No. 14-281

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

REPLY BRIEF FOR THE PETITIONERS

PAUL ALSTON
J. BLAINE ROGERS
ALSTON HUNT FLOYD & ING
1001 Bishop Street
Suite 1800
Honolulu, HI 96813

MARGERY S. BRONSTER
ROBERT M. HATCH
CATHERINE L. AUBUCHON
BRONSTER HOSHIBATA
1003 Bishop Street
Suite 2300
Honolulu, HI 96813

KANNON K. SHANMUGAM
Counsel of Record
ALLISON B. JONES
LESLIE COOPER MAHAFFEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

VICTOR GEMINIANI
HAWAI'I APPLESEED
CENTER FOR LAW
& ECONOMIC JUSTICE
P.O. Box 37952
Honolulu, HI 96837

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In their brief in opposition, respondents do not dispute that the question presented here is a fundamental constitutional question left unresolved by the Court's precedents: namely, which standard of review should apply when a court considers a claim that a State's decision to reduce medical benefits to a category of legal aliens, conducted within the discretion afforded to the States by Congress under the cooperative Medicaid program, violates the Equal Protection Clause. Respondents also do not dispute—though they do not so much as acknowledge—that the resolution of that question is of exceptional practical importance to petitioners and the

class of thousands of individuals they represent, who will lose access to potentially life-saving medical care if certiorari is denied.

Instead, respondents tilt at windmills. Respondents primarily argue that, because Hawaii supposedly operates two different medical-benefit programs—one for citizens and certain aliens, and another for aliens such as petitioners—its provision of lesser benefits in the latter program is not susceptible to an equal protection challenge at all. But respondents made the same argument below, and the lower courts specifically (and correctly) rejected it. In any event, respondents' argument does nothing to negate the recognized conflict among the federal courts of appeals and state courts of last resort on the question presented here. That question was raised and decided below, and it has been exhaustively analyzed both in the multiple opinions below and in the opinions from other courts nationwide to have considered it. Because this case satisfies the criteria for further review in all respects, the petition for certiorari should be granted.

1. Respondents do not dispute that the question presented—concerning the standard of review applicable to a State's decision to draw an alienage-based classification pursuant to congressionally conferred discretion to provide benefits—is an important question of constitutional law. Nor do respondents dispute that, by applying different levels of scrutiny to state and federal alienage-based classifications, the Court's equal protection precedents have created the "conundrum" presented by cases such as this one, Pet. App. 10a, or that the Court should resolve the question presented to provide clarity to the lower courts among the "morass of conflicting approaches," *id.* at 25a (Bybee, J., concurring and concurring in the judgment).

Apparently recognizing the importance of the question that petitioners ask this Court to review, respondents resort to recharacterizing the question and then arguing that the lower courts did not decide it. See Br. in Opp. 9-11. Specifically, respondents contend that petitioners are now challenging Hawaii's discrimination between aliens who are within the discretionary category created in the Welfare Reform Act and are eligible for Basic Health Hawaii (BHH), including COFA residents, and other aliens who are also within the discretionary category but are ineligible for BHH. *See id.* at 10.

That is a quixotic contention. Petitioners are hardly complaining—indeed, they would lack standing to complain—that other aliens are even worse off than they are. Instead, they are challenging the same discrimination that they have consistently challenged throughout this litigation: Hawaii's discrimination between COFA residents, who are eligible only for the unquestionably inferior benefits of BHH, and citizens and other aliens who are eligible for the superior Medicaid-level benefits that Hawaii had previously provided to COFA residents. See Pet. 7-8. In the opinion below, the court of appeals addressed the standard of review applicable to petitioners' claim that *that* discrimination was impermissible. See, *e.g.*, Pet. App. 3a-4a, 14a.

Not surprisingly, therefore, the court of appeals' holding on that issue is the subject of the question presented in the petition for certiorari: "Whether a State's reduction of medical benefits to some categories of legal aliens [*i.e.*, COFA residents] but not others [*i.e.*, aliens eligible for Medicaid-level benefits], 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." See Pet. i. Nothing in the petition

suggests otherwise. That question is an undeniably important one that warrants the Court's review.

2. As a majority of the panel below expressly acknowledged, the Ninth Circuit's decision in this case deepens a conflict among the federal courts of appeals and state courts of last resort regarding the standard of review applicable to a claim challenging a State's alienage-based classification in the context of the cooperative Medicaid program. See Pet. App. 25a-26a (Bybee, J., concurring and concurring in the judgment); *id.* at 68a-69a (Clifton, J., dissenting). Respondents attempt to deny the existence of that conflict on two grounds, see Br. in Opp. 11-17, but neither is convincing.

a. Respondents contend that no conflict exists between the decision below and the decisions of the Massachusetts Supreme Judicial Court in *Finch* v. *Commonwealth Health Insurance Connector Authority*, 946 N.E.2d 1262 (2011), and the New York Court of Appeals in *Aliessa ex rel. Al Fayad* v. *Novello*, 754 N.E.2d 1085 (2001), because the latter two cases "did not involve aliens-only programs." Br. in Opp. 17; see *id.* at 13-15. That is an immaterial ground for distinction.

As a preliminary matter, neither of the lower courts in this case accepted respondents' contention that, because Hawaii had created a separate program for COFA residents, that program could not be compared, for equal protection purposes, to Hawaii's Medicaid-level program for citizens and other aliens. In rejecting that contention, the district court noted that, before BHH, Hawaii gave COFA residents access to the same programs as citizens and other aliens—and, on that basis, it concluded that Hawaii was discriminating on the basis of alienage when it enacted BHH. See Pet. App. 93a n.4, 104a, 112a-113a.

For its part, the court of appeals declined to rule on the basis of the "evidentiary question" of whether there were meaningful differences between the two programs. Pet. App. 21a n.8. Instead, the court of appeals held that, "assuming *arguendo* that Hawai'i's discretionary decision not to provide optional coverage for COFA [r]esidents constitutes alienage-based discrimination, that decision * * * is subject to rational-basis review." *Id.* at 21a-22a. Notably, a majority of the otherwise fractured panel agreed that Hawaii had "classified COFA [r]esidents on the basis of alienage" by treating them differently from citizens and other aliens. *Id.* at 58a (Clifton, J., dissenting); see *id.* at 49a-50a (Bybee, J., concurring and concurring in the judgment).

Given the Ninth Circuit's square holding that rational-basis review applies to a claim challenging a State's alienage-based classification, it is clear that both *Finch* and *Aliessa* would have come out differently if they had been decided there. In both cases, the courts assessed state actions that they determined had discriminated against aliens over whom Congress had given the States discretion in favor of citizens and other aliens, and the courts held that the States' discrimination was subject to strict scrutiny. See *Finch*, 946 N.E.2d at 1278-1280; *Aliessa*, 754 N.E.2d at 1096, 1098-1099. Here, the Ninth Circuit assumed that the State had engaged in "alienage-based discrimination" against aliens in the discretionary category in favor of citizens and other aliens, and held that the State's action should nevertheless be subject only to rational-basis review. Pet. App. 22a. As a result, the conflict between those decisions could not be starker. See also *Soskin* v. *Reinertson*, 353 F.3d 1242, 1252, 1255 (10th Cir. 2004) (acknowledging that the arguments in *Aliessa* "mirrored those of the parties in this case," yet

explicitly rejecting "the view adopted * * * in *Aliessa*").

For similar reasons, the four other cases that respondents claim fall on the Ninth Circuit's side of the conflict are inapposite. See Br. in Opp. 12-13. The courts in those cases did not resolve the question presented here, because they concluded either that no class of similarly situated citizens existed, see *Khrapunskiy* v. *Doar*, 909 N.E.2d 70, 77 (N.Y. 2009), or that the State was discriminating on the basis of a factor other than alienage (such as in-state residency), see *Bruns* v. *Mayhew*, 750 F.3d 61, 70 (1st Cir. 2014); *Hong Pham* v. *Starkowski*, 16 A.3d 635, 645 (Conn. 2011); *Doe* v. *Commissioner of Transitional Assistance*, 773 N.E.2d 404, 414 (Mass. 2002). Indeed, two of those courts expressly reserved the question presented here on the ground that, because of their holdings, they did not need to "reach the issue of whether a court should apply rational basis review or strict scrutiny to state classifications based on alienage that are authorized by the federal government." *Hong Pham*, 16 A.3d at 645; see *Bruns*, 750 F.3d at 71 n.3.

b. Second, respondents contend that the decisions of the Maryland Court of Appeals in *Ehrlich* v. *Perez*, 908 A.2d 1220 (2006), and Massachusetts Supreme Judicial Court in *Finch*, *supra*, do not conflict with the decision below because they involved state constitutional provisions. See Br. in Opp. 15-16. But both of those courts based their decisions on, and understood their holdings to be dictated by, federal equal protection jurisprudence. Indeed, those courts made clear that the state constitutional provisions at issue in those cases were "coextensive" with the Equal Protection Clause of the Fourteenth Amendment in matters concerning aliens, *Finch*, 946 N.E.2d at 1282 n.3, and were applied "in like manner and

to the same extent," *Perez*, 908 A.2d at 1234. Accordingly, in holding that strict scrutiny should apply to materially identical claims, those courts relied on this Court's precedents interpreting and applying the Equal Protection Clause; their decisions "trained on what [federal equal protection jurisprudence] demands, rather than on what [state] law independently requires." *Florida* v. *Powell*, 559 U.S. 50, 57-58 (2010); cf. *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983). Because two federal courts of appeals and three state courts of last resort (including one that was exclusively interpreting the federal Constitution) are divided over the fundamental question whether federal law requires strict scrutiny or only rational-basis review of discretionary state alienage-based classifications, this Court should intervene to resolve the conflict.

3. Finally, perhaps recognizing that this case is a compelling candidate for the Court's review, respondents offer a lengthy discussion of the merits. See Br. in Opp. 17-21. For present purposes, it should suffice to note that the conflicting views of courts of appeals and state courts of last resort nationwide concerning "the proper *standard of review* for classifications based on alienage" underscore the need for this Court's intervention. Pet. App. 26a (Bybee, J., concurring and concurring in the judgment). But respondents' merits discussion warrants a brief response here.

In the decision under review, the Ninth Circuit compared Hawaii's treatment of COFA residents to its treatment of citizens and other aliens and held that, 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 because "Congress has authorized the [S]tates" to discriminate against aliens in the discretion-

ary category of the Welfare Reform Act. Pet. App. 4a, 22a.

Respondents make no effort to defend the Ninth Circuit's reasoning. Instead, respondents argue that COFA residents "cannot be compared with" citizens and other aliens receiving superior medical benefits that are paid for by Hawaii and reimbursed in part by Medicaid. Br. in Opp. 20. Notably, respondents do not contend that, if Hawaii in fact treats COFA residents less favorably than citizens and certain other aliens, Hawaii's action should be subject to rational-basis review. Instead, respondents argue only that Hawaii did not treat COFA residents less favorably than similarly situated citizens or aliens. *Id.* at 19-20. Respondents claim that, although their regulation singles out COFA residents based on their alienage, see Haw. Admin. R. § 17-1722.3-1, any discrimination was "on the basis of federal Medicaid eligibility," Br. in Opp. 18 (internal quotation marks omitted). While the decision below was badly fractured, not a single judge adopted that reasoning. Respondents can hardly avoid this Court's review of the question presented by pretending that the Ninth Circuit did not decide it.

What is more, the Ninth Circuit's actual holding—that rational-basis review applies to discretionary state alienage-based classifications—is incorrect. State alienage-based classifications are ordinarily subject to strict scrutiny. See *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). It was Hawaii's decision to treat COFA residents like citizens and other aliens, which it did until 2010, or to treat COFA residents worse than those groups, which it does now. To be sure, in the Welfare Reform Act, Congress left that decision to each State. But "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* at 382. Even if the federal government could somehow in-

sulate the States from strict scrutiny by prescribing a "uniform rule" to follow, see *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982), Congress's grant of complete discretion in the Welfare Reform Act is the antithesis of such a uniform rule. See Pet. App. 67a (Clifton, J., dissenting); *Perez*, 908 A.2d at 1241; *Finch*, 946 N.E.2d at 1276-1277; *Aliessa*, 754 N.E.2d at 1098.

Indeed, the Equal Protection Clause prohibits precisely this type of discrimination in state "expenditure decision[s]," Br. in Opp. 19 (citation omitted): *i.e.*, decisions resulting from "a State's desire to preserve limited welfare benefits for its own citizens," *Graham*, 403 U.S. at 374. And here, Hawaii's decision to make dramatic cuts to the medical benefits available to COFA residents will indisputably have severe and even life-changing consequences for thousands of class members, who will be denied equal medical benefits based solely on their status as a particular type of alien. This Court should grant review to resolve the recognized conflict among the federal courts of appeals and state courts of last resort on the question presented. As the conflicting decisions across the country demonstrate, that question is of enormous legal and practical importance, both in Hawaii and elsewhere.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL ALSTON
J. BLAINE ROGERS
ALSTON HUNT FLOYD & ING
1001 Bishop Street
Suite 1800
Honolulu, HI 96813

MARGERY S. BRONSTER
ROBERT M. HATCH
CATHERINE L. AUBUCHON
BRONSTER HOSHIBATA
1003 Bishop Street
Suite 2300
Honolulu, HI 96813

KANNON K. SHANMUGAM
ALLISON B. JONES
LESLIE COOPER MAHAFFEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

VICTOR GEMINIANI
HAWAI'I APPLESEED
CENTER FOR LAW
& ECONOMIC JUSTICE
P.O. Box 37952
Honolulu, HI 96837

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