basis review. *See, e.g., Lewis v. Thompson*, 252 F.3d 567, 582–84 (2d Cir. 2001) (upholding the alienage classifications in the Welfare Reform Act); *City of Chicago v. Shalala*, 189 F.3d 598, 603–08 (7th Cir. 1999) (same); *see also Arizona*, 132 S. Ct. at 2499 ("Federal law also authorizes States to deny noncitizens a range of public benefits. . . .").

II. THE STATE ACTION: HAWAI'I FOLLOWS THE FEDERAL POLICY AND DIRECTION

The logical corollary to the national policy that Congress set out in the Welfare Reform Act is that, where the federal program is constitutional, as it is here, states cannot be forced to replace the federal funding Congress has removed. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1109 (9th Cir. 2012). We considered a similar situation in *Sudomir v. McMahon*, 767 F.2d 1456, 1457 (9th Cir. 1985), where plaintiffs brought an equal protection challenge to California's determination that a particular category of aliens was ineligible for benefits under the fed-

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states. In the context of both clauses, the answer to that question is no, and the dissent offers no controlling authority to the contrary. Like the Tenth Circuit in *Soskin*, we conclude that the discretion afforded to states under the Welfare Reform Act does not undermine the uniformity established under that statute. *Soskin*, 353 F.3d at 1257.

eral statute instructing states in the application of the cooperative federal-state Aid to Families with Dependent Children program. As we said in *Sudomir,* "[i]t would make no sense to say that Congress has plenary power in the area of immigration and naturalization and then hold that the Constitution impels the states to refrain from adhering to the federal guidelines." *Id.* at 1466.

Like the plaintiffs in *Sudomir,* Korab argues, and the dissent agrees, that the state has a constitutional obligation to make up for the federal benefits that Congress took away from him. Putting this argument in practical funding terms, states would be compelled to provide wholly state-funded benefits equal to Medicaid to all aliens in the discretionary third category, thus effectively rendering meaningless the discretion Congress gave to the states in 8 U.S.C. § 1622(a). *See Sudomir,* 767 F.2d at 1466 ("To so hold would amount to compelling the states to adopt each and every more generous classification which, on its face, is not irrational."). As the New York Court of Appeals put it in upholding a state program that provided partial benefits to aliens who were federally ineligible, the right to equal protection does not "require the State to remediate the effects of [the Welfare Reform Act]." *Khrapunskiy v. Doar,* 909 N.E.2d 70, 77 (N.Y. 2009); *see also Finch v. Commonwealth Health Ins. Connector Auth.,* 946 N.E.2d 1262, 1286 (Mass. 2011) (Gants, J., concurring in part and dissenting in part) ("It is inconsistent with *Mathews* to require the State to undo the effect of Congress's decision and replace the funds that Congress, under its plenary power over aliens, determined it would not provide.").

Congress has drawn the relevant alienage classifications, and 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. Korab fails to offer any evidence that Hawai'i, in making that decision, has not closely "follow[ed] the federal direction" and adhered to the requirements prescribed by Congress in its provision of state benefits. *Plyler*, 457 U.S. at 219 n.19. Notably, Korab has not even alleged that the *state* expenditures for health insurance for aliens within the discretionary category created by Congress are less than the state expenditures for health insurance for others.[8] Even assum-

[8] At this stage of the proceedings, we harbor serious doubts that Korab has carried his initial burden to establish a claim of disparity vis-a-vis the state's actions. Under Medicaid, citizens and eligible aliens are covered under a plan funded by both federal and state funds. By contrast, Basic Health Hawai'i is funded solely by the state. Here, however, Korab has not claimed that COFA Residents are receiving less per capita *state* funding than citizens or qualified aliens. *Finch,* 946 N.E.2d at 1288 (Gants, J., concurring in part and dissenting in part) ("[S]trict scrutiny is the appropriate standard of review to evaluate a State's alienage classification only where the State's per capita expenditures for the plaintiff aliens are substantially less than the per capita amount contributed by the *State* for similarly situated Commonwealth Care participants. . . ."). Nor has Korab offered any evidence that the state's average expenditures on behalf of COFA Residents in Basic Health Hawai'i are less than the amount the state contributes for citizens and qualified aliens eligible for Medicaid. On this record, Hawai'i "does nothing more than refuse to expend State monies to restore the Federal funds lost by Congress's constitutional exercise of its plenary power." *Id.; Hong Pham v. Starkowski,* 16 A.3d 635, 646 (Conn. 2011) (concluding that Connecticut's elimination of state-funded health insurance for aliens merely implemented the Act's restrictions and did not create any alienage-based classifications). Nevertheless, because we vacate the district court's grant of the injunction on the ground that rational

ing *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. The posture of Korab's constitutional challenge—essentially a complaint about state spending—coupled with the legitimacy of the federal statutory framework, leads to this conclusion.

The dissent urges a contrary result, seizing upon the Supreme Court's statement in *Graham* that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." 403 U.S. at 382. We acknowledge the rhetorical force of this proposition, but, like the Tenth Circuit, conclude that the "proposition is almost tautological." *Soskin,* 353 F.3d at 1254. The constitutional question before us is not whether Congress may authorize Hawai'i to violate the Equal Protection Clause but rather "what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens,"[9] as Congress has

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basis, rather than strict scrutiny, is the appropriate standard of scrutiny, we need not resolve this evidentiary question at this stage.

[9] The dissent claims that our reference to Congress's clearly expressed will demonstrates our "confusion as to whether this an equal protection or a preemption case." Dissent at 67 n.7. We are not confused. To determine the applicable level of constitutional scrutiny in this equal protection case, we ask whether Hawai'i is following the federal direction, *see Plyler,* 457 U.S. at 219 n.19, which in turn, demands consideration of Congress's intent in establishing a uniform federal policy through the Welfare Reform Act, *Soskin,* 353 F.3d at 1254–56. That Congress's will is also the touchstone of preemption analysis does not render it irrelevant to the determination of the scrutiny required for our equal protection inquiry. *See Plyler,* 457 U.S. at 219 n.19; *Sudomir,* 767 F.2d at 1466.

done through the Welfare Reform Act. *Id.* Our determination that rational-basis review applies to Hawai'i's conduct is consistent with *Graham* and the Supreme Court's equal protection cases because Hawai'i is merely following the federal direction set forth by Congress under the Welfare Reform Act. *See Plyler*, 457 U.S. at 219 n.19. At bottom, the dissent reaches the wrong conclusion because it asks the wrong question and invites a circuit split.[10] *Soskin*, 353 F.3d at 1254–56.

Accordingly, we vacate the injunction and remand to the district court for further proceedings consistent with this opinion.[11] *See Doe v. Reed*, 586 F.3d 671, 676 (9th

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[10] Beyond asking the wrong question, the dissent muddies its own analysis by continually shifting the target of its constitutional inquiry. On one hand, the dissent argues that "the state of Hawai'i . . . is ultimately responsible" for the "denial of equal benefits to COFA Residents," Dissent at 58, and that we must subject "Hawai'i's actions" to strict scrutiny, Dissent at 59. On the other hand, the dissent acknowledges that Congress, through the Welfare Reform Act, "was giving states broad discretion to discriminate against aliens in the provision of welfare benefits" but concludes that Congress lacked the constitutional power to do so. Dissent at 68–69. So which is it? Does the dissent challenge the constitutionality of Hawai'i's actions, Congress's, or both? The dissent's own mixing and matching on this point underscores why Hawai'i's conduct should be viewed as part and parcel of the federal welfare scheme, a scheme that is not challenged by Korab and has been deemed constitutional. *See, e.g., Lewis*, 252 F.3d at 582–84; *Shalala*, 189 F.3d at 603–08.

[11] Judge Bybee has written a thoughtful and compelling concurrence urging the adoption of a preemption-based approach to alienage classifications. However, as Judge Bybee acknowledges, this fresh approach veers away from the controlling authority set forth in *Graham* and *Mathews* and goes where no circuit has gone. Concurrence at 52–53. It is therefore unsurprising that neither party has addressed preemption on appeal, and neither should we at this

Cir. 2009) (reversing injunction ruling where the district court applied the incorrect level of scrutiny).

VACATED AND REMANDED.

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stage. Just as significantly, Judge Bybee's preemption analysis—that the Hawai'i welfare program is not expressly or impliedly preempted nor does it violate Congress's dormant immigration power—sidesteps the ultimate constitutional question raised by Korab and briefed by both parties: namely, whether Hawai'i's action violates the Equal Protection Clause.

BYBEE, Circuit Judge, concurring and concurring in the judgment:

I concur in full in Judge McKeown's thoughtful opinion for the court. Her opinion captures the unsettled nature of the current state of the law and offers a way through the morass of conflicting approaches. I write separately to explain why the law of alienage remains so unclear and how we might better approach it.

The courts' reaction to state implementation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") demonstrates the conundrum of our current Equal Protection doctrine as applied to aliens. *Compare Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004) (applying rational basis scrutiny to Colorado's PRWORA-based alien eligibility restrictions); *Khrapunskiy v. Doar*, 909 N.E.2d 70, 76 (N.Y. 2009) (holding that the Equal Protection Clause does not apply to New York's PRWORA-based alien eligibility restrictions); *Hong Pham v. Starkowski*, 300 Conn. 412, 16 A.3d 635, 661 (Conn. 2011) (applying rational basis scrutiny to Connecticut's PRWORA-based alien eligibility restrictions); *with Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1279–80 (Mass. 2011) (applying strict scrutiny to Massachusetts' PRWORA-based alien eligibility restrictions); *Ehrlich v. Perez,* 908 A.2d 1220, 1243–44 (Md. 2006) (applying strict scrutiny to Maryland's PRWORA-based alien eligibility restrictions); *Aliessa ex rel. Fayad v. Novello,* 754 N.E.2d 1085, 1098 (N.Y. 2001) (applying strict scrutiny to New York's PRWORA-based alien eligibility restrictions); *see also Basiente v. Glickman*, 242 F.3d 1137, 1143 (9th Cir. 2001) (applying rational basis scrutiny to PRWORA-based restriction on aliens eligible

for federal benefits in the Commonwealth of the Northern Marianas).

It is not surprising that courts might divide over the application of equal protection rules to the PRWORA. Even where courts agree on the standard of review, judges may disagree over the application of the standard. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *United States v. Virginia*, 518 U.S. 515 (1996). What is remarkable is that seventy-five years after *United States v. Carolene Products Co.* announced the need for "more exacting judicial scrutiny" for "discrete and insular minorities," 304 U.S. 144, 153 n.4 (1938), and more than forty years since *Graham v. Richardson* declared classification based on alienage subject to strict scrutiny, 403 U.S. 365, 375 (1971), we should be divided over the proper *standard of review* for classifications based on alienage.

As discussed below, the *Graham* doctrine—while ostensibly clear when issued—has been, in fact, riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult. In the years since *Graham* was decided, the Supreme Court has applied different levels of scrutiny depending on whether the state or the federal government established the challenged restriction, whether the restriction involved economic rights or the democratic process of self-government (often stretching that concept), whether the restriction involved undocumented aliens, and whether the discriminatory classification was created by Congress or an administrative agency. A review of the history of alienage jurisprudence, with a particular review of *Graham*—both what it said and how it has been applied

(and not applied) in the past forty years—suggests that it is time to rethink the doctrine. As I explain below, I am persuaded that an alternative approach based on preemption analysis would bring welcome clarity to this area. Employing preemption analysis instead of equal protection analysis in alienage cases will not spare us hard cases, but it offers us a mode of analysis that is more consistent with the Constitution, our history, and the Court's cases since *Graham.*

I

For over a century, the Supreme Court has recognized that aliens are "persons" entitled to the protection of the Fifth and Fourteenth Amendments. *See Wong Wing v. United States,* 163 U.S. 228, 237 (1896); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886); *see also Graham,* 403 U.S. at 371 ("It has long been settled . . . that the term 'person' in this context encompasses lawfully admitted resident aliens . . . and entitles both citizens and aliens to the equal protection of the laws . . . ."). For the first half of the twentieth century, the Court was generally deferential to state alienage restrictions, so long as they did not interfere with "[t]he authority to control immigration—to admit or exclude aliens—[which] is vested solely in the Federal Government." *Truax v. Raich,* 239 U.S. 33, 42 (1915) (declaring unconstitutional an Arizona law requiring that employers with more than five employees hire at least 80 percent native-born citizens since "deny[ing] to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode . . .") But where a state's discriminatory classification related to a public interest without a clear nexus to a field of federal control, the Court often

upheld the restriction. *See Clarke v. Deckebach*, 274 U.S. 392, 396 (1927) (holding an Ohio law banning alien ownership of pool halls constitutional as it did not amount to "plainly irrational discrimination"); *Crane v. New York*, 239 U.S. 195 (1915) (upholding statute criminalizing the employment of aliens on public works contracts); *Terrace v. Thompson*, 263 U.S. 197, 221 (1923) (holding a Washington law banning alien ownership of land constitutional because "[t]he quality and allegiance of those who own, occupy and use the farm lands within [a State's] borders are matters of highest importance . . ."); *Heim v. McCall*, 239 U.S. 175, 194 (1915) (upholding a prohibition of employment of aliens on public works contracts constructing New York City subway in light of "the special power of the state over the subject-matter [government employment]"); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (holding constitutional a law excluding aliens from hunting wild game and noting that "a state may classify [aliens] with reference to the evil to be prevented . . . if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared . . .").

The Court's approach to alienage restrictions began to change after the Second World War, notably in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). In *Takahashi*, a Japanese resident alien fisherman challenged a California law barring aliens from obtaining commercial fishing licenses. The Court struck down the law on preemption grounds, but in the course of its discussion, it referred to the civil rights law enforcing the Fourteenth Amendment:

> The Federal Government has broad constitutional powers in determining what aliens shall be admit-

> ted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. . . . State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration . . .

Id. at 419 (internal citation omitted). The Court then quoted the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws a proceedings for the security of persons and property as is enjoyed by white citizens . . .

Id. Finding that this section "extend[s] to aliens as well as to citizens," *id.* (footnote omitted), the Court declared that Congress had adopted the Civil Rights Act "*in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization* . . ." *Id.* (emphasis added). Accordingly, California's provision conflicted with "a general policy" found in "[t]he Fourteenth Amendment and the laws adopted under its authority" that "all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." *Id.* at 420. Without a "special public interest," California's law had to yield to federal law. *Id.*

It was in light of this fluctuating doctrine that the Court decided *Graham* in 1971.

II

The root of much of the current confusion over the courts' treatment of alienage lies in *Graham* itself. *Graham* dealt with restrictions on public benefits imposed by Arizona and Pennsylvania. In Arizona, persons permanently and totally disabled were not eligible for assistance under a federal program in which Arizona participated if they were not citizens of the United States or had resided in the U.S. for fewer than fifteen years. 403 U.S. at 366–67. Pennsylvania had a general assistance program, one not funded in any part by the federal government, that limited participation to U.S. citizens. *Id.* at 368. The Court proceeded on two distinct analytic fronts: the Equal Protection Clause and federal preemption based on the Supremacy Clause. First, it addressed the state classifications under the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Although the Court had mentioned the Fourteenth Amendment in connection with state restrictions on aliens in previous cases, the Court had never rested its judgment solely on the Equal Protection Clause.[1] In *Graham,* for the first time, the Court established a level of scrutiny, holding that "classifications based on alienage, like those based

[1] Even in *Yick Wo,* where the Court first declared aliens to be "persons" within the scope of the Fourteenth Amendment, the Court cited several sources of authority, including the U.S. treaty with China, the Fourteenth Amendment, and the Civil Rights Act of 1866. 118 U.S. at 368–69.

on nationality or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372 (footnotes omitted). This meant that state classifications based on alienage must fall unless the state can show "a compelling state interest by the least restrictive means available." *Bernal v. Fainter,* 467 U.S. 216, 219 (1984). In *Graham,* Arizona's and Pennsylvania's "desire to preserve limited welfare benefits for its own citizens [was] inadequate to justify" the restrictions, 403 U.S. at 374, and "a concern for fiscal integrity" was not compelling. *Id.* at 375. With respect to Arizona, whose state plan—including its alienage restriction—was previously approved by the Secretary of Health, Education & Welfare, the Court construed federal law not to authorize the restrictions because "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* at 382.

Second, and alternatively, the Court in *Graham* found the state laws preempted by federal law, thereby violating the Supremacy Clause. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land"). The Court found that the state restrictions on alienage could not "withstand constitutional scrutiny" because of "[t]he National Government ['s] . . . 'broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.'" *Graham,* 403 U.S. at 376–77 (quoting *Takahashi,* 334 U.S. at 419). Describing Congress's "comprehensive plan for the regulation of immigration and naturalization," including aliens who become "public charges," the Court found that "Congress has not seen

fit to impose any burden or restriction on aliens who become indigent after their entry into the United States." *Id.* at 377. Accordingly, "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." *Id.* at 378. As "the States 'can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states,'" Arizona's and Pennsylvania's "laws encroach[ing] upon exclusive federal power . . . [were] constitutionally impermissible." *Id.* at 378 (quoting *Takahashi,* 334 U.S. at 419), 380.

Graham was a watershed case in equal protection analysis because it placed classifications based on alienage in the same category as classifications based on race, *see Korematsu v. United States,* 323 U.S. 214, 216 (1944), and in a more protected class than classifications based on gender or illegitimacy, *see Craig v. Boren,* 429 U.S. 190, 197 (1976) (gender); *Clark v. Jeter,* 486 U.S. 456, 461 (1988) (illegitimacy). The implications *of Graham* were significant. Under an important line of cases, the *Graham* rule would have bound the federal government to the same degree as the states. In *Bolling v. Sharpe,* 347 U.S. 497 (1954), decided the same day as *Brown v. Board of Education,* 347 U.S. 483 (1954), the Court held that the same equal protection principles applied to the federal government as applied to the states. That proposition was not obvious, because the Equal Protection Clause is found in the Fourteenth Amendment, which by its terms applies to the states and grants Congress the power to enforce it. U.S. Const. amend. XIV, §§ 1, 5. In *Bolling*, however, the Court declared it "unthinkable

that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500. Although the Court in *Brown* held that state discrimination on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment, the Court in *Bolling* held that federal discrimination on the basis of race violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 499; *see also Brown,* 347 U.S. at 495 & n.12. Since *Bolling*, it has been well established that the "Court's approach to Fifth Amendment equal protection has always been precisely the same as to the equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975). *See United States v. Windsor,* 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."); *United States v. Paradise,* 480 U.S. 149, 166 n.16 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth . . ."); *Buckley v. Valeo,* 424 U.S. 1 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."). *But see Hampton v. Mow Sun Wong,* 426 U.S. 88, 100 (1976) ("Although both [the Fifth and Fourteenth] Amendments require the same type of [equal protection] analysis, . . . the two protections are not always coextensive.").

In the Court's most extensive discussion to date of the *Bolling* principle, the Court recounted that in *Bolling* "the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications." *Adarand Constructors, Inc. v. Pena,* 515

U.S. 200, 215 (1995). While "*Bolling*'s facts concerned school desegregation, . . . its reasoning was not so limited." *Id.* The Court repeated "'that the Constitution of the United States, in its present form, forbids, so far as the civil and political rights are concerned, discrimination *by the General Government, or by the States,* against any citizen because of his race.'" *Id.* at 216 (emphasis in original) (quoting *Bolling,* 347 U.S. at 499) (other citation and quotation marks omitted). The Court also underscored that the equal protection component of the Fifth Amendment is "an obligation equivalent to that of the States." *Id.; see id.* at 217 ("the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable"). The only exception might be "a few contrary suggestions appearing in cases in which we found special deference to the political branch of the Federal Government to be appropriate to detract from this general rule." *Id.* at 217–18 (citing *Hampton,* 426 U.S. at 88).

This last caveat was huge. It turns out that, in the area of immigration and naturalization, the "unthinkable," *Bolling,* 347 U.S. at 500, was exactly what the Court had been thinking for more than one-hundred years. The obligations of the federal government and the states with respect to aliens were indeed "[]distinguishable," *Adarand,* 515 U.S. at 217. In a venerable line of cases, the Court had approved the political branches' control over the privileges that aliens enjoy in the United States. *See, e.g., Fiallo v. Bell,* 430 U.S. 787, 792–96 (1977); *Hines v. Davidowitz,* 312 U.S. 52, 62–68 (1941); *Fong Yue Ting v. United States,* 149 U.S. 698, 711–14 (1893); *Henderson v. Mayor of New York,* 92 U.S. 259, 273–74 (1876); *Chy Lung v. Freeman,* 92 U.S. 275, 280 (1876). At the same time, the Court had established that the states

had some, but not unlimited, control over aliens' privileges within the state. *See Part I, supra.*

From the outset, the *Graham* rule, *simpliciter,* was unsupportable. *See Adarand,* 515 U.S. at 217–18 (acknowledging that the equal protection component of the Fifth Amendment is coextensive with that of the Fourteenth Amendment except with respect to some of the alien cases); *United States v. Verdugo–Urquidez,* 494 U.S. 259, 273 (1990) ("[Our decisions] expressly accord[ ] differing protection to aliens than to citizens, based on our conclusion that the particular provision in question were not intended to extend to aliens in the same degree as to citizens."); David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986,* at 500 (1990) (*Graham* "carried this line of authority to the extreme of declaring alienage as suspect a classification as race—a characterization so implausible that it would soon have to be revised.") (footnote omitted).

At the first opportunity, the Court declined to impose the equal protection component of the Fifth Amendment on the federal government. Indeed, the *Graham* rule, as a mode of equal protection analysis, has never been fully applied to the federal government since *Graham.* Just five years after *Graham,* in *Mathews v. Diaz,* the Court phrased the issue as "whether Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence." 426 U.S. 67, 69 (1976). The Court did not begin with *Graham* and equal protection analysis. Rather, it divided the alienage question into two parts: May Congress discriminate between citizens and aliens? And may Congress discriminate between different

groups of aliens? As to the first question, the Court had little difficulty finding that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" *Id.* at 79–80. The Court made no acknowledgment of *Graham* or *Bolling*. With respect to the second question, and again without even mentioning *Graham* or *Bolling*, the Court reasoned that since it was

> obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others.

Id. at 82 (emphasis added). In the end, the Court declined to "substitute [its] judgment for that of Congress in deciding which aliens shall be eligible to participate in the supplementary insurance program on the same conditions as citizens." *Id.* at 84. Only then did the Court consider *Graham*, which it had no difficulty distinguishing "because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government. . . . Classification [of aliens] by the Federal Government is a routine and normally legitimate part of its business." *Id.* at 84–85.

The same day, the Court decided *Hampton v. Mow Sun Wong*, 426 U.S. at 88. In *Hampton*, lawful perma-

nent residents were denied federal employment by the Civil Service Commission because they were not U.S. citizens. This time, however, the Court began with an equal protection analysis consistent with *Graham.* Citing *Sugarman v. Dougall,* 413 U.S. 634 (1973), and *In re Griffiths,* 413 U.S. 717 (1973), two cases in which the Court had applied *Graham*'s equal protection analysis to strike down state restrictions on alien employment, the Court similarly struck the federal restrictions on the employment of non-citizens. The Court linked *Graham* and *Bolling*, but to distinguish them: "Although both [the Fifth and Fourteenth] Amendments require the same type of analysis . . . the two protections are not always coextensive." *Hampton,* 426 U.S. at 100.[2] The Court observed that *Sugarman* dictated that the Court strike the restriction on federal employment of aliens unless there was an "overriding national interest [ ]," *id.* at 101, proof of which would have to come from Congress or the President, and not just from the Civil Service Commission, *id.* at 103, 105, 116.

What is odd about the juxtaposition of these two cases is the way in which the Court followed on the one

[2] The only other reference I can locate in which the Court refers to both *Bolling* and *Graham* was later in the same Term in *Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero,* where the Court struck down a Puerto Rico law restricting civil engineers to U.S. citizens. 426 U.S. 572 (1976). One of the questions was the constitutional status of Puerto Rico. For the Court's purposes, Puerto Rico's status did not matter: "If the Fourteenth Amendment is applicable, the Equal Protection Clause nullifies the statutory exclusion. If, on the other hand, it is the Fifth Amendment and its Due Process Clause that apply, the statute's discrimination is so egregious that it falls with the rule of [*Bolling v. Sharpe*]." *Id.* at 601.

hand, and virtually ignored on the other, the equal protection principles it had previously announced. In *Hampton*, the Court followed equal protection principles, finding that the federal employment restrictions were presumptively invalid under *Sugarman* unless there was a compelling governmental interest and the rules "were expressly mandated by the Congress or the President. . . ." *Id.* at 103. When the Court couldn't find such an interest mandated by the elected branches, the law fell. It would have been easy enough in *Mathews* for the Court to have analyzed the restrictions on federal benefits under equal protection, but the Court made *Graham* an afterthought. Had it started with *Graham*, the Court would have considered the statutory restrictions on aliens receiving federal benefits presumptively invalid and then asked whether there was a compelling governmental interest. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 294 ("The existence of these special federal interests may explain why the federal government can demonstrate a compelling need for a particular classification even though a state could not. But it does not in an obvious way explain why the burden of justification on the federal government should be different from the burden on a state."). Given the Court's statements in *Hampton*, and given its analysis of the national interest in naturalization and immigration, the Court might well have honored Congress's preferences, even under strict scrutiny. *But see Hampton*, 426 U.S. at 117 (Brennan, J., concurring) (joining the majority opinion "with the understanding that there are reserved the equal protection questions that would be raised by congressional or Presidential enactment of a bar on employment of aliens by the Federal Government"). Instead, the Court largely ignored the equal pro-

tection component of the Fifth Amendment and left us scratching our heads over two entirely separate modes of analysis of challenges to federal restrictions on alienage.[3]

The *Bolling* equivalence principle aside, the Court has also qualified *Graham* as applied to the states. The Court has tended to affirm state classifications regarding political or democratic rights afforded to aliens and has tended to invalidate those classifications that limited the distribution of economic benefits or regulated commercial opportunities, altering the level of scrutiny on an almost case-by-case basis. Following *Graham*, the Court has applied strict scrutiny to some state restrictions on *aliens—see, e.g., Bernal*, 467 U.S. at 216 (holding unconstitutional a Texas law prohibiting aliens from becoming notaries); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (holding unconstitutional a New York law barring resident aliens from state assistance for higher education); *In re Griffiths*, 413 U.S. at 717 (holding unconstitutional a Connecticut law barring aliens from becoming lawyers); *Sugarman*, 413 U.S. at 634 (holding unconstitutional a New York City law making aliens ineligible for city employment)—but not to others. In one case it applied a form of intermediate scrutiny. *See Plyler v. Doe*, 457

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[3] *Compare* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 9.5.3 at 744 (3d ed. 2002) ("the Court's decisions can be criticized for so openly manipulating the level of scrutiny. The Court could have used strict scrutiny. . . .") *with* David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069, 1091 (1979) ("The Supreme Court's creation in *Graham v. Richardson* of a suspect classification of alienage has not been a successful experiment. . . . [T]he equal treatment of resident aliens by the states is required by preemption rather than by the equal protection clause.").

U.S. 202 (1982) (holding unconstitutional a law requiring alien schoolchildren to pay for education that was free to citizens). In still other cases, the Court has applied rational basis scrutiny instead. *See, e.g., Cabell v. Chavez–Salido,* 454 U.S. 432 (1982) (holding constitutional a California law requiring probation officers to be citizens); *Ambach v. Norwick,* 441 U.S. 68 (1979) (holding constitutional a New York law requiring public schoolteachers to be citizens); *Foley v. Connelie,* 435 U.S. 291 (1978) (holding constitutional a New York law limiting appointment to state police force to citizens). And in still other cases, the Court has largely ignored the Equal Protection Clause altogether. *See Toll v. Moreno,* 458 U.S. 1 (1982) (holding that the University of Maryland's policy barring domiciled aliens and their dependents from acquiring in-state tuition violated the supremacy clause); *Elkins v. Moreno,* 435 U.S. 647 (1978) (holding that whether resident aliens can become domiciliaries of Maryland is a matter of state law the federal courts should leave to state courts as a matter of comity); *DeCanas v. Bica,* 424 U.S. 351 (1976) (holding that a California law prohibiting an employer from knowingly employing an illegal alien was not unconstitutional as a regulation of immigration or as being preempted under the Supremacy Clause).

The curious point for my purposes is not so much whether the Court upheld or struck down the state restrictions in the face of an equal protection challenge, but that the Court did not apply a consistent standard of review.[4] It would be one thing if the Court, consistently ap-

[4] As the Majority notes, Maj. Op. 25 n.10, the Dissent suggests both that Hawai'i's denial of equal benefits to COFA residents is subject to strict scrutiny, Dissent at 59, and that Congress has given the states "broad discretion to discriminate against aliens in the

plying strict scrutiny, upheld some state restrictions while striking others. It is an entirely different matter when the Court doesn't apply consistently its standard of review. With all due respect for the difficulty of these questions, the Court's indecision over the equal protection standard of review gives these cases the appearance that the standard has been manipulated to accommodate the Court's intuition over the result in the particular case. And its case law makes lower court review of alienage restrictions all the more difficult.

III

This brief history should make us rethink whether *Graham*'s equal protection analysis alone can explain the Court's cases. Obviously, I believe that it cannot. But I do believe that *Graham*'s preemption analysis, not its equal protection analysis, has significant explanatory power here.

A preemption analysis is more securely anchored in the Constitution itself. There can be little question that "[t]he Government of the United States has broad . . . power over the subject of immigration and the status of aliens." *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012). The constitutional sources for that power are both textual and structural. Most obviously, Article I grants Congress express authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4.

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provision of welfare benefits," Dissent at 68–69, all of which underscores the difficulty of applying a uniform standard of review in cases involving alienage, especially when they involve the intersection of federal schemes and state schemes that have—at least in the abstract—been afforded differing levels of scrutiny.

In addition, the authority of the political branches to determine the terms on which aliens may immigrate to the United States, whether to visit, study, work, marry, or remain, rests on an undefined amalgamation of powers vested in Congress and the President. Those powers include the Foreign Commerce Clause, *id.* art. I, § 8, cl. 3 ("Congress shall have Power . . . to regulate Commerce with foreign Nations"), and the foreign affairs powers derived from the President's authority "to make Treaties" and "appoint Ambassadors, other public Ministers and Consuls," *id.* art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. *See Toll,* 458 U.S. at 10. The Court has also relied on the "inherent power [of the United States] as sovereign to control and conduct relations with foreign nations," *Arizona,* 132 S. Ct. at 2498, including concepts core to "the conduct of foreign relations, the war power, and the maintenance of republican form of government," *Harisiades v. Shaughnessy,* 342 U.S. 580, 588–89 (1952). *See also United States v. Valenzuela–Bernal,* 458 U.S. 858, 864 (1982) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government."); *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 210 (1953) ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). In sum, the Court has said, "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo,* 430 U.S. at 792 (quoting *Oceanic Navigation Co. v. Stranahan,* 214 U.S. 320, 339 (1909)).

The Court has frequently employed preemption as its mode of analyzing state restrictions based on alienage. In general, there are three ways Congress may preempt a law through legislation. *See Arizona*, 132 S. Ct. at 2500–01. First, because Congress possesses plenary authority over immigration and naturalization, Congress may expressly preempt certain laws. *See, e.g., Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (discussing 8 U.S.C. § 1324a(h)(2), which forbids "any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens"). Second, where state laws actually conflict with federal laws, the state laws must yield. *Arizona*, 132 S. Ct. at 2502 (holding that a law making failure to comply with federal alien-registration requirements a state misdemeanor was preempted). Third, even where Congress has not expressly preempted state laws, but "has enacted a complete scheme of regulation . . . , states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66. This is so-called field preemption.[5] *See, e.g., Toll*, 458 U.S. at 17 (holding that the Immigration and Nationality Act was a comprehensive regulation of domiciled, nonimmigrant G–4 visa holders and that it preempted

[5] The distinction between actual conflict preemption and field preemption is not always clear. *See, e.g., Arizona*, 132 S. Ct. at 2502 (finding that "the Federal Government has occupied the field of alien registration" but then concluding that "[p]ermitting [Arizona] to impose its own penalties for the federal offense here would conflict with the careful framework Congress adopted"). *See also Hines*, 312 U.S. at 67 (noting that expressions such as "conflicting" or "occupying the field" do not provide "an infallible constitutional test or an exclusive constitutional yardstick").

Maryland's refusal to grant such persons in-state tuition); *Hines*, 312 U.S. at 74 (holding that the Alien Registration Act of 1940 preempted Pennsylvania's alien registration requirements).

Even where Congress has not legislated specifically, the Court has enforced a kind of "dormant immigration"[6] analysis. The principle of "dormant" legislative authority was first recognized in a commerce case, *Cooley v. Bd. of Wardens*: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." 53 U.S. (12 How.) 299, 319 (1852). Since that time, the Court has defended Congress's power to legislate exclusively on matters requiring a national or uniform rule, irrespective of whether Congress has in fact adopted such a rule. The Court has invoked the same principle in the context of immigration. In *Henderson v. Mayor of the City of New York*, it struck New York and Louisiana provisions that taxed passengers arriving from overseas. 92 U.S. at 259. Citing *Cooley*, the Court wrote that taxing arriving aliens imposed a burden on Congress's powers under the Foreign Commerce Clause and on our "international relations":

> A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity

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[6] *See* Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. Rev. 1821 (2007); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 Hastings Const. L.Q. 939, 958 (1995) (referring to the "Dormant Immigration Clause").

> be national in its character. It is more than this; for it may properly be called *international.* It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments.

Id. at 273. Accordingly, "[t]he laws which govern the right to land passengers in the United States from other countries" "may be and ought to be, the subject of uniform system or plan." *Id. See Hines,* 312 U.S. at 66–67; *Chy Lung,* 92 U.S. at 280 ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. . . . If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."). *But see DeCanas,* 424 U.S. at 354–55 ("[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised. . . . [T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration . . .").

The Court has recently enforced Congress's dormant powers where, even though state law does not actually conflict with federal law, it is inconsistent with a national rule or scheme. *See Arizona,* 132 S. Ct. at 2504–05 (observing that Congress's "comprehensive framework does not impose federal criminal sanctions on [aliens who seek or engage in unauthorized work]" and that Arizona's law imposing criminal penalties on unauthorized alien employees "conflict[s with] the method of enforcement" because "Congress [must have] decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment").

In some, even comprehensive, legislative schemes, Congress has expressly authorized states to regulate certain aspects of an alien's privileges within the state. The Court recently approved state laws that relied on such authorization. In *Chamber of Commerce v. Whiting*, Congress expressly preempted "'any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ . . . unauthorized aliens.'" 131 S. Ct. at 1968 (quoting 8 U.S.C. § 1324(h)(2) (emphasis added)). In effect, the parenthetical was express congressional non-preemption. In response, Arizona adopted the Legal Arizona Workers Act in which it provided that employers who knowingly or intentionally employed unauthorized aliens could have their business licenses suspended or revoked. The Court rejected a claim that Arizona's law was either expressly or impliedly preempted by federal law. With respect to express preemption, the Court held that federal law "expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States." *Id.* at 1981. With respect to the claim of implied preemption, the Court observed that "[g]iven that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Id.* (plurality opinion). The Court noted that Arizona's "tools" mirrored the federal provisions, including "us[ing] the Federal Government's own definition of 'unauthorized alien,' . . . rel[ying] solely on the Federal Government's own determination of who is an unauthorized alien, and requir[ing] Arizona employers to use the Federal Gov-

ernment's own system for checking employee status." *Id.* at 1987.

All of which is to suggest that preemption analysis, not equal protection, is the better approach, for preemption analysis can be applied more consistently to alienage cases, with more predictable outcomes for parties and courts.

IV

The choice between a pure preemption analysis and a pure equal protection analysis yields very different results in this case.

A

In my view, and consistent with the majority opinion, Hawai'i's health insurance program at issue in this case is not expressly preempted by any federal law. Neither does it actually conflict with any federal law, nor does it obstruct in any way the congressional scheme. Hawai'i's law most resembles the law at issue in *Chamber of Commerce:* Hawai'i has responded to a congressional authorization, and it has mirrored federal law to make its law consistent with the federal scheme.

As the majority opinion explains, Congress has established three categories of aliens for purposes of federal and state benefits. Maj. Op. at 7–9; *see Pimentel v. Dreyfus,* 670 F.3d 1096, 1100–01 (9th Cir. 2012). One group of aliens—including permanent resident aliens, refugees and asylees, and aliens who are serving or have served in the Armed Forces of the United States—"shall be eligible for any State public benefits." 8 U.S.C. § 1622(b). A second group of aliens—including those aliens here

without authorization—are "not eligible for any State or local public benefit," unless the state adopted a law "after August 22, 1996, . . . affirmatively provid[ing] for such eligibility." *Id.* § 1621(a), (d). Finally, the third group includes all other aliens. For this group, "a State is authorized to determine the eligibility for any State public benefits." *Id.* § 1622(a). The plaintiffs in this case, who are nonimmigrant aliens admitted under the Compact of Free Association with the United States,[7] fall into this third category.

Section 1622(a), as plainly as words can express it, authorizes states to decide whether to make that class of aliens eligible for state benefits. It is, as in *Chamber of Commerce,* express non-preemption. *See Chamber of Commerce,* 131 S. Ct. at 1981. As in *Chamber of Commerce,* Hawai'i "uses the Federal Government's own definition of ['qualified alien'], [and] relies solely on the Federal Government's own determination of who is a[ ]

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[7] *See* Compact of Free Association, *reprinted at* 48 U.S.C. § 1901 note. A citizen of the Marshall Islands or the Federated States of Micronesia may "establish residence as a nonimmigrant in the United States and its territories and possessions." Compact § 141(a). The Compact further specifies:

> The right of such persons to establish habitual residence in a territory or possession of the United States may, however, be subjected to nondiscriminatory limitations provided for:
>
> (1) in statutes or regulations of the Unities States; or
>
> (2) in those statutes or regulations of the territory or possession concerned which are authorized by the laws of the United States.

Compact § 141(b).

'[qualified alien']." *Id.* at 1987. By definition, Hawai'i's act is authorized by Congress and, accordingly, is not preempted. *Id.* (plurality opinion). Hawai'i has "'neither added[ed] to nor take[n] from the conditions lawfully imposed by Congress.'" *Graham*, 403 U.S. at 378 (quoting *Takahashi*, 334 U.S. at 419). Acting consistent with Congress's scheme, and at its invitation, Hawai'i's law cannot "encroach upon exclusive federal power." *Id.* at 380.

Nor does Hawai'i's scheme violate Congress's dormant immigration powers. There is no reason for federal courts to intervene here to defend Congress's power over immigration and naturalization. Congress drew the lines clearly: there are classes of aliens who may come to the United States and must be treated on the same basis as if they were citizens; there are other classes of aliens—those who have not come to our shores lawfully—who may not receive such benefits, even if the states were otherwise disposed to afford them our largesse. Finally, there is the third class of aliens—including those entering the United States lawfully under COFA—for whom Congress has determined that the states need not treat them as citizens, but may do so at the state's discretion. Where Congress has made such a determination, the courts should only second-guess that judgment if Congress itself has overstepped its constitutional authority. I do not believe there is any basis for that theory.

B

If we follow a pure equal protection model, it is unlikely that Hawai'i's scheme can muster constitutional scrutiny. Following *Graham*, Hawai'i's law discriminates between citizens and aliens, and, for that reason (as the

district court correctly pointed out), Hawai'i must satisfy strict scrutiny. Hawai'i will have to show that it has a compelling state interest in treating resident aliens differently from citizens, and even if it can show such an interest, it will have to prove that it has narrowly tailored its program. Hawai'i can likely offer two interests. First, it adopted its law because of budgetary reasons. This has never been thought to be a sufficient reason to justify discrimination that is subject to increased judicial scrutiny. *See Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) ("[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens"); *Graham*, 403 U.S. at 375 ("[A] concern for fiscal integrity is not compelling."); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("a State has a valid interest in preserving the fiscal integrity of its programs. . . . But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens."); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547–49 (2001). Second, Hawai'i can point to PRWORA itself and Congress's declaration that a state that "follow[s] the Federal classification in determining the eligibility of . . . aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling government interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7). Despite the appeal of Congress's finding, this is not likely a sufficient justification. In *Graham*, the Court made clear that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." 403 U.S. at 382. More importantly, the Court has previously held that, whatever reasons the federal government may offer for its own discrimination policy, the states cannot rely on that same justification. The states must supply their

own sovereign reasons and cannot cite the reasons of a coordinate government. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 504 (1989) ("Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."). In sum, if we looked exclusively to equal protection principles, I think it is likely that Hawai'i's law would fall.

V

The equal protection principle announced in *Graham* has proven unsustainable. In the end, I think that preemption analysis will prove more consistent with the text and structure of the Constitution, the Court's pre-*Graham* cases, and even with the history of the Fourteenth Amendment itself.[8] Were it within my power, I

[8] Nothing I have said here should diminish in any way the fact that aliens are "persons" entitled to the protection of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Due Process Clause—including its equal protection component—of the Fifth Amendment. *See Takahashi,* 334 U.S. at 410; *Truax,* 239 U.S. at 33. But the tension evident in the Court's post-*Graham* cases is a consequence of the Court's efforts to reconcile the Equal Protection Clause with a recognition that there are common law and constitutional distinctions between the rights of citizens and the rights of aliens visiting or residing in the United States.

The Fourteenth Amendment, of course, took account of these differences in the Privileges and Immunities Clause, which provided that the "privileges or immunities *of citizens* of the United States" could not be abridged, and in the Due Process and Equal Protection Clauses, which applied to "any *person.*" The current confusion is due in no small part to the Court's disastrous decision in The *Slaughter–*

would adopt preemption analysis as the appropriate analysis for evaluating the alienage cases. Because I am bound by *Graham* and the cases that follow it, I join Judge McKeown's opinion for the court.

House Cases, 83 U.S. (16 Wall.) 36 (1873). In that case, as Justice Field pointed out, the Court effectively read the Privileges or Immunities Clause out of the Fourteenth Amendment, rendering the Clause a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Id.* at 96 (Field, J., dissenting). Understandably, to compensate, the Court later invigorated the Equal Protection and Due Process Clauses, which had narrower purposes, but applied more broadly to all "persons." *See McDonald v. City of Chicago,* 130 S. Ct. 3020, 3029-31 (2010). The Court's treatment of aliens under the Equal Protection Clause has been, in large measure, both counter-textual and counter-historical. *See* David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888,* at 342–50, 387 & n.133 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 Yale L.J. 1385, 1390, 1442–47 (1992); Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality,* 7 Const. Comment 251, 257–65 (1990).

CLIFTON, Circuit Judge, dissenting:

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is settled law that alienage is a suspect class and that state laws that discriminate against aliens who are lawfully present in this country generally violate the Equal Protection Clause unless they can withstand strict scrutiny.[1]

In this case, the State of Hawai'i discriminated against aliens from three Micronesian nations who were lawfully present in this country, based on the terms of Compacts of Free Association those nations entered with the United States ("COFA Residents"), by limiting the state-funded health benefits available to them. The state could provide to them the same benefits it provides to citizens. It had, in fact, provided the same benefits to COFA Residents for fourteen years, until budgetary woes motivated the state to try to save money, by exercising an option given to it by Congress.

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[1] *See Graham v. Richardson,* 403 U.S. 365, 371–72 (1971); *see also Bernal v. Fainter,* 467 U.S. 216, 219 (1984); *Nyquist v. Mauclet,* 432 U.S. 1, 7 (1977); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 602 (1976); *In re Griffiths,* 413 U.S. 717, 721 (1973); *Sugarman v. Dougall,* 413 U.S. 634, 642 (1973); *cf. Takahashi v. Fish & Game Comm'n,* 334 U.S. 410, 420 (1948) (applying equal protection principles to discrimination against aliens and striking down state ban on aliens' commercial fishing). There are two exceptions to the application of strict scrutiny not relevant to this case. *See Toll v. Moreno,* 458 U.S. 1, 12 n.17 (1982) (outlining the self-government exception); *Plyler v. Doe,* 457 U.S. 202, 223–24 (1982) (holding that discrimination against illegal aliens is subject only to intermediate scrutiny).

But the state's fiscal condition does not provide the compelling justification required under the Equal Protection Clause to justify unequal treatment of aliens. The option given to the states by Congress to decide whether to treat aliens differently was illusory, under established Supreme Court precedent. Congress has broad power, based on its authority over immigration and foreign relations, to decide whether to treat aliens differently than citizens, but Congress does not have the power to assign that discretion to states. As explained by the Supreme Court, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Graham v. Richardson*, 403 U.S. 365, 382 (1971). When the State of Hawai'i exercised the option given to it by Congress, it discriminated against aliens without a compelling justification. In my view, that violated the Equal Protection Clause. I respectfully dissent.

I. Disparity in Expenditure of State Funds

The majority opinion most obviously goes astray when it suggests that Plaintiffs have failed to establish a claim of disparity because they have not claimed that Hawai'i's per capita expenditures of state funds differ as between citizens and COFA Residents. Maj. Op. at 23 & n.8. The majority thus appears to require that, in order to establish a claim of disparate treatment, a class alleging discrimination under the Equal Protection Clause must demonstrate that the state is expending less funds, on a per capita basis, than it is spending on the rest of the population. In effect, the majority requires Plaintiffs to allege (and eventually, I presume, to prove) that they have been shortchanged on a per capita basis. Because Plaintiffs have not so alleged, the majority harbors serious doubts that Plaintiffs have made out a claim of an

equal protection violation by the state. That approach is wrong in two separate ways.

First, it treats Medicaid as if it consisted of two separate programs, one federal and one state, because the program is partially funded by the federal government. But that is not how Medicaid actually works. In Hawai‘i, as in most states, there is a single plan, administered by the state. The federal government reimburses the state for a significant portion of the cost, and the plan must comply with federal requirements, but it is a state plan. The majority opinion's own description of the program, at 5, confirms as much. Beneficiaries are not covered by two separate federal and state plans, but rather by one single plan administered by the state.

Second, and more importantly, the approach suggested by the majority opinion runs afoul of bedrock equal protection doctrine dating back at least to *Brown v. Board of Education*, 347 U.S. 483 (1954). The majority opinion would allow a state to treat a class of aliens differently as long as the state's financial outlay for Plaintiffs and other members of the suspect class is the same, on a per capita basis, as the state's expenditures for the rest of the population. But that does not change the fact that Hawai‘i has treated aliens differently by placing COFA Residents in a program with reduced benefits. That action constitutes disparate treatment in violation of the Equal Protection Clause. The disparate treatment is not immunized because the per capita expenditures might be the same. "Separate but equal" is not permitted.

The approach of the majority opinion could justify a state reducing benefits provided to members of a particular group on the ground that providing benefits to that

group is more expensive than providing the same benefits to the general population. For example, a state could reduce chemotherapy and radiation therapy benefits for African Americans and justify this discrimination by citing African Americans' increased susceptibility to various types of cancer.[2] That state could argue that, despite the reduced benefits available to any single individual, its average per capita expenditures for African Americans were not less than the expenditures for the rest of the population.

Such a "separate but equal" approach runs counter to the dictates of *Brown v. Board of Education.* "The point of the equal protection guarantee is not to ensure that facially discriminatory laws yield roughly equivalent outcomes. . . . Rather, the right to equal protection recognizes that the act of classification is itself invidious and is thus constitutionally acceptable only where it meets an exacting test." *Finch v. Commonwealth Health Ins. Connector Auth.,* 946 N.E.2d 1262, 1278 (Mass. 2011).

I don't really think the majority opinion is trying to return to the era of separate but equal. Although it denies the existence of a claim of disparity vis-a-vis state action, the majority opinion nevertheless proceeds to assume *arguendo* the existence of such a claim and subjects Hawai'i's actions to review under the Equal Protection Clause, albeit based on a rational basis standard. *See* Maj. Op. at 23-24. If there really were no disparity attributable to the State of Hawai'i, as the majority argues,

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[2] *See, e.g., Cancer and African Americans,* U.S. Dep't of Health & Human Servs. Office of Minority Health, http://minorityhealth.hhs.gov/templates/content.aspx?ID=2826 (last updated Sept. 11, 2013).

the Equal Protection Clause would simply be inapplicable, and no further judicial review would be required. By discussing the equal protection framework established by *Graham v. Richardson,* 403 U.S. 365 (1971), and *Mathews v. Diaz,* 426 U.S. 67 (1976), and applying rational basis review to uphold Hawai'i's discriminatory health welfare programs, the majority tacitly acknowledges that a claim for discrimination based on disparate treatment does not require proof of disparate per capita expenditure of funds. But it shouldn't even start down that road.

II. Hawai'i's Decision to Reduce Benefits for COFA Residents

The main thrust of the majority opinion, as I understand it, is that Hawai'i's actions are subject only to rational basis review under the Equal Protection Clause, rather than strict scrutiny, because those actions were authorized by Congress. Here again, the majority fails to heed well established Supreme Court precedent.

We must decide this case under the equal protection framework established by the Supreme Court in *Graham* and *Mathews.* The equal protection holdings in those cases are clear, and the majority opinion ably summarizes them, at 13–17. In brief, *Graham* requires that we review state discrimination against aliens under strict scrutiny, while *Mathews* requires that we review federal discrimination against aliens under rational basis review, because of the federal government's broad powers in the area of immigration and foreign relations. The question this case thus turns on is whether the denial of equal benefits to COFA Residents is ultimately the responsibility of the state or of Congress.

I conclude that it is the State of Hawai'i that is ultimately responsible. The majority reaches a different conclusion, permitting it to uphold Hawai'i's program under rational basis review, by obscuring the role states play within the statutory framework established by Congress.

The majority repeatedly emphasizes that Hawai'i is following the federal direction and that states are given only limited discretion to decide which aliens to provide benefits to under the Welfare Reform Act. But there is no federal direction regarding how to treat COFA Residents and others within what the majority describes as the Welfare Reform Act's third category of aliens. The statute gives states discretion to decide whether or not to provide health benefits to persons within that category.[3] *See* 8 U.S.C. §§ 1621–1622; Maj. Op. at 7–9.

In making the decision not to provide equal benefits to COFA Residents, Hawai'i has necessarily made a distinction on the basis of alienage: a similarly situated *citizen* is eligible to receive more benefits. Because Hawai'i has classified COFA Residents on the basis of alienage, the Equal Protection Clause requires that we strictly scrutinize Hawai'i's actions to ensure that they are "narrowly tailored measures that further compelling gov-

[3] In fact, the statute gives discretion regarding how to treat aliens within the *second* category as well, notwithstanding the majority's description of that category as that of "aliens for whom states *must not* provide *any* state benefits," Maj. Op. at 18 (emphases added). The Welfare Reform Act allows states to provide benefits to this category of aliens "through the enactment of a State law after August 22, 1996, which affirmatively provides for [those aliens'] eligibility." 8 U.S.C. § 1621(d).

ernmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

That federal discrimination against aliens would be subject only to rational basis review is irrelevant. We are presented with a case not of *federal* discrimination, but one of *state* discrimination. It is undisputed that COFA Residents are not eligible for federal benefits and that Hawai'i thus cannot obtain federal reimbursements for expenses incurred to cover COFA Residents under Hawai'i's Medicaid programs.[4] *See* 8 U.S.C. §§ 1611, 1641. But it is also undisputed that Hawai'i remains free to cover COFA Residents under its Medicaid programs, so long as it uses only state funds—something Hawai'i did for fourteen years, from the time of the enactment of the Welfare Reform Act in 1996 until 2010. *See id.* §§ 1621–22. In 2010, based on COFA Residents' status as aliens, Hawai'i cut them off from its Medicaid programs and placed them in the reduced-benefits BHH program.[5] *See* Haw. Admin. Rules (HAR) §§ 17–1714–28, 17–1722.3–7. Hawai'i's actions thus classify on the basis of alienage and are subject to strict scrutiny.

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[4] "Medicaid programs" refers to the managed care programs Hawai'i has operated since 1993, pursuant to a waiver approved by the federal government under section 1115 of the Social Security Act. These programs include QUEST, QUEST–Net, QUEST Adult Coverage Expansion, and QUEST Expanded Access.

[5] Because the BHH program has a capped enrollment, HAR § 17–1722.3–10, and more COFA Residents were moved from the Medicaid programs to BHH than would normally be allowed under the cap, new COFA Residents moving to Hawai'i after 2010 may not be covered under *any* state medical welfare program.

In effect, through the Welfare Reform Act, I think Congress has given states a lit firecracker, at risk of exploding when a state exercised its discretion to discriminate on the basis of alienage. It was Hawai'i's decision not to cover COFA Residents under its Medicaid programs that effected the discrimination in this case. "Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country." *Mathews*, 426 U.S. at 85 (footnote omitted). "The States enjoy no power with respect to the classification of aliens. This power is 'committed to the political branches of the Federal Government.'" *Plyler*, 457 U.S. at 225 (citation omitted) (quoting *Mathews*, 426 U.S. at 81). And, as I will discuss below, this is not a power the federal government can delegate to the states.

III. A Tale of Three Clauses: Equal Protection, Preemption, and the Immigration and Naturalization Power

The principles just articulated lead me to the majority's final reason for upholding Hawai'i's discriminatory actions: its conflation of the Supreme Court's equal protection holdings in *Graham* and *Mathews* with the distinct *preemption* holding in *Graham*. As explained above, in the equal protection arena, *Graham* stands for the proposition that strict scrutiny applies to state laws classifying on the basis of alienage, and *Mathews* stands for the proposition that rational basis review applies to similar *federal* laws. As a case interpreting the Supremacy Clause, *Graham* is part of the line of cases that establishes federal supremacy in the area of immigration and naturalization, as the concurrence by Judge Bybee explains, at 20–27. *See Graham*, 403 U.S. at 376–80; *see al-*

so, e.g., Arizona v. United States, 132 S. Ct. 2492, 2498–501 (2012) (outlining the preemption principles applicable in the area of immigration and naturalization).

In this case, no one argues that Hawai'i's actions are preempted by the Welfare Reform Act. Preemption doctrine has no bearing on the outcome here. Congress has authorized Hawai'i to exclude COFA Residents from the state Medicaid programs, *see* 8 U.S.C. § 1622, so there is no conflict between the state's action and the Welfare Reform Act.

The crux of the question is not whether Hawai'i has adhered to the requirements prescribed by Congress in the Welfare Reform Act—it has, and no one argues that it has not—but rather whether Hawai'i could constitutionally take the action it took "as part and parcel of the federal welfare scheme." Maj. Op. at 25 n.10. I submit that we should answer this question in the negative, following precedent from both the Supreme Court and our own court.

Graham stated that:

> Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. *Shapiro v. Thompson,* 394 U.S., at 641. Under Art. I, § 8, cl. 4, of the Constitution, Congress' power is to 'establish an uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the

> subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.

403 U.S. at 382; *see also Saenz v. Roe,* 526 U.S. 489, 508, (1999) ("Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.").

We previously relied on this passage in holding that a federal statute that requires states to grant benefits to citizens and certain aliens while also requiring states to *deny* benefits to other aliens did not authorize the states to violate the Equal Protection Clause, because "Congress ha[d] enacted a *uniform* policy regarding the eligibility of [certain aliens] for welfare benefits." *Sudomir v. McMahon,* 767 F.2d 1456, 1466 (9th Cir. 1985). As such, we stated that "[t]his makes inapplicable the suggestion in *Graham v. Richardson* that *Shapiro* may require the invalidation of congressional enactments permitting states to adopt divergent laws regarding the eligibility of aliens for federally supported welfare programs." *Id.* at 1466–67 (citation omitted).

Both the Supreme Court and this court recognize that uniformity is required for any congressional enactment regulating immigration and the status of aliens, because Congress's power over immigration and naturalization matters derives from the Naturalization Clause, which grants Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. The majority opinion makes an effort to argue that the uniformity requirement is inapplicable here because the

original motivations for the Naturalization Clause centered around avoiding a scenario that had plagued the Articles of Confederation, whereby a naturalization decision made by one state with respect to aliens within its territory was binding on other states. Maj. Op. at 18-19 (citing *Soskin v. Reinertson*, 353 F.3d 1242, 1257 (10th Cir. 2004)). However, the majority also appears to recognize that, whatever the original intent of the Naturalization Clause's uniformity requirement may have been, it applies to this case. *See id.*

The majority minimizes the significance of the divergent Medicaid eligibility requirements allowed through the discretion the Welfare Reform Act gives to the states. *See id.* at 19 ("The limited discretion authorized . . . does not undermine the uniformity requirement of the Naturalization Clause."); *id.* at 20 ("[A] state's limited discretion to implement a plan . . . does not defeat or undermine uniformity."). In reaching this conclusion, the majority relies on the Supreme Court's reading of the Bankruptcy Clause's uniformity requirement. *See id.* at 21–22.

Unfortunately, the majority's analogy to the Bankruptcy Clause does not fit. The analogy fails to recognize the crucially important counterweight the Equal Protection Clause provides against the constitutional grant of power—a counterweight present in this case but absent from the bankruptcy arena.

The grants of power in Article I with respect to naturalization and bankruptcy are very similar. Indeed, the Naturalization Clause and the Bankruptcy Clause are listed together in a single clause within Article I, section 8, which grants Congress the power "[t]o establish an

uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. It is also true that the Supreme Court has interpreted the uniformity requirement in the Bankruptcy Clause to allow for the incorporation of divergent state laws within the Bankruptcy Act. *See* Maj. Op. at 20 (citing, among others, *Hanover National Bank v. Moyses,* 186 U.S. 181 (1902)).

The Naturalization Clause and the Bankruptcy Clause are simply grants of power to Congress, however. They do not *require* Congress to pass federal naturalization and bankruptcy laws. The first federal naturalization law, Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, was passed right away, by the First Congress, likely to avoid the serious difficulties presented by the states' divergent laws on the subject under the Articles of Confederation. The first federal bankruptcy law was not passed for more than a decade, until 1800, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19.

That the majority relies so heavily on the constitutional grants of power contained in Article I is thus particularly problematic. If there were no federal bankruptcy law (as was the case for the first eleven years of our nation's Constitution), it is clear that the states could adopt their own bankruptcy laws, crafting their creditor-debtor relationships as they wished, advantaging some creditors and debtors over others, so long as the states' laws were rational.

Not so for immigration and naturalization. It would not be the case that, if there were no federal immigration and naturalization laws dealing with the United States' relations with aliens, the states would be free to craft their own laws, advantaging citizens and some aliens

over other aliens. The Equal Protection Clause would prevent them from doing so, given the strict scrutiny applied to distinctions by states between aliens and citizens under *Graham*.

It is this crucial interaction between the Article I grant of power and the Equal Protection Clause that the majority opinion neglects, which leads it to its unpersuasive conclusion that the discretion given to the states by the Welfare Reform Act does not undermine uniformity. That conclusion rests on the separate preemption doctrine that is not part of this case and does not come to grips with the dictates of the Equal Protection Clause.

Consider the following hypothetical. Congress passes and the President signs a new law, the Alien Discrimination Act. In it, Congress authorizes states to classify aliens in any manner that is not wholly irrational. To justify the Act, Congress articulates a uniform policy of devolving more traditionally state police powers to the states.[6] As a preemption matter, this Act would remove any obstacles to state legislation on the subject. But could the states then discriminate against aliens subject only to rational basis review under the Equal Protection Clause? The answer must surely be "no," if we are to heed *Graham*'s statement that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." 403 U.S. at 382. Strict scrutiny must still apply in this hypothetical. The majority opinion, at 24, describes that statement in *Graham* as

[6] This uniform federal policy would follow the principle of "New Federalism," a principle which also underlies the Welfare Reform Act. *See, e.g.,* Steven D. Schwinn, *Toward a More Expansive Welfare Devolution Debate,* 9 Lewis & Clark L. Rev. 311, 312–13 (2005).

"almost tautological" and proceeds to treat it as if it were not there, taking the view that as long as Congress clearly expresses its will, it can authorize individual states to discriminate against aliens.[7] Though I may have sympathy for the position of the State of Hawai'i, see below at 70-71, I would not so freely disregard the Supreme Court's explicit pronouncements.

The "limited" nature of the discretion to discriminate the states are given under the Welfare Reform Act is irrelevant: the Act still authorizes states to discriminate against some aliens in the provision of some welfare benefits, and thus authorizes them to violate the Equal Protection Clause. Therefore, in this case as in the hypothetical above, strict scrutiny must apply.

My conclusion does not detract from *Sudomir*'s requirement that states cannot be compelled to replace federal funding where the federal statute *requires* states to discriminate against aliens. 767 F.2d at 1466. In such cases, the states are merely "follow[ing] the federal direction." *Plyler v. Doe,* 457 U.S. 202, 219 n.19 (1982).

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[7] The majority opinion also states that I am asking the wrong question, but its own language underscores its confusion as to whether this is an equal protection or a preemption case. The majority would have me ask "not whether Congress may authorize Hawai'i to violate the Equal Protection Clause but rather 'what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens.'" Maj. Op. at 24 (quoting *Soskin*, 353 F.3d at 1254). I know of no equal protection doctrine that turns on whether "Congress has (clearly) expressed its will." That is instead the language of preemption analysis. *See, e.g., Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194-95 (2009).

In this case, though, there is no federal direction for states to follow. The ultimate decision is left up to each state. Congress articulated what the majority argues are uniform policies in the Welfare Reform Act, including a policy "to assure that aliens be self-reliant in accordance with national immigration policy," 8 U.S.C. § 1601(5), and "to remove the incentive for illegal immigration provided by the availability of public benefits," *id.* § 1601(6). Those policies would presumably support a flat prohibition on providing benefits to aliens or to a specified group of aliens. Congress did not enact a prohibition, though. The decision as to how a given group of aliens is to be treated is simply left to each state. In light of the broad discretion it gives to the states, the Act simply does not provide a federal direction with regard to COFA Residents and others in the third category of aliens. It does not require or forbid the states to do anything.

Although the majority opinion argues, at 15, that Hawai'i followed a federal direction by shunting COFA Residents into the BHH program, it could also be said that Hawai'i followed a federal direction during the fourteen years when it included COFA Residents in its Medicaid programs. A federal "direction" that points in two opposite ways is not a direction. We have already recognized as much. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1109 (9th Cir. 2012) (per curiam) ("[T]he Welfare Reform Act did not establish a uniform rule with respect to state welfare programs. . . ."); *see also, e.g., Ehrlich v. Perez*, 908 A.2d 1220, 1240–41 (Md. 2006) (holding that the Welfare Reform Act's "laissez faire . . . approach to granting discretionary authority to the States in deciding whether to continue State-funded medical benefits" for certain aliens does not amount to a "single, uniform, and articulated directive").

In the Welfare Reform Act, Congress itself recognized that, far from providing a uniform federal direction, it was giving states broad discretion to discriminate against aliens in the provision of welfare benefits. This recognition comes through in Congress's statement of policy emphasizing that the states exercising their discretion to determine some aliens' eligibility for welfare benefits "shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7). But Congress does not have the power to give states discretion to discriminate.

IV. Conclusion

Though the majority opinion asserts that I am inviting a circuit split, I note that it is the majority opinion that is contrary to the opinions of a majority of courts that have considered this question. Only one other circuit has spoken, in *Soskin v. Reinertson,* 353 F.3d 1242 (10th Cir. 2004), and that is the only decision consistent with the majority opinion. For the reasons discussed above, as well as for the reasons Judge Henry articulated in his dissent, I believe that *Soskin* was wrongly decided, under current Supreme Court precedent. *See Soskin,* 353 F.3d at 1265 (Henry, J., dissenting). Against *Soskin* lie three decisions of the high courts of Maryland, Massachusetts, and New York. *Ehrlich v. Perez,* 908 A.2d 1220 (Md. 2006); *Finch v. Commonwealth Health Ins. Connector Auth.,* 946 N.E.2d 1262 (Mass. 2011); *Aliessa ex rel. Fayad v. Novello,* 754 N.E.2d 1085 (N.Y. 2001). All three decisions applied strict scrutiny under the Equal Protection Clause to strike down state statutes that purported to exclude certain aliens from Medicaid because

they were aliens. *See Ehrlich*, 908 A.2d at 1243; *Finch*, 946 N.E.2d at 1280;[8] *Aliessa*, 730 N.Y.S.2d 1, 754 N.E.2d at 1098. The majority opinion's application of equal protection rational basis review to state action thus stands against the weight of authority.

Even though in my view Plaintiffs should prevail, I acknowledge there is something paradoxical and more than a little unfair in my conclusion that the State of Hawai'i has discriminated against COFA Residents. The state responded to an option given to it by Congress, albeit an option that I don't think Congress had the power to give. Hawai'i provided full Medicaid benefits to COFA Residents for many years, entirely out of its own treasury, because the federal government declined to bear any part of that cost. Rather than terminate benefits completely in 2010, Hawai'i offered the BHH program to COFA Residents, again from its own pocket. The right of COFA Residents to come to Hawai'i in the first place derives from the Compacts of Free Association that were negotiated and entered into by the federal government. That a disproportionate share of COFA Residents, from Pacific island nations, come to Hawai'i as compared to the other forty-nine states is hardly a surprise, given basic geography. The decision by the state not to keep paying the full expense of Medicaid benefits for those

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[8] Although *Finch* speaks in terms of the Massachusetts Constitution's right to equal protection, the Massachusetts Supreme Judicial Court has interpreted that state provision to be coextensive with the federal Equal Protection Clause in matters concerning aliens. *See, e.g., Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 408 (Mass. 2002). Accordingly, *Finch's* analysis relies heavily on United States Supreme Court decisions interpreting the Equal Protection Clause. *See* 946 N.E.2d at 1273–80.

aliens is not really a surprise, either. In a larger sense, it is the federal government, not the State of Hawai‘i, that should be deemed responsible.

But the federal government is permitted to discriminate against aliens in a way that the state government is not. Because established precedent should require us to apply strict scrutiny to Hawai‘i's exclusion of COFA Residents from the Medicaid programs, and no one seriously contends that Hawai‘i's actions can withstand such strict scrutiny, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-15132

TONY KORAB; TOJIO CLANTON; KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiffs-Appellees

v.

KENNETH FINK, in his official capacity as State of Hawaii, Department of Human Serivces, Med-QUEST Division Administrator, and PATRICIA MCMANAMAN, in her official capacity as Director of the State of Hawaii, Department of Human Services, Defendants-Appellants.

May 12, 2014

ORDER

Before: McKEOWN, CLIFTON and BYBEE, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-15132

TONY KORAB; TOJIO CLANTON; KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiff-Appellees

v.

KENNETH FINK, in his official capacity as State of Hawai'i, Department of Human Services, Med-QUEST Division Administrator and PATRICIA MCMANAMAN, in her official capacity as Director of the State of Hawai'i, Department of Human Services, Defendants-Appellants.

May 20, 2014

ORDER

Before: McKEOWN, CLIFTON, and BYBEE, Circuit Judges.

Appellees' motion to stay the mandate pending the filing of their petition for a writ of certiorari is **GRANTED**. Fed. R. App. P. 41(d)(2).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 10-00483 JMS/KSC

TONY KORAB; TOJIO CLANTON; KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiffs

v.

LILLIAN B. KOLLER, in her official capacity as Director of the State of Hawaii, Department of Human Services, and KENNETH FINK, in his official capacity as State of Hawaii, Department of Human Services, MedQUEST Division Administrator, Defendants.

December 13, 2010

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

On August 23, 2010, Plaintiffs filed this class action asserting claims against Lillian Koller, in her official capacity as Director of the State of Hawaii, Department of Human Services ("DHS"), and Kenneth Fink, in his offi-

cial capacity as State of Hawaii, DHS, Med–QUEST Division Administrator (collectively "Defendants")[1] challenging DHS's implementation of a new health care benefits program, Basic Health Hawaii ("BHH"), which Defendants created for non-pregnant adults residing in Hawaii under a Compact of Free Association ("COFA") with the United States who are ineligible for the same health benefits as other Hawaii residents ("COFA Residents"), and non-pregnant immigrants residing in Hawaii, age nineteen or older, who have been United States residents for less than five years and who are ineligible for the same health benefits as other Hawaii residents ("New Residents"). Plaintiffs are COFA Residents who bring this action on behalf of themselves and others similarly situated, asserting that BHH violates (1) the Equal Protection Clause of the Fourteenth Amendment because it provides less health benefits than the State of Hawaii's (the "State") Medicaid program offered to citizens and certain qualified aliens, and (2) the Americans with Disabilities Act (the "ADA") because BHH is not administered in the most integrated setting appropriate to meet their medical needs.

Currently before the court is Plaintiffs' Motion for Preliminary Injunction, in which they seek an injunction preventing Defendants from excluding COFA Residents from the State Medicaid program. Plaintiffs argue that Defendants' policy of denying COFA Residents access to the same health benefit programs as United States citizens and other qualified aliens violates the Equal Protec-

[1] The parties have stipulated that "Defendants" means Defendants in their official capacities as well as their officers, agents, servants, and employees.

tion clause of the Fourteenth Amendment and is causing irreparable injury to COFA Residents who cannot receive medical assistance they would otherwise receive under the State Medicaid program.[2] Based on the following, the court finds that COFA Residents have a high likelihood of success on the merits of proving their Equal Protection claim, and that the likelihood of irreparable harm to COFA Residents without an injunction outweighs any relative hardship to Defendants. The court therefore GRANTS Plaintiffs' Motion for Preliminary Injunction.

II. BACKGROUND

A. Factual Background

Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor, disabled, and others in need. 42 U.S.C. § 1396 *et seq.* Up until the Personal Work Opportunities Reconciliation Act of 1996 ("PRWORA"), COFA Residents were granted access to benefits under Medicaid, with the costs jointly paid by the federal and State government. The PRWORA changed that arrangement, however, by excluding COFA Residents from federal Medicaid funding. Instead, the PRWORA left it up to the states to determine for themselves whether to provide funding to these individuals based solely on State funding. *See* 8 U.S.C. § 1622(a).

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[2] Although the briefing also addressed Plaintiffs' claims as they relate to New Residents and Plaintiffs' ADA claim, Plaintiffs subsequently withdrew their request for injunctive relief as to the New Residents and the ADA claim without prejudice. *See* Doc. No. 32.

After the PRWORA went into effect, the State decided to continue providing COFA Residents with the same level of medical assistance benefits that they would have received if they were U.S. citizens. *See* Doc. No. 29 ¶ 1. Rather than adopt any administrative rules to create a state-funded medical assistance program, the State instead created a de facto state-funded medical assistance program by continuing to provide medical assistance benefits to COFA Residents and paying for those benefits entirely with State funds. *See id.* ¶¶ 2–3. So long as COFA Residents met the income and asset eligibility requirements for Hawaii's Federal Medicaid program, they received the same benefits as those provided to U.S. citizens. *Id.* ¶ 5. As such, COFA Residents were eligible to participate in the State's QUEST, Quest Expanded Access ("QExA"), QUEST–Net, QUEST–ACE, fee-for-service, and the State of Hawaii Organ and Tissue Transplant ("SHOTT") programs (the "Old Programs").

Allowing COFA Residents to participate in the Old Programs assisted eligible COFA Residents in seeking treatment that they could not receive in COFA countries. Compared to the general population of the United States, COFA Residents have higher than average prevalence of several serious medical conditions including certain cancers and diabetes mellitus. *See* Dr. Neal Palafox Decl. ¶ 4. Medical facilities in COFA countries, however, do not have the capability or capacity to treat serious health conditions—no COFA country has any facility that provides chemotherapy or radiation therapy to cancer patients, and there are only a few dialysis machines to be found in these countries. *Id.* ¶ 5.

As of July 1, 2010, Defendants disenrolled COFA Residents who were not pregnant and who were age

nineteen years or older and were not receiving long-term care services or had not recently received an organ transplantation from the Old Programs, and enrolled them in BHH, a health care benefits program for COFA Residents and New Residents. Compared to the Old Programs for which the COFA Residents were previously qualified, BHH provides only limited care.[3] For example, while QUEST and QExA provide comprehensive medical and behavioral health benefits and all necessary prescription drugs without limit, BHH limits patients to no more than ten days of medically necessary inpatient hospital care per year, twelve outpatient visits per year, six mental health visits, and a maximum of four medication prescriptions per calendar month. Doc. No. 24 ¶¶ 14–17, 20, 23. BHH covers dialysis treatments as an emergency medical service only, *see* Defs.' Ex. A, does not cover cancer treatments beyond the benefits provided to all members of BHH, and does not allow access to the State's organ and tissue transplant program, "SHOTT." Doc. No. 24 ¶¶ 18, 24.

Due to these limitations on BHH, doctors have found that they cannot provide adequate care to COFA Residents through BHH. For example,[4] COFA Residents

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[3] In addition to the limitations discussed below, enrollment in BHH is capped at 7,000 statewide, and an open application period will not occur until enrollment drops below 6,500. This Order does not address, and should not be construed to address, the impact of this Order on an open enrollment application period under Hawaii Administrative Rule § 17–1722.3–10.

[4] Plaintiffs provided numerous examples displaying how BHH is harming and/or causing extreme hardship to COFA Residents. Defendants do not dispute this evidence, and the court's description of Plaintiffs' evidence is not exhaustive.

with chronic illnesses are typically prescribed more than the four-prescriptions-per-month limit imposed by BHH, but cannot afford to pay for non-covered prescriptions out of pocket. *See* Palafox Decl. ¶ 11; *see also* Dr. Wilfred Alik Decl. ¶¶ 11–12; Dr. Ritabelle Fernandes Decl. ¶ 16. As a result, doctors are prioritizing medications and/or providing samples when available, and some patients have gone without needed prescriptions. Dr. Seji Yamada Decl. ¶ 10; Dr. Joseph Humphrey Decl. ¶ 10; Fernandes Decl. ¶ 16. As another example, cancer patients will exhaust BHH's yearly limit of only twelve outpatient visits within three to four months. *See* Palafox Decl. ¶ 11; *see also* Alik Decl. ¶¶ 9, 15. Finally, while Defendants have worked to streamline approval for emergency dialysis treatments by creating a one-page form, implementing fast approval responses, and covering drugs administered during the procedure, Dr. Anthea Wang Decl. ¶¶ 9, 10, 12, BHH is still inadequate in covering the care necessary for these patients—before dialysis can even begin, patients require up to five or six doctor visits. *See* Alik Decl. ¶ 13; Fernandes Decl. ¶ 18.

Plaintiffs have also presented evidence of multiple, specific instances where the limitations of BHH are compromising the care provided to COFA Residents. *See, e.g.,* Humphrey Decl. ¶¶ 12–15; Yamada Decl. ¶¶ 10–12; Fernandes Decl. ¶¶ 18–23. For example, Tojio Clanton, a kidney transplant recipient, attended three doctor visits and took ten prescriptions per month prior to BHH, but now has stopped taking four of his medications (paying for two medications out of pocket), which caused him to go into kidney failure and spend fourteen days in the hospital. Clanton has now used up all of his doctor visits and cannot afford to pay for doctor visits or other prescriptions. *See generally* Tojio Clanton Decl.

Tony Korab, a dialysis patient, takes approximately fifteen prescriptions per month, but as a result of his enrollment into BHH, he must now prioritize his prescriptions and he is no longer eligible for a kidney transplant through the SHOTT program. *See generally* Tony Korab Decl.

B. Procedural Background

On August 23, 2010, Plaintiffs filed this action, alleging claims against Defendants for violations of the Equal Protection Clause and the ADA.

On September 9, 2010, Defendants filed a Motion to Dismiss. On September 13, 2010, Plaintiffs filed a Motion for Preliminary Injunction. On October 4, 2010, Defendants filed their Opposition to the Motion for Preliminary Injunction, and Plaintiffs filed their Opposition to the Motion to Dismiss on October 5, 2010. Replies were filed on October 12, 2010. On October 28, 2010, the parties filed declarations of direct testimony for the preliminary injunction hearing, and a joint stipulation of facts. *See* Doc. No. 24.

A hearing was held on November 2, 2010, in which the court deferred hearing argument on the Motion for Preliminary Injunction pending resolution of several issues. On November 5, 2010, the parties filed a stipulation regarding Hawaii's laws and/or policies as to health benefits for COFA Residents. *See* Doc. No. 29. On November 10, 2010, the court denied Defendants' Motion to Dismiss. *See Korab v. Koller,* 2010 WL 4688824 (D. Haw. Nov. 10, 2010).

On November 24, 2010, the parties stipulated, and the court ordered, that this action be certified and main-

tained as a class action pursuant to Federal Rule of Civil Procedure 23(a), with the named Plaintiffs as class representatives. The class is defined as: "all non-pregnant adults residing in Hawaii under the Compact of Free Association with the United States who are ineligible for the same health benefits as other Hawaii residents."

III. STANDARD OF REVIEW

"The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.,* 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002); *see also Burgess v. Forbes,* 2009 WL 416843, at *2 (N.D. Cal. Feb. 19, 2009); *Magnuson v. Akhter,* 2009 WL 185577, at *1 (D. Ariz. Jan. 27, 2009).

"A preliminary injunction is an extraordinary and drastic remedy [that] is never awarded as of right." *Munaf v. Geren,* 553 U.S. 674, 690 (2008) (citation and quotation signals omitted). In *Winter v. Natural Resources Defense Council, Inc.,* 129 S. Ct. 365, 374 (2008), the Supreme Court explained that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." So long as all four parts of the *Winter* test are applied, "a preliminary injunction [may] issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] fa-

vor.'"[5] *Alliance for Wild Rockies v. Cottrell,* ___ F.3d ____, 2010 WL 3665149, at *4 (9th Cir. Sept. 22, 2010) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir. 2003)). "In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.*

IV. DISCUSSION

The court applies *Winter* to determine the following preliminary injunction considerations: (1) Plaintiffs' likelihood of success, (2) irreparable injury in the absence of preliminary relief, (3) the balance of equities, and (4) whether an injunction is in the public interest.

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[5] A higher standard applies to a mandatory preliminary injunction, which "orders a responsible party to take action," as opposed to a prohibitory preliminary injunction, which "preserves the status quo pending a determination of the action on the merits." *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.,* 571 F.3d 873, 879 (9th Cir. 2009). The status quo means "the last, uncontested status which preceded the pending controversy." *Id.* (citation omitted). The parties have not briefed whether the facts before the court require the entry of a mandatory preliminary injunction, and the court need not determine whether Plaintiffs seek a mandatory injunction—even if the status quo were the benefits offered by BHH, the court finds that a mandatory injunction is warranted given the serious damage that COFA Residents will face without access to the State Medicaid program. *See id.* (stating that "[m]andatory injunctions should not be "granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages" (quoting *Anderson v. United States,* 612 F.2d 1112, 1114 (9th Cir. 1980))).

A. Likelihood of Success on the Merits

Plaintiffs assert that Defendants' determination that COFA Residents should no longer receive the same benefits as U.S. citizens violates the Equal Protection Clause because it discriminates between U.S. citizens who may participate in the Old Programs, and COFA Residents who may receive benefits under BHH only. As the court found in its November 10, 2010 Order Denying Defendants' Motion to Dismiss, Defendants' decision to exclude COFA Residents from the Old Programs is subject to strict scrutiny, as opposed to the rational basis review urged by Defendants. *See Korab,* 2010 WL 4688824, at *4–12.

Applying strict scrutiny, *i.e.,* requiring Defendants to show that their classification "advance[s] a compelling state interest by the least restrictive means available," *Bernal v. Fainter,* 467 U.S. 216, 219 (1984), the court finds that Plaintiffs have shown a high degree of likelihood of success on the merits.[6] As the November 10, 2010 Order explained, Defendants have failed to identify *any* particular State interest that is advanced by their decision to exclude COFA Residents from the Old Programs.[7] Further, while the court recognizes that BHH was created in response to the State's budget crisis, when applying strict scrutiny, the "justification of limit-

[6] Indeed, Defendants conceded at the November 2, 2010 hearing that if the court denied their Motion to Dismiss, a preliminary injunction should follow applying a strict scrutiny review.

[7] As explained in the November 10, 2010 Order, the court rejects Defendants' argument under *Avila v. Biedess,* 78 P.3d 280 (Ariz. Ct. App. 2003) (depublished at *Avila v. P Biedess/AHCCCS,* 207 Ariz. 257 (2004)), that they have established the strict scrutiny standard.

ing expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens." *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (quotation and citation signals omitted).

In sum, Defendants have failed to proffer any plausible explanation of how they can meet the strict scrutiny standard and without any such explanation, the courts finds that Plaintiffs have established a likelihood of success on the merits. This factor weighs in favor of granting a preliminary injunction.

B. Irreparable Harm

Plaintiffs have shown a strong likelihood of irreparable harm if a preliminary injunction is not granted. Plaintiffs have submitted compelling evidence that BHH's limited coverage for doctors' visits, prescriptions, and other critical services is causing COFA Residents to forego much needed treatment because they cannot otherwise afford it. This lack of treatment clearly supports a finding of irreparable harm. *See Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that possibility that plaintiffs would be denied Medicaid benefits sufficient to establish irreparable harm); *Cota v. Maxwell–Jolly*, 688 F. Supp. 2d 980, 997 (N.D. Cal. 2010) (finding that "the reduction or elimination of public medical benefits is sufficient to establish irreparable harm to those likely to be affected by the program cuts"); *Newton–Nations v. Rogers*, 316 F. Supp. 2d 883, 888 (D. Ariz. 2004) (citing *Beltran* and finding irreparable harm shown where Medicaid recipients could be denied medical care as a result of their inability to pay increased copayments to medical service providers).

Accordingly, this factor also weighs in favor of granting a preliminary injunction.

C. Balance of the Equities

A preliminary injunction will effectively maintain the status quo that existed before Defendants implemented BHH for COFA Residents. In comparison, Plaintiffs will suffer irreparable harm without a preliminary injunction because they would be left without adequate medical coverage, which will force them to pay for treatment on their own or completely forego the treatment. In contrast, Defendants will incur the same costs and lose only the "cost savings" that they intended to receive as a result of switching COFA residents over to BHH. While the money Defendants save in implementing BHH is significant, it does not outweigh the physical and financial harm caused to COFA Residents. Accordingly, this factor also weighs in favor of Plaintiffs.

D. Public Interest

Finally, the court finds that a preliminary injunction is in the public interest, but even it were neutral, the other factors clearly weigh in favor of granting the temporary restraining order.

E. Weighing the Factors

Because all of the factors weigh in favor of granting Plaintiff's Motion for Preliminary Injunction, the court finds that Plaintiffs are entitled to relief.

V. PRELIMINARY INJUNCTION

Based on the above, the court **GRANTS** Plaintiffs' Motion for Preliminary Injunction.[8] Specifically, the court orders as follows:

1. For COFA Residents who presently are enrolled in BHH, Defendants shall reinstate the benefits that the COFA Resident was receiving through the Old Programs as of June 1, 2010, prior to being deemed into BHH effective July 1, 2010 pursuant to Hawaii Administrative Rule § 17–1722.3–33, as amended.

2. Defendants shall give priority to processing the reinstatement of benefits for those COFA Residents who are enrolled in BHH and who were receiving benefits through the QExA or SHOTT programs. These COFA Residents presently enrolled in BHH will be entitled to benefits effective December 15, 2010 and Defendants shall reimburse providers for any benefits provided on or after that date, regardless of when Defendants complete processing the re-enrollment documentation. COFA Residents having QExA benefits reinstated will receive these benefits through the same health plan through which they previously received them.

3. No later than January 1, 2011, Defendants shall complete the reinstatement of benefits for COFA Residents presently enrolled in BHH who were receiving

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[8] Before entering this Preliminary Injunction, the court asked the parties to meet and confer to determine whether they could agree on the language for a preliminary injunction. The following language was agreed to by the parties and is accepted by the Court as appropriate.

QUEST benefits before being deemed into BHH. COFA Residents having QUEST benefits reinstated will receive these benefits through the same health plan through which they previously received them.

4. No later than February 1, 2011, Defendants shall reinstate benefits for COFA Residents who were enrolled in BHH and were receiving benefits through the QUEST–ACE or QUEST–Net programs. COFA Residents having QUEST–ACE or QUEST–Net benefits reinstated will receive these benefits through the same health plan through which they previously received them.

5. No later than January 15, 2011, Defendants shall complete the reinstatement of benefits for COFA Residents deemed into BHH who were disenrolled upon conclusion of the transition period for failing to meet BHH eligibility criteria. However, COFA Residents in this group who received benefits through the QExA or SHOTT programs on June 1, 2010 will have these benefits reinstated effective December 15, 2010 as provided in paragraph 2, above.

6. Effective December 15, 2010, Defendants shall accept and timely process applications for medical benefits from COFA Residents who are not presently enrolled in BHH. Defendants shall not deny any application for medical assistance[9] from a COFA Resident with an ap-

[9] The Department of Human Services, Med–QUEST Division ("MQD"), may be amending its medical assistance application to be titled "Application for Public Health Insurance." This Preliminary Injunction Order shall apply to the MQD's application for federal or state funded medical assistance benefits, notwithstanding any changes to the application form.

plication date on or after December 15, 2010 based on citizenship. Upon meeting all medical assistance eligibility requirements that are applicable to United States citizens, other than citizenship, COFA Residents shall receive the benefits of the Old Program for which he/she is eligible. However, for applications dated from December 15, 2010 through December 31, 2010, if the COFA Resident applicant is determined eligible to receive QUEST benefits, then the applicant will receive BHH benefits from the date of eligibility through December 31, 2010 and will receive QUEST benefits beginning January 1, 2011.

7. Defendants shall publish notice in the Honolulu Star–Advertiser, The Maui News, Hawaii Tribune Herald, West Hawaii Today, and The Garden Island, announcing that the Defendants are accepting applications for medical benefits from COFA Residents as provided in paragraph 6, above. Defendants shall consult with Lawyers for Equal Justice, to the extent practicable given the time constraints of this Order, on the wording of the public notice.

8. Defendants shall make every effort to identify COFA Residents who were disenrolled from the Old Programs because of a change in pregnancy status or who turned 19 years old after July 1, 2010, but were not enrolled into BHH because of the cap on BHH enrollment. Once identified, Defendants shall separately notify these individuals of their right to apply for medical assistance benefits.

9. Defendants shall take steps to assure that medical providers in the State of Hawai'i are aware that COFA Residents are entitled to benefits under the Old Programs so that they receive the benefits to which they are

entitled, even if Defendants have not completed processing the re-enrollment documentation.

No bond shall be required pursuant to Fed. R. Civ. P. 65(c). This Preliminary Injunction Order shall be binding as provided in Fed. R. Civ. P. 65(d) and shall remain in effect for the duration of this litigation, until further order of the court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 13, 2010

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 10-00483 JMS/KSC

TONY KORAB; TOJIO CLANTON; KEBEN ENOCH, each individually and on behalf of those persons similarly situated, Plaintiffs,

v.

LILLIAN B. KOLLER, in her official capacity as Director of the State of Hawaii, Department of Human Services, and KENNETH FINK, in his official capacity as State of Hawaii, Department of Human Services, MedQUEST Division Administrator, Defendants.

November 10, 2010

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AS TO COFA RESIDENTS

I. INTRODUCTION

On April 5, 2010, Plaintiffs filed this class action asserting claims against Lillian Koller, in her official capacity as Director of the State of Hawaii, Department of Human Services ("DHS"), and Kenneth Fink, in his offi-

cial capacity as State of Hawaii, DHS, Med–QUEST Division Administrator (collectively "Defendants") challenging DHS's implementation of a new health care benefits program, Basic Health Hawaii ("BHH"), which Defendants created for non-pregnant citizens, age nineteen or older, of countries with Compacts of Free Association ("COFA") with the United States who are lawfully residing in Hawaii ("COFA Residents"), and non-pregnant immigrants, age nineteen or older, who have been United States residents for less than five years ("New Residents"). Plaintiffs are COFA Residents who bring this action on behalf of themselves and others similarly situated, asserting that BHH violates (1) the Equal Protection Clause of the Fourteenth Amendment because it provides less health benefits than the State of Hawaii's (the "State") Medicaid program offered to citizens and certain qualified aliens, and (2) and the Americans with Disabilities Act (the "ADA") because BHH is not administered in the most integrated setting appropriate to meet their medical needs.

Currently before the court is Defendants' Motion to Dismiss in which they argue that the Complaint as directed to COFA Residents fails to state a claim upon which relief can be granted.[1] Based on the following, the court **DENIES** Defendants' Motion to Dismiss.

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[1] Although the briefing also addressed Plaintiffs' claims as they relate to New Residents, the parties agreed at the November 2, 2010 hearing that the court would limit its analysis at this time to COFA Residents only.

II. BACKGROUND

A. Factual Background

To put Plaintiffs' claims in context, the court first outlines the history of Medicaid and health care in Hawaii as relevant to this action, and then outlines the allegations of the Complaint.

1. History of Medicaid Benefits Provided to Aliens in Hawaii

Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor, disabled, and others in need. 42 U.S.C. § 1396 *et seq.* "State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements." *Frew ex rel. Frew v. Hawkins,* 540 U.S. 431, 433 (2004) (citations omitted).

The Personal Work Opportunities Reconciliation Act of 1996 ("PRWORA") changed Medicaid law significantly. As is relevant to this action,[2] the PRWORA limited Medicaid availability to aliens in an effort to, among other things, "remove the incentive for illegal immigration provided by the availability of public benefits" and encourage "self-sufficiency." 8 U.S.C. § 1601(1), (6). The PRWORA divided aliens into two groups—qualified aliens and non-qualified aliens. Qualified aliens include lawful permanent residents, designated refugees, aliens

[2] The PRWORA provided comprehensive welfare reform, but the court is concerned with Title IV only, which addresses eligibility of aliens for certain benefits.

granted asylum, and certain other specified categories of lawfully present aliens. 8 U.S.C. § 1612(b); *id.* § 1641(b). Qualified aliens may receive Medicaid if they entered the United States prior to August 22, 1996, or otherwise have lived in the United States for at least five years. 8 U.S.C. § 1613(a). Nonqualified aliens are not eligible for Medicaid benefits.

The PRWORA further provides that states, with their own funding, may provide benefits for certain aliens who are not otherwise eligible for federal Medicaid benefits. The PRWORA provides that state programs may not exclude certain groups of aliens, 8 U.S.C. § 1622(b), but must exclude other certain groups. *Id.* § 1621(a). As for a third group of aliens not qualified for federal benefits—which include COFA Residents[3]—the PRWORA gives discretion to the states to determine eligibility for state benefits. Specifically, 8 U.S.C. § 1622(a) provides:

> Notwithstanding any other provision of law . . . , a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien (as defined in section 1641 of this title), a nonimmigrant under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.], or an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for less than one year.

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[3] COFA Residents are "non-immigrants." *see* Pub. L. No. 99–239 § 141. The parties agree that COFA Residents fall within this third group of aliens for which the PRWORA has granted discretion to the states to determine eligibility of benefits.

Notwithstanding these restrictions on eligibility for Medicaid and state benefits, all aliens may receive state and federally funded emergency medical treatment. *See* 8 U.S.C. §§ 1611(b)(1)(A), 1613(c)(2)(A), 1621(b)(1). *See also Soskin v. Reinertson,* 353 F.3d 1242, 1245 (10th Cir. 2004) (explaining provisions of the PRWORA); *Aliessa ex rel. Fayad v. Novello,* 754 N.E.2d 1085 (N.Y. 2001) (same).

2. Allegations in the Complaint

After the PRWORA went into effect, the State decided to provide the same medical benefits to COFA Residents—using state funds only—that are provided through Medicaid to citizens and qualified aliens who meet the durational residency requirement. Compl. ¶ 20. As such, COFA Residents could participate in the State's QUEST, QExA, QUEST–Net, QUEST–ACE, fee-for-service, and SHOTT programs ("Old Programs").[4]

On July 1, 2010, DHS Med–Quest implemented BHH—a medical benefits program for non-pregnant COFA Residents age nineteen or older. *Id.* ¶ 1. As of this date, DHS disenrolled COFA Residents who were not

[4] As stipulated by the parties, the State did not adopt any administrative rules to create a state-funded medical assistance program, and instead created a de facto state-funded medical assistance program by continuing to provide medical assistance benefits to COFA Residents and paying for those benefits entirely with State funds. *See* Doc. No. 29 ¶¶ 2–3. COFA Residents used the same application as that used for applicants seeking federal Medicaid and state-funded medical assistance. *Id.* ¶ 4. So long as the COFA Resident met the income and asset eligibility requirements for Hawaii's Federal Medicaid program, the COFA Resident received the same benefits as those provided under the Old Programs. *Id.* ¶ 5.

pregnant and who were age 19 or older from the Old Programs and enrolled them in BHH. *Id.* ¶ 29. As alleged in the Complaint, in enacting BHH, Defendants specifically targeted COFA Residents because of their alienage and immigrant status. *Id.* ¶ 30.

Enrollment in BHH is capped at 7,000 statewide, and an open application period will not occur until enrollment drops below 6,500. *Id.* ¶ 33. Given that over 7,500 residents were admitted into BHH, new enrollment is unlikely. *Id.* ¶ 34. Thus, COFA Residents who were not enrolled into BHH cannot get State health benefits. *Id.* ¶ 35.

As compared to the Old Programs, BHH provides only limited care. While the Old Programs provide comprehensive medical, behavioral, and prescription coverage, under BHH, transportation services are excluded and patients can receive no more than ten days of medically necessary inpatient hospital care per year, twelve outpatient visits per year, and a maximum of four medication prescriptions per calendar month. *Id.* ¶¶ 31–32. Further, BHH covers dialysis treatments as an emergency medical service only, and the approximate ten to twelve prescription medications dialysis patients take per month are not fully covered. *Id.* ¶ 37. BHH also does not provide a comprehensive program for cancer treatments, causing cancer patients to exhaust their allotted doctors' visits within two to three months. *Id.* ¶ 38. Finally, COFA Residents in need of an organ transplant were removed from SHOTT (the State's organ and tissue transplant program), and COFA Residents may not enroll in programs covering long-term care services. *Id.* ¶¶ 41–42.

COFA Residents without an insurance plan, or those individuals under BHH who have used up their allotted patient visits under BHH, must use the State's program for Medical Assistance to Aliens and Refugees ("MAAR"). *Id.* ¶ 44. MAAR requires patients to wait until they have developed a serious medical condition posing a serious threat to bodily health, and then seek treatment in a hospital setting. *Id.* ¶ 45. The Complaint asserts that by requiring these individuals to seek care in a hospital setting, Defendants are not administering their programs in the most integrated setting appropriate to meet the needs of patients with disabilities in violation of the ADA. *Id.* ¶ 46.

B. Procedural Background

On August 23, 2010, Plaintiffs filed this action, alleging claims for violations of the Equal Protection Clause and the ADA.

On September 9, 2010, Defendants filed a Motion to Dismiss. On September 13, 2010, Plaintiffs filed a Motion for Preliminary Injunction. On October 4, 2010, Defendants filed their Opposition to the Motion for Preliminary Injunction, and Plaintiffs filed their Opposition to the Motion to Dismiss on October 5, 2010. Replies were filed on October 12, 2010.

A hearing was held on November 2, 2010. During the hearing, the parties agreed that at this time the court would limit its analysis to Plaintiffs' claims as they relate to COFA Residents, pending further briefing regarding New Residents. The court further deferred hearing argument on the Motion for Preliminary Injunction pending the resolution of several issues. This Order therefore

addresses only Plaintiffs' claims as they relate to COFA Residents.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss a claim for "failure to state a claim upon which relief can be granted[.]"

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). This tenet—that the court must accept as true all of the allegations contained in the complaint—"is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). Factual allegations that only permit the court to infer "the mere possibility of misconduct" do not show that the pleader is entitled to relief as required by Rule 8. *Id.* at 1950.

IV. DISCUSSION

Defendants argue that Plaintiffs have failed to state a claim upon which relief can be granted under either the Equal Protection Clause or the ADA. The court addresses these claims in turn.

A. Equal Protection

The Fourteenth Amendment declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. "[T]he term 'person' in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." *Graham v. Richardson,* 403 U.S. 365, 371 (1971).

In determining an equal protection challenge, different levels of scrutiny apply to different types of classifications. Plaintiffs assert that Defendants' provision of medical benefits violates the Equal Protection Clause because it discriminates between citizens and certain groups of aliens who may receive Medicaid, and COFA Residents who may receive benefits under BHH only. Plaintiffs contend that this classification is based on alienage and therefore subject to strict scrutiny, allowing the court to uphold this program only if it "advance[s] a compelling state interest by the least restrictive means available." *Bernal v. Fainter,* 467 U.S. 216, 219 (1984). In comparison, Defendants argue that they simply followed the classifications created by the PRWORA such that BHH is subject to a rational basis review, requiring the court to uphold this program "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [people's] actions were irrational." *Gregory v. Ashcroft,* 501 U.S. 452, 471 (1991) (quotations and citations omitted). To address these arguments, the court first outlines the relevant framework for addressing classifications based on alienage, and then applies the framework to the facts of this

action to determine under what standard BHH must be reviewed.

1. Framework

In general, state classifications based on alienage are subject to strict scrutiny. *See, e.g., Bernal*, 467 U.S. at 227–28 (invalidating Texas statute that required notary publics to be citizens under strict scrutiny standard); *Nyquist v. Mauclet*, 432 U.S. 1, 7–12 (1977) (using strict scrutiny in striking down New York statute that restricted eligibility for college scholarships based on alienage); *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601–02 (1976) (applying strict scrutiny to strike down Puerto Rico's ban on aliens practicing civil engineering); *In re Griffiths*, 413 U.S. 717, 718–23 (1973) (striking down Connecticut law barring resident aliens from taking the bar examination); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418–20 (1948) (ruling California statute barring issuance of fishing licenses to persons ineligible for citizenship invalid).

For example, *Graham v. Richardson*, 403 U.S. 365 (1971), applied strict scrutiny to invalidate Arizona and Pennsylvania statutes that denied welfare benefits to otherwise qualified recipients who were aliens. The Pennsylvania statute limited state welfare benefits to citizens or those who had filed a declaration of intent to become a citizen. *Id.* at 368. In comparison, the Arizona statute limited benefits under federally funded programs to citizens or individuals who had resided in the United States for at least fifteen years. *Id.* at 367. *Graham* explained that strict scrutiny applies to these state classifications based on alienage:

> Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. This is so in "the area of economics and social welfare." But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in [*Takahashi*, 334 U.S. at 420], that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."

Id. at 371–72 (citations and footnotes omitted). Applying strict scrutiny to both statutes, *Graham* concluded that "a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause." *Id.* at 376.

In coming to this conclusion, *Graham* rejected Arizona's argument that its durational residency requirement was authorized by § 1402(b) of the Social Security Act, 42 U.S.C. § 1352(b), which required that the Secretary not approve state-submitted plans that exclude citizens of the United States from eligibility. *Id.* at 380–81. *Graham* explained that although the meaning of the federal statute was not clear, it neither authorized nor commanded states to adopt durational residency requirements. *Id.* at 381. Further, to the extent the federal statute could be construed as authorizing "discriminatory treatment of aliens at the option of the States," *Graham* rejected such

construction because it would present "serious constitutional questions" and "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* at 382. *Graham* explained that while *Congress* has the power to "establish a uniform Rule of Naturalization," "[a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." *Id.*

Graham left open the applicable standard of review when Congress enacts a statute providing benefits based on alienage. *Mathews v. Diaz*, 426 U.S. 67 (1976), answered the question when it upheld a federal law that granted Medicare benefits to certain resident citizens yet denied eligibility to comparable aliens unless they were permanent aliens or had resided in the United States for at least five years. *Matthews* explained that this federal law was subject to rational basis review:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . The reasons that preclude judicial review of political questions also dictate a narrow stand-

> ard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

426 U.S. at 81–82 (footnotes and citations omitted). Upholding the federal statute, *Mathews* found that "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence." *Id.* at 83.

Since *Mathews,* courts have upheld federal classifications between citizens and aliens using a rational basis review. *See Lewis v. Thompson,* 252 F.3d 567, 582 (2d Cir. 2001) (upholding PRWORA's denial of prenatal Medicaid benefits to unqualified aliens based on rational basis review); *Aleman v. Glickman,* 217 F.3d 1191, 1197 (9th Cir. 2000) (applying rational basis review to challenge of the PRWORA's eligibility requirements for food stamps); *City of Chicago v. Shalala,* 189 F.3d 598, 603–05 (7th Cir. 1999) (applying rational basis review to challenge to PRWORA that disqualified noncitizens from supplemental social security income and food stamps); *Rodriguez v. United States,* 169 F.3d 1342, 1346–50 (11th Cir. 1999) (same).

The two different standards of review for alienage classifications are born out of the different roles the federal and state governments hold regarding aliens. While the federal government has broad constitutional power to "establish a uniform Rule of Naturalization," U.S. Const. Art. I, § 8, cl. 4, the States have no such power. *See Mathews,* 426 U.S. at 84–85 ("[I]t is the business of the political branches of the Federal Government, rather than that of either the States . . . , to regulate the conditions of entry and residence of aliens."); *Hampton v.*

Mow Sun Wong, 426 U.S. 88, 102 n.21 (1976) ("It is important to note that the authority to control immigration is . . . only vested solely in the Federal Government, rather than the States [.]"); *Takahashi,* 334 U.S. at 418–19 ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."); *see also Toll v. Moreno,* 458 U .S. 1, 10 (1982).

Despite this seemingly clear line between state action that is subject to strict scrutiny on the one hand, and federal action that is subject to rational basis review on the other, *Graham* contemplated that a different standard of review might apply to state action where the states are merely following federal direction on the treatment of aliens. *See Graham,* 403 U.S. at 382–83. Subsequent caselaw confirms that where Congress has established a uniform rule regarding alienage for the states to follow, the state's action in following Congress' mandate is subject to rational basis review. *See Plyler v. Doe,* 457 U.S. 202, 219 n.19 (1982); *Sudomir v. McMahon,* 767 F.2d 1456, 1464–66 (9th Cir. 1985). This "uniform rule" exception providing for the lower standard of review is due to the fact that a mandate from the federal government is essentially an act of Congress (albeit through the arms of the states). As *Plyler* explains:

> With respect to the actions of the Federal Government, alienage classifications may be intimate-

> ly related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. *But 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.*

457 U.S. at 219 n.19 (emphasis added).

2. Application—Standard of Review

From this caselaw, the court distills the following: First, *Graham* teaches that a state's decision to treat aliens differently from citizens is subject to strict scrutiny. Second, *Mathews* teaches that the federal government's decision to treat aliens differently from citizens is subject to rational basis review. Third, *Plyler* teaches that if the federal government has prescribed a uniform rule regarding how the states must treat aliens, the state's implementation of that rule is subject to rational basis review because the state is simply following the mandate of the federal government.

BHH does not fit squarely into either of the first two rules. On its face, the State's health benefit programs appear to classify individuals based on alienage—citizens and qualified residents receive benefits under the Old Programs, while COFA Residents are eligible for BHH only. With that said, however, the PRWORA in 1996 (1) made certain groups of aliens no longer eligible for federal funding, (2) granted states the authority to deter-

mine eligibility of state benefits for certain groups of aliens including COFA Residents, and (3) required the states to either grant or deny benefits to other groups of aliens based on certain criteria. *See* 8 U.S.C. §§ 1621(a), 1622(a) & (b). For the last fourteen years, Defendants have treated COFA Residents the same as citizens and other qualified aliens by allowing them access to the same programs, with the only difference being that COFA Residents' participation was funded through State dollars only.[5] It is only now that Defendants have decided to single out COFA Residents for lesser benefits than are provided to citizens and other classes of aliens. Accordingly, at issue is whether the PRWORA validly granted states the authority to classify individuals based on alienage in determining eligibility for these programs.

As described above, for the PRWORA to validly allow states to classify based on alienage, pursuant to *Plyler*, the PRWORA must establish a uniform rule for the states to follow. *Plyler*, however, did not establish the contours of when the uniformity requirement is met, and courts have fallen on both sides of the issue in determining whether the PRWORA establishes a uniform rule allowing the states to choose whether to grant benefits to certain groups based on alienage. *Compare Soskin v. Reinertson*, 353 F.3d 1242, 1256 (10th Cir. 2004) (find-

[5] Both parties have presented arguments regarding the significance of the fact that the State receives federal funds to assist in providing public assistance to COFA Residents. No party, however, has asserted that the purpose of these funds is to pay for COFA Residents' participation in the Old Programs to the same extent as the federal government pays for qualified individuals in Medicaid. Accordingly, that the State receives money designated for COFA Residents does not affect the court's analysis one way or another.

ing that Colorado law removing optional Medicaid coverage to legal aliens was subject to rational basis review due to PRWORA); *and Doe v. Comm'r of Transitional Assistance,* 773 N.E.2d 404, 410 (2002) (finding Massachusetts law with six-month residency requirement subject to rational basis review in light of PRWORA); *with Hong Pham v. Starkowski,* 2009 WL 5698062, at *16 (Conn. Super. Dec. 18, 2009) (applying strict scrutiny to state action terminating medical benefits to legal noncitizens despite PRWORA); *Ehrlich v. Perez,* 908 A.2d 1220, 1241 (Md. App. 2006) (concluding that the PRWORA prescribes no uniform rule and applying strict scrutiny); *Aliessa,* 754 N.E.2d at 1098 (concluding that the PRWORA prescribes no uniform rule such that state law denying medical assistance to legal immigrants was subject to strict scrutiny).

For example, in *Soskin*—a case whose facts are very similar to those presented in this action—Colorado originally provided optional Medicaid coverage to legal aliens no longer covered by the PRWORA, but removed this coverage in 2003 to assist in easing its budget shortfall. 353 F.3d at 1246. *Soskin* found that Colorado's decision to limit benefits to legal aliens was subject to rational basis review based on *Mathews. Id.* at 1255. Although *Soskin* recognized that the PRWORA was different than the statute at issue in *Mathews* because the PRWORA gave the states "a measure of discretion" in determining whether to provide benefits funded only through state funds, *Soskin* reasoned that rational basis nonetheless applies because the states' exercise of discretion to limit benefits effectuates the PRWORA's concern that "individual aliens not burden the public benefits system." *Id.* at 1255 (quoting 8 U.S.C. § 1601(4)).

According to *Soskin*, the PRWORA essentially created two welfare programs—one for citizens, and one for aliens, with the states having the option of including more or less aliens in the latter. *Id.* at 1255–56. *Soskin* found that the states' discretion in implementing the latter program did not run afoul of the uniformity requirement because (1) Congress' authority to enact the PRWORA may come from a source other than Naturalization Clause requiring a "uniform Rule of Naturalization," Const. Art. 1, § 8, cl. 4; and (2) the PRWORA did not undermine the purpose of the uniformity rule, which was to treat as full citizens anyone admitted to citizenship by another state. *Id.* at 1256–57; *see also Doe,* 733 N.E.2d at 410 (finding statute that created a state-funded supplemental program to provide assistance to qualified aliens no longer eligible for federally-funded benefits did "not enact or incorporate into State Law a uniform Federal policy or guideline regarding the availability of welfare benefits to aliens").

In comparison, *Aliessa* applied strict scrutiny to a New York statute that terminated state-funded Medicaid benefits for certain non-qualified aliens, but maintained benefits for other aliens. 754 N.E.2d at 1092. *Aliessa* found that the PRWORA could not "constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility." *Id.* at 433. *Aliessa* explained that the PRWORA's grant of discretion to the states violated the uniformity requirement because it allowed for variation among the states:

> Thus, in administering their own programs, the States are free to discriminate in either direction—producing not uniformity, but potentially

> wide variation based on localized or idiosyncratic concepts of largesse, economics and politics. Considering that Congress has conferred upon the States such broad discretionary power to grant or deny aliens State Medicaid, we are unable to conclude that title IV reflects a uniform national policy. If the rule were uniform, each State would carry out the same policy under the mandate of Congress—the only body with authority to set immigration policy.

Id. at 435. *Hong Pham*, 2009 WL 5698062, at *16 (finding that PRWORA did not meet uniformity requirement because it "simply does not provide the states with any sort of consistent guidance or clear limits as to what they can and cannot do in dealing with legal aliens who lost their eligibility for federal Medicaid"); *Ehrlich*, 908 A.2d at 1241 ("The unbridled discretion afforded by Congress prevents us from characterizing the material provisions of PRWORA as 'uniform.'").

What the courts *have* agreed on is that the PRWORA grants the states discretion in determining whether to grant benefits to certain classes of aliens. The issue therefore becomes whether this grant of discretion comports with the uniformity requirement. The court finds *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985), instructive in answering this question in the negative.

While *Plyler* left undefined what "uniformity" means, *Sudomir* explains that the uniformity requirement is met where the federal statute outlines both what the states may and may not do. In *Sudomir*, the plaintiffs raised an Equal Protection challenge to California's decision not to provide welfare benefits under a cooperative

federal-state assistance program, the Aid to Families with Dependent Children ("AFDC") program, to plaintiff/aliens who had applied for, but not yet received, political asylum. Even though the program distinguished between individuals based on alienage, California was simply following a federal statute, which provided that to be eligible for the AFDC program, the "individual *must be* . . . [inter alia] an alien . . . permanently residing in the United States under color of law. . . ." 767 F.2d at 1466 (quoting 42 U.S.C. § 602(a)(33) (1984)).

Sudomir interpreted the federal statute as *requiring* participating states "not only to grant benefits to eligible aliens but also to *deny* benefits to aliens" that do not meet the federal standard. *Id.* at 1466. Thus, by limiting AFDC benefits as outlined by the federal statute, *Sudomir* found that California had "employed both a federal classification *and* a uniform federal policy regarding the appropriate treatment of a particular subclass of aliens," which was subject to rational basis review. *Id. Sudomir* reasoned that "[i]t would make no sense to say that Congress has plenary power in the area of immigration and naturalization and then hold that the Constitution impels the states to refrain from adhering to the federal guidelines." *Id.; Cf. Graham,* 403 U.S. at 382–83 ("[A] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.").

Sudomir helps to clarify that the uniformity requirement, as its name suggests, is met where the federal government outlines how the states *must* act regarding classification of aliens. In contrast to the statute in

Sudomir, the PRWORA does not dictate any particular state action as to COFA Residents, and instead gives states a choice as to whether they should be eligible for any state public benefits. This broad grant of discretion creates neither a federal classification nor a uniform federal policy because the states can do as they please regarding these individuals—under the PRWORA, states may provide these individuals no benefits, some benefits, or the same benefits provided to citizens and qualified aliens. By failing to provide any guidance to states regarding how to choose among these options, the PRWORA does not establish uniformity, but rather fosters a lack of uniformity between the states based on the state's own considerations of who should receive benefits based on alienage. *See Aliessa*, 754 N.E.2d at 1098 (finding that the PRWORA violates the uniformity requirement because it allows "potentially wide variation based on localized or idiosyncratic concepts of largesse, economics and politics"). In other words, the PRWORA's grant of discretion does not guarantee that each state will adopt the same laws regarding non-qualified aliens.

The court therefore agrees with those courts finding that the PRWORA does not establish a uniform rule that would subject BHH to rational basis review because the PRWORA does not *require* that Defendants provide lesser benefits to COFA Residents than it does to those qualified under the Old Programs. Accordingly, the court holds that Defendants' determination that COFA Residents should no longer receive the same benefits as citizens and other aliens is subject to strict scrutiny.

In opposition, Defendants argue that the court should follow the reasoning in *Soskin*. Defs.' Mot. 19–21. To a point, *Soskin* is instructive to the court's analysis. *Soskin*

recognized that Colorado's decision to no longer provide optional Medicaid coverage to legal aliens fell "somewhere in between" *Graham* and *Mathews,* and that the relevant question boiled down to whether Congress had clearly "expressed its will regarding a matter relating to aliens." *Soskin,* 353 F.3d at 1255. Where the court disagrees with *Soskin,* however, is in its next step of the analysis.

Soskin reasoned that the PRWORA reflects a Congressional policy that some aliens must be provided benefits, other aliens must not be provided benefits, and that states may choose for themselves whether to provide benefits to the remaining aliens. *Id.* at 1255. As to this latter group of aliens, *Soskin* explained that Congress effectively gave "each state the ability to make its own assessment of whether it can bear the burden of providing any optional coverage," and a state effectuates this national policy by exercising its discretion. *Id.* Applying *Mathews, Soskin* found that because Congress has expressed a national policy that it has the power to enact, the courts must be deferential in reviewing the states' implementation of that policy. *Id. Soskin,* however, then goes far off track by ignoring the Naturalization Clause's uniformity requirement.

In the abstract and without the confines of the uniformity requirement, *Soskin's* analysis makes sense—Congress has created a national policy through the PRWORA and states are simply following that policy in determining whether to provide benefits to certain groups of aliens. Unlike *Soskin,* however, the court cannot give such short shrift to the uniformity requirement.

Specifically, *Soskin* relied on an unduly restrictive interpretation of the uniformity requirement, finding that it *might* not apply because Congress' authority to enact the PRWORA *may* come from a source other than the Naturalization Clause and the purpose of the uniformity requirement is limited to treating anyone admitted to citizenship by another state as a citizen in another state.[6] *Id.* at 1256–57. Contrary to *Soskin's* rejection of the uniformity requirement under these circumstances, *Graham* explains that while Congress has the power to "establish a uniform Rule of Naturalization," "[a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." *Graham*, 403 U.S. at 382.

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[6] Although *Soskin* suggests that the PRWORA's alien provision may not rest on the Naturalization Clause, it provides no alternative basis for Congress' authority to legislate in this area. Further, *Soskin*'s limitation of the Naturalization Clause's uniformity requirement to its original purpose has not been adopted by other courts, and certainly not the Ninth Circuit. *See Sudomir v. McMahon*, 767 F.2d 1456, 1466–67 (9th Cir. 1985). In fact, in Federalist 32, Alexander Hamilton noted that immigration was one of the few powers delegated exclusively to the federal government. The constitutional power "to establish a UNIFORM RULE of naturalization . . . must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE." The Federalist No. 32 (internal quotation marks omitted, emphasis in original); *see also Ex Parte Clark*, 100 U.S. 399, 412 (1879) ("[T]he Constitution invests Congress with the 'power to establish a uniform rule of naturalization;' and this power, from its nature, is exclusive. A concurrent power in the States would prevent the uniformity of regulations required on the subject.").

Further, although *Soskin* rejected this language in *Graham* as dicta, *Sudomir* recognized *Graham*'s suggestion that "congressional enactments permitting states to adopt divergent laws regarding the eligibility of aliens for federally supported welfare programs" are invalid. *Sudomir*, 767 F.2d at 1466–67. *Sudomir* found that the uniformity requirement was met where California merely followed the federal government's mandate regarding eligibility of certain classes of aliens for welfare benefits under the AFDC program. *Id.* at 1466. Thus, applying *Graham* and *Sudomir*, the court rejects *Soskin*'s refusal to recognize the uniformity requirement, and finds that Congress' authority to distinguish between citizens and aliens stems from the Naturalization Clause and the uniformity rule must be met where the states rely on a federal statute as providing a basis to distinguish between citizens and aliens.

Defendants also argue that they are not classifying individuals based on alienage because Defendants are simply creating a benefits program for individuals not covered by Medicaid, and the Equal Protection clause does not require the states to create a program for individuals not covered by Medicaid, much less to provide those individuals the same level of benefits as Medicaid. The court rejects this argument.

As an initial matter, regardless of how Defendants attempt to characterize their actions, Defendants' implementation of the Old Programs and BHH classify individuals based on alienage—citizens and certain groups of aliens are eligible to participate in the Old Programs, while COFA Residents are eligible to participate in BHH. Because Defendants were not following any uniform rule established by federal law in making these dis-

tinctions, these classifications are subject to strict scrutiny.

The court further rejects Defendants' attempt to characterize their actions as simply creating a brand new benefits program where one did not exist. For the last fourteen years Defendants have provided COFA Residents the same benefits as those provided to citizens and other qualified aliens, creating a unified program treating citizens, qualified aliens, and non-qualified aliens the same, regardless of federal funding. Accordingly, the issue is not whether a state must create a benefits program for certain groups of individuals where no program exists, but rather where a program involving state funding already exists, whether a state may then exclude certain groups from that program based on alienage.

In sum, where the federal government does not require Defendants to take any particular action and the State on its own has decided to exclude certain groups of aliens from its Old Programs, Defendants' decision is state action subject to strict scrutiny. The court therefore applies strict scrutiny to Defendants' decision to enroll COFA Residents into BHH.

3. Application—Strict Scrutiny Analysis

Applying strict scrutiny, *i.e.,* requiring Defendants to show that their classification "advance[s] a compelling state interest by the least restrictive means available," *Bernal,* 467 U.S. at 219, the court finds that Plaintiffs have stated a claim upon which relief can be granted. Defendants have failed to identify *any* particular State interest that is forwarded by their decision to exclude COFA Residents from the Old Programs. Further, while the court recognizes that BHH was created in response

to the State's budget crisis, the "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens." *Graham,* 403 U.S. at 376 (quotation and citation signals omitted).

In opposition, Defendants argue that the court should follow the reasoning in *Avila v. Biedess,* 78 P.3d 280 (Ariz. Ct. App. 2003), which was subsequently depublished (*Avila v. P Biedess/AHCCCS,* 207 Ariz. 257 (2004)). *Avila* applied strict scrutiny to a wholly state-funded benefits program that simply adopted the same eligibility requirements as the federal program. *Avila* found that the state program furthered "an important governmental interest for the state to have uniform eligibility criteria for both parts of the program, so that the significant difference between the two programs is income level." *Avila,* 78 P.3d at 288. *Avila* reasoned that "it would be an impractical and strained application of the Equal Protection Clause to bar a state from using federal eligibility criteria for a state program when a mandatory federal policy applies to one portion of a program and the state merely acts to implement uniform rules of alien eligibility for another part of the same program." *Id.*

Avila is not controlling (much less persuasive, or even good law). The court rejects that a State's desire to have uniform eligibility requirements for both state and federally-funded programs is a compelling interest, and in any event Defendants did not mirror the federal eligibility requirements for Medicaid in creating BHH. Accordingly, the court **DENIES** Defendants' Motion to Dismiss Plaintiffs' Equal Protection claim.

B. ADA

The Complaint asserts that Defendants are discriminating against disabled Plaintiffs by requiring them to seek care in a hospital setting, which is not the most integrated setting appropriate to meet their needs. Compl. ¶ 46. Defendants summarily argue that Plaintiffs have failed to state a violation of the ADA because Plaintiffs are not qualified individuals with a disability and the Complaint fails to allege any denial of benefits to Plaintiffs by reason of their disabilities. Defs.' Mot. at 30. Defendants have not carried their burden.

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove that a public service or program violates the ADA, a plaintiff must show: (1) she is a "qualified individual with a disability;" (2) she was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; (3) the service, program, or activity receives federal financial assistance; and (4) such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability. *Townsend v. Quasim,* 328 F.3d 511, 516 (9th Cir. 2003).

As to Defendant's first argument that Plaintiffs do not meet the first element of an ADA claim, a "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in pro-

grams or activities provided by a public entity." 42 U.S.C. § 12131(2). Disabled COFA Residents are eligible for BHH and are therefore qualified individuals with disabilities.[7]

As to Defendants' assertion that Plaintiffs have not asserted a denial of any benefit to Plaintiffs by reason of their disabilities, Defendants fail to address in any meaningful manner that Plaintiffs are asserting a claim for violation of the ADA's integration mandate, which requires public entities to administer their programs "in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d). In certain circumstances, a plaintiff may assert a violation of this integration mandate challenging state action that may unnecessarily risk institutionalization. *See Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1181–82 (10th Cir. 2003) (denying motion for summary judgment where evidence established that imposition of cap on prescription medications would place participants in community-based program at high risk for premature entry into nursing homes in violation of ADA); *V.L. v. Wagner,* 669 F. Supp. 2d 1106, 1119–20 (N.D. Cal. 2009) (granting preliminary injunction where plaintiffs established that class members faced a severe risk of institu-

[7] It appears that Defendants misunderstand Plaintiffs' ADA claim. Defendants argue that Plaintiffs' ADA claim is based on their exclusion from the Old Programs and that Plaintiffs are not qualified to participate in those programs. While Plaintiffs' Equal Protection claim is focused on Plaintiffs' exclusion from the Old Programs, the court interprets Plaintiffs' ADA claim as directed to whether BHH provides care in the most integrated setting. Accordingly, that Plaintiffs no longer qualify for the Old Programs is not relevant to the ADA claim.

tionalization as a result of losing services new health care plan eliminates); *Ball v. Rodgers*, 2009 WL 1395423, at *5 (D. Ariz. Apr. 24, 2009) (finding violation of the ADA where Defendants' "failure to provide Plaintiffs with the necessary services threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care"). Indeed, Plaintiffs assert that BHH's limitation of benefits requires them to seek care in a hospital setting, which may be sufficient to state a claim for violation of the ADA.

The court therefore **DENIES** Defendants' Motion to Dismiss Plaintiffs' ADA claim.

V. CONCLUSION

Based on the above, the court **DENIES** Defendants' Motion to Dismiss as to Plaintiffs' claims directed to COFA Residents.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 13, 2010

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge